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THE CANADIAN LAW

OF

BANKS AND BANKING

THE CLEARING HOUSE, CURRENCY AND DOMINION NOTES

BILLS, NOTES, CHEQUES

AND OTHER NEGOTIABLE INSTRUMENTS

BY

JOHN DELATRE FALCONBRIDGE, M.A., LL.B.

OF OSGOODE HALL, BARRISTER-AT-LAW
ONE OF THE LECTURERS TO THE LAW SOCIETY
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Second Edition

BRANCH MANAGERS AND THE CHANGES IN THE BANK ACT

By H. M. P. ECKARDT

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PREFACE TO THE SECOND EDITION

In this edition the whole book has been revised, and the leading decisions on the law of banking and bills of exchange which have been reported in England and in Canada during the six years since the first edition was published have been noted.

The statutes passed since May, 1907, directly affecting the subjects dealt with include the Currency Act, 1910, and the important amendments to the Bank Act which came into force on the first day of this month. A brief account of the changes effected in the revision of the Bank Act in 1913 is given in chapter 2, and in the notes to the various sections attention has been directed to the amendments. Any further reference here to the new Bank Act is rendered unnecessary by the interesting introduction written by Mr. H. M. P. Eckardt for this edition. I think it is proper to state that I did not have the advantage of seeing Mr. Eckardt's chapter until the main part of the book was in the press, and that he is not responsible for any views expressed by me.

The notes to the Bills of Exchange Act have been to a large extent rewritten. A new feature of this edition is the comparison drawn between the Bills of Exchange Act and the Negotiable Instruments Law now in force in the majority of the United States of America. It is hoped that this comparison will be useful, not only because Canadian lawyers, bankers and business men may have to do with negotiable instruments drawn, accepted or endorsed in the United States, but also because the American act contains provisions which are not in the Canadian act but which in many cases express in a concise way doctrines applicable wherever the common law prevails.

J. D. F.

31st July, 1913.

PREFACE TO THE FIRST EDITION

The book which I am venturing to commit to the kindly consideration of the bankers and the members of my own profession in the Dominion consists primarily of an exposition of the Bank Act and the Bills of Exchange Act, recently re-enacted as chapters 29 and 119 of the Revised Statutes of Canada, 1906.

The former act has established a system of banking which differs in many respects from that prevailing either in England or in the United States. The act contains provisions in regard to the incorporation, organization and existence of chartered banks with large but carefully limited lending powers and with other privileges, and in regard to the security afforded by the banks to the public.

Since 1901 no commentary on the Bank Act has been published and the cases on the subject which have been reported during the last six years are both numerous and important.

In connection with the Bank Act, I have not neglected to discuss the general relation of banker and customer and the body of law merchant which governs that relation, but the limits of time and space have restricted my discussion of them to a moderate length. The act affects such relation to a comparatively small extent, and the standard English text books contain an exposition of the law more in detail than it has been possible to include in a book of the somewhat wide range of this one.

In the course of the second part of the book, I have had frequent occasion to acknowledge my indebtedness to Chalmers on Bills of Exchange. The fact that the English act was drafted by the author of that work and that the provisions of the act were for the most part his deductions from the cases which he cites as illustrations gives his work a peculiar importance. In making a free use of Chalmers' illustrations I am following the example of previous commentators on the Canadian act.

Both the Bank Act and the Bills of Exchange Act are also illustrated by the leading Canadian cases. Inasmuch, however, as the Bills of Exchange Act is a codifying act and has made plain many matters which before were obscure, or has given statutory sanction to many propositions which formerly required to be supported by the citation of reported cases, I have not hesitated to omit a reference to cases where I considered that their citation would increase the size of the book without adding materially to its usefulness.

Both the statutes above mentioned have undergone great changes in form in the revision of 1906. Whenever an alteration in wording or arrangement is not obviously immaterial, I have in the notes drawn attention to the change. By virtue of the Revised Statutes of Canada, 1906, Act, if upon any point the provisions of the revised statutes are not in effect the same as those of the acts for which they are substituted, the provisions of the revised statutes prevail as respects all transactions, matters and things subsequent to the time when the revised statutes take effect, that is, on, from and after the 31st of January, 1907.

One result of the revision of the Bills of Exchange Act is that, while before the revision its sections corresponded almost exactly with those of the English act and only a few important differences had to be borne in mind, now the arrangement and section-numbering of the Canadian and the English acts are so different that an English text book no longer affords a convenient guide to the Canadian act.

It gives me pleasure to acknowledge my obligation to Mr. Arthur Whyte Anglin, barrister-at-law, who was so kind as to read the manuscript of the first half of the book and who made many valuable suggestions which I gladly adopted. The responsibility for the final form of the text is, however, mine alone. I am indebted to my father for the affectionate care with which he read the whole book in proof form. The proof was also read, and the table of cases prepared, by Mr. R. B. Lowndes.

TORONTO, April, 1907. J. D. F.

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BYLES.—A Treatise on the Law of Bills of Exchange, etc., by the Right Hon. Sir John Barnard Byles, (17th ed. by Walter G. Barnard Byles and Eric R. Watson, London, 1911).

CHALMERS.—A Digest of the Law of Bills of Exchange, etc., by Sir M. D. Chalmers, (7th ed., London, 1909).

CRAWFORD.—The Negotiable Instruments Law, by John J. Crawford, by whom the statute was drawn, (3rd ed., New York, 1908).

GRANT.—A Treatise on the Law relating to Bankers and Banking Companies, by James Grant, (6th ed. by A. M. Langdon and Herbert Jacobs, London, 1910).

HALSBURY.—The Laws of England (vol. 1, pp. 567-647). Bankers and Banking, by Sir John R. Paget, Bart., London, 1907; see also vol. 2 pp. 457-580, Bills of Exchange, Promissory Notes and Negotiable Instruments, by Kenneth E. Chalmers, revised by Sir Mackenzie Dalzell Chalmers.

HART.—The Law of Banking, by Heber Hart, (2nd ed., London, 1906).

RUSSELL.—A Commentary on the Bills of Exchange Act, by the Hon. Benjamin Russell, (Halifax, 1909).

LIST OF ABBREVIATIONS

The usual abbreviations of the English reports are omitted. The reports here cited as U.C.C.P., O.A.R., O.P.R., are usually cited in the province of Ontario simply as C.P., A.R., P.R., respectively; but this local method of citation is too brief for use outside the province. Similarly in the province of Quebec the reports here cited as Q.R. — S.C., Q.R. — K.B., are commonly cited simply as S.C., K.B., respectively.

A.L.R.	Alberta Law Reports.
Allen	Allen's New Brunswick Reports.
Ames	See Table of Authors Cited.
Am. R.	American Reports.
Barb.	Barbour's New York Supreme Court Reports.
B.C.R.	British Columbia Reports.
Can. Crim. Cas.	Canadian Criminal Cases.
Can. Ex. C.R.	Exchequer Court of Canada Reports.
C.L.J.	Canada Law Journal.
C.L.T.	Canadian Law Times.
Chipman	Chipman's New Brunswick Reports.
Com. Cas.	Commercial Cases (English).
Com. L.R.	Commercial Law Reports (Canadian).
Conn.	Connecticut Reports.
Cush.	Cushing's Massachusett's Reports.
D.L.R.	Dominion Law Reports.
Draper	Draper's Upper Canada King's Bench Reports.
E.L.R.	Eastern Law Reporter.
E.R.	English Reports (Reprint).
G. & O.	Geldert and Oxley's Nova Scotia Reports.
Gr.	Grant's Upper Canada Chancery Reports.
Han.	Hannay's New Brunswick Reports.
Harv. L.R.	Harvard Law Review.
J.C.B.A.	Journal of the Canadian Bankers' Association.
Kerr	Kerr's New Brunswick Reports.
L.C.J.	Lower Canada Jurist.
L.C.R.	Lower Canada Reports.
L.N.	Legal News (Quebec).
L.Q.R.	Law Quarterly Review.
Man. R.	Manitoba Reports.
Mason	Mason's United States Circuit Court Reports.
Mass.	Massachusetts Reports.
M.L.R. — S.C.	Montreal Law Reports, Superior Court.
McCreary	McCreary's United States Circuit Court Reports.
McLean	McLean's United States Circuit Court Reports.

N.B. Eq. Cas.	New Brunswick Equity Cases.
N.B.R.	New Brunswick Reports.
N.S.D.	Nova Scotia Decisions.
N.S.R.	Nova Scotia Reports.
N.S.W.R.	New South Wales Reports.
N.Y.	New York Reports.
O.A.R.	Ontario Appeal Reports.
O.L.R.	Ontario Law Reports (since 1900).
O.P.R.	Ontario Practice Reports.
O.R.	Ontario Reports.
O.W.N.	Ontario Weekly Notes.
O.W.R.	Ontario Weekly Reporter.
Pugs.	Pugsley's New Brunswick Reports.
Q.L.R.	Quebec Law Reports.
Q.R. — K.B.	Quebec Reports, King's Bench.
Q.R. — Q.B.	Quebec Reports, Queen's Bench.
Q.R. — S.C.	Quebec Reports, Superior Court.
Rev. de Leg.	Revue de Législation (Quebec).
R.C.	Ruling Cases (English).
R. & C.	Russell and Chesley's Nova Scotia Reports.
R. & G.	Russell and Geldert's Nova Scotia Reports.
R.J.R.Q.	Rapports Judiciaires Revisés de Québec.
R.L.	Revue Légale (Quebec).
R.R.	Revised Reports (English).
S.C. Cas.	Supreme Court Cases.
S.C.R.	Supreme Court of Canada Reports.
S.L.R.	Saskatchewan Law Reports.
Terr. L.R.	Territories Law Reports.
U.C.C.P.	Upper Canada Common Pleas Reports.
U.C.O.S.	Upper Canada Queen's Bench Reports, Old Series.
U.C.R.	Upper Canada Reports (Queen's Bench).
U.S.	Reports of the Supreme Court of the United States.
Wend.	Wendell's New York Reports.
W.L.R.	Western Law Reporter.

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BRANCH MANAGERS AND THE CHANGES IN THE BANK ACT

BY H. M. P. ECKARDT

Author of "Manual of Canadian Banking" and "A Rational Banking System."

The portions of the Bank Act of 1913 in which the branch managers are most directly concerned are those dealing with the business and powers of the bank, and particularly with the security that may be taken for loans and advances. These portions comprise sections 76 to 98 inclusive. A number of changes of more or less importance have been made in this part of the Act, and it is advisable to discuss the question of their effect upon the everyday work of the branches. Before dealing with loans on securities the matter of interest and exchange rates may be dealt with. So far as interest on deposits is concerned the bank is permitted, as heretofore, to allow any rate whatever upon money deposited with it (sec. 92). The wording of section 91, which deals with the rate of discount or interest on loans, is exactly the same as in the preceding act. Section 91 says "The bank may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank."

Interpretation of Section 91.

This section has been interpreted by the courts to mean that the bank can take in advance by way of discount any rate that may be agreed upon between itself and the borrower or customer, but in cases wherein the interest is not taken in advance and there is no agreement between bank and customer, the bank cannot recover more than seven per cent. As the interpretation has been definitely settled, so to speak, the clause itself was left undisturbed. But there is now a requirement for the bank to make a quarterly return to the Minister of Finance as of the last juridical day of the months of March, June, September and December in each year, giving such

particulars as may be prescribed by regulations made by the Treasury Board of the interest and discount rates charged by the bank. This is provided for by sub-section 2 of section 91.

Questioned in the House of Commons on May 20th, 1913, the Minister of Finance stated that the information contained in these statements or rates of interest charged would be made public just as the bank returns are.

Quarterly Return of Interest and Discount Rates.

The object of this sub-section is to indirectly influence the banks to charge moderate rates. When the maximum rates charged by each bank are published quarterly the critics will be making comparisons of the policies of the different banks as thus indicated. And if a branch manager charges an exorbitant figure on any particular loan or transaction, it may have the result of bringing his bank into uncomfortable notoriety when the quarterly return is published. Judging from the discussion in Committee and in the House, it is not the intention of Parliament to take note of what are known as "minimum" charges. When the bank discounts a note for $15 with thirty days to run, it will charge 50 cents—that being the minimum charge for which discounted bills are put through the books. (In some cases, notably in Western Canada, the minimum charge is $1). A rate of 50 cents on $15 for thirty days represents 40 per cent. per annum. Apparently the rates to be reported to the Finance Department will be those pertaining to transactions in which the charge exceeds the minimum of 50 cents, or $1 as the case may be.

In view of the publicity here provided it will be in the interest of the banks, in most cases, to avoid transactions which appear to call for exceptional rates of interest or discount. Under the Act of 1900 and preceding acts, as there was no compulsory publicity in regard to interest rates, a branch manager might perhaps undertake a limited number of transactions involving comparatively small amounts in connection with which the risk was slightly abnormal. To compensate the bank for the increased risk a comparatively high rate would be charged. Such transactions were more likely to be in evidence in small villages where no private bankers are established. As mentioned above, the obvious tendency of subsection 2 of section 91 is to discourage these transactions.

Exchange or Agency Charges.

There is a notable change made in section 93, also in section 94, in regard to exchange or agency charges. The Bank Act of 1900 stipulated that when a branch of the bank discounted "any note, bill, or other negotiable security or paper, payable at any of the bank's places or seats of business, branches, agencies or offices of discount and deposit in Canada," other than that at which it was discounted, it might charge in addition to the discount a certain percentage in order to defray the expenses of collection. This percentage was graded according to the length of time the paper had to run. On paper having a currency of less than thirty days the maximum charge permitted was one-eighth of one per cent; where the paper ran for thirty days or over but less than sixty days, the maximum was to be one-fourth of one per cent.; for sixty days or over but less than ninety days, three-eighths of one per cent.; for ninety days or over, one-half of one per cent.

Section 93 of the Act of 1913 permits the bank to charge one-eighth of one per cent., with a minimum of fifteen cents, for exchange or collection expenses, in addition to the discount, on paper payable at a branch point in Canada other than the point at which discounted. This maximum of one-eighth of one per cent. applies to all paper payable at other branch points in Canada regardless of the length of time it has to run.

Exchange on Paper Payable Where the Bank has no Branch.

And section 94 of the old Act provides for a maximum charge of one-half of one per cent., in addition to the discount, on paper discounted by the bank and payable at some point in Canada where it has no branch. In the new Act this maximum is reduced to one-fourth of one per cent., and a mimimum of twenty-five cents is named.

With reference to exchange rates it should be said that competition has reduced them considerably in the past decade; and possibly the reduction here made will not affect the practice of the banks at the majority of their offices. However, in some of the remote places where expenses of operation are abnormally high, it has been the custom to charge rates of exchange higher than the maximum provided by the new Act. And it would seem that in the day-to-day transactions of the banks there must be numerous instances in which the legal

maximum of one-eighth per cent. for exchange between branch points would not cover the expenses of collection and transfer of funds. As this question of domestic or inland exchange is rather complicated it will be worth while to elaborate one or two of the points relating to the effects of the two sections now under discussion.

Items Payable on a certain Date or a Period after Date.

The branch manager is obliged to bear in mind that so far as exchange rates are concerned demand or sight items are on a somewhat different footing from items payable on a fixed day, especially when the place of payment is distant or remote from the place of discount. For example a bank discounts at its Montreal branch a bill payable in Vancouver at one month after the date of discount. If the bank has a branch at Vancouver the exchange charge is limited to one-eighth per cent. In this case the distance between the points does not serve to delay or retard collection. The bill reaches Vancouver in plenty of time before maturity, and presumably the Vancouver branch receives payment on the due date. Ultimately the transaction may necessitate a transfer of cash from the Vancouver branch to the Montreal branch; and if so there is a possible loss of six days' interest while the funds are in the mails or travelling by express, and there may be an outlay for postage, registration and insurance, or express charges, or exchange paid to another bank.

A transaction of this kind might not demand so high an exchange rate as would be required if the Montreal branch cashed or discounted a cheque or a sight draft on Vancouver. In that case the distance between the two points serves to retard collection by perhaps six days or a week. The bank does not get its funds back for six or seven days. And the bare interest for six days at seven per cent. would practically exhaust the one-eighth per cent. charge which it is authorized to make, leaving nothing for expenses of collection or possible re-transfer of the funds to Montreal.

Interest on Demand and Short Date Items.

Again if the bank buys a bill payable at some distant point at which it has no branch it may not get its funds back until the correspondent bank remits its draft in payment. In that case the correspondent will make a charge also. These matters

are mentioned to illustrate the point that the branch manager may be confronted with the necessity of charging in some way for extraordinary expenses. If such necessity arises it cannot legally be met by increasing the exchange or agency charge beyond the maximum prescribed by the Bank Act. Where the extra expense is due to the time required to forward the bill to a distant place of payment, it would seem that an extra charge for interest would be quite in order. Presumably such an extra charge could be made without bringing the bank into conflict with the Act.

In carrying the accounts of exporters the banks are frequently offered bills of exchange drawn say at three months after date, or at so many days after sight, on parties resident in Chile or some other remote country. The bill of exchange must go to the place at which it is domiciled. The banker there acting as correspondent for the Canadian bank which negotiated the bill, collects it at maturity and perhaps remits in payment direct to London by means of a sixty or ninety day bill on that centre. All told it may be six months or more before the Canadian bank can get its funds back again at points where they can be used. To meet the requirements of a case of that kind it is necessary to charge the customer interest for the whole term during which the funds are out. The bank charges the customer interest at his regular rate for six months or seven months as the case may be, and it charges exchange in addition. The Bank Act has nothing to say about maximum rates of exchange on foreign bills. The sections under discussion deal exclusively with inland bills.

Treating Cheques and Sight Items as Discounted Paper.

There is apparently nothing in the Bank Act to prevent the bank charging interest for the time during which its funds are out in case of an inland bill as well as in case of a foreign bill. For example a customer in Halifax tenders a sight draft on his debtor in Vancouver. It will be at least seven days before the draft can reach Vancouver; it may be two days more before the Vancouver branch can procure the drawee's acceptance, and then three days must elapse after acceptance before the draft is due. The Halifax branch, therefore, treats the bill as having a currency of twelve days and charges interest or discount for that term; it also charges one-eighth per cent. exchange.

If it is a cheque on a Vancouver bank, or a demand draft on a person or firm doing business in Vancouver, which the Halifax customer tenders, the bank might treat it as discountable paper maturing in seven days in the case of the cheque and in nine days in the case of the demand draft; and if it charged interest for the requisite number of days in addition to one-eighth per cent. exchange, it is difficult to see in its action any violation of the law.

However in every case wherein interest or discount is charged, in addition to exchange, it would be advisable in order to strengthen the presumption that it was discounting paper in the ordinary course, to put the items through the books as discounts.

With reference to exchange rates it might be said that they are regulated perhaps more effectually by banking competition than by the Bank Act. In the majority of transactions in inland bills competition effectually prevents the banks charging rates higher than the rates specified in the Act.

The Privileged Lien on Bank Stock.

By virtue of section 77 and sub-sections 2, 3, and 4 thereof, the bank has a privileged lien on the shares of its own capital stock standing in the name of any person under liability to it. This section and its sub-sections remain practically as in the Act of 1900. It is to be observed that an attempt was made to have this section struck out, but it failed. The ostensible reason for the hostility manifested towards the privileged lien was that it had a tendency to injure other creditors of the party in whose name the stock stood, and that parties purchasing bank stock from such a party might be defrauded if after paying him the money the bank refused to allow the stock to be transferred.

The discussion in Committee of the House of Commons served to show that there was no ground for the last mentioned objection, as the practice in regard to sales of bank stocks is to pay for the shares immediately after the transfer is made.

The privileged lien as provided in this section and sub-sections requires to be taken in conjunction with sub-section 2b of section 76 and section 43b. Section 43b says that no transfer of the shares of the capital stock of the bank shall be valid unless "the person making the transfer has, if required by the bank, previously discharged all his debts or liabilities

to the bank which exceed in amount the remaining stock, if any, belonging to such person, valued at the then current rate." This strengthens or fortifies the lien. Sub-section 2b of section 76 on the other hand modifies its force and appears to qualify it. That sub-section reads as follows: "Except as authorized by this Act the bank shall not, either directly or indirectly, purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank."

Origin of the Privileged Lien.

In the course of his examination before the Banking and Commerce Committee of the House of Commons, on April 16th, 1913, Sir Edmund Walker gave an explanation of these clauses of the Act. He said: "In the old days we were allowed to lend upon the shares of other banks, and it was found that the amount of banking capital was less than we supposed because one bank had loaned its capital to another. The prohibition to loan in that way was made, and I think very properly so. Then the stockbroker could not borrow from one bank on another bank's shares, and he was driven to borrow from some life insurance or trust company, or some other agency, and that was a different thing for him to do, and so the owner of a bank share was really left without any way in which he could make actual use of his bank holdings as collateral. That is why they were forbidden in the Act by one clause to loan upon bank shares of any kind, but permitted in the other clause to consider the fact that a man had shares when they were making a loan to him."

Thus it appears that the approved and proper practice in regard to section 77 and sub-section 2b of section 76 is to look upon the stock of the bank standing in the would-be borrower's name as something serving to increase his right to a loan, and serving also as a circumstance which might induce the bank to lessen or abandon its claim for other specific security. In other words his holding of stock should perhaps entitle the owner to a little extra consideration at the hands of the bank when he applies for a loan. If the loan is wanted for a legitimate and proper purpose the bank might be favorably predisposed towards the transaction; and it need not be overparticular in regard to taking other security providing the amount of the loan was within the value of the borrower's bank stock.

The Question of Permanent Loans to Stockholders.

However it would not appear to be proper, and perhaps it would be illegal to make a loan to a stockholder of the bank immediately or shortly after he acquires his stock where the indications pointed to his use of the proceeds of the loan for the purpose of paying for the stock. Also it might be considered improper to allow a loan to a stockholder of the bank, for which no security was held other than the lien on the stock, to run on more or less permanently, particularly if the amount of the loan approached the total value of the stock.

But when the stockholder merely wants a temporary advance for the purposes of his ordinary business, such advance to be repaid in due course through the collection of debts or sale of merchandise, there seems to be no ground for questioning the propriety of allowing him to borrow an amount up to or close up to the value of his stock, with little or no other security. Sir Edmund Walker gave the Banking Committee an instance which excellently serves the purpose of illustration. He said: "Only a few days ago a customer of ours in Quebec who recently became a customer of ours through the taking over of the Eastern Townships Bank, wanted to borrow some money for his manufacturing business, and when customers borrow on their own name from us they are required to give a balance sheet. This client declined to do that, but said he had more stock in the Bank of Commerce than the amount of money he wanted to borrow. We found that a most effective reply."

Bank's Stock Should not be Recorded as Security for the Loan.

It should be a requirement when making such advances that the applicant possess a sound financial standing. The bank would have the best chance of avoiding legal complications if it confined itself, in making loans of this kind to its stockholders, to parties who had a comparatively small amount of outside liabilities. In other words it would probably be inadvisable to lend in this way to a stockholder who was known to have a very considerable amount of troublesome outside liabilities.

Another point which branch managers should bear in mind when lending to a stockholder is that the bank should not too openly avow its dependence on the bank stock as collateral.

For example, the security for the loan should not be indicated in the books and records as bank stock. The stock ledger is kept at the head office of the bank and usually all transfers must be made there. If the branch manager notifies the general manager of the particulars of an advance made to a stockholder, a memorandum, perhaps in pencil, can be made in the borrower's account in the stock ledger to the effect that this stockholder is indebted to the bank for a certain amount. And if necessary the bank can refuse to transfer any shares from th's name unless the shares remaining are equal in value to the amount of the loan. Then when the loan is repaid the memorandum is erased and the stock is free.

It is bad banking as well as illegal for the bank to lend on the stock of another bank. And no such loans would be countenanced by the general manager. If such loans were permitted the results might be disastrous for the lending bank in such cases wherein the stock of a weak institution was taken as collateral. To obtain title to the security the lending bank would have to take the stock of the other bank, and accept the risk of the double liability. The security which it took as a protection for the loan to its customer might involve it in further losses.

Loans Secured by Other Bonds and Stocks.

A slight change has been made in sub-section 2 of section 78, which deals with the power of the bank to sell stocks, bonds, debentures or securities, acquired and held by it as collateral security, in case of default in payment of the debt for which they serve as collateral. The section itself is not changed. It states that the bank may sell and convey these securities in the same way and subject to the same restrictions as in the case of its own stock on which it holds a privileged lien—except that the bank need not sell these other securities within twelve months after the debt has accrued and become payable, as it is obliged to do in the case of its own stock. Notice is to be given the holder of the securities, by mail, at least thirty days prior to the sale. This stipulation of the Act governs the bank's action unless there is an agreement otherwise providing between the bank and the owner of the securities.

As a matter of fact the business of lending large amounts to stockbrokers, repayable on demand or on time, on what is

known as stock market collateral, could not well be carried on if the bank was debarred from selling the collateral except after thirty days' notice. A customary condition of such loans is that the borrower must provide and maintain a margin or surplus in securities of at least twenty per cent. of the amount of the loan. The securities pledged may fluctuate rapidly in value. If they depreciate to such an extent as to impair the twenty per cent. margin, in order to protect itself the bank would require to have the right to take summary action in case the debtor failed to respond promptly to its demand for payment or reduction of the debt, or for additional security. If it could not sell within thirty days the depreciation of the security might proceed so rapidly as to sweep away its margin and involve it in a considerable loss.

The Power of Sale.

As section 78 and sub-section 2 of section 77 standing by themselves would in practice prohibit the transaction of a large amount of useful business, sub-section 2 of section 78 was provided to modify or qualify the restriction referred to. The sub-section as appearing in the Act of 1913 reads as follows: "The right so to deal with and dispose of such stock, bonds, debentures or securities in manner aforesaid may be waived or varied by any agreement between the bank and the owner of the stock, bonds, debentures or securities."

The Act of 1900 contained the same words, but they were followed by a stipulation that the agreement should be "made at the time at which such debt was incurred, or, if the time of payment of the debt has been extended, then by an agreement made at the time of the extension." The omission of this clause improves the position of the bank. An agreement of this kind can now apparently be made at any time, during the currency of the loan or after its maturity.

The almost invariable practice is for the bank to make an agreement with the borrower at the time at which the loan is made. This agreement is part of the form of hypothecation of the stock or bonds to serve as collateral. In this hypothecation the borrower assigns specified securities to the bank as collateral security for its loan to him. He agrees to maintain a certain per cent. of margin. Then he waives his right to the thirty days' notice of sale and empowers the bank to sell or

dispose of the securities serving as collateral, or any part thereof, in such manner as the bank may deem advisable, without notice, protest, or other proceedings of any kind.

Warehouse Receipts and Bills of Lading.

Bank loans on warehouse receipts and bills of lading require to be considered in connection with loans on the pledges given by wholesale purchasers or shippers of, or dealers in, the products of agriculture, the forest, quarry, or mine, or the sea, lakes and rivers, or by wholesale purchasers or shippers of, or dealers in live stock or dead stock or the products thereof, or by farmers, or by manufacturers, upon goods or property remaining in their possession. A considerable number of sections of the Act are devoted to these transactions—sections 86 to 90 inclusive, with sub-sections; and sections 141 to 144 inclusive, with sub-sections.

The changes made in these clauses are not of great importance from the point of view of the manager of a branch bank—that is to say the changes will not necessitate the institution of banking policies differing greatly from the policies in effect prior to the passage of the Act of 1913. Loans secured in the manner just mentioned range themselves in two classifications. Those based on warehouse receipts and bills of lading comprise one class; and those secured by means of liens comprise the other. The distinguishing point is the possession of the property or goods comprising the security for the loan. In the case of a warehouse receipt or a bill of lading held by the bank, the property represented by the document is held by an independent party subject to the production and surrender of the warehouse receipt, or bill of lading duly endorsed by the rightful party or parties. The borrower cannot obtain possession of or control the goods representing the security except through pay ng his loan or through arrangement with the bank. In the case of the liens or "own pledges" on the other hand the borrower retains possession of the goods.

How to Avoid Complications.

In the day-to-day practice of the banks both classes of loans give rise to numerous complications, and the average branch manager may on occasions be much puzzled as to the step that should be taken in order to safeguard the bank's position.

It is obviously impossible within the limits of this monograph to discuss the various points that are constantly arising. It will be advisable, however, to discuss a few of the important matters which the banker is obliged to consider in connection with loans secured in this wise. The banker would remember of course that the risk of loss and of legal complications is most in evidence in the cases of the weaker borrowers or of borrowers who are not prosecuting their business successfully. In all those cases it is necessary to take the most particular care to have the bank possess clear and indisputable right or title to the security constituting the basis of the loan or loans, as well as unquestioned power to sell or dispose of it in such manner as to protect the bank from loss.

Thus, in case of a warehouse receipt the first point to consider is the reliableness or responsibility of the warehouseman whose name is signed at the foot of the receipt. If satisfied, that he is thoroughly responsible or reliable and that the purported signature is truly his, the next thing to consider is the value of the goods or commodities he acknowledges to have received, in relation to the amount of the loan applied for. The next question has to do with the applicant's right or title to the warehouse receipt which he tenders as security. Is he the owner of the document; or has he authority from the owner to transfer the title to the bank?

Procedure in Connection with Assignment of Security.

These points being satisfactorily disposed of, and presuming of course that the standing of the applicant is such as to entitle him to the bank's consideration, the procedure in connection with the making of the loan would next engage the banker's attention. He is required to bear in mind the provisions of section 90. That section says: "The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted,—(*a*) at the time of the acquisition thereof by the bank; or (*b*) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank:

"Provided that such bill, note, debt or liability may be renewed, or the time for the payment thereof extended, without affecting any such security."

Briefly, the bank cannot take security in this way for a pre-existing debt unless at the time the debt is created a written agreement to lodge a warehouse receipt, bill of lading or pledge, is taken by the bank.

Assuming that the security is to be used to support an entirely new loan, we may now proceed to discuss the transfer to the bank of the right and title to the document. Each bank has its particular form of assignment. The manager inserts the necessary details in one of these forms; the customer signs and dates the form and the assignment or transfer of title to the bank is completed when he executes and delivers the note, which is the evidence of his debt to the bank, and when the bank pays him the proceeds or gives him credit therefor in his account.

When the Debtor Defaults.

Then in case the debtor defaults at maturity of his note and the bank finds it necessary to realize on the security, the banker's action is governed by sub-sections 3a, 3b, and 3c of section 89. If the property assigned to the bank consists of products of the forests—in other words if it is timber, boards, deals, staves, saw-logs or other lumber—thirty days' notice must be given to the pledgor thereof; and if it consists of other goods, ten days' notice of the time and place of sale is required. And in either case the sale is to be by "public auction after notice thereof by advertisement, in at least two newspapers published in or nearest to the place where the sale is to be made, stating the time and place thereof." And if the sale is in the province of Quebec the notice is to be published in a French newspaper and also in an English newspaper.

This notice and the sale by public auction are necessary unless the consent in writing of the owner of the pledged goods has been obtained. Where it is considered advisable for the bank to have the right to summarily sell or dispose of the goods held by it as security, the consent of the pledgor or assignor of such goods would be obtained at the time the loan was granted. This consent would be incorporated in the form of assignment.

Section 88 *and Schedule C.*

When the document representing the bank's security is a bill of lading issued by a railway or shipping company, the

procedure is exactly the same as in the case of the warehouse receipt. But in the case of the liens given by wholesalers, manufacturers and farmers under section 88, the form in Schedule C of the Act is used to convey to the bank the title to the goods constituting the security for the loan. In the Act of 1913 a slight change has been made in the wording of the assignment. The schedule provided in the Act of 1900 stated that "In consideration of an advance of .....dollars made by the .....Bank to A.B., for which the said bank holds the following bills or notes:.....the goods, wares and merchandise mentioned below are hereby assigned to the said Bank, etc, etc." In the new form instead of using the words goods, wares, and merchandise, it is necessary to mention the class or kind. It is to be: "the products of agriculture, the forest, quarry or mine mentioned below"; or "the products of the sea, lakes and rivers"; or "the live stock or dead stock or the products thereof"; or "the goods, wares and merchandise"; or "the grain"—as the case may be. And finally, as in the preceding Act, there is to be a detailed description of the property or articles pledged and of the place or places where they are. It will be seen that this change is merely a matter of detail; it does not affect the powers or responsibility of the banks.

Borrower Retains Possession of the Security.

As mentioned in a preceding paragraph the outstanding point in connection with these liens or 'own pledges,' whether given by wholesalers, manufacturers, or farmers, is that the borrower retains possession of the security for the bank loan. Because of that fact the banker is obliged to handle these transactions with more carefulness and watchfulness than are required when the security is safely held by a responsible and independent third party, who will not surrender or dispose of the goods except on production of the duly endorsed warehouse receipt or bill of lading covering them.

Of course there is the penalty provided by section 144—imprisonment for a term not exceeding two years—for the man who after pledging goods to the bank as security for a loan wilfully alienates or parts with them, or wilfully withholds possession of them, while his loan is yet unpaid. Imprisonment of the debtor will not compensate the bank for the

loss of its money. So the branch managers endeavor to avoid taking liens or pledges of this kind from parties who are not likely to meet their engagements.

The points in connection with secret or unregistered liens were thoroughly discussed in the Banking Committee and in the House of Commons when the Bank Act was being revised. And it will be well to bring some of the principal points specially to the attention of the bank officers who have the conduct of these transactions at the branches.

Legislation re the Secret Lien.

The Minister of Finance and various members of the Committee repeatedly mentioned that it was an underlying principle of the Bank Act to permit none but parties in business in a wholesale way to give secret or unregistered liens. In the Bank Act of 1913 there is a departure from this principle—for the farmer is allowed to give a secret lien on his threshed grain as security for bank loans. The special reason for making this departure is explained in a subsequent paragraph. The action of Parliament in thus empowering the farmer to give a secret pledge of his threshed grain is to be taken as an exception; it does not relieve the banker from the necessity of confining his loans on this class of security in general to those who are in business in a wholesale way.

Even when so confined the loans may involve the bank in troublesome legal complications. So the branch manager who is desirous of avoiding troubles and complications of this kind will probably establish a set of rules to govern his transactions. The first and most important rule is to avoid making loans on pledges given under section 88 unless the borrower is a capable and honorable man who is making a success of his business. To make assurance double sure the borrower should also have an adequate capital for the business he is carrying on; but if the other requirements are fulfilled the banker may feel that he can and should stretch a point in regard to the matter of borrower's capital.

Unpaid Vendors.

The next essential is that the goods or property which the intending borrower proposes to pledge to the bank shall be paid for—in other words the banker should be satisfied that after

the loan is made and the proceeds disposed of, there will be no unpaid vendors. In many cases the advance made by the bank is applied to pay the claims of the vendors of the goods. In others the borrower deals in and offers to pledge goods which are cash products—which cannot be bought on credit. It is well to have reasonably complete assurance on this point. Sub-section 2 of section 89 gives the bank making an advance on the security of a bill of lading, warehouse receipt or a pledge under section 88, a prior claim to that of an unpaid vendor who had a lien upon the goods at the time the bank acquired its claim, unless the bank when taking the pledge or assignment, had knowledge of the pre-existing claim. This sub-section does not excuse the banker from taking all reasonable precautions to assure himself that the claims of unpaid vendors to the goods which are to be pledged, have been duly satisfied. As mentioned above, it is easily possible in many cases, perhaps in most cases, for the banker to procure conclusive information on this point.

Borrower's Outside Liabilities.

Then the next point has to do with the extent of the liabilities of the would-be borrower outside of and apart from the bank. If these outside liabilities are relatively large, it is clear that the bank must move with circumspection and be absolutely satisfied that it is in accord with the Bank Act at every step, when it undertakes to lend money to such a customer on his own pledge under section 88. For the other creditors will be disposed to challenge its position. In case the debtor gets into deep water these other creditors will likely take advantage of any opening to bring an action for setting aside the bank's exclusive claim to the goods held by it. Even if the bank considers its position unassailable, it may have to defend itself in the courts; and in that development whether it wins or loses, costs are incurred.

So it is in the interest of the individual branch manager to avoid all business which is likely to lead to entanglement with the law. We have seen that when the customer who applies for a loan on security of a pledge of goods under section 88 is an honorable, capable and successful man, in business in a wholesale way, when the goods he proposes to pledge are paid for, and when he has little or no outside liabilities (apart from the bank), the bank can make loans to him with all propriety

and with the minimum of risk—provided of course that the value of the security is equal to or in excess of the amount of the loan.

When the Bank Takes Greater Risk.

It is when the banker passes definitely outside of these grounds that he involves himself in risk of loss and legal complications. In actual practice it is very often necessary or advisable to lend money on pledges given by virtue of section 88 in cases wherein one or more of the requirements mentioned above are not fulfilled. The borrower may fail to measure up to the test, especially in the matter of outside liabilities. In many, many cases the banks lend money in this way to parties who have very extensive outside liabilities, and the results are beneficial to all parties concerned—to the outside creditors as well as to the bank and its customer.

The great thing is, in connection with such loans, to have a reasonable assurance or confidence that the borrower who gives the pledge will use the proceeds of the loan or loans in such manner as to make them increase or fructify—in other words that he will put them to a profitable use. When he puts them to such a use his ability or power to pay his debts, whether owed to the bank or other parties, is enhanced.

Of course it might happen that a man was prosecuting his business successfully and using the bank's loans in such manner as to make the money increase, while at the same time his personal expenses or the expenses of his family were so large as to more than exhaust his annual profits. Or he might sink in speculations or ventures apart from his regular business sums and amounts greater than his profits. It would be the duty of the branch manager to be watchfully on guard against such developments. For they would have some tendency, in the end, to involve the bank in trouble in connection with loans on pledges and other loans.

Farmer's Pledge of Grain.

Sub-section 2 of section 88 reads as follows:

"The bank may lend money to a farmer upon the security of his threshed grain grown upon the farm."

This is a new clause; and, as before mentioned, it represents a departure from the rule which had governed parlia-

mentary action on secret liens prior to 1913. For that reason, and as this clause of the Act of 1913 will in all probability be extensively used, particularly in Western Canada, it is advisable to discuss it at some length.

Hon. W. T. White, the Minister of Finance, explained time and again, when the Bank Act was under consideration early in 1913, that because of its departure from the principle that none but parties in business in a wholesale way should be permitted to give secret or unregistered liens, he had hesitated long before consenting to insert in the Act of 1913 this clause empowering the farmer to give an unregistered lien on the threshed grain in his possession. The action of Parliament was largely influenced by the fact that in the case of the grain-growing farmer in Western Canada his annual production comes into his hands available for sale or realization all at one time—in the early fall. As a rule the farmer's debts all mature at the same time or shortly afterwards. Consequently the farmer is obliged to borrow on his products or sell them at once when the crops are gathered and threshed. If the farmers are not able to borrow freely at this time they are forced to throw their products on a market that is probably declining, and the yielding tendency of prices deprives them so to speak of some revenue or profit. Also the great rush of grain to market immediately after harvest, tends to produce congestion on the railroads.

A Deviation from a Settled Principle.

It was therefore thought that if the farmer was empowered to give a pledge under section 88 it would enable him to borrow from the banks to a greater extent and perhaps on better terms. And if those expectations were realized there would not be the same necessity for rushing the grain to market as soon as it was threshed, thus breaking the price and embarrassing the carriers. What the actual developments will be in this respect remains to be seen. Briefly, the foregoing expresses the intention of Parliament, as explained by the Minister of Finance and others, in thus empowering the farmer to give a secret lien.

As the clause constitutes an exception to, or a departure from a general rule or principle, it is incumbent upon the branch managers to see that in its operations it does not lead to serious abuses.

It has been anticipated that trouble might arise in connection with the outside liabilities of farmers who had pledged their grain to the bank. As a rule the farmer in Western Canada has a considerable amount of outside liabilities. He may have recourse to credit quite extensively. He may owe money to the various storekeepers or retail merchants of the country town, to the implement dealer, the horse dealer, and to other parties as well as to the bank. Also he may owe a considerable amount on his farm—the unpaid balance of purchase money, or a mortgage loan negotiated after purchase.

The Farmer's Outside Liabilities.

From the bank's point of view the existence of these outside liabilities is against the making of a loan on the farmer's own pledge of grain. We have seen that when the wholesale dealer or the manufacturer has a relatively large amount of outside liabilities, it may at times be a dangerous or risky proceeding to lend him money on his own pledge. In the same way these outside debts affect the question of lending to the farmer. The danger arises from two directions. The other creditors may be disposed to attack the bank's claim to the security; and the pressure of the debts may have a tendency to cause the pledgor to surreptitiously sell or alienate a part of the goods pledged to the bank. As a matter of fact it might be said that a farmer is more likely to give way to pressure of this kind—to surreptitiously sell a part of the pledged property—than a wholesale business man would be. For the average farmer does not understand so clearly the serious nature of the offence thus committed.

He may try to persuade himself, as he takes away a load of pledged grain, that there is plenty left to meet the bank's claim; and that, if there should be a deficiency, he can arrange the matter with the bank manager.

Discrimination in Lending to Farmers.

For these and other reasons it is necessary for the banker to discriminate very carefully in making loans to farmers on pledged grain remaining in their possession. There need be little or no anxiety caused by such loans when made to well established farmers of good character who hold their land subject to very light encumbrance and who have scarcely any

floating debts of consequence apart from the loan at the bank. Such men have been able in the past to borrow from the banks on their own names—without endorsers and without collateral security. And there is no doubt that they will be able to borrow freely under this new clause of the Bank Act of 1913.

But when the branch manager is asked for a loan on the pledge of grain by a farmer whose financial position is not so strong, the question is more difficult. For instance the applicant may have his farm encumbered by a mortgage which exceeds 60 or 65 per cent of its value; and he may have a relatively large amount of liabilities apart from what he owes the bank. In some particular cases of this kind the banker will find it quite safe to lend under section 88. But the borrowers should be most carefully selected. In the first place they should be men of undoubted integrity and in the second place they should be men who are obviously succeeding in pulling down the amount of their liabilities.

Padlocked Granaries.

An officer of one of the western grain growers' asssociations in giving evidence before the Banking and Commerce Committee of the House of Commons in April, 1913, suggested that if necessary the farmer could keep the grain pledged to the bank in a special granary provided with lock and key; and that this granary could be locked and the key delivered to the bank manager to be held by him during the currency of the loan. And when Sir Edmund Walker was on the witness stand the Finance Minister asked him the following question: "Do you think it wise or desirable that there should be (in the Act) any limitation by way of providing that there shall be a granary padlocked or that the bank shall have the key and so on, or would that be worked out in actual practice between the customer and the bank?"

Sir Edmund replied that he thought it would sometimes work out in actual practice that the bank would want the key and sometimes not.

Considering that many farmers would not have a clear or lively sense of the responsibilities they undertook upon giving a pledge of grain under section 88, it seems that the bank would

strengthen its position in regard to a considerable number of these loans if it followed the practice of requiring the farmer to store the pledged grain in a padlocked granary and to deliver the key controlling the same to the bank. If the pledged stuff is left where it is easily accessible, where the farmer can dip into it without any trouble, it may happen on frequent occasions that the pledgor, without any intention to defraud, takes a few bushels out now and again, with the net result that when the granary is cleaned out there is a deficiency.

There is more formality about the procedure when the security is placed under lock and key. When that is done the pledgor cannot take away or use any of the pledged grain unless he breaks into the storehouse or uses a false key. In other words he must commit an act which he knows quite well is a serious offence against the law.

Application of Section 90.

There is another point which should be discussed in connection with this particular clause of the Bank Act. In the ordinary course the farmer may begin to borrow from the bank early in the spring as soon as the expenses of seeding are to be met. Then through the summer he gets additional loans for the purpose of meeting current expenses, buying provisions, clothing, animals, implements, etc. When harvest time arrives his indebtedness to the bank may have reached a considerable amount.

He cuts the grain and threshes it; then appears at the bank and wants to borrow on his own pledge of the threshed grain for the purpose of clearing off his debts. Suppose his bank loans amount to $500 and he owes another $500 to outside parties. He proposes to the banker that a loan of $1000 be put through, on the security of a pledge of grain under section 88, and that the proceeds be applied to clear off the $1000 of pre-existing debt.

So far as the $500 of outside debts are concerned, the bank can without doubt take the farmer's pledge and lend him the money. But it would be held that section 90 of the Act prohibits the bank from taking a pledge under section 88 when the purpose of the loan secured thereby is to retire or replace a pre-existing debt to the bank.

Agreements to Pledge.

Apparently then, if the bank has not taken a written agreement or promise on each occasion on which it loaned money to the farmer through the spring and summer, the farmer's loans from the bank could not be cleared off in this way after harvest by a loan against threshed grain in his possession, unless by means of a subterfuge, without violating section 90. Of course if section 90 is not observed, the bank title to the security would be invalid as against other creditors of the farmer. This penalty, however, would not perhaps do material injury to the bank in a case wherein the farmer had no outside creditors, or in one wherein the outside claims were of a negligible amount.

Then, in regard to taking a written promise to give a pledge, it might be said that if the first loan to the farmer is negotiated in April that would seem to be a very early date for the farmer to promise the bank that he would give it a pledge of so much grain in the fall. The farmer might have no crop; if he had a crop he might have a poor one; or he might elect to sell his grain at once instead of borrowing on it.

However if the farmer at harvest time sells his grain and pays his notes at the bank, the bank has no interest or motive to require him to fulfil the promise to lodge a pledge of grain. And if the borrower has no crop, the bank can refrain from requiring fulfilment of the agreement. The point is that if the agreement or promise to give a pledge of the grain is taken on the various occasions of making loans to the farmer during the spring and summer, the bank is in position to make a loan to the farmer on the security of his pledge of threshed grain and with the proceeds retire the existing loans made by it to this borrower. The lien held by the bank should then be valid as against other creditors of the farmer.

BANKING AND BILLS OF EXCHANGE

CHAPTER I.

Usage and the Law Merchant.

There is no part of the history of English law more obscure, said Lord Blackburn,(*a*) than that connected with the common maxim that the law merchant is part of the law of the land. There is, however, today a considerable volume of easily accessible material in English on the history of the law merchant(*b*) apart from foreign works and works of a more special character.

History of the law merchant.

This *lex mercatoria* or custom of merchants was formerly not part of the common law of England as it is now, but was a concurrent and co-existent law or custom. It comprised, in addition to a body of maritime law of international

(*a*) Blackburn on Sales, 3 ed. p. 345.

(*b*) See *e.g.* the publications of the Selden Society, especially Select Cases concerning the Law Merchant, 1270-1638 (vol. 1, Local Courts); Select Pleas in the Court of Admiralty (vol. 1, Court of Admiralty of the West, 1390-1404, High Court of Admiralty, 1527-1545; vol. 2, High Court of Admiralty, 1547-1602); also the following essays and extracts from other works: T. E. Scrutton, General Survey of the History of the Law Merchant, being chapter 1 of the Elements of Mercantile Law, 1891, reprinted in 3 Select Essays in Anglo-American Legal History, 1909, p. 7; B. E. S. Brodhurst, The Merchants of the Staple, 17 L.Q.R. 56, 1901, reprinted in 3 Select Essays, p. 16; A. T. Carter, Early History of the Law Merchant, 17 L.Q.R. 232, 1901; F. M. Burdick, What is the Law Merchant? 2 Columbia L.R. 470, 1902, reprinted in 3 Select Essays, etc. p. 34, under the title Contributions of the Law Merchant to the Common Law; W. S. Holdsworth, History of English Law, vol. 1, chap. 7, p. 300, 1903, reprinted in 1 Select Essays, etc. p. 289, under the title The Development of the Law Merchant and its Courts; W. Mitchell, Essay on the Early History of the Law Merchant, Cambridge, 1904; T. A. Street, Foundations of Legal Liability, vol. 2, chap. 31, p. 324, Northport, N.Y. 1906; see also essays in regard to the early history of negotiable instruments referred to in a subsequent note.

Law merchant formerly administered in local courts.

character, a body of customary commercial law recognized both in England and on the continent of Europe and slightly affected perhaps by local variations. Up to the reign of Edward III the law merchant in both its branches was administered in England by local and popular courts of merchants, mariners or civic officials. The courts which administered the commercial branch were chiefly the courts of fairs (piepoudre courts), the courts of the more important towns and the courts of the staple. These courts, by administering, helped to create the law merchant. Edward I was particularly solicitous for the foreign merchants; he endeavoured to give them the speedy justice which they demanded and constituted the king in council the final court of appeal in mercantile disputes. The staple system dates from his reign, but it was the Statute of the Staple (27 E. 3, st. 2) which consolidated the system and gave parliamentary sanction to the informal judicial procedure already existing. Certain towns, known as staple towns, were set apart and only in these towns might the more important articles of commerce be dealt in. A mayor and two constables were to be chosen annually in each town to hold the court of the staple with the assistance of two merchants. Justice was to be done to the foreign merchant from day to day and from hour to hour, according to the law of the staple or the law merchant and not according to the common law or particular burghal usages.

Admiralty jurisdiction.

The concentration of the foreign trade in the staple towns resulted in the local fair courts becoming less and less important, and the staple courts themselves lost their importance and fell into desuetude when the admiralty in Tudor times assumed jurisdiction in practically all commercial and shipping cases. During the sixteenth century the admiralty was the chief tribunal by which the law merchant was declared.

Victory of the courts of common law.

The admiralty jurisdiction was in turn assailed by the common law courts. The attack began in the reign of Elizabeth, but after Coke's elevation to the bench in 1606 it was carried on more vindictively and was brought to a victorious conclusion under the Commonwealth. The most effective weapon of the common law courts was the writ of prohibition. Not only did the common law courts rigorously prohibit the admiralty from exercising jurisdiction within the bodies of counties, but by means of the non-traversable fiction that a contract really made at sea was made in England,

they usurped jurisdiction over commercial causes generally. The importance of the event could not at the time be fully appreciated, for English commerce was destined to expand beyond the most sanguine dreams of the seventeenth century.

Lord Mansfield and the incorporation of the law merchant into the common law.

The complete incorporation of the law merchant in the common law was not effected till the time of William Murray, first earl of Mansfield, who was chief justice of the King's Bench from 1756 to 1788. Up to his time mercantile business had been divided between the courts of law and equity. No attempt had been made to reduce it to a system. In courts of law "all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. * * * Lord Mansfield * * * may be truly said to be the founder of the commercial law of this country."(*c*)

The common law procedure was however less speedy and effective than that of the admiralty. To the litigant the triumph of the common law courts under Coke "meant much inconvenience. To the commercial law of the country it meant a slower development. But to the common law it meant a capacity for expansion, and a continued supremacy over the law of the future which consolidated the victories won in the political contests of the 17th century. If Lord Mansfield is to be credited with the honourable title of the founder of the commercial law of this country, it must be allowed that Coke gave to the founder of that law his opportunity."(*d*)

But for Lord Mansfield the merchants might have resorted to the Court of Chancery whose doctrine and practice had much in common with their own. The law merchant borrowed much from the Roman law, and possibly was the channel through which the Roman law chiefly affected our law. (*e*)

(*c*) Bullen, J. in Lickbarrow v. Mason, 1787, 2 T.R. 63, at p. 73. See also Lord Campbell's account of Lord Mansfield and his special jurymen (Lives of the Chief Justices, vol. 2, p. 407).

(*d*) Holdsworth, Hist. Eng. Law, vol. 1, p. 326.

(*e*) A. T. Carter, 17 L.Q.R. at p. 240; cf. T. E. Scrutton, Roman Law in the Law Merchant, extract from The Influence of the Roman Law on the Law of England, Cambridge, 1885, reprinted in 1 Select Essays in Anglo-American Legal History, 1907, p. 237.

Mercantile use sanctioned by judicial decision.

The law merchant as is pointed out by Cockburn, C. J. in Goodwin v. Robarts, 1875, L.R. 10 Ex. 337, at p. 346, (s.c. 1 App. Cas. 476, 5 R.C. 199) is not fixed and stereotyped, but is capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience. The court proceeded herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell in Brandao v. Barnett, 1846, 12 Cl. & F. at p. 805, 3 R.C. at p. 606, "it becomes a part of the law merchant, which courts of justice are bound to know and recognize. Justice could not be administered if evidence were required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case."

Bankers' notes.

Thus when goldsmiths' or bankers' notes came into general use, Lord Mansfield and the Court of King's Bench had no difficulty in holding that the property in such notes passed by delivery on the ground that they "are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes." Miller v. Race, 1758, 1 Burr, at p. 457, 3 R.C. at p. 63.

Cheques.

In Goodwin v. Robarts, L.R. 10 Ex. at p. 351, Cockburn, C.J. notices another very remarkable instance of the efficacy of usage. It is notorious, he says, that with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited

with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer. Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another.(*f*)

Bills of lading.

Bills of lading may also be referred to as an instance of the manner in which general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage as proved in evidence, and ratified by judicial decision in the great case of Lickbarrow v. Mason, 1787, 2 T.R. 63(*g*) that the efficacy of bills of lading to pass the property in goods is derived.

Banker's lien.

Again in Brandao v. Barnett, *supra*, judicial notice was taken of the usage of trade by which bankers are entitled to a general lien on the securities of customers in their hands.

The greater or less time during which a custom has prevailed may be material in determining how far it has generally prevailed, but if it is once shewn to be universal, it is none the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the courts. Goodwin v. Robarts, L.R. 10 Ex. at p. 356.

Evidence of usage.

A mercantile custom may be so frequently proved in courts of law that the courts will take judicial notice of it, and it becomes part of the law merchant. It would entail useless expense in such a case to require parties to prove by a

(*f*) See notes to sec. 165 of the Bills of Exchange Act, *infra*.

(*g*) Reversed by the Exchequer Chamber, 1 H.Bl. 357; removed into the House of Lords, which awarded a *venire de novo*, 4 Brown, P. C. 2 ed. 57, 6 East, 20 note; second trial before the King's Bench, 1794, 5 T.R. 683, 4 R.C. 756.

large number of witnesses a custom which has been proved over and again. But if the reported cases do not clearly establish a custom it must be proved by evidence as on a question of fact. Ex parte Powell, 1875, 1 Ch.D. 501 at p. 506; Ex parte Hattersley, 1878, 8 Ch.D. 601; Chawcour v. Salter, 1881, 18 Ch.D. 30 at p. 50; Edelstein v. Schuler, [1902] 2 K.B. 144 at p. 155. Evidence to establish a custom must relate to the mercantile usage of the place where the obligation is undertaken (Wisconsin v. Bank of B.N.A., 1861, 21 U.C.R. 284), and is to be performed.

Mercantile usage, however extensive, should not be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law. Goodwin v. Robarts, *supra*; Edie v. East India Co., 1761, 2 Burr, 1216.

The authority given by the factors acts to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them. Oppenheimer v. Attenborough, [1908] 1 K.B. 221.

Must be general and reasonable.

A custom to be binding must be not merely general, but also reasonable. Perry v. Barnett, 1885, 15 Q.B.D. 388, and cases cited. Cf. Aske, Custom and the Usages of Trade, pp. 158 ff., 169 ff.

A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests require them to have knowledge of its existence, and in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. Parsons v. Hart, 1900, 30 S.C.R. 473.

The mere fact that a person employs a broker to buy for him in a particular market does not render a local custom of that market binding upon the principal if he is ignorant of the existence of the custom. Robinson v. Mollett, 1875, L.R. 7 H.L. 802; Scott v. Godfrey, [1901] 2 K.B. 726, 734-5; cf. Aske, *op. cit.* pp. 191 ff.

One important product of the law merchant is the law of exchange which is now part of the common law.

Origin and history of bills of exchange.

The origin and history of bills of exchange and other negotiable instruments are traced by Cockburn, C.J., in his judgment in the case of Goodwin v. Robarts, 1875, L.R. 10 Ex. at pp. 346 ff. in language which need not be quoted at length. The introduction and use of bills of exchange in England, as indeed everywhere else, seems to have been founded on the mere practice of merchants and gradually to have acquired the force of a custom. The old form of declaration of a bill used always to state that it was drawn *secundum usum et consuetudinem mercatorum*. The practice of making bills negotiable by endorsement was at first unknown, but from its obvious convenience it speedily came into general use, and, as part of the general custom of merchants, received the sanction of the courts. In the beginning the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not. In the time of Chief Justice Holt, a controversy arose between the courts and the merchants, as to whether the customary incidents of negotiability were to be recognized in the case of promissory notes. The dispute was settled by the stat. 3 & 4 Anne, c. 9, which vindicated the custom and confirmed the negotiability of notes.(*h*)

The results of the formation, by custom, of the law of exchange are instructive, as pointed out by Chalmers, 7 ed. p. lxi (Introduction to third edition):

English and French law of exchange contrasted.

"A reference to Marius' treatise on Bills of Exchange, written about 1670, or Beawes' Lex Mercatoria, written about 1720, will shew that the law, or perhaps rather the practice, as to bills of exchange, was even then pretty well defined. Comparing the usage of that time with the law as it now stands, it will be seen that it has been modified in some

(*h*) See also W. Cranch, Promissory Notes before and after Lord Holt, reprinted in 3 Select Essays in Anglo-American Legal History, 1909, p. 72, from the appendix to the first volume of Cranch's Reports of Cases in the Supreme Court of the United States, 1804; E. Jenks, Early History of Negotiable Instruments, 9 L.Q.R. 70, 1893, reprinted in 3 Select Essays, etc., p. 51; T. A. Street, Foundations of Legal Liability, 1906, vol. 2, chapters 31 to 40, and as to negotiable instruments generally and the term negotiable, as defined by usage, see chapter 30, *infra*.

English and French law of exchange contrasted.

important respects. Comparing English law with French, it will be seen that, for the most part, where they differ, French law is in strict accordance with the rules laid down by Beawes. The fact is that when Beawes wrote, the law or practice of both nations on this subject was uniform. The French law, however, was embodied in a code by the "Ordonnance de 1673," which is amplified but substantially adopted by the *Code de Commerce* of 1818. Its development was thus arrested, and it remains in substance what it was 200 years ago. English law has been developed piecemeal by judicial decisions founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavours to stamp it out. A comparison of some of the main points of divergence between English and French law will shew how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise, see the definition of bill in Comyns' Digest). In France the place where a bill is drawn must be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange. In England, since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise. In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed

would be an absurdity. In England a bill originally payable to order becomes payable to bearer when endorsed in blank. In France an indorsement in blank merely operates as a procuration. An endorsement to operate as a negotiation must be an endorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England, if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonoured at maturity; the holder, in the meantime, is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the case of an inland bill, notice of dishonour alone being sufficient. In France every dishonoured bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve."

English and French law of exchange contrasted.

In every province of Canada except Quebec the common law of England prevails, subject to any provincial or other statutes enacted by competent authority and applicable to the province. It is of no importance to define the precise date or mode of the introduction of the law of England, so far as the unwritten law is concerned, but it may be material to do so for the purpose of deciding to what extent imperial statutes which are not in force in a particular province *proprio vigore* are nevertheless in force there by virtue of the general introduction of the law of England.(*i*)

English common law in Canada.

The provinces of Nova Scotia and New Brunswick being British colonies by settlement, the original law in force there was the common law of England as modified by such statutes of the mother country as were suitable to the condition of the colony. For this purpose the latest date after which statutes passed in Great Britain would no longer apply to the colony, unless expressly made applicable thereto, is the 3rd of October, 1758, the day of the meeting of the

(*i*) See fuller discussion in Clement, Canadian Constitution, 2 ed. 1904, pp. 38 ff.; Maclaren on Bills, 4 ed., 1909, pp. 10 ff.

English common law in Canada.

first general assembly of Nova Scotia (then including New Brunswick).

Upon a review of the Nova Scotia decisions, it appears that the admission of imperial statutes has been the exception; those which have been held to be in force being in the main statutes in amelioration of the rigour of the common law, acts in curtailment of prerogative or in enlargement of the liberty of the subject. To a greater extent than has been the case in either New Brunswick or Ontario, the judges of Nova Scotia have deemed it the office of legislation rather than of judicial decision to bring into operation within the province the provisions of imperial statutes not originally capable of being made operative, but which might be thought suitable to the changed circumstances of the colony(*j*).

In Prince Edward Island the law of England was expressly introduced by proclamation as of the 7th Oct., 1763, and in Ontario by a provincial statute of the 15th Oct., 1792, it was enacted that from and after the passing of the act, in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same. It was subsequently held that the terms of this statute did not "place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects."(*k*)

In Manitoba it was held that the common law was introduced on the 2nd May, 1670—the date of the charter of the Hudson's Bay Company,(*l*) but by provincial statute of 1874 and dominion statute of 1888, the law of England was introduced as of the 15th July, 1870—the date of the admission of Manitoba into the Dominion.

In the Northwest Territories (including prior to 1905, the present provinces of Saskatchewan and Alberta) the

(*j*) Clement, 2 ed. p. 45. The classic case in Nova Scotia on the subject of the applicability of imperial statutes is Uniacke v. Dickson, 1848, 2 N.S.R. (James) 287. A leading case in New Brunswick is Doe *dem.* Hanington v. McFadden, 1836, 2 N.B.R. (Berton) 153.

(*k*) Doe *dem.* Anderson v. Todd, 1845, 2 U.C.R. 82. In this case were stated the principles which were substantially adopted in the later cases.

(*l*) Sinclair v. Mulligan, 1888, 5 Man. R. 17.

common law was in force as of the 2nd May, 1670, until by dominion statute of 1886 the law of England was introduced as it existed on the 15th July, 1870.

In British Columbia, the law of England was introduced by provincial statute as of the 19th Nov., 1858.

French law in Quebec.

In Quebec the Custom of Paris and the common law of France were introduced by the royal edict of 1663 creating the Sovereign Council (later known as the Superior Council) of Quebec. "*Avons en outre au dit conseil souverain donné et attribué, donnons et attribuons le pouvoir de connaître de toutes causes civiles et criminelles, pour juger souverainement et en dernier ressort selon les loix et ordonnances de notre royaume, et y procéder autant qu'il se pourra en la forme et manière qui se pratique et se garde, dans le ressort de notre cour de parlement de Paris, nous réservant néanmoins, selons notre pouvoir souverain, de changer, réformer et amplifier les dites loix et ordonnances, d'y déroger, de les abolir, d'en faire de nouvelles, ou tels réglements, statuts et constitutions que nous verrons être plus utiles à notre service et au bien de nos sujets du dit pays.*"(*m*)

The *lois* and *ordonnances* of earlier date than 1663 had not made many changes in the private law, but several of the *grandes ordonnances* of Louis XIV have a special importance for the student of commercial law. The ordinance of 1667 on civil procedure with some modifications was in 1678 brought into force in Quebec by registration with the Sovereign Council(*n*). The ordinance of 1673 (*sur le commerce*) and that of 1681 (*sur la marine*), which codified the commercial law and the maritime law respectively, were, however,

(*m*) *Edits et Ordonnances Royaux, Déclarations et Arrêts du Consei d'Etat du Roi concernant le Canada* (Quebec, 1854), vol. 1, p. 38. The text of the *Edit de Création* is reprinted in Lemieux, *Les Origines du Droit Franco-Canadien*, pp. 264-7. The Custom of Paris was expliciitly introduced, and resort to any other custom was forbidden, by the ordinance of 1664 establishing the *Compagnie des Indes occidentales*. The charter of this company was revoked in 1674 and the territory which had been granted to it was restored to the jurisdiction of the crown. Lemieux, pp. 272, 311. It is to be noted that the Custom of Paris which had obtained a dominating position among the various customs of France, was far from covering the whole field of private law. The important subjects of obligations and contracts were largely regulated by Roman law. General Survey of Events, Sources, etc. in Continental Legal History (Boston, 1912), pp. 209, 262-3.

(*n*) Lemieux, *op. cit.*, p. 312.

French law in Quebec.

not so registered, and it is still apparently a debateable question whether they were ever in force in the province.(*o*)

Whether the ordinances of 1673 and 1681 were technically in force in Quebec or not, their character was such that they might, for the most part, be followed as laying down rules of private law of universal applicability and it is said that they were in fact much relied upon by Lord Mansfield and the other judges who erected the structure of modern English maritime and commercial law.(*p*)

In addition to the changes made by the ordinances published in France and in force in Quebec, the law of the province was subject to alteration by the *arrêts* and *réglements* of the Council of Quebec itself and by the ordinances of the governors and intendants of French Canada.(*q*)

Whether, after the cession of Canada to Great Britain, English civil law was introduced into the province by the royal proclamation of 1763(*r*) is another much disputed question,(*s*) but by the Quebec Act, 1774, the general body of Quebec civil law including the commercial law was re-established as the rule for decision in all matters of controversy relative to property and civil rights. See Stuart v. Bowman, 1853, 3 L.C.R. 309, 3 R.J.R.Q. 228, 268; Wilcox v. Wilcox, 1857, 8 L.C.R. 34.

Notwithstanding the legislation of the century following the Cession, the Custom of Paris continued to be the funda-

(*o*) The contention that these ordinances were not in force in Quebec has received, to some extent, the sanction of judicial decision, and is supported by F. P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada, pp. 2 ff. See also the two opposing views summed up and the authorities referred to by Lemieux (*op. cit.*, pp. 278 ff.), who is of the opinion that the ordinances in question belonged to that class of general laws applicable to the whole kingdom of France which did not require registration in the local *parlements*. *Ibid.*, p. 292.

(*p*) Walton, *op. cit.*, pp. 139-140. The declaratory and universal character of the ordinances may reconcile the view that they were not in force in Quebec with the fact that it is not uncommon to find ordinances which had not been registered cited in early cases in Quebec without any statement that they were not in force. Cf. Walton, pp. 4-5.

(*q*) The whole body of law by which the Custom of Paris was modified is collected in the volumes of *Edits et Ordinances* and in the five volumes of *Jugements et Délibérations du Conseil Souverain de la Nouvelle France* also published by the Government of Quebec, 1885-9. Walton, p. 5.

(*r*) See Shortt and Doughty, Documents relating to the Constitutional History of Canada, 1759-1791, pp. 119 ff.

(*s*) The two recent writers already cited disagree on this question. See Lemieux, pp. 363 ff; Walton, pp. 6 ff.

mental law of the province, until in 1866 it was embodied with the statutory law of civil rights and property in the Civil Code of Lower Canada. French law in Quebec.

Nevertheless some important changes were made by statute in the commercial law of the province during this period. The most notable enactments were the ordinance of the Legislative Council introducing in 1785 the English law of evidence in commercial matters(*t*), and the provincial statute 10 & 11 V., c. 31, in effect bringing into force the 17th section of the Statute of Frauds.

Still more important modifications have been effected by the practice of the courts. The commerce of the country was always mainly in the hands of the English-speaking part of the community and trade was carried on almost exclusively with England, the United States and the other provinces. It was natural, therefore, that the decisions of English judges on commercial law should come to be treated by Quebec courts with a high degree of deference, and this was all the more natural inasmuch as it was found that there was great similarity between the English and French systems by reason of their common origin in the custom of merchants.(*u*)

The result seems to be that although English decisions may not necessarily be binding authorities in Quebec because the commercial law of Quebec, as a general rule, is the French law (Gravelle v. Beaudoin, 1863, 7 L.C.J. 289, 11 R.J.R.Q. 221; Young v. Macnider, 1895, 25 S.C.R. at p. 283), yet the practice of the judges has been to consider English decisions as well as French (as *e.g.* in Young v. Macnider, 25 S.C.R. at pp. 277 and 278, and in the court below, Q.R. 3 Q.B. 539; Glengoil v. Pilkington, 1897, 28 S.C.R. 146; Forget v. Ostigny, [1895] A.C. 318, Q.R. 4 Q.B. 118). English authorities cited.

In the recent case of Préfontaine v. Grenier, 1906, Q.R. 15 K.B. 143, involving the liability of a bank president for negligence, many English cases were cited. The members of the Judicial Committee, in affirming the judgment of the Quebec court, said that they thought that, in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings,

(*t*) Shortt and Doughty, *op. cit.*, p. 532.

(*u*) See Walton, *op. cit.*, p. 21.

Common law not always applicable to Quebec.

because they were based, not upon any special rule of English law, nor upon any circumstances of a local character, but upon the broadest considerations of the nature of the position and exigencies of business: [1907] A.C. 110.

Propositions based upon the common law of England will not, however, always be applicable to the province of Quebec, and in a number of instances in the course of this book, attention will be drawn to differences between the law of that province and that of the rest of the Dominion. It is manifest that a bank must in many cases enter into contracts, and both incur and have the benefit of obligations, governed by the civil law of a particular province.

The following are some of the salient general differences between the English and the Quebec law in respect to matters which most frequently concern a bank.(*v*)

Hypothecary system.

(1) In Quebec the hypothecary system of the Roman law prevails. Under English law a mortgage is a conveyance of the mortgaged land to the mortgagee. The mortgagor retains only an equitable interest known as the equity of redemption. The legal title passes to the mortgagee, who on default may bring an action for foreclosure as well as asking for payment. In Quebec the mortgagor merely hypothecates or charges the land in favour of the mortgagee, in effect acknowledging the indebtedness as a personal obligation, but retaining the title in himself. On default the mortgagee may recover judgment on the obligation and bring the property to sale at the hands of the sheriff, and is entitled to be paid the amount of the hypothec as a preferred claim out of the proceeds of the sale.

Married women.

(2) The Quebec law on the subject of married women is also peculiar. Unless husband and wife have made a contract before marriage, they are held by the law to be in community, which means that a partnership is deemed to be established between them, each member being entitled to a half interest. The husband is regarded as the head of the community or as the managing partner of the firm, and may deal with the property according to his own discretion.

Ante-nuptial contracts are quite usual and almost any

(*v*) See "The Banker in the Province of Quebec," 13 J.C.B.A. 230, (April, 1906), an address by R. D. McKibbon, introductory to a course of lectures on the Bank Act by A. Rives-Hall (13 J.C.B.A. 237, 298; 14 J.C.B.A. 58, 123, 232).

form of settlement may be made, and a woman's private estate secured to her thereby. Even where such a contract exists, a married woman is subject to a legal disability which does not prevail in the other provinces. As a rule, she requires the authorization of her husband in all business transactions. A wife's mortgage of her separate property is void both as to the debt contracted and as to the disposition if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail and the burden is on him to prove that it was not so borrowed. Trust & Loan v. Gauthier, [1904] A.C. 94. In the other provinces, speaking generally, a married woman is capable of dealing with, and contracting in respect to, her property.

Interdicts.

(3) Another class of persons who in Quebec are under disability to contract is that of "interdicts," that is, persons who are placed under restrictions by the court on account of prodigality, drunkenness, etc., and who cannot contract without the assistance of curators appointed by the court on the advice of a family council.

Notarial system.

(4) In Quebec, as in France and other countries under the civil law, the notarial system prevails. The notary is an important personage. He is not, as in the other provinces, a mere verifier of documents and protester of bills, possessed of a seal and a signature, but is a member of a separate branch of the legal profession. Certain deeds must be signed before a notary, such as deeds of mortgage or hypothec, deeds of donation, marriage contracts, etc. The original deed signed by the parties is retained by the notary, and remains in his office until his death, when it is transferred to the public archives. What are known as "authentic copies" may be issued by the notary, certified by him under his seal of office, and these copies are admitted to proof in court and are sufficient for the purpose of registration in the province.

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BOOK I.

BANKING AND THE BANK ACT

CHAPTER II.

Review of Banking Legislation.

The statutory banking law of Canada, notwithstanding the important changes which have taken place since 1867, is, in the main, the result of the continuation and development of the policy of the statutes relating to the subject of banking in force in the two Canadas at the time of the confederation of the provinces. It may therefore be useful, as an aid to the understanding of the present Bank Act, to refer to some of the statutes of the late province of Canada and then to review briefly the banking legislation since the formation of the Dominion.

Scope of chapter.

In the following sketch little more is attempted than to give a summary of provisions actually enacted as law, and I have been much indebted to Roeliff M. Breckenridge's "Canadian Banking System, 1817-1890" published in instalments in 1894-5 in the second volume of the Journal of the Canadian Bankers' Journal.(a)

I have also referred frequently to Professor Adam Shortt's essays on the History of Canadian Currency, Banking and Exchange published during the years 1899 to 1906 in the same Journal. Much of the valuable material there collected is,

(a) Beginning at p. 105. See also "Some critical observations" by Adam Shortt, 3 J.C.B.A. 100 (Oct. 1895). Breckenridge's work was published in 1895 in book form. In 1910 a new and somewhat abbreviated edition was published by the National Monetary Commission, Washington, under the title "A History of Banking in Canada." A shorter "History of Banking in Canada" is that of Sir Edmund Walker, 2 ed. Toronto, 1909.

however, of economic rather than legal interest and is beyond the scope of a work on the law of banking.(*b*)

The best general exposition of the practical operation of the "Canadian Banking System" is Joseph French Johnson's book bearing that title published by the National Monetary Commission, Washington, 1910.(*c*)

Banking Legislation of 1841.

Legislation of 1841.

Prior to 1841 various banks were carrying on business with power to issue bank notes, under individual charters granted by the legislatures of Upper Canada and Lower Canada respectively before the Union. The charters of some of the Lower Canadian banks were due to expire at the end of the session of 1841. Applications for their renewal had to be considered, and several of the Upper Canadian banks were applying for power to increase their capital. Lord Sydenham urged upon the legislature of the united province at its first session that it was necessary that the principle upon which the future issue of paper money was to be permitted should be settled

(*b*) The following are the titles of Professor Shortt's papers: vol. 7, p. 209, Early metallic currency and its regulation; p. 311, One currency for the Empire; vol. 8, p. 1, Re-construction and new schemes; p. 145, Criticism, prosperity and expansion; p. 237, Prosperity and expansion in Upper Canada; p. 305, Experiment and inflation; vol. 9, p. 1, Further expansion and crisis; p. 101, Crisis and resumption; p. 183, Some special features; p. 271, Metallic currency before the Union; vol. 10, p. 21 (no. 1), Lord Sydenham's measures; p. 25 (no. 2), Currency and exchange as influenced by the Union; p. 10 (no. 3), General features from 1841 to 1850; p. 12 (no. 4), Free banking and currency amendments; vol. 11, p. 13, Introduction of the decimal system; p. 106, Expansion during the fifties; p. 199, The crisis of 1857-58; p. 308, Mr. Galt's new plan for a provincial bank of issue; vol. 12, p. 14, Government versus bank circulation; p. 193, The passing of the Upper Canada and Commercial Banks; p. 265, The first general bank act for the Dominion; vol. 13, p. 11, The economic atmosphere of the banks, before and after Confederation; pp. 95, 184, Some individual banks; p. 272, Further individual cases; vol. 14, p. 7 (Oct. 1906), The revision of 1880.

See also earlier articles published 1896 to 1899: Early History of Canadian Banking (vol. 4, pp. 1, 129, 235, 341; vol. 5, p. 1), Canadian Currency and Exchange under French Rule (vol. 5, pp. 271, 385; vol. 6, pp. 1, 147, 233).

(*c*) A more detailed account of the technique of banking transactions and the routine of bank management and bank book-keeping is contained in H.M.P. Eckhardt's Manual of Canadian Banking, Toronto, 1909 (2nd edition, 1913). For briefer accounts of the salient features of the Canadian banking system, see addresses and papers published from time to time in the Journal of the Canadian Bankers' Association.

at once, and proposed a plan for the establishment of a provincial bank, to which should be confined the power to issue paper money payable on demand.(*d*) The legislature rejected the governor's proposal to establish a provincial bank of issue and fell back upon his alternative proposal to obtain a revenue by taxing the note issue of the banks, and accordingly, notwithstanding a good deal of opposition from the banking interests, imposed upon the bank notes issued and circulating in the province a duty of one per cent. per annum calculated on the average monthly circulation as shewn by semi-monthly statements furnished to the receiver general (4 & 5 V., c. 29). A select committee on banking and currency reported in favour of adopting some uniform system of banking in the province, and of granting the request of the various banks for an increase in capital subject to certain restrictions, most of which had been recommended in a circular despatch dated the 4th of May, 1840, issued under the signature of Lord John Russell, principal secretary of state for the colonies.(*e*)

Report of select committee, 1841.

By chapter 99 of the same session the banks previously chartered by either of the provinces were authorized to carry on their business throughout the new province.

Acts were also passed in the same year and in 1842 renewing until 1862 the charters of various banks, and authorizing certain increases of capital. Although each of these acts referred to only a single bank, they all contained the restrictions recommended by the select committee.

In 1846 another circular despatch, dated 30th May of that year, was issued by the Colonial Office containing a series of revised regulations which were recommended to be introduced into any bills for the incorporation of banking companies in the colonies. These regulations, with the

Banking regulations of 1846.

(*d*) Shortt, *op. cit.*, 10, J.C.B.A. 21 ff. Among those who gave a general but critical support to the Governor's proposals was Mr (afterwards Sir Francis) Hincks, who exercised a decided influence upon banking legislation, at this time in his newspaper *The Examiner* and as chairman of the legislative committee on currency and banking, and a few years later as inspector-general. Some 35 years later it fell to the lot of Sir Francis Hincks to incorporate the central feature of Lord Sydenham's bank of issue in our financial system, in the form of the government issue of notes accompanied by a partial restriction of bank note issue. Cf. Shortt, Lord Sydenham, p. 330 (Makers of Canada Series).

(*e*) In substance the restrictions recommended by the committee are set out in 10 J.C.B.A. at pp. 35-36 (no. 1).

restrictions recommended by the select committee of 1841, formed the basis of the subsequent general banking legislation.

Only on one point was there any essential difference between the regulations of 1840 and those of 1846, namely that the latter required that no bank notes should be issued for sums under one pound currency. The Canadian bank charters had hitherto authorized the issue of one dollar notes.(*f*)

The crisis of 1848 in business and banking had led to a criticism of the banks which was not altogether enlightened, and attention had been directed to the system of free banking which had been developed in the adjoining state of New York. Upon this system was modeled the "Act to establish Freedom of Banking" (13 & 14 V., c. 21) passed in 1850(*g*). It forbade the issue of circulating notes under the value of five shillings. Notes for five shillings or over might be issued, as theretofore, by the chartered banks, but not by other persons except as specially authorized by the act. The most significant feature of the act was the liberty it gave to individuals or general partners to establish banks, and to persons to form joint stock companies to carry on the business of banking, each bank or company with a single office in one place, and with a minimum capital of £25,000. Banking institutions under this act were permitted to issue registered notes secured by, and to an amount not exceeding, a deposit of provincial securities with the receiver general. These notes were exempted from the payment of the one per cent. tax levied upon the circulation of the chartered banks. The chartered banks were at liberty to surrender their rights of issuing notes upon the security of the general assets and to obtain registered notes against deposits of securities.

Free Banking Act, 1850.

In 1851 an amendment was passed requiring monthly instead of semi-annual returns from the "free banks" (14 & 15 V., c. 69). In the same year an act was passed "to encourage the chartered banks to adopt, as far as conveniently practicable, the principles of the general banking act in regard to the securing of the redemption of their bank notes" (14 & 15 V., c. 70), and a further act was passed for the same

(*f*) Shortt, History of Canadian Currency, etc., 10 J.C.B.A. 18 (no. 3).
(*g*) Shortt, *op. cit.*, 10 J.C.B.A. 12 (no. 4).

purpose in 1853 (16 V., c. 62). The chartered banks, as a rule, rejected the encouragement offered by the legislation just referred to, as their own system of note issue gave greater opportunity for banking profit.(*h*) Not many new banks were established under the provisions of the Free Banking Act, and those that did not cease to do business subsequently applied for and obtained charters. The act was finally repealed by the Provincial Notes Act of 1866 (29 & 30 V., c. 10). In the meantime most of the existing chartered banks had obtained by statute further additions to their capital and a number of new banks had received charters.(*i*)

Loans on real estate or goods.

Since 1841 bank charters had contained a prohibition against a bank's lending money or making advances on the security of real estate or goods.

A general act of 1850 (13 & 14 V., c. 22) authorized the chartered banks to take, hold and dispose of mortgages of real and personal property by way of *additional* security for debts contracted to them in the course of their business and conferred certain ancillary rights upon the banks in regard to property mortgaged to them, etc.

In 1859 another act of general application to the chartered banks was passed, being the first step in the legislation permitting banks to take warehouse receipts and bills of lading as security for advances.(*j*) In the latter year a select committee of the legislature was struck, and in the evidence reported by this committee and chiefly obtained from the leading bankers, there was much pointed criticism of the existing banking system.(*k*) No general legislation, however, resulted at this time, and the charters granted in the years from 1858 to 1866 were subject only to the general regulations and restrictions referred to above.

Resolutions as to note issue, 1860.

In 1860 the Hon. A. T. Galt, minister of finance, introduced in the Legislative Assembly a series of resolutions on the subject of a proposed provincial treasury department,

(*h*) For a discussion of the economic aspects of the free banking system as applied to the then conditions of Canada, see Shortt, *op. cit.*, 10 J.C.B.A. 16 ff (no. 4).

(*i*) For an account of the remarkable expansion of the chartered bank system during the fifties, see Shortt, *op.cit.*, 11 J.C.B.A. pp. 113 ff.

(*j*) See chapter 16, *infra*, for review of the subsequent legislation on this subject.

(*k*) See Shortt, *op. cit.*, 11 J.C.B.A. pp. 214 ff.

which should have the exclusive right to issue paper money for circulation in the province. This was intended to remedy one of the serious defects in the existing banking system, namely the lack of uniformity in the value of bank notes owing to the discount in one part of the province of notes issued in another. It was proposed to repeal the Free Banking Act, but to allow the existing chartered banks to continue to issue notes until the expiration of their charters in 1870, subject to the surrender by them of their privilege under provisions to be enacted for that purpose. Owing to the opposition of the banking and commercial interests, however, Mr. Galt's resolutions were not pressed.(*l*)

From 1862 to 1864 Mr. Galt was out of office, and in this interval the government account was transferred from the Bank of Upper Canada to the Bank of Montreal, the latter bank being better able to render the financial assistance which the government at this period so urgently required.(*m*) In his budget speech of 1866 Mr. Galt outlined his plan for meeting the financial situation. To pay an accumulated floating debt of about $5,000,000 he proposed that the government should be authorized to issue notes to the extent of at least that amount. In addition he proposed to offer inducements to the banks to surrender their right to issue notes. The details of the proposals were submitted later in the session, in the form of resolutions(*n*) which were in part embodied in the "Act to provide for the issue of Provincial Notes" of 1866 (29-30 V., c. 10). This statute authorized the unconditional issue of provincial notes payable on demand in specie to the extent of $5,000,000. It also made provision for payment to any banks surrendering their right to issue notes, of 5% on such banks' note circulation (as of the 30th of April, 1866), and provided for a further issue of provincial notes, not exceeding $3,000,000, to be given to such banks in exchange for the provincial

Provincial Notes Act, 1866.

(*l*) Shortt, *op. cit.*, 11 J.C.B.A. 218, 308 ff.

(*m*) For an account of the condition of Canadian public finances after the collapse of the speculative boom of the fifties, and the influence exercised by the Bank of Montreal from 1864 to 1870 upon the financial policy of the province, see Shortt, *op. cit.*, 12 J.C.B.A. 14 ff.

(*n*) 12 J.C.B.A. 18-19. Before the conclusion of the debate on the resolutions Mr. Galt resigned from the government on other grounds but continued to assist the government with the financial measures then under way. *Ibid.*, 23.

debentures held by them in compliance with the requirements of their charters, or to be issued to any chartered banks as required and paid for by them. Provincial Notes Act, 1866.

The other banks having declined to surrender their right to issue notes, the Bank of Montreal was appointed the agent of the government for the issue of provincial notes. This bank was a creditor of the government and was a holder of provincial debentures to such an extent that it was able to replace the indebtedness of the government by provincial notes and issue provincial notes in place of its own notes without any reduction of its available funds. Owing to the limited amount of the provincial notes issued, the government realized little in ready money, but its immediate needs were met by the Bank of Montreal, partly by arrangement with other banks and with the help of about $1,000,000 obtained by public loan. Soon afterwards the improvement of the public revenue relieved the government of its financial embarrassment, and the government account became a source of great profit to the Bank of Montreal. (*o*)

Dominion Banking Act of 1867.

By section 91 of the British North America Act, 1867, exclusive legislative authority was given to the Parliament of the new Dominion of Canada created by the act in regard to:— B.N.A. Act, 1867.

(14) Currency and coinage.
(15) Banking, incorporation of banks and the issue of paper money.
(16) Savings banks.
(18) Bills of exchange and promissory notes.
(19) Interest.
(20) Legal tender.

"An Act respecting Banks" (31 V., c. 11) passed in the session of 1867-1868 was the earliest statute on the subject of banking enacted under this authority. It was merely a temporary measure, due to expire at the end of the first session of parliament after the 1st of January, 1870. It extended to the whole Dominion the powers of banks previously incorporated by any of the four provinces. In other respects it was mainly a re-enactment for the Dominion of the general banking legislation previously in force in the province of Canada. First dominion banking act, 1868.

(*o*) Shortt, *op. cit.*, 12 J.C.B.A. 25-27.

Dominion Notes Act, 1868.

Chapter 46 of the same session, being "an Act to enable Banks in any part of Canada to use notes of the Dominion instead of issuing notes of their own," was likewise an extension to the Dominion of the Provincial Notes Act of 1866. The $8,000,000 worth of provincial notes prepared in 1866, and the $5,000,000 thereof in circulation in 1868, were declared to be dominion notes redeemable at Montreal, Toronto, Halifax and St. John.(*p*)

In 1869 various bank charters which were about to expire were extended until the end of the first session of parliament next after the 1st of January, 1870.

By these measures time was gained to consider the important problem of creating one uniform system of currency and banking for the Dominion, applicable to all banks, both those to be incorporated in the future, and those which had originally come into existence or were doing business under charters granted by the provinces of Canada, Nova Scotia and New Brunswick or (as in the case of the Bank of British North America) under royal charter.

Discussion preliminary to the Bank Act of 1870.

In the interval between 1867 and 1870 the future banking policy of the Dominion was much discussed, the chief interest being concentrated on the question of the character of the note issue. While the Hon. John Rose was minister of finance, reports upon the banking system were presented by committees both of the Senate and of the House of Commons during the session of 1868-9. The Senate committee condemned the Provincial Notes Act in set terms and recommended a return to the conditions obtaining prior to 1866, but expressed the view that if the government was determined somehow to take possession of the note issue, the change, which the committee strongly deprecated, should be in the direction of the issue by the banks of a paper currency based on the deposit of government securities. The committee of the House collected and reported the evidence of leading bankers and other persons. Although the questions were drawn with the evident intention of eliciting evidence favourable to the introduction of bond-

Reports of select committees, 1868-9.

(*p*) See chapter 29 on Dominion Notes, *infra*, for a summary of the subsequent legislation on this subject.

secured bank notes, the weight of the evidence collected was against the issue of bank notes upon specific security and against the issue of a government paper currency.(*q*) Nevertheless in May, 1869, the minister presented to the Commons resolutions in favour of a revision of the banking legislation on the model of the national banking system of the United States, the banks to be permitted in future to issue only notes prepared by the government and delivered to the banks on deposit of equivalent amounts of bonds, the unsecured bank notes in circulation to be gradually retired. In face of the pronounced opposition which manifested itself in the House and in the country, however, the proposals were temporarily withdrawn. Before the next session began Mr. Rose resigned and was succeeded by Sir Francis Hincks, who had lately returned to Canada after having spent 15 years as governor of the Barbadoes and British Guiana.(*r*)

Resolutions on banking and currency, 1870.

After conferences with the leading bankers and other persons, the new minister on the 1st of March, 1870, laid before the House of Commons a series of resolutions on banking and currency, which emphasized the need of a uniform banking law and recommended a number of changes.

The minister still adhered to his earlier belief in the plan of a government bank of issue, but did not press this plan in face of the adverse opinion of the country. He was however, of the opinion that the government should share in the profits derived from the supply of a paper currency, and proposed that the government alone should issue all notes below the value of $4 and that the banks should be required to hold one-half of their cash reserves in dominion notes. Dominion notes were to be issued directly by the government instead of through the Bank of Montreal and the issue was to be increased. The bank note circulation was not to be based upon the deposit of government securities but was to be limited to the amount of the paid-up capital of each bank. Monthly returns to the government were to be made by the banks, and many other safeguards were suggested, including the requirement of a paid-up capital

(*q*) Excerpts from the evidence given in answer to the more important questions were published in 5 J.C.B.A. 65 ff. (Oct. 1897).

(*r*) Breckenridge, History of Banking in Canada, 1910, pp. 91 ff; cf. Shortt, *op. cit.*, 12 J.C.B.A. 31 ff.

of large amount before a new bank should be permitted to commence business.(*s*)

Bank Act of 1870.

The Act respecting Banks and Banking of 1870 (33 V., c. 11) embodied in large measure the resolutions of Sir Francis Hincks. It enacted that in any act establishing a new bank or renewing the charter of any existing bank a number of restrictions should be incorporated, certain exceptions being granted in the case of the Bank of British North America and La Banque du Peuple in order to conform to the peculiarities of their respective charters.

These provisions were practically re-enacted by the act of 1871 and need not be further referred to here.

The monopoly of issuing notes for circulation was assured to the banks by imposing on private or unauthorized issue a fine of $400. Previous legislation in conflict with the new act was repealed and the "Act respecting Banks" of 1868, was extended to the end of the session of 1872.

The act also contained provisions for the extension by letters patent of the charters of existing banks until the end of the session of Parliament next after the 1st of January, 1881, and no longer, and subject to the other provisions of the act.

Bank Act of 1871.

Only in one instance, however, was a charter renewed under the act of 1870, bankers having expressed themselves in favour of having parliamentary charters. The government therefore determined to embody in one general banking act, not only the provisions of the act of 1870, but also general provisions respecting what might be termed the internal regulation of banks. The statute drafted in accordance with this purpose was passed with very slight discussion in either house, and on the 14th of April, 1871, received the royal assent. This statute was the first general law under which the banks really operated, and may be regarded as practically the first Bank Act of the Dominion.

(*s*) See Shortt, *op. cit.*, 12 J.C.B.A. 264 ff. for an account of Sir Francis Hincks' proposals.

Bank Act, 1871.

By this act (34 V., c. 5) the charters or acts of incorporation, and amendments thereof, of the several banks enumerated in the schedule were continued as to their incorporation, the amount of their capital stock, the amount of each share of such stock, and the chief place of business of each bank, respectively, until the 1st of July, 1881, subject to the right of any such bank to increase its capital stock in the manner provided for by the act. In other respects the charters became subject to the provisions of the act from the 1st of July, 1871, until the end of the then next session of parliament, after which, it was provided, the act should form and be the charters of the said banks respectively until the 1st of July, 1881, and the provisions thereof should apply to each of them respectively, and their charters as existing at the time of the act should be repealed, except only as to the matters for which the said charters were as above provided continued until the said 1st of July, 1881 (sec. 1). It was also enacted that the provisions of the act should apply to any bank to be thereafter incorporated, (either at the then present session or at any future session), whether the act should be specially mentioned in its act of incorporation or not (sec. 2). Any act incorporating any bank thereafter was to declare the capital stock of such new bank, the amount of each share, the name of the bank, and the place where its chief office should be situate (sec. 3).

A large part of the act was devoted to the re-enactment and consolidation of legislation previously in force. One important change was the provision requiring a bank, before issuing notes, or commencing the business of banking, to have $500,000 of capital stock *bonâ fide* subscribed and $100,000 *bonâ fide* paid up, a further sum of $100,000 to be paid up within two years from the commencement of business.(*t*) Another important change was the authority given to shareholders, at any annual general meeting or any general meeting specially called for the purpose, to increase the capital of the bank (sec. 5).

The bank was empowered to open branches or agencies, and offices of discount and deposit, and transact business at any place or places in the Dominion (sec. 4).

(*t*) Sec. 7. The corresponding provision of the act of 1870 required $200,000 to be paid up before a bank commenced business, but said nothing about the amount to be subscribed.

Bank Act, 1871.

Of the other provisions of the act which were made generally applicable to the banks as above stated and which illustrate the policy of the act, particularly as regards the security afforded to the public, the more important may be summarized as follows:

Sec. 8. Amount of notes intended for circulation issued by the bank and outstanding at any time not to exceed the amount of the bank's unimpaired paid-up capital, and no note to be for less than $4.

Sec. 9. Notes of the bank to be received in payment at par at any of its offices, but the bank not to be bound to redeem them in specie or dominion notes at any place other than where they are made payable, the chief seat of business of the bank always to be the place or one of the places of payment.

Sec. 10. Paid up capital not to be impaired by any dividend or bonus; directors knowingly and wilfully concurring in any impairment to be individually liable for the amount thereof as a debt due to the bank. Loss of paid-up capital to be made good by calls upon unpaid stock, such loss and calls to be mentioned in the next return to the government. All net profits to be applied to make good loss, if capital impaired.

Sec. 11. No division of profits by way of dividends or bonus, or both, or in any way, exceeding 8 per cent. per annum to be paid unless, after paying the same and deducting all bad and doubtful debts, the bank has a rest or reserve fund equal to at least 20 per cent. of its paid-up capital.

Sec. 12. Certified lists of shareholders with their respective additions, residences, and holdings of stock, to be laid before parliament annually.

Sec. 13. Monthly returns of assets and liabilities to be made to the government in the form prescribed by the act, signed by the chief officers of the bank.

Sec. 14. The bank to hold, as nearly as may be practical, one-half, and never less than one-third, of its cash reserve in dominion notes.

Sec. 15. A bank to which this act is applicable to be exempt from the tax on the average amount of its notes in circulation and from the obligation to hold any of its capital in government or other debentures.

Sec. 27. Each shareholder to have one vote for each share held by him for at least 30 days before the time of shareholders' meeting. Bank Act, 1871.

Sec. 28. Shareholders to have power to regulate by by-law certain matters incident to the management and administration of the bank, including the qualification and the number of the directors, (to be not less than 5 nor more than 10), and the quorum thereof, the time and manner of electing directors and filling vacancies in the board of directors. No director to hold less than $3,000 of the stock of the bank, when the paid up capital thereof is one million dollars or less, nor less than $4,000 when such capital is between one million and three millions, nor less than $5,000 when such capital exceeds three millions. Directors to be elected annually by the shareholders.

Sec. 39. The bank to have power to acquire and hold real and immovable estate for its actual use and occupation and the management of its business.

Sec. 40. The bank not to lend money upon the security, mortgage or hypothecation of any lands or tenements or of any ships or other vessels, or upon the security or pledge of its own shares, or of any goods, wares or merchandise, except as authorized by the act, or to deal in the buying and selling or bartering of goods, wares or merchandise, or to be engaged in any trade whatever, except as a dealer in gold and silver bullion, bills of exchange, discounting of promissory notes and negotiable securities, and in such trade generally as appertains to the business of banking.

Sec. 41. The bank empowered to take, hold, and dispose of mortgages upon personal as well as real property, by way of additional security for debts contracted to the bank in the course of its business.

Sec. 51. The bank not to make loans or grant discounts on the security of its own stock, but to have a privileged lien for any overdue debt on the shares and unpaid dividends of the debtor, and to have the right to decline to allow any transfer of the shares of the debtor until such debt is paid, and, if such debt is not paid when due, to realize on the shares after due notice. The bank entitled to acquire and hold as collateral security for any advance by or debt to the bank, etc., the shares of the capital stock of any other bank, the bonds or debentures of municipal or other corpor-

Bank Act, 1871.

ations, or dominion, provincial, British or foreign public securities.

Sec. 52. The bank not to be liable to any penalty or forfeiture for usury, but no rate of interest or discount exceeding 7 per cent. to be recoverable by the bank.

Sec. 57. Suspension by the bank of payment of any of its liabilities as they accrue, in specie or dominion notes, if it continues for ninety days, to constitute the bank insolvent and operate a forfeiture of its charter so far as regards the issue or reissue of notes and other banking operations, the charter to remain in force for purpose of winding up only.

Sec. 58. In the event of the property and assets of the bank becoming insufficient to pay its debts and liabilities, the shareholders to be liable for the deficiency to an amount equal to the amount of their respective shares, over and above any amount not paid up on such shares. In the event of suspension of payment by the bank of any of its liabilities for six months, the directors to make calls on shareholders without waiting for the collection of any debts due to it or the sale of any of its assets or property, such calls to be made at intervals of 30 days, each call not to exceed 20 per cent. on each share. Additional liability of directors not to be affected by this section.

Sec. 59. Shareholders who have transferred their shares or registered the transfer thereof within one month before the commencement of the suspension of payment by the bank to be liable to calls under sec. 58, saving their recourse against the transferees.

Secs. 60 *et seq.* Offences and penalties.

Sec. 68. No private person or party, except a chartered bank, to issue or re-issue, make, draw, or indorse, any bill, bond, note, cheque, or other instrument intended to circulate as money, or to be used as a substitute for money, for any amount whatever under a penalty of $400.

Sec. 70. The bank to be subject to such provisions of any general or special winding-up act to be passed by parliament as may be declared to apply to banks.

Sec. 71. The bank to be subject to any general provisions respecting banks which parliament may deem necessary for the public interest.

Secs. 72 *et seq.* Special provisions as to certain banks.

Between 1871 *and* 1880.

In 1873 the form of the monthly return was expanded (36 V., c. 43), and in 1875 was further amended by the addition of a provision requiring a statement of the direct and indirect liabilities of the directors to the bank (38 V., c. 17).

The same act of 1875 forbade a bank, either directly or indirectly, to purchase or deal in any share or shares of the capital stock of the bank, except where it should be necessary, "to realize upon any such share or shares held by the bank as security for any pre-existing and matured debt."

In 1876 a general insolvent act was applied to banks with modifications (39 V., c. 31).

In 1879 the clause permitting banks to make loans upon shares in other chartered banks was repealed (42 V., c. 45), and banks were required to number their shares, all contracts for the sale of bank stock being required to specify the number of the shares to be transferred. The provision requiring bank shares to be numbered was, however, repealed in 1880.

Revision of Bank Act in 1880.

Bank charters under the act of 1871 being due to expire on the 1st of July, 1881, Sir Leonard Tilley, minister of finance, in the session of 1880, introduced a bill which became law (43 V., c. 22) after some debate.(*u*)

Bank Act, 1880.

By this statute the charters of the thirty-four banks, which were then in operation, were continued to the 1st of July, 1891, and those of four others until the completion of their liquidation. The principal amendments of the law made by the act were the following:(*v*)

Sec. 2. No person holding stock as executor, administrator, guardian or trustee of or for any person named in the books of the bank as being so represented by him or her to be personally liable as a stockholder, but the estate or funds in his or her hands, or the person for whom the trust is, to be liable.

(*u*) The discussion of the bill to amend the Bank Act had been preceded by a vigorous debate on the bill to amend the Dominion Notes Act, involving the whole question of the note issue and its security. Cf. Shortt, *op. cit.*, 14 J.C.B.A. 7 ff.

(*v*) In addition to the amendments noted in chapter 16, *infra*, in regard to taking warehouse receipts, etc., as collateral security.

Bank Act, 1880.

Sec. 3. The proportion of cash reserves to be held in dominion notes never to be less than 40 per cent. (instead of one-third as in the act of 1871).

Sec. 4. A new and expanded form of monthly return substituted, the minister of finance to have power to call for special returns from any particular bank, whenever in his judgment such returns are necessary in order to a full and complete knowledge of its condition.

Sec. 6. No bank to hold any real or immovable property howsoever acquired, except such as shall be required for its own use, for any period exceeding seven years from the date of the acquisition thereof.

Sec. 8. The bank forbidden to lend money on the stock of any other bank, as well as on its own, and the lien of a bank on its own shares extended to cover any "debt or liability for a debt," instead of any "overdue debt," to the bank.

Sec. 10. After the first day of July 1880 any person, firm or company assuming or using the title of "bank" without being authorized so to do by this act or by the act of 1871, or by some other act in force in that behalf, to be guilty of a misdemeanour.

Sec. 12. After the 1st of July, 1881:—

1. The payment of the notes issued by the bank and intended for circulation, then outstanding, to be the first charge upon the assets of the bank in case of its insolvency.

2. No bank note for a sum less than $5, or for any sum not being a multiple of $5, to be issued or re-issued by the bank.

3. Any bank making any payment to make the same up to $50, at the request of the payee, in dominion notes for $1, or $2 each.

4. Proxies to vote at a shareholders' meeting to be made or renewed within three years next preceding the time of such meeting.

Perhaps the most notable feature of the legislation of 1880 was the attempt to give greater security to the paper currency by conferring upon the holder of an insolvent bank's note a prior claim on the assets of such bank. The clause to give effect to this was objected to in the House of Commons on the ground that it was likely to increase the danger of runs from depositors anxious to convert their

claims into privileged liens.(*w*) This had also been the view of Sir Francis Hincks in 1870. Now, however, the proposal had the support of the bankers. For them the privilege of note circulation was a source of easy and considerable profit. To the people it assisted in giving an elastic currency, increased sources of discount, and, through the system of branch banks promoted by it, widespread and accessible banking facilities. Bank Act, 1880.

The scheme, already proposed before 1870, to remodel the Canadian banking system on the plan of the national banking system of the United States was again mooted in 1880, but was opposed by the bankers.

A plan was also proposed for the establishment of a government bank inspection or for the appointment of an auditor by the shareholders. The bankers argued, however, that it was impossible for a government inspector or an auditor properly to inspect a Canadian bank on account of its many branches and the multiplicity and variety of the commercial paper in its assets. Many persons, they said, would make deposits upon the faith of an official report which would be more or less illusory. It was better, in their opinion, to rely on the careful organization of the bank, the vigilance of the directors, and the inspection by trained men of its own staff travelling from branch to branch and reporting to the general manager.

In the bill which he introduced the minister gave effect to the representations of the bankers on these points.(*x*)

Between 1880 *and* 1890.

In 1883 (by 46 V., c. 20) various money penalties were provided for contraventions of the Bank Act, the penalty of charter forfeiture having proved insufficient because of the government's unwillingness to punish transgression by a penalty of such excessive severity.

The unauthorized use of the title "banking company," "banking house," "banking association," "banking institution" or "banking agency," was made a misdemeanour unless the words "not incorporated" were added to the title.

(*w*) Debates H. of C., 1880, vol. 2, col. 729.

(*x*) Breckenridge, Canadian Banking System, 1817-1890, in 2 J.C.B.A., pp. 450-451.

In 1886 the Bank Act of 1871 and amending acts were consolidated as chapter 120 of the Revised Statutes of Canada.

Two winding-up acts in part affecting banks were passed in this decade, namely, in 1882, an Act respecting Insolvent Banks, etc. (45 V., c. 23), consolidated as R.S.C. 1886, c. 129 (The Winding-up Act), and in 1889 the Winding-Up Amendment Act.

Revision of Bank Act in 1890.

Before the time had arrived for the next decennial revision and renewal of charters, several defects in the banking law had become patent.(*y*)

Defects to be remedied in 1890.

1. The prior lien given by the act of 1880 to holders of notes of an insolvent bank made final payment in full almost certain, but failed to enable the holders of such notes to realize them at par immediately after the suspension. The discount and the delay were in some cases considerable.

2. The operation of the statutes of limitations upon the outstanding notes of an insolvent bank unjustly injured holders who were ignorant or unmindful of the necessity of presenting notes for payment. The notes of a bank were never entirely redeemed before the limitation came into effect.

3. Under the existing system bank notes did not circulate at par in localities remote from the office where they were payable or in localities whose trade centre was different from that of the bank whence they were issued. The evil became aggravated as closer relations were established between different banks of the Dominion and a larger number of notes were circulated at a distance.

4. The security of a large paid-up capital was not sufficiently attained by the existing law which required $100,000 of capital to be paid up before a new bank should commence business.

Early in 1890 the views of the principal bankers on these and other points were presented to the minister of finance, (the Hon. Geo. E. Foster), and subsequently to the assembled members of Sir John A. Macdonald's cabinet. The question of requiring a bank to hold a fixed proportion of its liabilities

(*y*) Breckenridge, *op. cit.*, 2 J.C.B.A., pp. 469 ff.

in specie and dominion notes was discussed; but, owing to the strong opposition of the bankers, the proposal to this end made by the minister was overruled by the cabinet.

In March, 1890, Mr. Foster introduced in the House of Commons a bill to amend the banking law. This was the subject in committee of the whole of a protracted and instructive debate, remarkable alike for its dispassionate tone and for the conspicuous legal ability brought to bear upon the questions at issue.(z)

By the act as finally passed (53 V., c. 31), the four points above noted as defects in the banking law were dealt with as follows: Bank Act, 1890.

1. By sec. 53 the prior lien in favour of the holders of notes outstanding at the time of the suspension of a bank was preserved and was also extended to cover interest thereon. By sec. 54 provision was made for the establishment of a bank circulation redemption fund for the payment of the notes of any insolvent bank (with interest at 6 per cent. per annum from the day of suspension until such payment) in the event of the failure on the part of such bank to pay within two months from the suspension all its notes which should be presented. Such fund was to be contributed to by all the banks, each being required to deposit with the minister of finance in two instalments a sufficient sum to make the total contribution of each bank equal to 5 per cent. of the average amount of its notes in circulation during the twelve months prior to the day fixed for payment of the second instalment, i.e., the 15th of July, 1893. The details of the scheme, including the provisions for replacing payments made out of the fund, need not be further referred to here as they are set out in the present revised statute.

The plan of a bond-secured system of note issue received in 1890 little support, in or out of parliament, as compared with that which it received in 1880.

2. Moneys payable by the liquidator of an insolvent bank to shareholders and depositors which should remain unclaimed for three years, or until the completion of the wind-

(z) Debates H. of C., 1890, vol. 2, col. 3811, 3879, 3955, 4074, 4277, 4507, 4590, 4928. The interest was chiefly concentrated on the question of the note issue and the amendments proposed in regard to the mode in which goods, wares, and merchandise might be taken by a bank as security for advances. As to the latter, see chapter 16, *infra*.

Bank Act, 1890.

ing up, were required to be paid to the minister of finance to be held by him subject to the claims of persons other than the bank. The liquidator was similarly required to pay to the minister a sum equal to the amount of the notes of the bank intended for circulation and then outstanding (sec. 88, sub-sec. 4 and 5). The debts of a solvent bank were also exempted from the statutes of limitations.

3. Each bank was required to make the arrangements necessary to insure the circulation at par in every part of Canada of all notes issued or re-issued by it and intended for circulation, including the establishment of agencies for the redemption and payment of its notes at the chief city of each province and at such other places as should be from time to time designated by the treasury board (sec. 55).

4. New banks were required before commencing business to obtain *bonâ fide* subscriptions to the extent of $500,000, of which $250,000 should be temporarily deposited with the minister of finance.

The bill, as originally introduced in the House of Commons, also provided for a system of compulsory audit by auditors appointed by the shareholders, the report of such auditors and their audit of the directors' report to be lodged with the minister of finance. The audit scheme was, however, successfully opposed in parliament, as that of a government inspection, or of the appointment of an auditor by the shareholders, had been by the bankers in 1880, and the provisions in question were struck out of the bill.

In addition to the changes above noted the whole Bank Act was revised and re-enacted. The more important of the other changes made by the act may be very briefly summed up, as they have been re-enacted in the act now in force.(*a*)

The payment of any amount due to the government of Canada in trust or otherwise was made the second charge on the assets of an insolvent bank and that of any amount due to the government of any of the provinces a third charge (sec. 53). This was a partial re-enactment of the crown priority existing at common law.

Directors required to hold *paid-up* stock to qualify (sec. 19).

(*a*) See chapter 16, *infra*, for discussion of changes made in 1890 in regard to the power of a bank to lend money on the security of natural products and manufactured goods.

Only a majority of the directors required to be British subjects (sec. 19). Bank Act, 1890.

Shareholders permitted to reduce as well as increase the capital stock, both increase and reduction however to be subject to the approval of the treasury board (sec. 26 and 28).

The amount of reserve required after division of profits exceeding 8 per cent. raised from 20 to 30 per cent. (sec. 49).

The bank forbidden to pledge, assign or hypothecate its notes, and no advance or loan made on the security of the notes of a bank to be recoverable from the bank or its assets (sec. 52).

A bank making any payment to make the same in dominion notes at the request of the payee up to $100, instead of $50 as required by the act of 1880 (sec. 57).

Provision as to receiving deposits from persons otherwise unable to contract (sec. 84).

The making of false returns or the wilful concurrence therein to be an offence against the act (sec. 99).

The period required for the registration of stock to be made before suspension, in order to exempt the transferor from liability, increased from 30 to 60 days (sec. 86).

The use of the titles "bank," "banking house" made an offence whether the expression "not incorporated" be added or not (sec. 100).

Persons committing an offence against the act to be liable to a fine not exceeding $1,000 and imprisonment not exceeding five years or both (sec. 101).

Penalties against circulation in excess of paid-up capital increased in severity (sec. 51, sub-sec. 3).

Finally the charters of 36 banks were continued, subject to certain contingencies, until the 1st of July, 1901, provision was made for bringing the Merchants Bank of Prince Edward Island under the operation of the act, some special features of La Banque du Peuple were again confirmed, and the two banks working under royal charter, the Bank of British North America and the Bank of British Columbia, were, except as to a few provisions, made subject to the act.

Revision of 1900.

In 1899 an act was passed permitting a bank to issue and re-issue at any office or agency of the bank in any British

colony or possession other than Canada, notes for one pound sterling each or for any multiple of such sum, subject to certain restrictions (62-63 V., c. 47).

Apart from this there was no amendment of the Bank Act of 1890 until the decennial renewal of charters in 1900. In the last mentioned year, the Hon. W. F. Fielding, then minister of finance, introduced a bill to amend the Bank Act, which became law with but little modification.

Bank Act, 1900.

By the Bank Act Amendment Act, 1900, (63-64 V., c. 26), the charters of 34 banks then in operation were continued until the 1st of July, 1911, subject to certain contingencies (sec. 6), and the charters of La Banque du Peuple, La Banque Ville Marie, and the Commercial Bank of Manitoba, which were in process of liquidation, were also continued for the purpose of liquidation only (sec. 5).

To all banks, except as otherwise provided, the Bank Act and the amendments of 1899 and 1900 were made applicable.

The charters of the Bank of British North America and of the Bank of British Columbia remained in force subject to the act to the extent specified therein.

By the act of 1900 a number of amendments were also made to the general banking law, of which the more important are the following:—

In addition to the statement already required to be submitted by the outgoing directors at the annual meeting, directors to submit to the shareholders such further statements of the affairs of the bank (other than statements with reference to the account of any person dealing with the bank), as the shareholders require by by-law passed at the annual or a special general meeting (sec. 9).

A bank not to issue notes during any period of suspension of payment of its liabilities, and in the case of a bank's resuming business without the consent in writing of the curator provided for in the act, not to issue notes again until authorized by the treasury board. Prohibition enforced by penalties (sec. 10).

Notes of a suspended bank to bear interest at 5 per cent. instead of at 6 per cent. (sec. 11).

Notes of a suspended bank which are paid out of the bank circulation redemption fund in excess of the amount to the credit of such bank in the fund to bear interest at 3 per

cent. until the fund is recouped out of the assets of the bank (sec. 13). Bank Act, 1900.

Treasury board empowered to extend the period for holding real or immovable property acquired by the bank for a further period of five years. Provisions for forfeiture in case of a bank's holding such property for a longer period (sec. 14).

If a person dies having a deposit with a bank not exceeding $500, the production to the bank and deposit with it of an authentic notarial copy of the will of such person or an authenticated copy of the probate of the will or letters of administration to be sufficient authority to the directors for paying such deposit in accordance with such probate, etc. (sec. 20).

Provision empowering the bank to purchase the assets of any other bank and setting out the conditions on which such a purchase may be made, the procedure which must be observed, etc., (secs. 33 to 44, as amended by chapter 27 of the same session).

The bank to make an annual return to the minister of finance of all drafts or bills of exchange issued and remaining unpaid for over five years, under penalties for failure to make the same (sec. 21).

In the event of suspension of payment by a bank, a curator to be appointed by the Canadian Bankers' Association to supervise the affairs of such bank. Provisions as to the curator's powers, duties and remuneration (secs. 24 to 29). Further by-laws, rules and regulations to be made by the said association, subject to the approval of the treasury board, not only on the subject of the curator's powers, duties and remuneration, but also as to: (1) the supervision of the making of the notes of the banks which are intended for circulation and the delivery thereof to the banks; (2) the inspection of the disposition made by the banks of such notes; (3) the destruction of notes of the banks, etc., (secs. 30 to 32).

By another statute of the same year the Canadian Bankers' Association was incorporated, among its powers being that of establishing clearing houses for banks, and of making rules and regulations in regard to them (63-64 V., c. 93).

Revised Statutes of Canada, 1906.

In 1906 the Bank Act, 1890, and amending acts were consolidated as chapter 29 of the Revised Statutes of Canada, 1906. In the revision the arrangement of the sections was to some extent altered, and many sections were divided into new sub-sections, and some were re-drafted. In one or two instances the revisers perhaps effected some unintentional legislation.

Revision of 1913.

Amending act of 1908.

In 1908, by the statute of 7 & 8 E. 7, c. 7, the Bank Act was amended so as to authorize a bank during the usual season of moving the crops, that is, between the 1st of October in any year and the 31st of January next ensuing to issue notes in excess of the amount of its paid-up capital, to an amount not exceeding 15% of the bank's combined paid-up capital and rest or reserve fund. This amendment was re-enacted by the statute 2 G. 5, c. 5, except that the dates above mentioned were changed to the first of September and the last day of February and as so modified is embodied in sec. 61 of the present act. Interest is payable by the bank to the minister on its excess note circulation, and under sec. 147A the neglect to make monthly returns of the excess circulation is made the subject of a penalty.

In 1910 a new Currency Act was passed, chiefly in consequence of the establishment at Ottawa of a branch of the royal mint.(*b*)

Bank Act, 1913.

In the usual course the decennial revision of the Bank Act should have taken place during the session of 1910-1911, and on the 15th of December, 1910, Sir Wilfrid Laurier, in the absence of Mr. Fielding, introduced a bill containing a number of proposed amendments of the banking law. No progress was made with this bill, however, owing to the protraction of the debate on the subject of reciprocity with the United States, and in 1911 by the statute 1 & 2 G. 5, c. 4 the charters of 37 banks were simply continued in force for one year from the 1st of July 1911. At the next following session of parliament, after the change of government resulting from the general election of 1911, no attempt was made to revise the Bank Act, and the charters of 37 banks were continued in force until

(*b*) See chapter 28, *infra*.

the 1st of July 1913, by the Bank Charters Continuation Act, 1912 (2 G. 5, c. 5). Bank Act, 1913.

On the 17th of December, 1912, the Hon. W. T. White, the present minister of finance, introduced a bill respecting banks and banking, and outlined the changes proposed to be made in the law.(*c*)

The feature which was of greatest interest to the public was undoubtedly the proposed provision for the inspection of banks by independent auditors. It will be remembered that in 1880 the bankers had successfully opposed a plan for either government inspection or inspection by an auditor appointed by the shareholders, and that in 1890 a provision for the appointment of auditors by the shareholders was struck out of the bill introduced at that time. In 1900 the subject was not discussed in parliament, but in the latter half of the next following decade public interest in the question was revived by the disastrous experiences of the shareholders of the Ontario Bank, the Sovereign Bank and the Farmers Bank(*d*). In the case of each of these banks it is said that

(*c*) Debates, H. of C. 1912-3, col. 1302 ff.

(*d*) In October, 1906, the directors of the Ontario Bank were obliged to make over most of its assets to the Bank of Montreal in consideration of the assumption of the liabilities by the latter bank. In January 1908, the business of the Sovereign Bank was taken over by 12 banks which guaranteed the creditors against loss. In December, 1910, the Farmers Bank closed its doors. In the case of the first mentioned bank, the shareholders have had to pay the greater part of their double liability. In the case of the Farmers Bank, not only have the shareholders had to pay the double liability to the full extent, but the depositors will receive little or no dividends on their claims. The present Government of Canada has, however, promised to provide "a reasonable measure of relief" to the depositors of the Farmers Bank, having regard to the special circumstances that the grant of the certificate of the treasury board authorizing the bank to commence business was obtained by fraudulent misrepresentation and that the certificate would not have been granted if certain charges had been investigated, namely, that the amount required to be paid up on account of subscriptions had not in fact been paid up. In the case of the Sovereign Bank, over two-thirds in value of the shareholders have assigned their shares to a holding company in which they have subscribed and paid for shares to the amount of their double liability. Although the bank ceased to do business with the public in January, 1908, it is not yet, strictly speaking, in liquidation as an insolvent bank, and therefore the remaining shareholders have not yet been called upon to pay the double liability.

The other bank failures occurring within the last decade, namely, that of the Bank of Yarmouth, in 1905, that of the Banque de St. Jean in 1908, and that of the Banque de St. Hyacinthe in 1908, were also disastrous for the shareholders, but the amounts in question were, comparatively speaking, small.

Bank Act, 1913.

adequate independent inspection would probably have prevented a substantial portion of the loss, the failure in each case being due primarily to mismanagement in the head office, against which a system of domestic inspection is not a sufficient safeguard; and an increasing public opinion demanded a change in the law in the direction of authorizing, if not enforcing, some form of external inspection of a bank's affairs.(*e*)

Mr. White's bill in many respects adopted the changes proposed by Mr. Fielding in 1910, but in the matter of inspection there was an important difference. Mr. Fielding had proposed to authorize the shareholders to appoint an auditor or auditors. Mr. White proposed to make it compulsory for them to do so and on default of an appointment by the shareholders, to authorize the minister to make the appointment (sec. 56). It was also proposed that the minister should have the right of his own motion to obtain an auditor's report upon the affairs of a bank (sec. 56A).

Another new feature of Mr. White's bill was the proposal to create central gold reserves to be held by trustees, three to be appointed by the Canadian Bankers' Association and one by the minister. Any bank was to be at liberty to deposit current gold coin or dominion notes with the trustees and to issue notes for circulation in excess of its unimpaired paid-up capital(*f*) to the amount so deposited with and held by the trustees for it. This provision for excess circulation was to be in addition to the provision allowing excess circulation during the usual season of moving the crops. Both provisions are now contained in sec. 61 of the act.

On the second reading of the bill in January, 1913(*g*) various features of it were the subject of a good deal

(*e*) Cf. Johnson, Canadian Banking System, pp. 135-6. The question of independent inspection of banks has been much before the public. Of special interest is a pamphlet entitled "The Necessity for External Examination" published at Toronto in November, 1909, by H. C. McLeod, sometime general manager of the Bank of Nova Scotia and for years an earnest advocate of an independent audit—being in the latter respect rather a noteworthy exception in the official banking world. It is stated in the preface to the pamphlet above mentioned that it was not published for general circulation until after the author had without result submitted to the Canadian Bankers' Association at its meeting of November 25th, 1909, a suggested amendment to the Bank Act embodying the principle of inspection of banks by auditors to be appointed by the association.

(*f*) Special provision was made for the Bank of British North America.

(*g*) Debates, H. of C. 1912-3, col. 1896 ff., 2350 ff, 2490 ff.

of debate and some degree of dissatisfaction with the banks was manifested. The bill was then referred to the select standing committee on banking and commerce, before which the evidence of banking experts was heard. The provisions for external inspection were adopted with an amendment requiring the general managers of the banks, subject to the approval of the minister, to select each year competent auditors to the number of at least forty, from whom the shareholders of each bank should appoint an auditor or auditors (sec. 56). In May the bill was discussed in committee of the whole and read a third time in the Commons.(*h*) Some minor amendments were made to the bill in the Senate, these were concurred in by the House on the 2nd of June(*i*) and the bill received the royal assent on the 6th of June. Bank Act, 1913.

The act of 1913 renewed until the 1st of July, 1923, the charters of the 24 banks which had neither lost their identity by merger with other banks nor ceased to do business. In addition to the provision for the appointment of auditors, the more important changes made in the law were as follows:(*j*)

Post office address and description of each subscriber for stock to be recorded in stock books and a copy of the double liability clause to be printed on each page of the stock books and on every document constituting or authorizing a subscription (secs. 12, 36, 37).

A payment of 10% on account to be necessary to constitute a *bonâ fide* subscription for stock forming part of the $500,000 of stock required to be subscribed, and total payments in money to be made on account thereof and to be paid thereout to the minister to the amount of not less than $250,000, before the organization meeting and the application for a certificate permitting a bank to do business (sec. 13).

Provisions aimed against the use of money subscribed for shares in payment of expenses of incorporation and organization (other than reasonable sums for the payment of clerical assistance, legal services, office rental, advertising, stationery, postage and expenses of travel, if any) before a certificate is

(*h*) *Ibid.*, col. 10342 ff. 10538 ff.

(*i*) *Ibid.*, col. 11865 ff.

(*j*) See also chapter 16 as to amendment authorizing loans to a farmer on the security of his threshed grain grown on the farm.

Bank Act, 1913.

obtained or without the special sanction of the subscribers (secs. 15, 16, 131A).

A copy of the shareholders' by-laws in force on the first day of July, 1913, to be sent to each shareholder before the 31st day of December, 1913, and a copy of the shareholders' by-laws in force at the end of each five-year period after the first day of July 1913, to be sent to each shareholder within six months after the end of each such period (sec. 18).

Provision enabling a bank the capital stock of which is divided into $50 shares to redivide the capital stock into $100 shares (sec. 35A).

Provision for the opening and maintaining of share-registry offices in different provinces (sec. 43).

More detailed statement of the assets and liabilities of a bank required to be submitted at the annual meeting (sec. 54). A bank to hold in dominion notes not less than 40% of the cash reserves *which it has in Canada* (sec. 60).

A bank to make to the minister an annual return showing in detail the fair market value of its real and immovable property (sec. 79).

Loans authorized to a receiver or to a liquidator appointed under any winding-up act (sec. 84A).

Previous written consent of the minister necessary to any agreement by a bank to sell the whole or any portion of its assets to another bank (sec. 99).

Further particulars required in the monthly returns to the minister (sec. 112 and schedule D).

The act of corruptly giving or offering any valuable consideration to a bank officer as an inducement to do or forbear to do anything relating to the bank's business, and, in the case of a bank officer, the act of corruptly accepting or obtaining such consideration made an indictable offence (sec. 131 B).

The pledging of the notes of a bank on behalf of the bank (sec. 146 A), or the payment of any debt or liability of the bank after suspension of payment and without the consent of the curator or liquidator (sec. 147A) made an offence against the act.

Negligence in preparing, signing, approving or concurring in any account or document containing a false or deceptive statement made an indictable offence (sec. 153).

Prohibition of the unauthorized description of a person's business by words in any foreign language equivalent to "savings bank," "banking company," "banker," "private banker," etc. (sec. 156). Bank Act, 1913.

Goods, wares and merchandise.

Warehouse receipts and bills of lading.

As noted above, the act of 1859 was the beginning of the legislation permitting banks to take warehouse receipts and bills of lading as security for advances. By various statutes in subsequent years this privilege was very much amplified, especially by the act of 1880. In 1890 important modifications were made in the rights of the banks in regard to this kind of security and in regard to loans on goods, wares and merchandise, and further amendments were made in 1900 and 1913. As the legislative history of these rights is necessary to a perfect understanding of the reported cases, it has seemed more convenient to note the legislative changes in connection with the sections of the present act relating to this branch of the subject. See chapter 16, *infra*. Loans on warehouse receipts, etc.

CHAPTER III.

The Bank Act: Short Title and Interpretation.

Scope of the Bank Act.

Upon even a casual perusal of the Bank Act, it will be obvious that the banking legislation of the Dominion leaves untouched in many respects the great body of the law merchant. The review of that legislation contained in chapter 2 shews that the efforts of parliament have been mainly directed to the perfecting of the banking system in regard to the existence of the banks as corporations with special powers and privileges, and the security afforded by them to the public. The general relation of banker and customer and the rights and liabilities arising therefrom are only incidentally affected. Nevertheless the general banking law is so far affected by the Bank Act that it seems impossible to treat the general subject of banking law in any order other than that followed by the act without such an elaborate system of cross references as would unduly tax the patience of the reader. I have therefore endeavoured to discuss different phases of banking law in connection with particular sections of the act which deal with cognate subjects, although this course will necessarily involve a treatment of the whole subject without much regard to logical sequence. In chapter 15 will be found an analysis of the business and powers of a bank which will also serve to some extent as an index to the chapters in which the leading subjects of banking law are discussed.

3-4 GEORGE V, CHAPTER 9.

An Act respecting Banks and Banking.

Assented to 6th June, 1913.

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

SHORT TITLE.

Short title.

1. This Act may be cited as *The Bank Act*. 53 V., c. 31, s. 1.

For a review of the chief changes in the general banking legislation of the Dominion leading up to the present act, the reader is referred to chapter 2. Sec. 1.

Powers of Dominion and Province in regard to Banks.

By reason of its power to legislate with regard to "direct taxation within the province in order to the raising of a revenue for provincial purposes" under clause 2 of sec. 92 of the British North America Act, 1867, a provincial legislature may impose a tax upon banks which carry on business within the province varying in amount with their paid-up capital and with the number of their offices, whether or not their principal place of business is within the province. Bank of Toronto v. Lambe, 1887, 12 App. Cas. 575. It has been held in Nova Scotia that a provincial legislature may impose a tax on the dominion notes held by a bank in the province as part of its cash reserve under sec. 60. Windsor v. Commercial Bank, 1882. 3 Cartw. 377, 15 N.S.R. (3 R. & G.) 420. Legislative power.

As to the questions of legislative power arising under the Bank Act, see notes to sec. 43 (succession duty and locality of shares), sec. 95 (locality of deposit), sec. 88 (security for advances), sec. 125 (insolvency).

INTERPRETATION.

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

(*a*) "Association" means the Canadian Bankers' Association, incorporated by chapter 93 of the statutes of 1900, intituled *An Act to incorporate the Canadian Bankers' Association;* "Association."

(*b*) "bank" means any bank to which this Act applies; "Bank."

(*c*) "bill of lading" includes all receipts for goods, wares or merchandise, accompanied by an undertaking to transport the same from the place where they were received to some other place, by any mode of carriage, whatever, whether by land or water, or partly by land and partly by water; "Bill of lading."

(*d*) "Circulation Fund" means the fund heretofore established and continued by the authority of this Act "Circulation Fund."

Sec. 2.

under the name of the Bank Circulation Redemption Fund;

"Curator."

(*e*) "curator" means any person appointed under the authority of this Act by the Canadian Bankers' Association to supervise the affairs of any bank which has suspended payment in specie or Dominion notes of any of its liabilities as they accrue;

"Farmer."

(*f*) "farmer" includes the owner, occupier, landlord and tenant of a farm;

"Goods, wares and merchandise."

(*g*) "goods, wares and merchandise" includes, in addition to the things usually understood thereby, products of agriculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers, petroleum and crude oil, and other articles of commerce;

"Grain."

(*h*) "grain" means wheat, oats, barley, rye and flax;

"Manufacturer."

(*i*) "manufacturer" includes manufacturers of logs, timber or lumber, maltsters, distillers, brewers, refiners and producers of petroleum, tanners, curers, packers, canners of meat, pork, fish, fruit or vegetables, and any person who produces by hand, art, process or mechanical means any goods, wares or merchandise;

"Minister."

(*j*) "Minister" means the Minister of Finance and Receiver General;

"President."

(*k*) "president" does not include an honorary president;

"Products of agriculture."

(*l*) "products of agriculture," in addition to the direct products of the soil such as hay, grain, roots, vegetables, fruits and other crops, includes milk, cream, butter, cheese, honey, poultry (dead), and eggs, hides, skins and wool, and dried, canned and preserved vegetables and fruits;

"Products of the forest."

(*m*) "products of * * * * the forest" includes bark, logs, spars, railway ties, poles and other timber, shingles laths, deals, boards, staves and other lumber, and the skins and furs of wild animals;

(*n*) "products of * * * * the sea, lakes and rivers" includes, in addition to fish of all kinds, whether fresh, frozen, salted, dried, canned, preserved in oil or otherwise preserved, whales and seals, their oil, skins and bone, oysters, lobsters and other crustaceans, fresh and canned or otherwise preserved; Sec. 2. "Products of the sea, lakes and rivers."

(*o*) "trustees" means the persons appointed by the Association and by the Minister to receive and hold the central gold reserves, and "trustee" means any one of the trustees, and if one or more of the trustees is a corporation then "trustee" includes each of the officers of such corporation who is responsible for any action taken by the corporation for the purposes of this Act; "Trustees."

(*p*) "warehouse receipt—" "Warehouse receipt."

(i) means any receipt given by any person for any goods, wares or merchandise in his actual, visible and continued possession as bailee thereof in good faith and not as of his own property, and

(ii) includes receipts, given by any person who is the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods, wares or merchandise, for goods, wares and merchandise delivered to him as bailee, and actually in the place or in one or more of the places owned or kept by him, whether such person is engaged in other business or not, and

(iii) includes also receipts given by any person in charge of logs or timber in transit from timber limits or other lands to the place of destination of such logs or timber.

2. Where by this Act any public notice is required to be given the notice shall, unless otherwise specified, be given by advertisement— Public notice, how given.

Sec. 2.

(*a*) in one or more newspapers published at the place where the chief office of the bank is situate; and,

(*b*) in *The Canada Gazette.*

Sufficiency of publication.

3. When by this Act a notice is required to be published in a newspaper for four weeks or any longer period, publication each week in a weekly newspaper, or once a week during the period in a newspaper published more frequently, shall be a sufficient publication for the purposes of this Act.

Notice of call.

4. When by this Act notice of any call is required to be given to the shareholders the notice shall, unless otherwise specified, be sufficiently given by mailing the notice in the post office, registered and post paid, to the last known post office address of the respective shareholders as shown by the records of the bank, at least thirty days prior to the day on which the call is payable. 53 V., c. 31, ss. 2, 54 and 102; 63-64 V., c. 26, ss. 3 and 24; 4-5 E. VII., c. 4, s. 4. Am.

Sec. 2. Definition of terms.

(*a*) "*Association.*"

The act of incorporation of the Canadian Bankers' Association is printed in chapter 23 *infra.*

(*b*) "*bank.*"

The banks to which this act applies are specified in secs. 3, 4, 5 and 6. The act does not apply to a foreign corporation. Commercial National Bank v. Corcoran, 1884, 6 O.R. 527. By sec. 156, every person assuming or using the title "bank," "banking company," etc., without being authorized so to do by this act, or by some other act in force in that behalf, is guilty of an offence against the act.

As to what is a bank in regard to its business and powers, see chapter 14, *infra.*

A bank for the purpose of the Bills of Exchange Act means an incorporated bank or savings bank carrying on business in Canada (see sec. 2(*c*) of that act, *infra*).

(*b*) "*warehouse receipt.*"

(*c*) "*bill of lading.*"

See notes to sec. 86.

Sec. 2. Definition of terms.

A warehouse receipt is in some respects like a bill of lading. Each is a receipt or acknowledgment that the goods of one person have been received by another, but the legal effects of these documents at common law were very different. A bill of lading, being an acknowledgment by a carrier that goods had been received for carriage, was an instrument well-known to commerce, and by the custom of merchants peculiar incidents were attached to it, the most important of which was that upon its transfer, the property in the goods mentioned in it passed to the transferee. A warehouse receipt on the contrary has not by custom any peculiar incidents attached to it, and its mere transfer did not pass to the transferee the property in the goods. Bank of British North America v. Clarkson, 1869, 19 U.C.C.P. at p. 188.

In England the Bills of Lading Act and the Factors Acts have largely extended the effect of bills of lading, and the rights of the holders of them. The former act confers upon the consignee of goods named in a bill of lading, and an endorsee of a bill of lading to whom the property in the goods pass upon or by reason of such consignment or endorsement the same rights of suit, and subjects him to the same liability, as if the contract contained in the bill of lading had been made with himself. The latter acts are intended to afford security to persons dealing with mercantile agents who have possession of goods or of the documents of title to goods. These or similar acts are in force in various provinces of Canada.(*a*)

The Bank Act affects the subject of warehouse receipts and bills of lading (as defined in sec. 2) to the extent of giving a bank special privileges in regard to taking such documents as collateral security. The banking legislation since 1859 has also made an important change in the effect of the endorsement of a warehouse receipt under certain circumstances.(*b*)

A bill of lading is not negotiable in the special sense that a bill of exchange may be negotiable (cf. chapter 30, *infra*). The mere honest possession of a bill of lading endorsed in blank, or upon which the goods are made deliverable to bearer,

(*a*) As to the Factors Acts, see notes to sec. 87, *infra*. The Bills of Lading Act is re-enacted in R.S.C. 1906, c. 118, the original of which—52 V., c. 30—was passed in 1889, apparently to avoid any question as to the jurisdiction of a provincial legislature on the subject. See, *e.g.* the Ontario statute 33 V., c. 19, passed in 1869, to the same effect, since consolidated in 10 E. 7, c. 63.

(*b*) See chapter 16, *infra*.

Sec. 2. Definition of terms.

is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. *The endorsement of a bill of lading gives no better right to the goods than the endorser himself had* (except in cases where an agent entrusted with it may transfer it to a *bonâ fide* holder under the Factors Acts), so that if the owner should lose or have stolen from him a bill of lading endorsed in blank, the finder or the thief could confer no title upon an innocent third person. But the title of *bonâ fide* third persons will prevail against the seller who has actually transferred the bill of lading to the buyer, although he may have been induced by the buyer's fraud to do so, because a transfer obtained by fraud is only voidable, not void. Benjamin on Sales, 5th ed. 1906, p. 919. Pollard v. Vinton, 1881, 105 U.S. at p. 8. Cf. Ewart on Estoppel, pp. 307 ff.

The absence of the endorsement of a bill of lading by the consignee therein named is notice of an outstanding interest in the goods represented by the bill, and places a person who is asked to make an advance upon the security of the bill upon enquiry. The mere manual possession of the bill does not enable the possessor to make a pledge except subject to the rights of the consignee. Gosselin v. Ontario Bank, 1905, 36 S.C.R. 406.

(*d*) "*Circulation Fund.*"
See sec. 64.

(*e*) "*curator*"
See secs. 117 ff.

(*f*) "*farmer.*"
See sec. 88. This definition was added to the act in 1913.

(*g*) "*goods, wares and merchandise.*"
See secs. 76, 86 to 90. The definition was extended in 1913 by the substitution of the general words "products of agriculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers."(*c*) for "timber, deals, boards, staves, saw-logs, and other lumber."

(*h*) "*grain*".
See sec. 88. This definition was added to the act in 1913.

(*i*) "*manufacturer*"
See sec. 88.

(*c*) These terms are defined in clauses (*l*), (*m*) and (*n*) of this section.

Sec. 2. Definition of terms.

(*j*) "*Minister.*"

The minister of finance and receiver general is frequently referred to in the act. He is also chairman of the treasury board, which exercises important functions under the act. See secs. 15 to 17, 33, 35, 67, 68 and 132. By the Act respecting the Department of Finance and the Treasury Board, the board consists of the minister of finance and receiver general, and any five of the ministers belonging to the King's Privy Council for Canada, to be nominated from time to time by the Governor-in-Council; the board acts as a committee of the Privy Council on all matters relating to finance, revenue and expenditure, or public accounts which are referred to it by the Council, or to which the board thinks it necessary to call the attention of the Council, and has power to require from any public department, board or officer, or other person or party bound by law to furnish the same to the government, any account, return, statement, document or information which the board deems requisite for the due performance of its duties.

(*k*) "*president.*"

See sec. 24.

(*l*) "*products of agriculture.*"

(*m*) "*products of . . the forest.*"

(*n*) "*products of . . the sea, lakes and rivers.*"

See sec. 88. These definitions were added to the act in 1913.

(*o*) "*trustees.*"

See sec. 61. This definition was added in 1913.

(*p*) "*warehouse receipt.*"

See notes to "bill of lading" clause (*c*) *supra*, and sec. 86.

Public notice.

See secs. 13, 21 and 31.

Publication in newspaper.

Sub-sec. 3 was added to the act in 1913. Cf. secs. 21 and 41.

Notice of call.

See secs. 38 and 128.

CHAPTER IV.

Application of the Act.

General.

To what banks this Act applies.

3. The provisions of this Act apply to the several banks enumerated in Schedule A to this Act, and to every bank incorporated after the first day of January, one thousand nine hundred and twelve, whether this Act is specially mentioned in its Act of incorporation or not, but not to any other bank, except as hereinafter specially provided. 53 V., c. 31, s. 3. Am.

Special provision is made by sec. 6 for the Bank of British North America.

The banks enumerated in schedule A are the following:

1. The Bank of Montreal.
2. The Quebec Bank.
3. The Bank of Nova Scotia.
4. The Bank of Toronto.
5. The Molsons Bank.
6. La Banque Nationale.
7. The Merchants Bank of Canada.
8. La Banque Provinciale du Canada.(*a*)
9. The Union Bank of Canada.
10. The Canadian Bank of Commerce.
11. The Royal Bank of Canada.(*b*)
12. The Dominion Bank.
13. The Bank of Hamilton.
14. The Standard Bank of Canada.
15. La Banque d'Hochelaga.
16. The Bank of Ottawa.
17. The Imperial Bank of Canada.

(*a*) Formerly the Banque Jacques Cartier (63-64 V., c. 102).
(*b*) Formerly the Merchants Bank of Halifax (63-64 V., c. 103).

Sec. 3.
Banks to which the Act applies.

18. The Sovereign Bank.
19. The Metropolitan Bank.
20. The Home Bank of Canada.
21. The Northern Crown Bank.
22. The Sterling Bank of Canada.
23. The Bank of Vancouver.
24. The Weyburn Security Bank.

Bank charters continued to July 1st, 1923, as to some particulars.

4. The charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in Schedule A to this Act are continued in force until the first day of July, one thousand nine hundred and twenty-three, so far as regards, as to each of such banks,—

(*a*) the incorporation and corporate name;

(*b*) the amount of the authorized capital stock, if the same has not been increased or decreased, but if increased or decreased then as increased or decreased before the passing of this Act;

(*c*) the amount of each share of such stock; and,

(*d*) the chief office;

subject to the right of each of such banks to increase or to reduce its authorized capital stock in the manner hereinafter provided.

As to other particulars.

2. As to all other particulars this Act shall form and be the charter of each of the said banks until the first day of July, one thousand nine hundred and twenty-three.

Forfeited or void charters not continued.

3. Nothing in this section shall be deemed to continue in force any charter or Act of incorporation, if, or in so far as it is, under the terms thereof, or under the terms of this Act or of any other Act passed or to be passed, forfeited or rendered void by reason of the non-performance of the conditions of such charter or Act of incorporation, or by reason of insolvency, or for any other reason. 63-64 V., c. 26, s. 6. Am.

In 1913 the words "the chief office" were substituted for the words "the chief place of business" in clause (d) of the former section, and all the words in clause (b) after the words "the amount of the authorized capital stock" were added.

Sec. 4.

The right of a bank to increase or reduce its authorized capital stock is provided for by secs. 33 and 35.

The section does not apply to the Bank of British North America (sec. 6).

Banks in course of winding-up.

Act continues to apply for purposes of winding-up.

5. The provisions of this Act shall continue to apply to the banks named in the Schedule to chapter 5 of the statutes of 1912, intituled *The Bank Charters Continuation Act*, 1912, and not named in Schedule A to this Act, but only in so far as may be necessary to wind up the business of the said banks respectively; and the charters or Acts of incorporation of the said banks, and any Acts in amendment thereof, or any Acts in relation to the said banks now in force, shall respectively continue in force for the purposes of winding up, and for such purposes only. 63-64 V., c. 26, s. 5. Am.

The following are the banks to which this section applies:

1. The Bank of New Brunswick, merged with the Bank of Nova Scotia, 1912.
2. The St. Stephen's Bank, merged with the Bank of British North America, 1910.
3. The Eastern Townships Bank, merged with the Canadian Bank of Commerce, 1912.
4. The Union Bank of Halifax, merged with the Royal Bank of Canada, 1910.
5. The Ontario Bank, wound up under an agreement with the Bank of Montreal, 1906. See notes to sec. 99.
6. The People's Bank of New Brunswick, merged with the Bank of Montreal, 1907.
7. La Banque de St. Jean, failed 1908.
8. La Banque de St. Hyacinthe, failed 1908.
9. The Western Bank of Canada, merged with the Standard Bank of Canada, 1908.
10. The Traders Bank of Canada, merged with the Royal Bank of Canada, 1912.
11. The United Empire Bank of Canada, merged with the Union Bank of Canada, 1911.
12. The Farmers Bank of Canada, failed 1910.
13. Banque Internationale du Canada, merged with the Home Bank of Canada, 1912.

The Bank of British North America.

6. The sections of this Act which apply to the Bank of British North America are sections— Sections applicable to Bank of British North America.

1; 2; 6; 7; 39; 45; 54 to 61, both inclusive; 63 to 124, both inclusive; 130 to 160, both inclusive.

2. The other sections of this Act do not apply to the Bank of British North America. 53 V., c. 31, s. 6; 63-64 V., c. 26 s. 7. Am. Sections not applicable.

The following sections of the Act do not apply to the Bank of British North America. Sections not applicable to Bank of B.N.A.

3-5. Application of the act;
8-17. Incorporation, and organization of banks;
18-32. Internal regulations;
33-35. Capital stock, increase or reduction;
36-38. Subscriptions and calls;
40-42. Recovery of calls;
43-44. Transfer of shares;
46. Sale of shares under execution.
47-51. Transmission of shares;
52-53. Shares subject to trusts;
62. Note issue at agency in British possession outside of Canada;
125-129. Double liability of shareholders, application of limitations, forfeiture of charter by insolvency, calls in case of insolvency;

7. For the purposes of the several sections of this Act made applicable to the Bank of British North America, the chief office of the Bank of British North America shall be the office of the bank at Montreal in the province of Quebec. 53 V., c. 31, s. 7. Chief office at Montreal.

The Bank of British North America was incorporated by royal charter, and has a corporate existence independently of the act. Its head office is situated in London, England, Cf. Bank of British North America v. Browne, 1850, 6 U.C.R. 490; Patton v. Foy, 1860, 9 U.C.C.R. 512; Lovitt v. The King, 1910, 43 S.C.R. at pp. 134-5.

CHAPTER V.

Incorporation and Organization of Banks.

"The provisions of the bank act with respect to the organization of new banks are intended to guard against the entry of unfit or inexperienced persons into the banking business. * * * * At least five men of integrity and good financial standing must agree to act as provisional directors and secure a favorable report on their project from the parliamentary committee on banking and commerce. These men must agree to subscribe for fairly large blocks of stock, otherwise the committee will be inclined to reject their application. They must convince the committee that their project is a well-considered one, that there is need for the new bank, that it is a *bonâ fide* enterprise, that they have in mind a competent man for general manager, that they really intend and expect to do a legitimate banking business. If they satisfy the parliamentary committee [the charter] will be granted." Johnson, The Canadian Banking System, pp. 18, 19.

Requirements for incorporation and organization

The authorized capital must not be less than $500,000 (sec. 10). The provisional directors may, after public notice, open stock books, obtain subscriptions for stock, and receive and collect sums payable on account of subscriptions (sec. 12). Before the bank can engage in the business of banking, the provisional directors must (1) obtain subscriptions for stock to the amount of not less than $500,000, including in such sum only subscribers who have paid at least 10% on account of their subscriptions, (2) receive at least $250,000 from subscribers on account of subscriptions, (3) pay thereout the sum of $250,000 to the minister of finance, (4) by public notice call a meeting of subscribers who shall elect permanent directors (sec. 13). The bank may then, subject to certain conditions, apply to the treasury board for a certificate permitting it to commence the business of banking. Such certificate must be obtained within one year from the time of the passing of the act of incorporation, otherwise the charter will lapse (secs. 14, 15, 16).

INCORPORATION AND ORGANIZATION OF BANKS.

Particulars of Act of incorporation.

8. The capital stock of every bank hereafter incorporated, the name of the bank, the place where its chief office is to be situated, and the name of the provisional directors, shall be declared in the Act of incorporation of every such bank respectively. 53 V., c. 31, s. 9.

Form thereof.

9. An Act of incorporation of a bank in the form set forth in Schedule B to this Act shall be construed to confer upon the bank thereby incorporated all the powers, privileges and immunities, and to subject it to all the liabilities and provisions set forth in this Act. 53 V., c. 31, s. 9.

The form of act of incorporation of new banks provides that the act shall remain in force until the 1st day of July, 1923, but subject to the provisions of sec. 16.

Capital stock and shares.

10. The capital stock of any bank hereafter incorporated shall be not less than five hundred thousand dollars, and shall be divided into shares of one hundred dollars each. 53 V., c. 31, s. 10.

This section dates from 1890, the provision as to the amount of the par value of shares being new in that year. The condition that the capital should be not less than $500,000 was implied in the provision of the act of 1871, that no bank to be thereafter incorporated, unless otherwise provided by its charter, should issue notes or commence the business of banking until $500,000 should have been *bonâ fide* subscribed, etc.; cf. sec. 13 of the present act.

Provisional directors.

11. The number of provisional directors shall be not less than five.

Tenure of office.

2. The provisional directors shall hold office until directors are elected by the subscribers to the stock, as hereinafter provided. 53 V., c. 31, s. 11; 4-5 E. VII, c. 4, s. 1.

This section dates from 1890 except that prior to 1906 it was not divided into two sub-sections.

Sec. 11. "As hereinafter provided." See sec. 13, which provides for the election of directors by the subscribers to the stock.

See notes to sec. 12, as to the powers of provisional directors.

Opening of stock books.

12. For the purpose of organizing the bank, the provisional directors may, after giving ten days public notice thereof, cause stock books to be opened, in which shall be recorded the subscriptions of such persons as desire to become shareholders in the bank.

Where.

2. The stock books shall be opened at the place where the chief office of the bank is to be situate, and elsewhere in the discretion of the provisional directors.

Particulars entered.

3. Each subscriber shall, at the time of subscription, give his post office address, and description, and these particulars shall appear in the stock books in connection with the name of the subscriber and the number of shares subscribed for.

Notice of double liability.

4. There shall be printed in small pica type, or type of larger size, on each page in the stock books upon which subscriptions are recorded, and on every document constituting or authorizing a subscription, on a part of the page and document, respectively, which may be readily seen by the person recording the subscription, or by the person signing the document, a copy of section 125 of this Act.

Time stock books open.

5. The stock books may be kept open for such time as the provisional directors deem necessary.

Recovery of unpaid subscriptions.

6. In case of the non-payment of any instalment or other sum payable by a subscriber on account of his subscription, the provisional directors may, in the corporate name of the bank, sue for, recover, collect and get in any such instalment or sum. 53 V., c. 31, s. 12. Am.

Sub-secs. 3, 4 and 6, and the words "ten days" in sub-sec. 1 were added in 1913. In other respects the section dates from 1890, except for its division into sub-sections in 1906.

Sub-sec. 3 of this section is in the same words as sub-sec. 3 of sec. 36. The object in each case is to facilitate the sending

of notices to subscribers and shareholders, as required by other sections of the act. Sec. 12.

The object of sub-sec. 4 obviously is to warn every subscriber of the existence of the double liability clause.

"public notice." See sec. 2, sub-sec. 2.

No provision is made as to what shall constitute a quorum or as to the filling of vacancies. A majority will be a quorum (see Interpretation Act, R.S.C. 1906, c. 1, s. 31); and casual vacancies in the board will not invalidate the acts of the board (York Tramways v. Willows, 1882, 8 Q.B.D. 685), unless the number of directors is thereby reduced below the legal minimum of five. In re Alma Spinning Co., Bottomly's Case, 1880, 16 Ch.D. 681; Toronto Brewing, etc., Co. v. Blake, 1883, 2 O.R. 175; cf. notes to sec. 25. Meetings of provisional directors.

It does not seem to be necessary that the provisional directors should actually meet together at one place if they are unanimous in coming to a decision. In re Great Northern, etc., Works, Ex parte Kennedy, 1890, 44 Ch.D. 472.

And the informality of their internal proceedings cannot affect a third person who deals with them. Allen v. Ontario & Rainy River, 1898, 29 O.R. 510; cf. chapter 6 on Internal Regulations.

The powers of the provisional directors seem to be limited to the organization of the bank, and, for that purpose, to the opening of stock books and the obtaining of subscriptions and payments thereon sufficient to comply with sec. 13, and then under the last mentioned section the calling of a meeting of subscribers to supplant them by the election of directors from among the subscribers, which the provisional directors themselves may never be. In re North Simcoe Railway Co. v. Toronto, 1874, 36 U.C.R. 101 at p. 119. They are merely trustees to start, as it were, the ordinary legal machinery into motion. Upon the meeting of the subscribers and the election of directors, the whole object of the appointment of provisional directors is satisfied, and their authority ceases. Michie v. Erie and Huron Railway Co., 1876, 26 U.C.C.P. 566 at p. 574. Powers of provisional directors.

As to the ordinary rules governing subscriptions for and allotments of stock see chapter 8 on Shares and Calls.

In North Sydney Mining and Transportation Co. v. Greener, 1898, 31 N.S.R., it was held that provisional directors might make calls on stock subscribed for, or do any acts for

Sec. 12. Powers of provisional directors.

and in the name of the company within the power of directors, so long as such acts fall short of what might properly be termed "commencing operations." But in this case the incorporating act authorized the provisional directors to "exercise all the powers of ordinary directors of the company, under the provisions of the act." Probably under the Bank Act the provisional directors have only the powers expressly conferred upon them by secs. 12 and 13, and have no power to make calls or to exclude subscribers in default from taking part in the organization of the bank. Re Monarch Bank of Canada, 1910, 22 O.L.R. 576. See also the notes to sec. 16. In view of the opinion expressed in the last mentioned case, the addition of sub-sec. 6 constitutes an important enlargement of the powers of the provisional directors.

First meeting of subscribers.

13. Whenever a sum not less than five hundred thousand dollars of the capital stock of the bank has been bona fide subscribed, and payments in money on account thereof have been made by the subscribers, the total of such payments making a sum not less than two hundred and fifty thousand dollars, and as soon thereafter as the provisional directors have paid thereout to the Minister the sum of two hundred and fifty thousand dollars, the provisional directors may, by public notice published for at least four weeks, call a meeting of the subscribers to the said stock, to be held in the place named in the Act of incorporation as the chief office of the bank, at such time and at such place as is set forth in the said notice.

What is a bona fide subscription.

2. For the purposes of the foregoing subsection no subscription shall be deemed to have been made bona fide or be complete unless and until payment in money equal to at least ten per cent of the amount subscribed has been made on account of such subscription by the subscriber, and such payment, with the date thereof, shall be entered on the stock books opposite to such subscription.

Business at meeting.

3. The subscribers shall, at such meeting,—

(*a*) determine the day upon which the annual general meeting of the bank is to be held;

(*b*) elect such number of directors, duly qualified under this Act, not less than five, as they think necessary; and, Sec. 13.

(*c*) provide for the method of filling vacancies in the board of directors until the annual general meeting.

4. Such directors shall hold office until the annual general meeting next succeeding their election. Tenure of directors.

5. Upon the election of directors as aforesaid the functions of the provisional directors shall cease. 53 V., c. 31, s. 13; 4-5 E. VII., c. 4, s. 2. Am. Provisional directors cease.

Sub-sec. 2, clause (c) of sub-sec. 3, and the words "and payments in money on account thereof have been made by the subscribers, the total of such payments making a sum not less than two hundred and fifty thousand dollars and as soon thereafter as the provisional directors have paid thereout" in sub-sec. 1 were added in 1913. In other respects the section dates from 1890, except for the division into sub-sections in 1906.

Prior to 1890 the amount of capital required to be *bonâ fide* subscribed before commencing business was the same as at present, but only $100,000 were required to be paid up. This last amount was required to be *bonâ fide* paid up, and the fact that the necessary amount had been subscribed and paid up had to be proved to the satisfaction of the treasury board, and its certificate obtained, before the bank commenced business. There was a further provision that at least $200,000 in all should be paid up within two years after the commencement of business. The provision of the present act that the minimum of paid-up capital shall be paid to the minister of finance was first enacted in 1890. It is designed to ensure the actual payment in cash of the necessary amount, and is aimed particularly against the practice of discounting paper of subscribers and crediting them with payment on stock subscribed. Prerequisites to commencement of business.

As to the disposal by the minister of the money deposited with him, see sec. 17.

The "public notice" required is prescribed by sec. 2, sub-sec. 2. Inasmuch as the directors are authorized to call a meeting "by public notice," individual notices to subscribers are unnecessary. Cf. notes to secs. 21 and 31.

Sec. 13.

It is doubtful whether a minority of the subscribers can make a valid election of directors. In re London and Southern Counties Freehold Land Co., 1885, 31 Ch.D. 223.

As a result of sub-sec. 2, a person who has not paid at least 10% of the amount subscribed by him is not entitled to vote at the subscribers' meeting, and the amount of his subscription must not be taken into account in making up the sum of $500,000 mentioned in sub-sec. 1.

Permission to commence business.

14. The bank shall not issue notes or commence the business of banking until it has obtained from the Treasury Board a certificate permitting it to do so.

No certificate until directors elected.

2. No application for such certificate shall be made until directors have been elected by the subscribers to the stock in the manner hereinbefore required. 53 V., c. 31, s. 14.

The section was divided into its present sub-sections in 1906.

Sec. 13 provides for the election of directors.

Sec. 132 makes it an offence against this act to issue notes or commence business before the obtaining of the certificate. Sec. 15 prescribes the conditions to be performed before the certificate of the treasury board may be given.

"Commence the business of banking" refers to the transaction of business with the public as distinguished from dealings connected with subscriptions for stock. Cf. North Sydney v. Greener, referred to in the notes to sec. 12.

Statement of payments by provisional directors.

15. At the time of the application for the certificate, there shall be submitted to the Treasury Board a sworn statement setting forth the several sums of money paid in connection with the incorporation and organization of the bank, and such statement shall, in addition, include a list of all the unpaid liabilities, if any, in connection with or arising out of such incorporation and organization.

To what limited.

2. Prior to the time at which the certificate is given no payments on account of incorporation and organization expenses shall be made out of moneys paid in by subscribers except reasonable sums for the payment of clerical assistance, legal

services, office rental, advertising, stationery, postage and expenses of travel, if any. Sec. 15.

3. No certificate shall be given by the Treasury Board until it has been shown to the satisfaction of the Board, by affidavit or otherwise, that all the requirements of this Act and of the special Act of incorporation of the bank, as to the subscriptions to the capital stock, the payment of money by subscribers on account of their subscriptions, the payment required to be made to the Minister, the election of directors, deposit for security of note issue, or other preliminaries, have been complied with, and that the sum so paid is then held by the Minister, and unless it appears to the Board that the expenses of incorporation and organization are reasonable. When certificate may be granted.

4. No such certificate shall be given except within one year from the passing of the Act of incorporation of the bank applying for the said certificate. 53 V., c. 31, s. 15. Am. Within one year.

Sub-secs. 1 and 2 and the words "the subscriptions to the capital stock, the payment of money by subscribers on account of their subscriptions" and "and unless it appears to the Board that the expenses of incorporation and organization are reasonable" in sub-sec. 3 were added to the section in 1913.

Except for the division into sub-sections in 1906 and the amendments made in 1913, secs. 14, 15 and 16 date from 1890. Prior to 1890 there was no time limit for the organization of the bank and the commencement of business other than the time set for the expiration in due course of the charter of the bank.

As to the subscriptions to the capital stock, etc., see sec. 13.

As to the expenses of incorporation and organization, see secs. 16 and 131A.

16. If the bank does not obtain a certificate from the Treasury Board within one year from the time of the passing of its Act of incorporation, all the rights, powers and privileges conferred on the bank by its Act of incorporation If certificate not granted, powers to cease.

Sec. 16.

shall thereupon cease and determine, and be of no force or effect whatever.

Ordinary disbursements allowed, but other expenses subject to resolution.

2. If stock books have been opened and subscriptions in whole or in part paid, but no certificate from the Treasury Board obtained within the time limited by the preceding subsection, no part of the money so paid, or accrued interest thereon, shall be disbursed for commissions, salaries, charges for services or for other purposes, except a reasonable amount for payment of clerical assistance, legal services, office rental, advertising, stationery, postage and expenses of travel, if any, unless it is so provided by resolution of the subscribers at a meeting convened after notice, at which the greater part of the money so paid is represented by subscribers or by proxies of subscribers; and each subscriber shall be entitled at such a meeting to one vote for each ten dollars paid on account of his subscription.

Application to court to settle amount of disbursements.

3. If the amount allowed by such resolution for commissions, salaries or charges for services be deemed insufficient by the provisional directors, or directors elected under section 13 of this Act, as the case may be, or if no resolution for such purpose be passed after a meeting has been duly called, then the provisional directors, or directors elected as aforesaid, may apply to a judge of any superior or county court having jurisdiction where the chief office of the bank is fixed by its Act of incorporation, to settle and determine all charges and the reasonableness of the amount of the disbursements already made to which such money and interest, if any, shall be subject, before distribution of the balance to the subscribers.

Notice of meeting and application to court, with statement.

4. Notice of the meeting and notice of the application respectively referred to in the next preceding subsections shall be given by mailing the notice in the post office, registered and post paid, at least twenty-one days prior to the date fixed for such meeting or the hearing of such application, to the several subscribers to their respective

post office addresses as contained in the stock books; and each of such notices shall contain a statement, in summary form, of the several amounts for commissions, salaries, charges for services and disbursements which it is proposed shall be provided by resolution for payment, or settled and determined by a judge, as the case may be. Sec. 16.

5. Votes of subscribers may be given at such meeting by proxy, the holder of such proxy to be a subscriber, and subscribers may be heard either in person or by counsel on such application. Voting.

6. In order that the sums paid and payable under the provisions of this section may be equitably borne by the subscribers, the provisional directors or the directors, as the case may be, shall, after the amount of such sums is ascertained as herein provided, fix the proportionate part thereof chargeable to each subscriber at the ratio of the number of shares, in respect of which he is a subscriber to the total number of shares *bona fide* subscribed. Ratio payable by subscribers.

7. The respective amounts so fixed shall, before return of the sums paid in to the subscriber, be deducted therefrom, and if the respective sums paid in are not as much as the amounts so fixed, then the excess in each case shall be payable forthwith by the subscriber to the provisional directors or the directors, as the case may be. Payment of excess.

8. The total of the amounts in excess mentioned in the next preceding subsection which the provisional directors or the directors are unable to get in or collect in what seems to them a reasonable time shall, with any legal costs incurred, be deducted by them from the sums then remaining in their hands to the credit of the several subscribers in the ratio hereinbefore mentioned, the shares in respect of which no such collections have been made being eliminated from the basis of calculation. Deductions.

9. The provisional directors or directors, after payment by them of the sums payable under this section, shall return to Returns of excess to subscribers.

Sec. 16.

the subscribers, with any interim interest accretions, the respective balances of the moneys paid in by the subscribers. 53 V., c. 31, s. 16. Am.

Sub-secs. 2 to 9 were added in 1913.

Payment of commissions out of money subscribed.

Prior to these amendments it had been held in Re Monarch Bank of Canada, 1910, 22 O.L.R. 516, that all the powers intended to be conferred on provisional directors were contained in secs. 12 and 13, and that if larger powers were to be exercised over funds contributed by subscribers, they must be acquired under contract with the subscribers. The powers conferred did not include the power to authorize payment out of the funds of the bank of commissions to persons who obtained subscriptions for shares of the capital stock, and in the winding-up of the bank the provisional directors were held liable upon the ground of breach of trust or misfeasance to pay to the liquidator the commissions which had improperly been paid under their authority. In the judgment there is some discussion as to what expenses might properly be incurred by the provisional directors within the express language of secs. 12 and 13 or as necessarily incidental to the organization of the bank as a business enterprise, but the question of the expenses of incorporation and organization is now governed by the provisions of secs. 15 and 16. See also sec. 131A.

Deposit, how disposed of if certificate granted.

17. Upon the issue of the certificate in manner hereinbefore provided, the Minister shall forthwith pay to the bank the amount of money so deposited with him as aforesaid, without interest, after deducting therefrom the sum of five thousand dollars required to be deposited under the provisions of this Act for the securing of the notes issued by the bank.

If certificate not granted.

2. In case no certificate is issued by the Treasury Board within the time limited for the issue thereof, the amount so deposited shall be returned to the bank for distribution in the manner provided by this Act.

Minister not bound.

3. In no case shall the Minister be under any obligation to see to the proper application in any way of the amount so returned. 53 V., c. 31, s. 17. Am.

Sec. 64 requires the minister of finance to retain the sum of $5,000 for the purposes of the bank circulation redemption fund. Sec. 17.

The words "returned to the bank for distribution in the manner provided by this Act" were substituted in 1913 in sub-sec. 2 in place of the words "returned to the person depositing the same." In other respects the section dates from 1890, except for its division into sub-sections in 1906.

The amendment of 1913 was made in view of the changes made in secs. 15 and 16 in regard to the allowance of expenses of incorporation and organization.

CHAPTER VI.

Internal Regulations.

The sections included in this chapter do not apply to the Bank of British North America (sec. 6).

Ultra vires acts.

A company is not bound by those acts of the directors, which as regards the company are *ultra vires*, and the subsequent approval of the whole body of shareholders cannot make such acts binding. Ashbury v. Riche, 1875, L.R. 7 H.L. 653; cf. Irvine v. Union Bank, 1877, 2 App. Cas. 366.

But a shareholder who has, with full knowledge of the facts, himself received part of the proceeds of an *ultra vires* act committed by the directors—such as payment of a dividend out of capital—and who still retains the money, cannot, either individually or as suing on behalf of the general body of shareholders, maintain an action against those directors. Towers v. African Tug Co., [1904] 1 Ch. 558.

Informality of internal proceedings.

If, however, the acts in question are *intra vires* of the company, the mere want of formality in the company's proceedings will not affect a third party with whom it is dealing, even though such party is himself a director and has notice of all that is done. Neelon v. Thorold, 1893, 22 S.C.R. 390, 396; Adams v. Bank of Montreal, 1899, 8 B.C.R. 314, 1 Com. L.R. 248, and cases cited.

Further, although persons dealing with companies are obliged to ascertain whether the transaction in question is within the powers conferred upon the directors, they are not obliged to see that directors exercise the powers they possess in the precise manner prescribed by the regulations of the company; and persons dealing with directors in good faith, and without notice of an irregular or improper exercise of the directors' powers are not affected by such irregularity or impropriety. Royal British Bank v. Turquand, 1856, 5 E. & B. 248, 6 *ibid.* 327; In re Land Credit Co., Ex parte Overend, Gurney & Co., 1869, L.R. 4 Ch. 460, especially at p. 469; County of Gloucester Bank v. Rudry, [1895] 1 Ch. 629; Duck v. Tower Galvanizing Co, [1901] 2 K.B. 314; Trusts & Guarantee v.

Abbott Mitchell, 1902, 11 O.L.R. 403; cf. Canadian Bank of Commerce v. Rogers, 1911, 23 O.L.R. 109, 120, cited in the notes to sec. 47 of the Bills of Exchange Act, and Bryant Powis and Bryant Ltd. v. Banque du Peuple, [1893] A.C. 170, and other cases cited in the notes to sec. 51 of the Bills of Exchange Act, and the notes to sec. 5 of the same act.

There is no necessity on the part of persons dealing with companies to see that *de facto* directors are properly appointed. Mahoney v. East Holyford, 1875, L.R. 7 H.L. 869.

Holding out of agent.

In any case where a person holds himself out as an agent or official of a company, and the circumstances are such that in law the company could repudiate such person or take proceedings to restrain him, but has not done so, then his acts within his apparent authority will bind the company as regards persons ignorant of his true position, even though his assumption of authority is entirely unwarranted. Allen v. Ontario and Rainy River Railway, 1898, 29 O.R. 510, 513 and cases cited.

In order that the principle of "holding out" should in any given case of agency apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do, and the party prejudiced must have believed in the existence of that general authority and have been thereby misled. In other words, if the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorized. Russo-Chinese Bank v. Li Yau Sam, [1910] A.C. 174, at p. 184.

Court will not interfere with internal management.

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their power, and in fact, has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should be *primâ facie* brought by the company itself. These cardinal principles are laid down in the well-known cases of Foss v. Harbottle, 1843, 2 Hare 461, and Mozley v. Alston,

1847, 1 Ph. 790, and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure, in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company or in which the other shareholders are entitled to participate, as was alleged in the case of Menier v. Hooper's Telegraph Works, 1874, L.R. 9 Ch. 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and if the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish, L.J., in MacDougall v. Gardiner, 1875, 1 Ch.D. 13 at p. 25.

When minority of shareholders may sue in respect of acts of majority.

"There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote. This is shewn by the case before this board of the North-West Transportation Co. Ltd. v. Beatty, 1887, 12 App. Cas. 589. In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained."

Shareholder may vote although he has a personal interest.

The two last preceding paragraphs, taken from the judg-

ment of Lord Davey in Burland v. Earle, [1902] A.C. 83, at pp. 93-4, were quoted with approval and applied in Dominion Cotton Mills Co. Ltd. v. Amyot, [1912] A.C. 546, 552; cf. Normandy v. Ind, Coope & Co. Ltd., [1908] 1 Ch. 84, 106-7.

INTERNAL REGULATIONS.

Regulation by by-law.

18. The shareholders of the bank may, at any annual general meeting or at any special general meeting duly called for the purpose, regulate, by by-law, the following matters incident to the management and administration of the affairs of the Bank, that is to say:—

(*a*) The day upon which the annual general meeting of the shareholders for the election of directors shall be held;

(*b*) The record to be kept of proxies, and the time, not exceeding twenty days, within which proxies must be produced and recorded prior to a meeting in order to entitle the holder to vote thereon;

(*c*) The number of the directors, which shall be not less than five, and the quorum thereof, which shall be not less than three;

(*d*) Subject to the provisions hereinafter contained, the qualifications of directors;

(*e*) The method of filling vacancies in the board of directors, whenever the same occur during each year;

(*f*) The time and proceedings for the election of directors in case of a failure of any election on the day appointed for it;

(*g*) The remuneration of the president, vice-president and other directors; and,

(*h*) The amount of discounts or loans which may be made to directors, either jointly or severally, or to any one firm or person, or to any shareholder, or to corporations.

Sec. 18. Copy of by-laws to be sent to shareholders.

2. A copy of the by-laws in force on the first day of July, one thousand nine hundred and thirteen, in respect of the several matters hereinbefore in this section set out, together with a copy of this section of the Act, shall, before the thirty-first day of December, one thousand nine hundred and thirteen, be sent to each shareholder at his last known post office address, as shown by the books of the bank; and after the first day of July, one thousand nine hundred and thirteen, within six months after the end of each successive five year period, a copy of the by-laws, in respect of the said matters, in force at the end of each such period, shall be sent as aforesaid.

Guarantee and pension funds.

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

Existing by-laws continued.

4. Until it is otherwise prescribed by by-law under this section, the by-laws of the bank on any matter which may be regulated by by-law under this section shall remain in force, except as to any provision fixing the qualification of directors at an amount less than that prescribed by this Act. 53 V., c. 31, s. 18; 4-5 E. VII., c. 4, s. 3.

Exception.

Sub-sec. 2, and the words "at any annual general meeting or at any special general meeting duly called for the purpose" in sub-sec. 1 were added, and the word "twenty" was substituted for the word "thirty" in clause (*b*) in 1913.

See notes, *supra*.

The division of sub-section 1 into lettered clauses was made in 1906. The corresponding provision of the act of 1890, as amended in 1900, contained also a clause prohibiting any person from being elected or continuing a director unless he held stock paid up to the amount required to qualify him. This clause is now part of sec. 20.

Meetings and powers of shareholders.

The shareholders meet and vote at the annual general meetings of the bank (the first of such meetings being held at a

time appointed under sec. 13 and subsequent ones being regulated by by-law under sec 18), and at special general meetings called by virtue of sec. 31. Sec. 32 regulates the voting at any shareholders' meetings. Although the shareholders may name the *day* of the annual meeting, the *hour* of the day is appointed by the directors; the place of meeting must be the head office of the bank and public notice must be given (sec. 21). Sec. 18.

It is advisable that the by-law appointing a day for the election of directors (sec. 18) should also provide for the possible failure of the election on that day, as by sec. 27 the election may take place on any other day appointed by by-law of the shareholders. A meeting held on the day first appointed could no doubt be legally adjourned to another named day, so as to allow of the election of directors. Reg. v. Wimbledon, 1882, 8 Q.B.D. at p. 463. Failing an adjournment, a special general meeting of the shareholders would have to be called. Meetings and powers of shareholders.

As to the mode of electing directors, see also secs. 22 and 23. Prior to 1905 the number of directors was limited to ten.

The power to regulate the qualifications of directors is subject to sec. 20.

If a vacancy occurring during any year is not filled, the acts of a quorum of the remaining directors is not thereby invalidated (sec. 25); but see notes to that section.

The aggregate amounts of loans to directors and firms of which they are partners must be shewn in the monthly return, schedule D.

Under sec. 18 the shareholders may regulate by by-law the record to be kept of proxies and the time, not exceeding 20 days, within which proxies must be produced and recorded prior to a meeting, in order to entitle the holder to vote thereon. By sec. 32 only shareholders entitled to vote may vote or act as proxies, and proxies must be renewed within one year preceding the time of the meeting. In the absence of by-law proxies may be registered up to the time of the meeting. A by-law must not provide that proxies to be valid shall be registered more than 20 days before the meeting.

Under other sections of the act the shareholders have power:

(1) To authorize the directors to establish guarantee and pension funds for the officers and employees of the bank and

Sec. 18. Meetings and powers of shareholders.

their families, and to contribute thereto out of the funds of the bank. (Sec. 18, sub-sec. 3.)

(2) To remove the president, vice-president or any director at a special general meeting called for the purpose. (Sec. 31, sub-sec. 4.)

(3) To increase or reduce the capital stock of the bank, subject to the approval of the treasury board. (Secs. 33 and 35.)

(4) To approve of an agreement for the sale of the assets of the bank to another bank, or for the purchase of the assets of another bank, but in the latter case the shareholders need consent only if it is necessary for the purpose of the purchase to increase the capital stock of the bank. (Secs. 101 and 103.)

(5) To require the directors to submit further statements of the affairs of the bank in addition to the regular annual statement. (Sec. 55.)

Under sec. 56, the shareholders shall, at each annual general meeting, appoint an auditor or auditors from the last published list of persons qualified.

Board of directors.

19. The stock, property, affairs and concerns of the bank shall be managed by a board of directors, who shall be elected annually in the manner hereinafter provided, and shall be eligible for re-election. 53 V., c. 31, s. 19.

The number of directors is to be not less than five and their quorum not less than three, but otherwise their number and quorum are subject to regulation by the shareholders. (Sec. 18.) Cf. notes to sec. 12.

See also the following sections relating to directors.

20. Qualification.

21-27. Election.

28. Meetings.

29-30. General Powers.

Duties and liability of directors.

At every annual meeting of the shareholders it is the duty of the outgoing directors to submit a clear and full statement of the affairs of the bank, containing the particulars required by sec. 54 and any additional statements which may be lawfully required by the shareholders under sec. 55.

Sec. 19.

The directors are responsible for knowingly and wilfully concurring in declaring any dividend or bonus so as to impair the paid-up capital. (Sec. 58.)

Duties and liability of directors.

A director is liable criminally if he pledges, assigns or hypothecates notes of the bank (sec. 139), if he refuses to make calls on the double liability of the shareholders after the expiration of three months from the insolvency of the bank (sec. 154), if he wilfully gives or concurs in giving any creditor of the bank any fraudulent, undue or unfair preference over other creditors (sec. 155), or if he makes any wilfully false or deceptive statement in any account or return respecting the affairs of the bank, or if he negligently, prepares, signs, approves or concurs in any such account or return containing any false or deceptive statement (sec. 153.) See also the following sections which may render directors criminally liable: sec. 131 A (payment of incorporation and organization expenses out of money subscribed), sec. 131 B (receiving corrupt gifts in connection with the bank's business), sec. 132 (commencing business without certificate), sec. 138 (issuing bank notes during period of suspension).

Directors are commercial men managing a trading business for the benefit of themselves and of all the other shareholders. They have sometimes been called commercial trustees, but they are not liable on strictly the same principles as trustees. They must exercise a reasonable diligence and must act honestly, but they have a wider discretion than a trustee usually has. See In re Forest of Dean Coal Mining Co., 1878, 10 Ch.D. 450; cf. Grant, pp. 602 ff., as to the nature of the office of director.

The directors are bound to account to the company for all profits made by them with the assets of the company, and for all profits made by them at the expense of the company otherwise than with its knowledge and consent. Imperial v. Coleman, 1873, L.R. 6 H.L. 189; Costa Rica v. Forwood, [1901] 1 Ch. 746.

They are also responsible for the loss of the company's assets, if that loss is attributable to the employment by them of the assets in a manner and for purposes not warranted by the constitution of the company. Cullerne v. London and Suburban, etc., Building Society, 1890, 25 Q.B.D. 485; In re Sharpe, [1892] 1 Ch. 154; Hirsche v. Sims, [1894] A.C. 654; Re Monarch Bank of Canada, 1910, 22 O.L.R. 516.

Sec. 19. Duties and liability of directors.

Directors of a bank are bound to exercise the care of a prudent administrator in the management of its business. Such acts as allowing overdrafts by insolvent persons without proper security, the impairment of the capital of the bank by the payment of unearned dividends, the furnishing of false and deceptive statements to the government, the expenditure of the funds of the bank in illegal purchases of its own shares, are acts of gross mismanagement which render the directors personally liable, jointly and severally, for losses sustained by the shareholders by reason thereof.

Directors cannot divest themselves of their personal responsibility. While they are at liberty to employ such assistants as may be required to carry on the business of the corporation, they are nevertheless responsible for the misconduct of the employees appointed by them, unless such misconduct could not have been guarded against by the exercise of reasonable diligence. McDonald v. Rankin, 1890, M.L.R. 7 S.C. 44.

If directors, in unwittingly assenting to what were in fact payments of dividends out of capital and advances on improper security, honestly relied on the judgment, information and advice of the chairman and general manager of the bank, by whose statements they were misled and whose integrity, skill and competence they had no reason to suspect, they are not negligent of their duties as directors and are not bound to look at the books for themselves. Dovey v. Cory, [1901] A.C. 477, and cases cited; In re Denham & Co., 1883, 25 Ch.D. 752; cf. Préfontaine v. Grenier, [1907] A.C. 110, referred to in the notes to sec. 153.

The trust reposed by directors in their manager must not, however, be blind or unqualified or to the exclusion of the exercise of their own judgment, nor may they disregard the directions contained in the by-laws and regulations of the bank. Leeds Estate v. Shepherd, 1887, 36 Ch.D. 787. As to the liability of directors who rely upon representations of officials after they have been put upon enquiry, see Stavert v. Lovitt, 1908, 42 N.S.R. 449, 5 E.L.R. 33.

But directors who keep within the limits of their authority, and who, acting in good faith to the best of their judgment, exercise a reasonable amount of care, are not liable to make good to the company the losses which may result from their acts. London Financial Association v. Kelk, 1883, 26 Ch.D. 107 and authorities there collected; Dovey v. Cory, *supra*.

20. Each director shall hold stock of the bank, of which stock he shall be the absolute and sole owner in his individual right and not as trustee or in the right of another, on which not less than— Qualifications.

(*a*) three thousand dollars have been paid up, when the paid-up capital stock of the bank is one million dollars or less;

(*b*) four thousand dollars have been paid up, when the paid-up capital stock of the bank is over one million dollars and does not exceed three million dollars;

(*c*) five thousand dollars have been paid up, when the paid-up capital stock of the bank exceeds three million dollars.

2. No person shall be elected or continue to be a director unless he holds stock, of which he is the owner as aforesaid, paid up to the amount required by this Act, or such greater amount as is required by any by-law in that behalf. Required stock holdings.

3. A majority of the directors shall be natural born or naturalized subjects of His Majesty and domiciled in Canada. 53 V., c. 31, ss. 18 and 19. Am. Majority to be British subjects.

Qualification of directors.

Prior to 1890 all the directors were required to be British subjects, but it was not necessary that their qualification shares should be paid up to any amount. The present section was redrafted in 1913, the provision that a director must be "the absolute and sole owner in his individual right and not as trustee or in the right of another" being new. Qualification of directors.

The shareholders may under sec. 18 make by-laws requiring additional qualifications for a director.

Under a by-law requiring a director to hold qualification shares "in his own right," he need not be the beneficial owner of the shares, but he must be a person who holds shares in such a way that the company can safely deal with him in respect of his shares, whatever his interest in them may be. Holding in a representative character will not do. Holding as trustee without beneficial ownership will do, but the holder must so hold as that the company can safely deal with him as owner. Sutton

Sec. 20. Qualification of directors.

v. English, [1902] 2 Ch. 502, and cases cited at p. 506; Boschoek v. Fuke, [1906] 1 Ch. 148; cf. notes to sec. 141 of the Bills of Exchange Act; see however, Ritchie v. Vermillion, 1902, 4 O.L.R. at p. 597, as to the meaning of "absolutely in his own right"—this phrase probably requiring a beneficial ownership.

The words added to sec. 20 in 1913, as noted above, make it clear that the director of a bank must hold shares beneficially, and not in a representative or fiduciary character.

If a by-law provides that no person shall be qualified to be a director who is not a holder of a certain number of shares, the holding of such shares is a condition precedent to the election of a director, and the election of an unqualified person is void. In re Percy, etc., Co., Jenner's Case, 1877, 7 Ch.D. 132. The necessity for holding shares does not oblige a director to take shares from the company. He may acquire them in any other legal mode, and therefore the mere acting as director does not amount to a contract by the person so acting to take the necessary number of unpaid shares from the company. In re Metropolitan, etc., Co., Brown's Case, 1873, L.R. 9 Ch. 102, at p. 109; Jenner's Case, *supra;* cf. Molineaux v. London, [1902] 2 K.B. 589.

Election of directors.

21. The directors shall be elected by the shareholders at the annual general meeting.

At chief office.

2. The election shall take place at the place where the chief office of the bank is situate.

Notice.

3. Public notice of the annual general meeting shall be given by the directors by publishing such notice, for at least four weeks previously to the time of holding the said meeting, in a newspaper published at the place where the chief office of the bank is situate, and by mailing a copy of such notice to each shareholder at his last known post office address, as shown by the books of the bank, at least twenty days prior to the time aforesaid. 53 V., c. 31, s. 9. Am.

The section in its present form dates from 1913.

Public notice. Sec. 21.

The public notice required is defined by the section, whereas in other sections (*e.g.*, secs. 13 and 31), the words "public notice" are used without any limitation and therefore mean public notice as defined by sec. 2, sub-sec. 2 In particular, the present sec. 21 makes plain a point which was doubtful prior to 1913, namely that notice must be given to each shareholder. As to the publication of the notice in a newspaper, see sec. 2, sub-sec. 3.

Election of directors.

See notes to sec. 18.

Election of directors.

The first directors are elected at the meeting of subscribers called by the provisional directors under sec. 13. Thereafter the directors are elected at the annual general meeting held each year on the day appointed by the charter or by by-law of the shareholders (secs. 18 and 21), or, if the election does not take place on such day, then on any other day according to the by-laws made by the shareholders in that behalf (secs. 18 and 27). The directors, as soon as may be after their own election, elect from their number a president and one or more vice-presidents and they may also elect one of their number to be honorary president (sec. 24). A vacancy which occurs in the board is filled in the manner provided by the by-laws (secs. 18 and 25), and if such vacancy is in the office of president or vice-president the directors elect such officer from among themselves (sec. 26). The president, a vice-president or any director may be removed by the shareholders at a special general meeting called for the purpose (sec. 31).

Who shall be directors.

22. The persons, to the number authorized to be elected, who have the greatest number of votes at any election, shall be directors. 53 V., c. 31, s. 19.

Provision in case of equality of votes.

23. If it happens at any election that two or more persons have an equal number of votes, and the election or non-election of one or more of such persons as a director or directors depends on such equality, then the directors who have a greater number of votes, or the majority of

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them, shall, in order to complete the full number of directors, determine which of the said persons so having an equal number of votes shall be a director or directors. 53 V., c. 31, s. 19.

Election of president and vice-president.

24. The directors, as soon as may be after their election shall proceed to elect, by ballot, from their number a president and one or more vice-presidents.

Honorary president.

2. The directors may also elect by ballot one of their number to be honorary president. 53 V., c. 31, s. 19; 4-5 E. VII., c. 4, s. 4. Am.

Sub-sec. 2 dates from 1905. Sub-sec. 1 dates from 1890, except that prior to 1913, only one vice-president was authorized to be elected.

As to the duties of president and vice-president, see sec. 28.

Vacancies, how filled.

25. If a vacancy occurs in the board of directors the vacancy shall be filled in the manner provided by the by-laws: Provided that, if the vacancy is not filled, the acts of a quorum of the remaining directors shall not be thereby invalidated. 53 V., c. 31, s. 19.

Proviso.

Sec. 18, sub-sec. 1, clause (*e*), confers upon the shareholders power to regulate by by-law the method of filling vacanies in the board.

If the number of directors is reduced below the legal minimum of five (*ibid*, clause (*c*)) or below the number fixed by by-law as a quorum of the board, the directors remaining in office are incapable of doing any business of the bank, and in order to fill the vacancies, it would be necessary to call a special general meeting under sec. 31. Sovereen Co. v. Whitside, 1906, 12 O.L.R. 638, and cases cited; cf. notes to sec. 12; see, however In re Bank of Syria, [1901] 1 Ch. 115.

Vacancy in presidency or vice-presidency.

26. If a vacancy occurs in the office of the president or vice-president, the directors shall, from among themselves, elect a president or a vice-president, who shall continue in office for the remainder of the year. 53 V., c. 31, s. 19. Am.

Postponed election of directors.

27. If an election of directors is not made on the day appointed for that purpose, such election may take place on any other day, according to the by-laws made by the shareholders in that behalf.

Continuance in office.

2. The directors in office on the day appointed for the election of directors shall remain in office until a new election is made. 53 V., c. 31, s. 20.

Cf. sec. 18, sub-sec. 1 (*e*), and notes to that section.

Meetings of directors.

28. The president, or in his absence a vice-president, shall preside at all meetings of the directors.

2. If at any meeting of the directors both president and vice-presidents are absent, one of the directors present, chosen to act *pro tempore*, shall preside.

Voting.

3. The president, a vice-president or president *pro tempore*, so presiding, shall vote as a director, and shall, if there is an equal division on any question, also have a casting vote. 53 V., c. 31, s. 21.

The division into sub-sections was made in 1906. This section contains the only provisions of the act relating to directors' meetings, except the provision of sec. 18 giving power to the shareholders to regulate the quorum. Cf. notes to sec. 12.

Duties of president and vice-president.

By sec. 24 the directors shall elect a president and vice-president, and may also elect an honorary president. No duties are assigned to the honorary president by the act; cf. sec. 2 (*k*).

The only duties imposed specially upon the president (or in his absence a vice-president) by the act are to preside at meetings of directors (sec. 28), to sign the bonds and other obligations of the bank (sec. 73), and to sign the monthly and other returns to the government (sec. 112, 113 and 114).

The signing of the returns may involve a greater liability than that of an ordinary director (see sec. 153), but except as above stated or as provided by by-law, the duties and liabilities of the president are the same as those of any other director. In some banks, however, the president is also the general manager. As to the latter, see the notes to sec. 30.

General powers of directors.

29. The directors may make by-laws and regulations, not repugnant to the provisions of this Act, or to any by-law duly passed by the shareholders or to the laws of Canada, with respect to—

(*a*) the management and disposition of the stock, property, affairs and concerns of the bank;

(*b*) the duties and conduct of the officers, clerks and servants employed therein; and,

(*c*) all such other matters as appertain to the business of a bank.

Existing by-laws continued.

2. All by-laws of the bank heretofore lawfully made and now in force with regard to any matter respecting which the directors may make by-laws under this section, including any by-laws for the establishing of guarantee and pension funds for the employees of the bank, shall remain in force until they are repealed or altered by other by-laws made under this Act. 53 V., c. 31, s. 22.

The division into sub-sections was made in 1906. The words "or to any by-law duly passed by the shareholders" were inserted in 1913.

The exercise by the directors of the powers given by this section is subject to any by-laws made by the shareholders under sec. 18.

Powers of directors.

By other sections powers in regard to the following specific matters are given to the directors:

(*d*) To appoint as many officers, clerks and servants for carrying on the business of the bank and with such salaries and allowances as they consider necessary, subject to the giving of a bond by an employee before he enters upon his duties (sec. 30).

(*e*) To call a special general meeting of the shareholders (sec. 31).

(*f*) To allot shares in the event of an increase of capital stock (sec. 34).

(*g*) To make calls upon shares subscribed, cancel subscriptions for non-payment, or sue for calls, etc. (secs. 38-42).

(*h*) To declare dividends out of profits (sec. 57).

(*i*) To depute an officer of the bank to sign notes intended for circulation (sec. 73).

Directors have no powers by implication except such as are incident to, or properly to be inferred from, the powers expressed in the charter and by-laws. Cf. Oakbank Oil Co. v. Crum, 1882, 8 App. Cas. 65, at p. 71. But by secs. 19 and 29 the management and disposition of the stock, property, affairs and concerns of the bank, and all such other matters as appertain to the business of banking, are conferred upon the directors, and under similarly wide powers it was held in Bank of Australasia v. Breillat, 1847, 6 Moo. P.C. 152, that the directors might borrow money for the purpose of discharging the existing liabilities of the bank till the assets should be realized, and might discontinue the business of the bank if they thought such a course essential to the interests of the shareholders. This decision was specially referred to by the Court of Appeal for Ontario in a similar case. Re Ontario Bank, 1910, 21 O.L.R. 1, S.C. affirmed *sub nom.* McFarland v. Bank of Montreal, [1911] A.C. 96. See notes to sec. 99. Sec. 29. Powers of directors.

Remuneration of directors.

The directors' remuneration is governed by by-law of the shareholders under sec. 18. Directors cannot pay themselves for their services or make presents to themselves out of the bank's assets unless authorized to do so by the shareholders at a properly convened meeting. In re George Newman & Co., [1895] 1 Ch. 674; cf. Boschoek v. Fuke, [1906] 1 Ch. 148.

30. The directors may appoint as many officers, clerks and servants as they consider necessary for the carrying on of the business of the bank. Appointment of officers.

2. Such officers, clerks and servants may be paid such salaries and allowances as the directors consider necessary. Salaries.

3. The directors shall, before permitting any general manager, manager, or other officer, clerk or servant of the bank to enter upon the duties of his office, require him to give a bond, guarantee or other security to the satisfaction of the directors, for the due and faithful performance of his duties. 53 V., c. 31, s. 23. Am. Security.

The present wording and division into sub-sections date from 1906, except that in 1913 the words "general manager,

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manager, or other" were substituted for the word "cashier" in sub-sec. 3, and the former sub-section authorizing the directors to "appoint a director or directors for any branch of the bank," was omitted.

Appointment of managers and officers.

Under this section the directors may appoint a general manager, and branch managers, and also subordinate officers and clerks. They may presumably also assign to one or more members of the board of directors the special supervision of particular branches, notwithstanding the change made in the section in 1913 as noted above.

If a bond is taken for the due and faithful performance by a cashier, officer, etc., of his duties, the legal relation between the bank and the surety will be governed by the general provincial law relating to principal and surety. Cf. Grant, pp. 351 ff. The shareholders may under sec. 18, sub-sec. 3, establish a guarantee fund.

Authority of general manager.

The keynote of the organization of a Canadian bank is the centralization of responsibility in the general manager, who is subject only to the control of the directors, and who has below him an army of employees, of whom all but two or three owe their positions to his favour. Cf. Johnson, The Canadian Banking System, p. 31.

Authority of general manager.

The general manager of a bank is its general agent in its banking business. Barwick v. English Joint Stock Bank, 1867, L.R. 2 Ex. 259, 265. In the exercise of his authority he is subject to the control of the directors, but whatever is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shewn, to be within the scope of his authority; the bank would be liable for his mistakes, and under some circumstances for his frauds, in the management of the business of the bank. Bank of New South Wales v. Owston, 1879, 4 App. Cas. 270, at p. 289.

In accordance with the general rule of the law of agency, a bank is answerable for every such wrong of its agent as is committed in the course of the employment and for the bank's benefit, although the directors have not authorized the particular wrong or given a general authority to commit wrongs. There is no distinction in this respect between frauds and other wrongs. Mackay v. Commercial Bank, 1874, L.R.

5 P.C. 394; Wilson v. Hotchkiss, 1901, 2 O.L.R. at p. 271. In the important case of Lloyd v. Grace, Smith & Co., [1912] A.C. 716, it was held that a principal is liable for the fraud of his agent acting within the scope of his agency, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Sec. 30. Authority of general manager.

But the arrest, or the prosecution, of offenders is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to shew that such arrest or prosecution is within the scope of the duties and class of acts such manager is in fact authorized to perform. The authority may be general, or it may be special and derived from the exigencies of the particular occasion on which it is exercised. In the former case it is usually enough to shew that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shews that such exigency is present or might reasonably be supposed to be present. Bank of New South Wales v. Owston, *supra;* cf. Thompson v. Bank of Nova Scotia, 1893, 32 N.B.R. 335, a case of a branch manager instituting criminal proceedings.

Where cheques were fraudulently initialed as accepted by the manager, and the drawer gave the bank certain securities which the bank retained, it was held that the cheques could not be repudiated as against a *bonâ fide* holder for value. Banque Nationale v. City Bank, 1873, 17 L.C.J. 197.

As to the tortious acts of managers and other servants, see also Grant, pp. 226 ff.

Authority of branch manager.

The responsible head of a branch is called the manager. He is selected by the general manager and must conduct his branch in harmony with the views of his chief. His duties are analogous to those of a bank president in the United States. Johnson, The Canadian Banking System, p. 34. Authority of branch manager.

While the general manager of a bank is its general agent in its banking business, the authority of a branch manager ordinarily will be confined to the transaction of the local business of the bank. For instance, he will have implied power to call in money which has been advanced from his

Sec. 30. Authority of branch manager.

branch at call (Robertson v. Sheward, 1843, 1 M. & G. 511, at p. 517; Collinson v. Lister, 1885, 7 DeG.M. & G. 634, at p. 637), or to accept the cheque of a customer to deliver to another customer on a particular day, or on the happening of a specified event. Grieve v. Molsons Bank, 1885, 8 O.R. 162. But, in the absence of actual authority, he has no apparent authority to exercise powers of a discretionary character, as for instance to compromise a claim of the bank. Bank of Commerce v. Jenkins, 1888, 16 O.R. 215, at p. 221.

Agent's knowledge imputed to principal.

The usual rules of the law of agency apply to a bank manager. If for instance he does an act outside of the apparent scope of his authority and makes a representation to advance his own private ends (or what is the same thing, the private ends of some one other than the bank), it can in no sense be called the representation of the bank—in other words, it is not a representation by him as agent, and the bank is not affected by reason of its agent's knowledge of the transaction. Richards v. Bank of Nova Scotia, 1896, 26 S.C.R. 381.

Liability of manager.

Liability of manager.

If a local manager does some act in breach of his instructions, he must make good the loss occasioned thereby, but in a case where he accepted a joint, instead of a joint and several, promissory note as security for an advance, he having been expressly instructed to require the latter, it was held that, as the form of the note which he did take was sufficient to secure the liability of the parties in Ontario as effectively to all intents and purposes as if the note had been in the exact form called for by his instructions, only nominal damages were recoverable against him for his breach of duty in this regard. After discovering the mistake as to the form of the note, the local manager inserted the words "jointly and severally," in the belief that this alteration was to be initialed by all the makers, which, however, was not done. After consulting the bank's solicitor, the defendant crossed out the inserted words. The note having thus been made void by reason of material alteration it was held that the manager was not liable for the result of the alteration, since he acted in good faith and in ignorance of the legal consequences, and exercised

reasonable care and diligence under all the circumstances. The mere fact that his judgment was mistaken, and his acts prejudicial to the bank, was not enough to render him liable. See Banque Provinciale v. Charbonneau, 1903, 6 O.L.R. 302, 2 Com. L.R. 478, where the degree of skill and knowledge which may reasonably be expected of a local manager is discussed.

Sec. 30. Liability of manager.

Bank of Upper Canada v. Bradshaw, 1867, L.R. 1 P.C. 479, was an action brought by a bank against its late manager and cashier to recover moneys belonging to the bank, alleged to have been improperly applied in discounting bills, etc., for his own advantage, for the benefit of parties and companies with whom he was connected and in which he was interested. It appeared that the transactions in question were all in the ordinary course of the business of the bank, that the manager had not exceeded the authority with which he was entrusted and that no case of bad faith could be established, and an appeal from a judgment in favour of the defendant was dismissed.

31. A special general meeting of the shareholders of the bank, may be called at any time by— Special general meeting.

(*a*) the directors of the bank or any four of them; or,

(*b*) any number not less than twenty-five of the shareholders, acting by themselves or by their proxies, who are together proprietors of at least one-tenth of the paid-up capital stock of the bank.

2. Such directors or shareholders shall give six weeks' previous public notice, specifying therein the object of such meeting. Notice.

3. Such meeting shall be held at the usual place of meeting of the shareholders. Place.

4. If the object of the special general meeting is to consider the proposed removal, for maladministration or other specified and apparently just cause, of the president or a vice-president, or of a director of the bank, and if a majority of the votes of the shareholders at the meeting is given for such removal, a director to replace him shall be elected or appointed in the manner provided by the Removal of president, vice-president or director. Another to replace.

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by-laws of the bank, or, if there are no by-laws providing therefor, by the shareholders at the meeting.

Choosing another president or vice-president.

5. If it is the president or a vice-president who is removed his office shall be filled by the directors in the manner provided in case of a vacancy occurring in the office of president or vice-president. 53 V., c. 31, s. 24.

As to shareholders' meetings generally, see note to sec. 18.

This section was divided into its present sub-sections in 1906. The first part of the section formerly read: "The directors of the bank, or any four of them—or any number not less than twenty-five of the shareholders of the bank, who are together proprietors of at least one-tenth of the paid-up capital stock of the bank, by themselves or by their proxies—may, at any time, call a special general meeting of the shareholders, to be held at their usual place of meeting, *upon giving six weeks' previous public notice*, specifying in such notice the object of such meeting." Under the old section it was clear that the only notice required was public notice, that is as defined in the act (see sec. 2, sub-sec. 2). Presumably the present section is not intended to change the law. Cf. secs. 13 and 21.

Calling of general meeting.

The general rule is that in the absence of special provision in the by-laws, notice of a general meeting must be sent to every shareholder. A conditional notice is not sufficient. Alexander v. Simpson, 1889, 43 Ch.D. 139.

The business to be transacted at the meeting must be mentioned in the notice. In re London, etc., Bank, Wright's Case, 1871, L.R. 12 Eq. 335 n.; Boschoek v. Fuke, [1906] 1 Ch. 148. As to what is a sufficient statement of the "general nature of the business to be transacted" at the meeting, see Normandy v. Ind, Coope & Co., Ltd., [1908] 1 Ch. 84.

Irregularity in notifying directors (Browne v. La Trinidad, 1887, 27 Ch.D. at p. 11), as distinguished from irregularity in the constitution of the board (Harben v. Phillips, 1883, 23 Ch. D. 14), will not affect the validity of a meeting of shareholders called by the directors. Resolutions passed at a meeting called by *de facto* directors are valid. Boschoek v. Fuke, *supra*.

The conditions for the calling of a special general meeting prescribed by this section must be strictly complied with. Resolutions passed at a meeting which has not been properly summoned have no validity. In re State of Wyoming Syndicate, [1901] 2 Ch. 431.

If a vacancy is created by a proceeding under this section it may be filled in the manner provided by sec. 25. Sec. 31. Calling of general meeting.

There is no inherent power in a corporation to remove directors before the expiration of the period for which they have been elected (Imperial Hydropathic Hotel v. Hampson, 1882, 23 Ch.D. 1); but, granted the power, the matter of the removal of directors is one entirely for the shareholders to decide, and the court will not interfere. Harben v. Phillips, 1883, 23 Ch. D. 14.

32. Every shareholder shall, on all occasions on which the votes of the shareholders are taken, have one vote for each share held by him for at least thirty days before the time of meeting. One vote for each share.

2. In all cases when the votes of the shareholders are taken, the voting shall be by ballot. Ballot.

3. All questions proposed for the consideration of the shareholders shall be determined by a majority of the votes of the shareholders present or represented by proxy. Majority to determine.

4. The chairman elected to preside at any meeting of the shareholders shall vote as a shareholder only, unless there is a tie, in which case he shall, except as to the election of a director, have a casting vote. Casting vote.

5. If two or more persons are joint holders of shares, any one of the joint holders may be empowered, by letter of attorney from the other joint holder or holders, or a majority of them, to represent the said shares, and to vote accordingly. As to joint holders of shares.

6. Shareholders may vote by proxy, but no person other than a shareholder eligible to vote shall be permitted to vote or act as proxy. Proxies.

7. No general manager, manager, clerk or other subordinate officer of the bank shall vote either in person or by proxy, or hold a proxy for the purpose of voting. Officers not to vote.

8. No appointment of a proxy to vote at any meeting of the shareholders of the bank shall be valid for that purpose Renewal of proxies.

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unless it has been made or renewed in writing within one year last preceding the time of such meeting.

Calls must be paid before voting.

9. No shareholder shall vote, either in person or by proxy, on any question proposed for the consideration of the shareholders of the bank at any meeting of the shareholders, or in any case in which the votes of the shareholders of the bank are taken, unless he has paid all calls made by the directors which are then due and payable. 53 V., c. 31, s. 25. Am.

In 1913 the words "general manager, manager," were substituted for "manager, cashier" in sub-sec. 7, and the words "one year" for the words "the two years" in sub-sec. 8. In other respects, the section practically in its present form dates from 1890.

Chairman.

The chairman of a general meeting is chosen by the shareholders, and is usually the president of the bank.

The chairman has *primâ facie* authority to decide all incidental questions which arise at such meeting and necessarily require decision at the time. The entry by him in the minute book of the results of a poll or of his decision on all such questions, although not conclusive, is *primâ facie* evidence of that result, or of the correctness of that decision, and the onus of displacing that evidence is thrown on those who impeach the entry. In re Indian Zoedone Co., 1884, 26 Ch. D. 70.

The chairman has a casting vote in case of a tie (except as to a tie in the election of directors—this event being provided for by sec. 23.)

Proxies.

A by-law requiring the signature to a proxy to be attested is imperative. The attestation is essential to the validity of the proxy. Harben v. Phillips, 1883, 23 Ch. D. 14. *Quære*, however, as to the powers to pass such a by-law under the act; cf. sec. 18(*b*).

Proxies.

A proxy may be signed in blank, and the blank filled in by the person to whom the proxy is entrusted or sent. Ex parte Lancaster, 1877, 5 Ch. D. 911; Ernest v. Loma, [1897] 1 Ch.1.

A proxy must be not only a shareholder, but also eligible to vote.

Eligible to vote. Sec. 32.

In order to be eligible to vote in respect of shares a shareholder must have held such shares for at least 30 days prior to the meeting, he must be the sole holder or have a letter of attorney from the other joint holder or holders, or a majority of them, to represent such shares, he must have paid all calls made by the directors which are then due and payable thereon, and he must not be a general manager, manager, clerk or other subordinate officer of that bank.

Eligible to vote.

The object of the condition excluding the vote of a general manager, manager or subordinate officer of the bank is to prevent officers of the bank from acquiring the power to elect or control those whose duty it is to superintend their conduct in the management of the affairs of the bank. The president and the vice-president are not excluded from voting by this section. Cf. Reg. v. Bank of Upper Canada, 1849, 5 U.C. R. 338. But in view of the present wording of sub-sec. 7, the general manager is excluded from voting, even though he is also a director.

If a shareholder is in other respects entitled to vote, he is not disqualified from doing so because his stock is not paid up. Where there has been no default in paying a call, votes are to be computed upon the face value of the shares held and not upon the amount paid thereon. Purdom v. Ontario Loan, 1892, 22 O.R. 597.

A shareholder is not debarred from voting or from using his voting power to carry a resolution by the fact of his having a personal interest in the subject-matter of the vote. North-West Transportation Co Ltd. v. Beatty, 1887, 12 App. Cas. 589; Burland v. Earle, [1902] A.C. at p. 94.

CHAPTER VII.

Capital Stock.

The sections included in this chapter do not apply to the Bank of British North America (sec. 6).

Increase of capital.

33. The capital stock of the bank may be increased, from time to time, by such percentage, or by such amount, as is determined upon by by-law passed by the shareholders at the annual general meeting, or at any special general meeting called for the purpose.

Approval of Treasury Board.

2. No such by-law shall come into operation, or be of any force or effect, unless and until a certificate approving thereof has been issued by the Treasury Board.

Conditions for approval.

3. No such certificate shall be issued by the Treasury Board unless application therefor is made within three months from the time of the passing of the by-law, nor unless it appears to the satisfaction of the Treasury Board that a copy of the by-law, together with notice of intention to apply for the certificate, has been published for at least four weeks in *The Canada Gazette*, and in one or more newspapers published in the place where the chief office of the bank is situate.

Treasury Board may refuse.

4. Nothing herein contained shall be construed to prevent the Treasury Board from refusing to issue such certificate if it thinks best so to do. 53 V., c. 31, s. 26.

The section dates in substance from 1890, when the provision requiring the certificate of the treasury board was added. The division into the present sub-sections was made in 1906. Prior to 1871 an increase of capital stock could be effected only by act of parliament.

Cf. sec. 35, which provides for the reduction of capital stock.

Sec. 33. Certificate of treasury board.

It is not intended that the treasury board, before issuing a certificate, should make a thorough inspection of the condition of the bank and estimate the value of its assets, or that the certificate should be taken as a representation to the public that the earnings and assets justify the increase of capital. But in exercising the discretion given it by this section the board might take into consideration any special circumstances brought to its attention by a dissenting minority or in any other way. The granting of the certificate should not be merely a ministerial act. Cf. In re Massey Manufacturing Co., 1886, 13 O. A. R. 466.

The benefit of a new issue of stock is an increment of the old shares, so that a contract by which a person is entitled to "the free annual dividends, interest and profits of 100 shares of the Bank of Montreal" gives him the right to the income of the new shares subscribed for under the privilege to subscribe attaching to the old shares. Hargrave v. Clouston, 1874, 18 L.C.J. 290, 26 R.J.R.Q. 70.

Allotment. To present shareholders.

34. Any of the original unsubscribed capital stock, or of the increased stock of the bank, shall, at such time as the directors determine, be allotted to the then shareholders of the bank pro rata, at such rate and on such terms as are fixed by the directors: Provided that—

(*a*) no fraction of a share shall be so allotted;

(*b*) in no case shall a rate be fixed by the directors, which will make the premium, if any, paid or payable on the stock so allotted, exceed the percentage which the rest or reserve fund of the bank then bears to the paid-up capital stock thereof; and,

(*c*) payment shall not be required in greater amounts or at shorter intervals than ten per cent of the price every thirty days.

Notice of allotment.

2. Notice of allotment shall be mailed to the shareholders at their last known post office address as shown by the record of the bank, and the directors shall in such notice fix a date not less than ninety days from the day on which the notice is mailed within which the allotment is to be accepted.

Sec. 34. Allotment to the public.

3. Any of such alloted stock which is not accepted by a shareholder to whom the allotment has been made, within the time so fixed, or which he declines to accept, together with such shares as remain unallotted because of the provisions of this section that no fraction of a share can be allotted, may be offered for subscription to the public in such manner and on such terms as the directors prescribe.

Distribution of fractions.

4. Any sums received in excess of the rate per share fixed by the directors under this section in respect of fractions of shares offered for subscription to the public shall be rateably distributed to the respective shareholders from whose shares the fractions arose. 53 V., 31, s. 27. Am.

This section was amended in 1913 by the addition of subsecs. 2 and 4, clause (*c*) of sub-sec. 1, the words in sub-sec. 1 which authorize the directors to fix the *terms* of allotment, and the words "together with such shares as remain unallotted because of the provisions of this section that no fraction of a share can be allotted" in sub-sec. 3. In other respects the section dates substantially from 1890.

Allotment of new and unsubscribed stock.

When the capital of a bank has been increased the directors may allot so much of the new stock and the original unsubscribed stock as they determine from time to time at such rate and on such terms as they fix. Before any of such stock is offered to the public it must be allotted to the existing shareholders *pro rata*, either at par or at a premium which does not exceed the percentage which the rest or reserve fund bears to the paid-up capital. Any of the stock so allotted which is is not accepted by the shareholder to whom it is allotted may then be offered for subscription to the public at such rate as the directors determine. Prior to 1913 the shareholders had six months in which to decide whether they would accept stock allotted to them under this section. Now the time may be fixed by the directors provided it is not less than 90 days.

In the case of stock allotted to a shareholder and not accepted by him, there should be a definite act of the directors prescribing the manner in which and terms on which such stock is to be offered to the public, otherwise the stock is not available for public subscription. Cf. Sovereign Bank of

Canada v. McIntyre, 1910, 44 S.C.R. 157, at pp. 171-2; in this case, however, the defendant was held by a majority of the court to be liable on a promissory note made by him in consideration of an alleged subscription for shares, although it was not proved that there had been any resolution of the directors prescribing the manner or the terms of public subscription or allotting the shares to the defendant. Sec. 34.

The act provides that no fraction of a share shall be allotted. Any division of shares *pro rata* will usually result in there being a number of fractions of shares unallotted. The shares made up of these fractions may be allotted in any way the directors think fit, and need not be allotted to shareholders before being offered for subscription to the public, but if these shares are taken by the public at higher rate than that fixed by the directors under sub-sec. 1, the excess is to be rateably distributed among the respective shareholders from whose shares the fractions arose. Fractions of shares.

The directors must not allot stock at a discount either to shareholders or to the public. Ooregum v. Roper, [1892] A.C. 125; North-West v. Walsh, 1898, 29 S.C.R. 33; Morris v. Union Bank, 1899, 31 S.C.R. 594; Mosely v. Koffyfontein, [1904] 2 Ch. 108. If, however, a certificate that shares are fully paid up is issued to an innocent holder, who changes his position upon the faith thereof, the bank will be estopped as against such holder from contending that there is an unpaid balance. Bloomenthal v. Ford, [1897] A.C. 156; Dixon v. Kennaway, [1900] 1 Ch. 833. Must not allot at a discount.

As to subscription for shares and allotment in ordinary cases, see the notes to sec. 36.

35. The capital stock of the bank may be reduced by by-law passed by the shareholders at the annual general meeting, or at a special general meeting called for the purpose. Reduction of capital.

2. No such by-law shall come into operation or be of force or effect until a certificate approving thereof has been issued by the Treasury Board. Approval Treasury Board.

3. No such certificate shall be issued by the Treasury Board unless application therefor is made within three Conditions for approval.

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months from the time of the passing of the by-law, nor unless it appears to the satisfaction of the Board that—

(*a*) the shareholders voting for the by-law represent a majority in value of all the shares then issued by the bank; and,

(*b*) a copy of the by-law, together with notice of intention to apply to the Treasury Board for the issue of a certificate approving thereof, has been published for at least four weeks in *The Canada Gazette*, and in one or more newspapers published in the place where the chief office of the bank is situate.

Treasury Board may refuse.

4. Nothing herein contained shall be construed to prevent the Treasury Board from refusing to issue the certificate if it thinks best so to do.

Statements to be submitted to Treasury Board.

5. In addition to evidence of the passing of the by-law, and of the publication thereof in the manner in this section provided, statements showing—

(*a*) the amount of stock issued;

(*b*) the number of shareholders represented at the meeting at which the by-law passed;

(*c*) the amount of stock held by each such shareholder;

(*d*) the number of shareholders who voted for the by-law;

(*e*) the amount of stock held by each of such last mentioned shareholders;

(*f*) the assets and liabilities of the bank in full; and,

(*g*) the reasons and causes why the reduction is sought; shall be laid before the Treasury Board at the time of the application for the issue of a certificate approving the by-law.

Not to affect liability of shareholders.

6. The passing of the by-law, and any reduction of the capital stock of the bank thereunder, shall not in any way diminish or interfere with the liability of the shareholders of the bank to the creditors thereof at the time of the issue of the certificate approving the by-law.

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If legislation is asked to sanction reduction.

7. If in any case legislation is sought to sanction any reduction of the capital stock of any bank, a copy of the by-law or resolution passed by the shareholders in regard thereto, together with statements similar to those by this section required to be laid before the Treasury Board, shall, at least one month prior to the introduction into Parliament of the bill relating to such reduction, be filed with the Minister.

Limit of reduction.

8. The capital shall not be reduced below the amount of two hundred and fifty thousand dollars of paid-up stock. 53 V., c. 31, s. 28.

This section dates in substance from 1890. Before that year the capital of a bank could be reduced only by act of parliament.

Cf. sec. 33, which provides for the increase of capital stock, and notes under that section as to the granting of the certificate of the treasury board. It is a condition precedent to the granting of the certificate of the treasury board under sec. 35 that a majority in value of all the shareholders of the bank should vote in favour of the by-law. There is no similar provision in sec. 33.

Re-division of shares into higher values.

35A. The capital stock of any bank heretofore incorporated which is at the date of the passing of this Act divided into shares of fifty dollars each may be re-divided into shares of one hundred dollars each, by by-law passed by the shareholders at any annual general meeting or at any special general meeting called for the purpose.

Allotment of shares, and new certificates.

2. Each shareholder, shall be entitled, on any re-division made in pursuance of the next preceding subsection, to an allotment of one share of one hundred dollars for each two shares of fifty dollars each then held by him, and the bank may call in the existing certificates of stock, and issue new certificates in lieu thereof.

3. As soon as may be after such re-division the bank shall call for tenders for the purchase of the share of persons who continue to hold respectively only one fifty dollar share by

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Sale of shares of holders of one fifty dollar share on tender and public notice.

giving public notice for four weeks, and the advertisement shall state the total number of shares so offered; and a copy of such advertisement shall be mailed in the post office, registered and post paid, to the last known address of each of such shareholders at least twenty-one days before the last day fixed thereby for receipt of tenders, and the tenders shall be for two such fifty dollar shares or multiples thereof, and the highest tenders shall be entitled, on payment of the amount tendered, to one one hundred dollar share for each two fifty dollar shares in respect of which they were the highest bidders.

Distribution of proceeds.

4. The proceeds derived from the sale of the shares referred to in the next preceding subsection shall, without deduction for cost or charges, be distributed ratably among the former shareholders entitled thereto, and the payment of the amounts shall relieve the bank from all liability to such shareholders in respect of the share so sold.

Allotment of unsubscribed and increased capital.

5. Any of the original unsubscribed capital stock, or of the increased capital stock of a bank whose shareholders have passed a by-law under sub-section 1 of this section, shall when issued be allotted in shares of one hundred dollars each.

When division approved by shareholders before 1st July, 1913.

6. If, before the first day of July, nineteen hundred and thirteen, the shareholders of any such bank at an annual general meeting or at a special general meeting called for the purpose have approved of the division of the capital stock into shares of one hundred dollars each, the by-law referred to in subsection 1 of this section may be passed by the directors.

This section was added in 1913. The par value of the shares of every bank incorporated since 1890 is $100. See sec. 10.

CHAPTER VIII.

Shares and Calls.

The sections included in this chapter, with the exception of sec. 39, do not apply to the Bank of British North America (sec. 6).

SHARES AND CALLS.

Shares personalty.

36. The shares of the capital stock of the bank shall be personal property.

Books of subscription.

2. For the purpose of disposing of stock which may be offered for subscription to the public under section 34 of this Act, stock books may be opened at the chief office of the bank, or at such of its branches, or elsewhere, as the directors prescribe.

Particulars entered.

3. Each subscriber shall, at the time of subscription, give his post office address, and description, and these particulars shall appear in the stock books in connection with the name of the subscriber and the number of shares subscribed for.

Sub-sec. 3 was added in 1913. It is in the same words as sub-sec. 3 of sec. 12.

The section prior to 1913 contained a provision that the shares should be assignable and transferable at any of the places aforesaid, according to such forms and subject to such rules and regulations as the directors prescribed. As to the transfer of shares see secs. 43 ff. As to the situs or locality of shares, see notes to sec. 43.

Nature of shares.

Shares are declared to be personal property. They are not an interest in land within the meaning of the Mortmain Acts (Myers v. Perigal, 1851, 11 C.B. 90, 2 DeG.M. & G. 599: Edwards v. Hall, 1855, 6 DeG.M. & G. 75; cf. Ashworth v. Munn, 1880, 15 Ch. D. 363 at pp. 368, 372, 375, 376), or of

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the 4th section of the Statute of Frauds (Humble v. Mitchell, 1839, 11 A. & E. 205), nor are they goods and chattels within the meaning of the 17th section of the latter statute. Humble v. Mitchell, *supra*. They are choses in action. Colonial Bank v. Whinney, 1886, 11 App. Cas. 426. See further as to the nature of shares, Bank of Hindustan v. Alison, 1870, L.R. 6 C.P. at pp. 73-74; In re Bridgewater Navigation Co., 1889, 14 App. Cas. at p. 543.

Nature of shares.

A share signifies a definite portion of the capital of the bank —the interest of the shareholder in the bank, measured for the purposes of liability and dividend by a sum of money, but also consisting of a series of mutual contracts entered into by all the shareholders *inter se*. Borland's Trustee v. Steel, [1901] 1 Ch. 279.

Shareholders.

The act of incorporation of a bank (schedule B), provides that the persons therein named together with such others as become shareholders in the corporation by the act created are constituted a corporation, etc.

As to the position of incorporators of a company incorporated by letters patent based upon their previous subscription, see In re Haggert Bros. Mfg. Co., Peaker and Runion's Case, 1892, 19 O.A.R. 582 and cases cited.

Subscription for shares and allotment.

There is no difference between a contract to take shares and any other contract. What is termed "allotment" is generally neither more nor less than the acceptance by the company of the offer to take shares. It is an appropriation of a certain number of shares, in most cases the subsequent act of placing on the register the person who has agreed to take shares being a ministerial act, performed in pursuance of the binding contract. In re Florence Land and Public Works Co., Nicol's Case, 1884, 29 Ch. D. 421, 426; In re National Savings Bank Association, Hebb's Case, 1867, L.R. 4 Eq. 9, 11.

Allotment of shares.

While the allotment is usually the acceptance of a prior application for shares, it may be merely an offer of shares to the allottee, and there is in that case no contract until the allottee has communicated his acceptance and complied with the conditions, if any, subject to which the allotment was made.

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See *e.g.* sec. 34 which provides for the allotment of new shares *pro rata* to existing shareholders. Cf. Spitzel v. Chinese Corporation, 1899, 80 L.T. 347, 351, cited in Sovereign Bank of Canada v. McIntyre, 1910, 44 S.C.R. 157, at p. 173.

The power of alloting shares is a discretionary one which the directors cannot delegate without authority in that behalf in the charter. Re Pakenham Pork Packing Co., Galloway's Case, 1906, 12 O.L.R. 100; Sovereign Bank v. McIntyre, *ubi supra*, at p. 172. As to what is necessary to constitute a valid allotment, see Re Canadian Tin Plate Co., Morton's Case, 1906, 12 O.L.R. 594; Hill's Case, 1905, 10 O.L.R. 501.

Shares must not be issued at a discount. See notes to sec. 34.

Subscription for shares.

There must be the consent of two parties to a contract, and when an individual applies for shares in a company, there being no obligation to let him have any, there must be, in order to bind the applicant, some communication either in writing or orally or by conduct to shew the applicant that his offer has been accepted. In re Universal Banking Corporation, Gunn's Case, 1867, L.R. 3 Ch. 40 at p. 45.

The application must be accepted, and the enterprise of the company proceeded with, within a reasonable time. Patterson v. Turner, 1902, 3 O.L.R. 373; Ramsgate v. Montefiore 1866, L.R. 1 Ex. 109.

An application for shares may be withdrawn even orally at any time before notice of allotment is given. In re Brewery Assets Corporation, Truman's Case, [1894] 3 Ch. 272; In re Publishers' Syndicate, Mallory's Case, 1902, 3 O.L.R. 552.

But a subscription for and agreement to take shares made under seal is not revocable (Nelson v. Pellatt, 1902, 4 O.L.R. 481), and, if not repudiated by the company, becomes a complete contract whenever the company accepts it and gives notice of acceptance. Re Provincial Grocers, Calderwood's Case, 1905, 10 O.L.R. 705; cf. Manes v. Willson, 1907, 14 O.L.R. 89, 95.

If application is made for shares by post or under circumstances from which authority to send notice of acceptance by post may be implied, notice of allotment sent by post is sufficient even if the notice fail to reach the allottee, and the contract is complete when the notice is posted. Household Fire v. Grant, 1879, 4 Ex. D. 216; In re Imperial Land Co., Harris' Case, 1872, L.R. 7 Ch. 587, and cases cited.

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Moreover an applicant may dispense with notice of allotment, or preclude himself from objecting to its non-receipt, as by acting as director or shareholder (In re International Contract Co., Levita's Case, 1867, L.R. 3 Ch. 36; In re Peruvian Railway Co., Crawley's Case, 1869, L.R. 4 Ch. 322), or as manager. In re Richards and Home Assurance Association, 1871, L.R. 6 C.P. 591.

Allotment, however, is the ordinary evidence of acceptance; and where there has been no allotment, acceptance will not be inferred from the mere facts that the applicant paid a deposit on the shares at the time he applied for them, that he obtained a receipt and that the money had not been returned. In re Adelphi Co., Best's Case, 1865, 2 De G. J. & Sm. 650; Ramsgate v. Montefiore, *supra*.

The acceptance must be unconditional and in strict conformity with the application, and must not depart from it in any material respect. Harris' Case, *supra*; In re Aberaman Ironworks, Peek's Case, 1869, L.R. 4 Ch. 532; Jackson v. Turquand, 1869, L.R. 4 H.L. 305.

A subscription for shares upon a certain condition is not enforceable unless the condition is performed. In re Richmond Hill Hotel Co., Pellatt's Case, 1867, L.R. 2 Ch. 527; Ontario Ladies' College v. Kendry, 1905, 10 O.L.R. 324. And if the condition is one which it is *ultra vires* of the company to perform, there can be no binding contract. Bank of Hindustan v. Alison, 1871, L.R. 6 C.P. 222; Page v. Austin, 1882, 10 S.C.R. 132.

A company is bound by the material misrepresentation of its agent whether made in good faith and with a belief in their certain fulfilment or not and cannot enforce a contract based on a subscription for shares induced by such misrepresentation. Ontario Ladies College v. Kendry, *supra*. But if the subscriber gives a note in payment of the stock subscribed for and action is brought upon the note by a holder in due course the defence of misrepresentation cannot be set up. Standard Bank of Canada v. Stephens, 1907, 16 O.L.R. 115, 121; see sec. 56 of the Bills of Exchange Act.

Notice of double liability.

37. There shall be printed in small pica type, or type of larger size, on each page in the stock books upon which subscriptions are recorded and on every document constituting

or authorizing a subscription, on a part of the page and document, respectively, which may be readily seen by the person recording the subscription, or by the person signing the document, a copy of section 125 of this Act. Sec. 37.

This section was added in 1913 in order to ensure that a subscriber for bank shares should at the time of subscribing receive notice of the existence of the double liability. Notice of double liability.

The former sec. 37 authorized the directors to cancel any subscription unless a sum equal to 10% of the amount subscribed was actually paid within 30 days after the time of subscribing. The section was struck out in 1913, the subject matter being covered by sec. 40.

38. The directors may make such calls of money from the several shareholders for the time being, upon the shares subscribed for by them respectively, as they find necessary. Calls on shares.

2. Any number of calls may be made by one resolution. Number of.

3. Such calls shall be payable at intervals of not less than thirty days. Intervals for calls

4. Notice of such calls shall be given to the shareholders. Notice.

5. No such call shall exceed ten per cent of each share subscribed. 53 V., c. 31, s. 31. Am. Limitation.

Cf. secs. 125 to 130, as to calls to be made in the event of the insolvency of the bank. Making of calls.

Sub-sec. 2 of the corresponding section of the act of 1890 reads as follows:—"Such calls shall be made at intervals of not less than thirty days, and upon notice to be given at least thirty days prior to the day on which such call shall be payable; and no such call shall exceed ten per cent. of each share subscribed." In the revision of 1906, this sub-section was divided into three new sub-sections, and the clause providing for notice was altered to read "notice of any such call shall be given at least thirty days prior to the day on which the call is payable," thus strengthening the probability that there must be an interval of at least thirty days (*i.e.* thirty days clear excluding the first day and the last), between the passing of each resolution making a call, and a similar interval between each call and the day fixed for payment of such call. The

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Making of calls.

present section is to the same effect, the notice of at least thirty days being prescribed by sec. 2, sub-sec. 4, which also prescribes the manner of giving notice. Sub-sec. 2, which was added in 1913, probably makes no change, but it makes it clear that there is no objection to one resolution making several successive calls. In such cases one notice to the shareholders of all the calls would be sufficient, provided at least thirty days intervened between the notice and the time for payment of the first call, and that thirty days intervened between the time for payment of each call and the time for payment of the next call.

The making of a call is the fixing of a time at which money is payable in respect of shares subscribed for. It is essential that the by-law or resolution of the directors making a call shall fix a time for payment. Re Cawley & Co., 1889, 42 Ch.D. 209; Armstrong v. Merchants, 1900, 32 O.R. 387.

If a meeting of directors is duly called, a quorum only and not necessarily a majority of the directors need be present to make a valid call. Ontario Marine v. Ireland, 1855, 5 U.C.C.P. 139. As to a quorum, see notes to sec. 12.

Sec. 37 prior to 1913 contained a sub-section providing that "the shares of the capital stock shall be paid in by such instalments and at such times and places as the directors appoint." It was held in Farmers Bank v. Blow, 1909, 18 O.L.R. 530, that there was nothing in that sub-section or in sec. 38 which prevented the directors of a bank from agreeing with a shareholder as to the manner in which his shares should be paid in—at all events when the times for payment agreed on were such as the directors, if there had been no agreement, might have fixed under sec. 38.

Capital lost to be called for.

39. If any part of the paid-up capital is lost the directors shall, if all the subscribed stock is not paid up, forthwith make calls upon the shareholders to an amount equivalent to the loss: Provided that all net profits shall be applied to make good such loss.

Returns to Minister.

2. Any such loss of capital and the calls, if any, made in respect thereof, shall be mentioned in the next return made by the bank to the Minister. 53 V., c. 31, s. 48.

In the act of 1890 this section and section 58 constituted one section. Sec. 58 provides that no dividend or bonus shall ever be declared so as to impair the paid-up capital of the bank. The separation of the two sections makes it clear that the recoupment, as directed by sec. 39, of paid-up capital lost, is not confined to the impairment of capital by reason of the declaration of dividends or bonuses. Sec. 39.

40. In case of the non-payment of any call, or instalment under an accepted allotment, the directors may, in the corporate name of the bank, sue for, recover, collect and get in any such call or instalment, or may cause and declare the shares in respect of which any such default is made to be forfeited to the bank. 53 V., c. 31, s. 32. Am. Recovery of calls and instalments. Forfeiture.

The section was amended in 1913 by inserting the words "or instalment under an accepted allotment" and "or instalment" and by substituting the word "default" for the word "call." Presumably the words "accepted allotment" refer to an allotment under sec. 34, because in other cases the allotment usually follows, and constitutes the acceptance of, a subscriber's application.

Shares declared forfeited under this section must under sec. 41 be sold by the bank within six months. Sec. 41 also provides for a money penalty for non-payment of calls, the amount of such penalty to be deducted from the proceeds of the sale of the shares. See sec. 42 as to what the declaration or statement of claim in an action for calls shall contain. Forfeiture of shares.

See sec. 128 as to forfeiture resulting from non-payment of a call when the bank is insolvent, and sec. 130 as to the result where subscriptions have been forfeited within 60 days before the commencement of suspension of payment by the bank.

There must be properly appointed directors to declare a forfeiture. Garden Gully, etc. v. McLister, 1875, 1 App. Cas. 39, but see notes to sec. 12.

No forfeiture can be effected unless every condition precedent has been strictly and literally complied with. Johnson v. Lyttle, 1877, 5 Ch. D. at p. 694; In re New Chile Gold Mining Co., 1890, 45 Ch. D. 598.

The power to sue or to declare a forfeiture is in the alternative. After threatening suit the directors cannot declare a forfeiture without giving an express notice that they intend to do so. Robertson v. Banque d'Hochelaga, 1881, 4. L.N. 314.

Fine for failure to pay call.

41. If any shareholder refuses or neglects to pay any instalment or call upon his shares of the capital stock at the time appointed therefor, such shareholder shall incur a penalty, to the use of the bank, of a sum of money equal to ten per cent of the amount of such shares.

Sale of forfeited shares at public auction.

2. If the directors declare any shares to be forfeited to the bank they shall, within six months thereafter, without any previous formality, other than public notice published for at least four weeks, of their intention so to do, sell at public auction the said shares, or so many of the said shares as shall, after deducting the reasonable expenses of the sale, yield a sum of money sufficient to pay the unpaid instalments or calls due on the remainder of the said shares, and the amount of penalties incurred upon the whole.

Transfer, how executed.

3. The president, a vice president, or the general manager of the bank shall execute the transfer to the purchaser of the shares so sold; and such transfer shall be as valid and effectual in law as if it had been executed by the original holder of the shares thereby transferred.

Remission of forfeiture or penalty.

4. The directors, or the shareholders at a general meeting may, notwithstanding anything in this section contained, remit, either in whole or in part, and conditionally or unconditionally, any forfeiture or penalty incurred by the non-payment of instalments or calls as aforesaid. 53 V., c. 31, s. 33. Am.

In 1913 this section was amended by inserting the words "or calls" after the words "instalments" in sub-secs. 2 and 4, and by substituting the words "or the general manager" for the words "manager or cashier" in sub-sec. 3.

The section was also amended by substituting the words "public notice published for at least four weeks" for the words "thirty days' public notice." As to mode of publication, see sec. 2, sub-sec. 3.

The section renders a shareholder who fails to pay a call or instalment liable to pay a money penalty to the use of the bank amounting to 10 % of the amount of his shares. The

penalty is in addition to the liability to forfeiture of the shares. The penalty or forfeiture may be remitted, or the bank instead of declaring the shares forfeited, may enforce payment of instalments or calls by suit, the forfeiture and suit being alternative not cumulative remedies. The power to declare shares forfeited or to sue is given by sec. 40. Sec. 41. Penalty for failure to pay call.

If the bank acquires shares by forfeiture it must within six months sell them, or a sufficient part thereof to pay the amount of penalties incurred for non-payment of the whole and the unpaid instalments due on the part not sold. This is in accordance with the policy of sec. 76 of the act, which forbids a bank to deal in shares of its own capital stock.

42. In any action brought to recover any money due on any instalment or call, it shall not be necessary to set forth the special matter in the declaration or statement of claim, but it shall be sufficient to allege that the defendant is the holder of one share or more, as the case may be, in the capital stock of the bank, and that he is indebted to the bank for instalments or calls upon such share or shares, in the sum to which the instalments or calls amount, as the case may be, stating the amount and number of the instalments or calls. Recovery by action. Allegations.

2. It shall not be necessary, in any such action, to prove the appointment of the directors. 53 V., c. 31, s. 34. Proof.

In 1913 this section was amended by inserting the words "instalment" and "instalments" before "call" and "calls" respectively. In other respects the section dates from 1871.

The jurisdiction of the dominion parliament has been called in question on the ground that procedure in an action for money due on a call is not properly part of the law relating to banking, and that it is not within the principle of Cushing v. Dupuy, 1880, 5 App. Cas. 409. In that case it was held that procedure even though it affects civil rights in the province necessarily forms an essential part of any law dealing with insolvency. The section would seem to be *intra vires* of parliament within the principle of Tennant v. Union Bank, [1894] A.C. 31; see notes to sec. 88. Legislative power.

CHAPTER IX.

Transfer and Transmission of Shares.

The sections included in this chapter, with the exception of sec. 45, do not apply to the Bank of British North America (sec. 6).

TRANSFER AND TRANSMISSION OF SHARES.

Conditions for transfer of shares.

43. No transfer of the shares of the capital stock of the bank shall be valid unless—

(*a*) made, registered and accepted by the person to whom the transfer is made, or by his attorney appointed in writing, in a book or books kept for that purpose; and,

(*b*) the person making the transfer has, if required by the bank, previously discharged all his debts or liabilities to the bank which exceed in amount the remaining stock, if any, belonging to such person, valued at the then current rate.

Entries in books.

2. The post office address and description of the transferee shall be entered in such book.

Fraction of share not transferable.

3. No fractional part of a share, or less than a whole share shall be transferable.

Share register office to be opened in each province.

4. The bank may open and maintain in any province in Canada in which it has resident shareholders and in which it has one or more branches or agencies, a share-registry office, to be designated by the directors, at which the shares of the shareholders, resident within the province, shall be registered and at which, and not elsewhere, except as hereinafter provided, such shares may be validly transferred.

Register and transfer of shares.

5. Shares of persons who are not resident in Canada or in any province in which there is a branch or agency of the bank may be registered and shall be transferable at the chief office of the bank or elsewhere, as the directors may designate.

Sec. 43. When change of residence.

6. Whenever there is a change in the ownership of shares, and the new shareholder resides in a province other than that in which the former shareholder resided, and whenever there is a change in the residence of a shareholder from one province to another, or whenever a shareholder residing outside of Canada becomes a resident of a province in Canada, the registration of the shares shall be changed to the registry of the province in which the shareholder has his residence, if there is a branch or agency of the bank in that province, and if a share-registry has been opened in that province, and the shares of such shareholder shall thereafter be transferable at such registry and not elsewhere, except as herein provided.

Residence defined.

7. For the purposes of this section, a shareholder shall be deemed to be resident in the province in which he has, according to the books of the bank, his post office address.

Agents.

8. The directors shall appoint such agents for the purposes of this section as they deem necessary. 53 V., c. 31, ss. 29 and 35. Am.

Clause (*b*) of this section confers upon the bank an implied lien upon shares of its own capital stock for debts or liabilities to it of the holder. Cf. sec. 77.

In 1913 sub-sec. 1 was amended by the insertion of the words "or by his attorney appointed in writing." In other respects sub-secs. 1 and 3 in substance date from 1890.

Provincial share-registry offices.

Sub-secs. 2, 4, 5, 6, 7 and 8 were added in 1913. By the bill in the form in which it passed the House of Commons it was proposed to make it obligatory for a bank to open and maintain a share-registry office in every province in which it had resident shareholders and in which it had one or more branches or agencies, but the section was amended in the Senate so as to leave the establishment of provincial share-registry offices permissive merely.(*a*)

(*a*) Debates, H. of C., 1912-13, col. 11,865 ff. The purpose of the provisions in regard to provincial share-registry offices was to give a *situs* or locality to bank shares in the province in which their owner was domiciled so as to avoid the liability to succession duty in more than one province, although it was considered doubtful whether its provisions would be effective for this purpose. See notes *infra* as to locality of bank shares.

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Shares are declared by sec. 36 to be personal estate, and have been held to be choses in action. Colonial Bank v. Whinney, 1886, 11 App. Cas. 426, 439. It has been held that they may be assigned in any legal manner. Bank of Montreal v. Henderson, 1870, 14 L.C.J. 169, 20 R.J.R.Q. 98.

Directors bound to register transfers.

Notwithstanding the omission in 1913 from sec. 36 of the provision that shares shall be assignable and transferable according to such forms and subject to such rules and regulations as the directors prescribe, it is submitted that the directors may make reasonable regulations as to the form and manner of transfer, provided they do not substantially restrict the assignability of the shares. But if these formalities are complied with, they are bound to register a transfer, unless some express provision of the act gives them the authority to refuse to do so, as in the two cases mentioned in section 43. Smith v. Bank of Nova Scotia, 1883, 8 S.C.R. 558; cf. Barss v. Bank of Nova Scotia, 1885, 18 N.S.R. (6 R. & G.) 245. Two cases being mentioned in which a transfer shall not be valid, the rule *expressio unius exclusio alterius* applies. In re Smith, Knight & Co. Weston's Case, 1868, L.R. 4 Ch. 20 at p. 30.

As illustrating the proposition that the directors have no discretionary power to refuse to register a transfer of paid-up shares except in the cases in which they are expressly authorized to do so by the charter of the company, see In re McKain and Canadian Birkbeck, 1904, 7 O.L.R. 241; In re Panton and the Cramp Steel Co., 1904, 9 O.L.R. 3. The cases under various statutes are collected in Re Good and Jacob Y. Shantz Son & Co. Ltd., 1911, 21 O.L.R. 153, 23 O.L.R. 544, in which it was held under the Dominion Companies Act that the directors had no power to refuse to register a transfer of paid-up shares by virtue of a by-law requiring the approval of a majority of the directors before the entry of a transfer.

As to the rights and obligations of the bank in regard to transfer of shares which are subject to trusts, see chapter 10, *infra*. As to the obligation to register a transmission of shares upon proper proof of the fact of transmission, see sec. 50.

If registration of the transfer is wrongfully refused, the transferee has a right of action—the measure of damages being the value of the shares at the time of the refusal to register. In re Ottos Kopje Diamond Mines, [1893] 1 Ch. 618.

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In practice the transferor does not usually attend in person to execute the transfer in the books of the bank, but executes a power of attorney by virtue of which some officer of the bank executes the transfer and registers the same in the books of the bank. The transferee must accept the transfer, and this also is usually done in practice by means of a power of attorney. See In re Central Bank, Baines' Case, 1889, 16 O.R. 293, where it was held that the system of transferring shares by what is known as a "marginal transfer" is a sufficient compliance with, or at least is not in any way a violation of, the statutory provisions of this section. Cf. Boultbee v. Gzowski, 1896, 28 O.R. at p. 287; S.C. reversed 24 O.A.R. 502, restored 1898, 29 S.C.R. 54.

Forged power of attorney.

If a broker or other agent although in good faith induces the bank to transfer shares upon a power purporting to be made in his favour by a shareholder, but which is in fact forged, the agent must be taken to have given an implied warranty that he had authority, upon the principle of Collen v. Wright, 1857, 8 E. & B. 647, 657, and is therefore liable to indemnify the bank against the claim of the stockholder for restitution. Starkey v. Bank of England, [1903] A.C. 114. C'. notes to sec. 51 of the Bills of Exchange Act.

A transferee of shares who lodges the transfer with the company for registration thereby impliedly warrants that the transfer is genuine. If such transferee then transfers the shares to another person who registers the transfer and obtains a certificate, the second transferee has a good title against the company and the first transferee is obliged to indemnify the company against its liability to the original holder whose transfer was forged. Sheffield v. Barclay, [1905] A.C. 392.

Warranty of identity.

The same principle has been applied to a "warranty of identity" in a case in which a broker sent to the Bank of England a "ticket," *i.e.* a statement of the names of the transferor and transferee, the nature of the stock and the amount to be transferred, from which the bank prepared a transfer in the transfer-book, and the personator attended and forged the holder's name in the book, the broker identifying her as being the holder. Bank of England v. Cutler, [1908] 2 K.B. 208.

If the stock certificate states that in the event of sale or transmission of the shares the certificate must be surrendered

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Production of share certificate.

before the transfer is registered or new certificate issued, the performance of such a condition, if prescribed by the directors, may be insisted upon by the bank, but, no doubt, if the non-production of the certificate is accounted for, as by proof that it was lost or destroyed or that it was wrongfully withheld by someone who had no right to withhold it, the court would order registration upon proper indemnity being given. Colonial Bank v. Whinney, 1886, 11 App. Cas. 426.

But the bank is not bound to insist upon the production of the certificate before registering a transfer of the shares represented thereby, and a transfer to an innocent transferee, duly registered and accepted without production of the certificate, will have priority over an earlier but unregistered transfer, accompanied by delivery of the certificate. The bank is not estopped from denying the right to the shares of the holder of the certificate. The only effect of the certificate is to preclude the bank from denying that at the time the certificate was issued the person named therein as the owner was entitled to the shares. Smith v. Walkerville, 1896, 23 O.A.R. 95 cf. Rainford v. Keith, [1905] 1 Ch. 296, [1905] 2 Ch. 147, and see chapter 30, *infra*, under the heading "Instruments not negotiable."

Forged certificate.

In Ruben v. Great Fingall Consolidated, [1906] A.C. 439, the appellants advanced in good faith a sum of money to the secretary of the respondent company for his own purposes on the security of a share certificate of the company issued to them by the secretary certifying that the appellants were registered in the company's register of shareholders as transferees of shares. This certificate was, in point of form, in accordance with the company's articles of association, inasmuch as it bore the seal of the company, and appeared to be signed by two of the directors and countersigned by the secretary. The seal of the company was, however, affixed by the secretary fraudulently and without authority, and the signatures of the two directors were forged by him. In an action against the company for damages for refusing to register the appellants as owners of the shares, it was held that in the absence of any evidence that the company ever held out the secretary as having authority in this behalf to do anything more than the ministerial act of delivering share certificates, when duly made, to the owners of shares, the company was not estopped by the forged certificate from disputing the claim

of the appellants, or responsible to them for the wrongful act of the secretary. Sec. 43.

If a transferee does not accept the shares in the books of the bank, but subsequently deals with the shares by selling and transferring them, his transferee, being the holder at the time of the suspension of the bank, is liable as a contributor. Re Central Bank, Nasmith's Case, 1889, 16 O.R. 293, 304; affirmed on appeal 18 O.A.R. 209. Liability of transferee.

After a winding-up order has been made, it is then too late for holders of shares entered as such in the books of the bank to escape liability by shewing irregularities in transfers to more or less remote predecessors in title. In re Central Bank, Home Savings & Loan Co.'s Case, 1891, 18 O.A.R. 489.

If the transfer is not registered more than 60 days before the bank suspends payment, the transferor is subject to the double liability under secs. 125 and 130.

A transfer of shares cannot legally be accepted by a minor or other person who by provincial law is incapable of contracting. Dumont v. Aubert, 1879, 5 L.N. 295; Walsh v. Union Bank, 1879, 5 Q.L.R. 289.

Bank of Liverpool v. Bigelow, 1878, 3 N.S.R. (3 R. & C.) 236, was an action for calls against the transferee of shares in the plaintiff bank. There was no valid transfer under the act, but the defendant had paid other calls, given a receipt for a dividend, combined with other persons in appointing a proxy, and, being present at the trial and hearing all the evidence, had not produced any evidence or offered his own evidence. *Held*, that he must be treated as a shareholder.

Locality of Shares.

Shares have a *situs* or locality at the head office (Nickle v. Douglas, 1875, 37 U.C.R. 51; In re Ewing, 1881, 6 P.D. at p. 23), notwithstanding that for the sake of convenience provision may be made for their transfer at another place, as *e.g.*, if a bank having its head office and stock register at Toronto has also separate stock registers at Montreal and London, Eng. (Hughes v. Rees, 1884, 5 O.R. at p. 666; In re Clarke, [1904] 1 Ch. at p. 297, in argument). In the last mentioned case, however, the head office of the company was in South Africa, but the share certificates were in England, and it was held that the shares passed under a bequest made by a testator domiciled

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in England, of all his personal estate in the United Kingdom, on the ground that the production of the certificate was by its terms essential to the completion of a transfer. If shares are transferable only on a local register at a place other than the head office, and in the case of a transmission, the transmission must be registered before the shares can be removed from the local register to the head-office register, it might be held on the same principle that the shares are locally situate where the local register is.

Locality of shares.

The question of the locality of shares may become one of importance in connection with the liability to succession duty under provincial acts, and these acts are likely to be a source of embarrassment to banks in regard to the registration of transfers of shares which have been transmitted on the death of a shareholder.

Taxation within the province.

Under the British North America Act, 1867, sec. 92, clause 2, a provincial legislature may make laws with regard to "Direct taxation within the province in order to the raising of a revenue for provincial purposes." By virtue of this authority a province (1) may tax property within the province without regard to the place of residence or domicile of the owner, and (2) conversely, may tax a person "found within the province," in respect, or upon the basis, of property situate without the province or of income derived from extra-provincial sources. Clement's Canadian Constitution, 2nd ed., 1904, p. 256, citing Bank of Toronto v. Lambe, 1887, 12 App. Cas. 584; Nickle v. Douglas, 1875, 37 U.C.R. at p. 62; Colquhoun v. Brooks, 1887, 19 Q.B.D. 65; Lefroy, 760 (*n*), 769 (*n*), but see Leprohon v. Ottawa, 1878, 2 O.A.R. at p. 534.

A provincial legislature cannot, however, impose a lien or charge upon property beyond the province; a tax upon a person "found within the province," would be enforceable only by process against the person taxed or against his property within the province. Clement, p. 256.

Locality of shares and jurisdiction to impose succession duty.

If, for instance, shares in a bank with its head office in province A. are registered in the local register of the bank in province B., and belong to a person who at the time of his death is domiciled in province C., what is the liability of the bank, and what is that of the estate to which the shares belong?

Either province A. or province B. may impose a duty on the transmission of shares by reason of their *situs* in the province. If they are locally situate in province A., where the

Sec. 43. Locality of shares and jurisdiction to impose succession duty.

head office of the bank is, then there is no property in province B. subject to taxation. If they are locally situate within province B., then there is no property in province A. subject to taxation.

In the case suggested there would appear to be no property in province C. subject to duty.(*b*) This conclusion is in accordance with justice as well as law, for, *ex hypothesi*, the property is liable to duty where it is locally situate. Several of the provinces have, however, attempted to impose a tax on the transmission not only of property actually situate within the province, but also of property actually situate without the province belonging to a person who at the time of his death was domiciled within the province.(*c*) The power of the provincial legislature to impose a personal tax upon the representative of the deceased person within the province is undoubted, but it seems equally clear that such legislature cannot alter the legal meaning of the words "property within the province" as used in the British North America Act, so as to extend its jurisdiction to property which is situate within the province only by the application of the maxim *mobilia sequuntur personam*, and cannot enforce an assumed jurisdiction against property actually situate in another province or country, either by lien or charge or interference with its transfer or otherwise.

The Privy Council has stated the rule that although the law of the testator's domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are, for the purpose of legal representation, of

(*b*) The territorial limitation on the jurisdiction of a provincial legislature has been strongly emphasised by the Privy Council in Woodruff v. Attorney-General, [1908] A.C. 508, and Royal Bank of Canada v. The King, [1913] A.C. 283.

(*c*) See the Ontario Succession Duty Act, 7 E. 7, c. 10, s. 6 (1) (*a*). Since the decision in Woodruff v. Attorney-General a new act has been passed by which the rate of succession duty is fixed by taking into account property outside the province as well as that within the province, but the duty is to be payable on the property within the province. 9 E. 7, c. 12, ss. 2 (1) (*a*), 8 (5). There are also provisions for an allowance to be made in case of the property outside the province being liable for duty in the province or country in which it is actually situate. Cf. article in 30 C.L.T. 5 (Jan. 1910). See also Rex v. Cotton, 1912, 45 S.C.R. 469, a case under the Quebec act purporting to impose a duty upon all movables, wherever situate, of persons having their domicile (or residing) in the province at the time of their death. An appeal to the Privy Council is pending.

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collection and of administration, as distinguished from distribution among the successors, governed by the law of their own locality and not by that of the testator's domicile. Blackwood v. The Queen, 1882, 8 App. Cas. 82; followed in Woodruff v. Attorney-General, [1908] A.C. 508; Rex v. Lovitt, [1912] A.C. 212.(*d*) This rule would seem to indicate that for the purpose of succession duty, the shares do not by reason of the late owner's domicile have a fictitious locality at the place of such domicile. The fiction is confined in its operation to pointing out the law which shall govern the succession and enjoyment of the property, but has not the effect of rendering the property locally situate in a place where it is not in fact situate.(*e*)

In Lambe v. Manuel, [1903] A.C. 68, a Quebec act provided for a duty upon transmissions, owing to death, of property in the province, and it was held that the act applied only to property which the successor claimed under and by virtue of Quebec law, and therefore had no application to property belonging to a person domiciled in Ontario and consisting (*inter alia*) of shares in the capital stock of a bank whose head office was in Montreal, where its stock registers and transfer books were kept. After this decision, however, the Quebec act was amended so as to render liable to duty all property actually situate within the province, no matter where the deceased was domiciled or where the transmission took place. Thus the Quebec act, like the Ontario act, now contemplates a *situs* or locality being given to all kinds of personal

(*d*) Cf. notes under sec. 95 as to "Locality of deposit."

(*e*) In the application of English cases, it must be borne in mind that succession duty under provincial acts resembles the English probate or estate duties, *i.e.*, duties on the collection or distribution of an estate passing on a person's death (cf. Attorney-General v. Newman, 1901, 1 O.L.R. at p. 515), rather than what are known in England as legacy or succession duties. The liability to legacy duty (Thompson v. Advocate-General, 1845, 12 Cl. & F. 1), and to some extent succession duty (Attorney-General v. Jewish Colonization Association, [1901] 1 Q.B. at p. 138), is dependent upon the British domicile of the deceased owner of property. Cf. Winans v. Attorney-General, [1910] A.C. 27, at pp. 30, 32, 39-40. Whether or not the maxim *mobilia sequuntur personam* is entirely inapplicable to the decision of questions relating to succession duties, it is obvious that movable property ought not to have more than one *situs* for the purpose of taxation and ought not to be liable to pay succession duty in two different jurisdictions. See article by R. C. Smith, in 16 J.C.B.A. 15 (Oct, 1898), in which many of the cases are collected.

property without regard to the principle *mobilia sequuntur personam.*(*f*)

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It has been held that the directors are bound to register a transfer except in the cases in which they are expressly authorized to refuse to do so. See Smith v. Bank of Nova Scotia, 1883, 8 S.C.R. 558, and notes to sec. 43. Further, in the case of a transmission of shares, the proper officers are absolutely required, upon certain proof being furnished, to register the name of the person entitled under the transmission (sec. 50). *Quære*, as to the power of a provincial legislature to impose any limitation upon the registration of a transfer or transmission. It has been held that it is *intra vires* of such a legislature to enact that "no transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid," etc., and that a bank is therefore justified in refusing to register a transfer of shares by executors under a will, until proof is given that the duties have been paid. Heneker v. Bank of Montreal, 1895, Q.R. 7 S.C. 257. It is submitted, however, that the principle of this decision must not be extended to the transfer of shares not actually situate within the jurisdiction of the legislature which enacts a statute of this kind.

A bank is not directly liable, in the absence of an enactment expressly creating such liability, for succession duty imposed upon transmission of its shares, but if a statute in effect renders illegal a transfer by an executor without payment of the duty, the bank might be liable if it knowingly became a party to an illegal transfer.

List of transfers.

44. A list of all transfers of shares registered each day in the books of the bank at the respective places where transfers are authorized, showing in each case the parties to such transfers and the number of shares transferred, shall be made up at the end of each day.

For inspection.

2. Such lists shall be kept at the said respective places for the inspection of the shareholders. 53 V., c. 31, s. 36. Am.

(*f*) Cf. Attorney-General v. Newman, 1901, 1 O.L.R. 511, a case in regard to deposits within the province owing to a person domiciled without the province; Rex v. Lovitt, *supra*, and notes to sec. 95.

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The words "at the respective places where tranfers are authorized" were added in 1913, in view of the provision made by sec. 43 for the establishment of share-registry offices in different provinces.

Requirements for valid transfer.

45. All sales or transfers of shares, and all contracts and agreements in respect thereof, hereafter made or purporting to be made, shall be null and void, unless the person making the sale or transfer, or the person in whose name or behalf the sale or transfer is made, at the time of the sale or transfer,—

(*a*) is the registered owner in the books of the bank of the share or shares so sold or transferred, or intended or purporting to be sold or transferred; or,

(*b*) has the registered owner's assent to the sale.

Contract to state number.

2. The distinguishing number or numbers, if any, of such share or shares shall be designated in the contract of agreement of sale or transfer.

Purchasers without notice.

3. Notwithstanding anything in this section contained, the rights and remedies under any contract of sale, which does not comply with the conditions and requirements in this section mentioned, of any purchaser who has no knowledge of such non-compliance, are hereby saved. 53 V., c. 31, s. 37.

This section dates from 1890. Similar provisions as to inserting numbers in transfers of shares of the English joint stock banks "are regularly disregarded on the Stock Exchange, but the custom to do so is illegal and unreasonable." Neilson v. James, 1882, 9 Q.B.D. 546. Possibly it may be binding upon principals of a stockbroker who know of it when they employ him. Perry v. Barnett, 1885, 15 Q.B.D. 388. See further Loring v. Davis, 1886, 32 Ch.D. 625; Mitchell v. Glasgow Bank, 1877, 4 App. Cas. 624; Seymour v. Bridge, 1885, 14 Q.B.D. 460; Grant, pp. 587 ff.

Sec. 132 makes a contravention of this section "an offence against this act." A bank is, however, under no obligation to distinguish its shares by numbers. Under the act of 1879, repealed in 1880, there was such an obligation.

Sale of shares under execution.

46. When any share of the capital stock has been sold under a writ of execution, the officer by whom the writ was executed shall, within thirty days after the sale, leave with the bank an attested copy of the writ, with the certificate of such officer endorsed thereon, certifying to whom the sale has been made.

Transfer, how executed.

2. The president, a vice-president or the general manager of the bank shall execute the transfer of the share so sold to the purchaser, but not until after all debts and liabilities to the bank of the holder of the share, and all liens in favour of the bank existing thereon, have been discharged as by this Act provided.

Validity.

3. Such transfer shall be to all intents and purposes as valid and effectual in law as if it had been executed by the holder of the said share. 53 V., c. 31, s. 38. Am.

The shares of a bank, the head office of which is in one province, may be sold under a writ of execution in another province where the bank has a branch office. In re Bank of Ontario, 1879, 44 U.C.R. 247. The question of the locality of shares is discussed in the notes to sec. 43.

Secs. 46, 47, 49 and 50 were amended in 1913 by the omission of the word "cashier" and the insertion of the words "general manager."

Transmission of shares.

47. If the interest in any share in the capital stock of any bank is transmitted by or in consequence of—

How authenticated.

(*a*) the death, lunacy, bankruptcy, or insolvency of any shareholder; or,

(*b*) the marriage of a female shareholder; or,

(*c*) any lawful means, other than a transfer according to the provisions of this Act;

the transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the directors of the bank require.

Declaration.

2. Every such declaration shall distinctly state the manner in which and the person to whom the share has been

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transmitted, and shall give his post office address and description, and such person shall make and sign the declaration.

Acknowledgment.

3. The person making and signing the declaration shall acknowledge the same before a judge of a court of record, or before the mayor, provost or chief magistrate of a city, town, borough or other place, or before a notary public, or a commissioner for taking affidavits, where the same is made and signed.

To be left with bank.

4. Every declaration so signed and acknowledged shall be left with the general manager, or other officer or agent of the bank, who shall thereupon enter the name of the person entitled under the transmission in the register of shareholders.

Exercise of rights as shareholder.

5. Until the transmission has been so authenticated, no person claiming by virtue thereof shall be entitled to participate in the profits of the bank, or to vote in respect of any such share of the capital stock. 53 V., c. 31, s. 39. Am.

In 1913, sub-sec. 2 was amended by the insertion of the words "and shall give his post office address and description," and sub-sec. 3 by the insertion of the words "or a commissioner for taking affidavits."

Meaning of "transmission."

"Transmission" in this and the next following sections is used in contradistinction to "transfer." The latter means a transfer by the act of the holder, the former a transmission by devolution of law. In re Bentham Mills, 1879, 11 Ch.D. 900.

If the Bank Act conflicts with provincial law, the latter is overruled. Cf. notes to sec. 42. These sections do not, however, purport to alter the transmission of shares as governed by the law of the domicile of the holder, but merely prescribe the method in which transmission shall be proved so as to authorize the bank to make the necessary entry in its books. In order to establish his right to deal with the shares, the person to whom the shares have been transmitted must comply with the provisions of the act, and until he has done so he is not entitled to participate in the profits of the bank or to vote in respect of the shares.

Sec. 47. Further provisions as to transmission.

Two of the cases of transmission mentioned in this section, namely, the death of a shareholder and the marriage of a female shareholder, are further provided for by secs. 48, 50 and 51. In the act of 1871 these sections were contained substantially in their present form. That act also contained a section providing that in case of transmission of shares, if the directors entertained reasonable doubts as to the legality of any claim to and upon such shares, they might apply to the court by way of petition for an order or judgment adjudicating and awarding the shares to the party or parties legally entitled to the same, etc. The division of the sections into their present sub-sections was made in 1906.

A bank cannot refuse to record a transmission of shares on the ground of any indebtedness or liability to the bank within sec. 43. In re Bentham Mills, *supra;* cf. sec. 50.

See sec. 49 as to the authentication of a declaration made under this section.

The bank need not insist upon a declaration being furnished under this section if it is content to act upon one of the documents mentioned in sec. 51.

The bank is not obliged to see to the execution of trusts by the person to whom the shares are transmitted. See notes to sec. 52 where the obligation of the bank to register a transfer which may be in breach of trust is discussed.

Transmission by marriage of female shareholder.

48. If the transmission of any share of the capital stock has taken place by virtue of the marriage of a female shareholder, the declaration shall be accompanied by a copy of the register of such marriage, or other particulars of the celebration thereof, and shall declare the identity of the wife, with the holder of such share, and shall be made and signed by such female shareholder and her husband.

Declaration.

If separate property of wife.

2. The declaration may include a statement to the effect that the share transmitted is the separate property and under the sole control of the wife, and that she may, without requiring the consent or authority of her husband, receive and grant receipts for the dividends and profits accruing in respect thereof, and dispose of and transfer the share itself.

Sec. 48. Revocation.

3. The declaration shall be binding upon the bank and persons making the same, until the said persons see fit to revoke it by a written notice to the bank to that effect.

Omission not to invalidate.

4. The omission of a statement in any such declaration that the wife making the declaration is duly authorized by her husband to make the same shall not invalidate the declaration. 53 V., c. 31, s. 40.

The provisions of this section are supplementary to those of sec. 47. It was proposed in 1890 to alter sec. 48, so as to permit a married woman in Quebec to dispose of her shares without the consent of her husband, as she can do in Ontario. The amendment, however, was withdrawn, and the section as it stands does not permit a married woman in Quebec to dispose of her shares unless both husband and wife file a declaration which is in effect a power of attorney to enable the wife to receive the dividends or dispose of the shares.

See next section as to the authentication of a declaration made under this section.

Authentication of declaration and papers in certain cases.

49. Every such declaration and instrument as are by the last two preceding sections required to perfect the transmission of a share in the bank shall, if made in any country other than Canada, the United Kingdom or a British colony,—

(*a*) be further authenticated by the clerk of a court of record under the seal of the court, or by the British consul or vice-consul, or other accredited representative of His Majesty's Government in the country where the declaration or instrument is made; or,

(*b*) be made directly before such British consul, vice-consul or other accredited representative.

Further evidence.

2. The directors, general manager or other officer or agent of the bank may require corroborative evidence of any fact alleged in any such declaration. 53 V., c. 31, s. 39. Am.

Prior to 1906, this section constituted one section with sec. 47.

Transmission by will or intestacy.

50. If the transmission has taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will, or the letters of administration, or act of curatorship or tutorship, or an official extract therefrom, shall, together with the declaration, be produced and left with the general manager or other officer or agent of the bank.

Entry.

2. The general manager or other officer or agent shall thereupon enter in the register of shareholders the name of the person entitled under the transmission. 53 V., c. 31, s. 41. Am.

See next section.

The imperative nature of the phrase "shall thereupon enter in the register," deprives the directors or officers of any discretion in regard to the registration, provided proper proof of transmission has been furnished in accordance with the act. Cf. notes to sec. 47. As to the obligation to register a transfer, see notes to sec. 43.

Transmission by decease.

51. Notwithstanding anything in this Act, if the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder, the production to the directors and the deposit with them of—

(*a*) any authenticated copy of the probate of the will of the deceased shareholder, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland, or any British colony, or of any testament, testamentary or testament dative expede in Scotland; or,

(*b*) an authentic notarial copy of the will of the deceased shareholder, if such will is in notarial form according to to the law of the province of Quebec; or,

(*c*) if the deceased shareholder died out of His Majesty's dominions, any authenticated copy of the probate of his will or letters of administration of his property, or

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other document of like import, granted by any court or authority having the requisite power in such matters; shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share, in pursuance of and in conformity to the probate, letters of administration, or other such document as aforesaid. 53 V., c. 31, s. 42. Am.

Transmission by decease of shareholder.

The provisions of this section and of section 50 supplement sec. 47. See notes to the last mentioned section.

Sec. 51 was amended in 1913 by the prefixing of the words "Notwithstanding anything in this Act." The effect of the amendment is to make it clearly permissive for the bank to accept the proof of transmission provided for by the section without requiring secs. 47 and 49 to be complied with.

A will in notarial form according to the law of Quebec does not require to be admitted to probate. The section provides for production of an authentic notarial copy of such a will, or of an authenticated copy of the probate of any other will, as proof in each case of transmission of shares. Similarly the probate of a will, letters of administration, etc., granted by a competent court and valid according to the law of the particular province or country where the deceased shareholder was domiciled may be produced as evidence of the title to shares. An authenticated copy no doubt means a copy certified by a person or court properly having the custody of the original.

Transmission of legal not beneficial title.

The words "in pursuance of and in conformity to such probate," etc., refer to the legal and not to the beneficial title conferred by such probate, etc. The probate would be "sufficient justification and authority" to the bank for paying dividends or transferring shares to the executor, *i.e.*, the person to whom by operation of law the transmission has taken place, and the bank would not be obliged to see that the executor did not convert the dividends or shares to his own use. See notes to sec. 52.

CHAPTER X.

SHARES SUBJECT TO TRUSTS.

The sections included in this chapter do not apply to the Bank of British North America (sec. 6).

SHARES SUBJECT TO TRUSTS.

Bank not bound to see to trusts.

52. The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any share of its stock is subject.

Receipt.

2. The receipt of the person in whose name any such share stands in the books of the bank, or, if it stands in the names of more persons than one, the receipt of one of such persons, shall be a sufficient discharge to the bank for any dividend or any other sum of money payable in respect of such share, unless, previously to such payment, express notice to the contrary has been given to the bank.

Bank not bound.

3. The bank shall not be bound to see to the application of the money paid upon such receipt, whether given by one of such persons or all of them. 53 V., c. 31, s. 43.

This section dates practically in its present form from 1871. It was divided into sub-sections in 1906.

The section refers only to trusts in regard to shares of the bank's own capital stock. It has no reference to trusts in respect of shares of other corporations taken by the bank as collateral security, as to which see notes to sec. 76, *infra*.

Bank not bound to see to execution of trust.

Sec. 53 deals with the question of the personal liability of a trustee-holder of shares By sec. 96, a bank is not bound to see to the execution of any trust to which any deposit is subject.

The language of sub-sec. 1 is general and comprehensive. It cannot be construed as referring to trusts of which the bank has no notice, for it would require no legislative provision to save

Sec. 52. Bank not bound to see to execution of trust.

the bank from responsibility for not seeing to the execution of a trust, the existence of which has not in some way been brought to its knowledge. The provision seems to be directly applicable to trusts, of which the bank has knowledge or notice, and in regard to these the bank, it is declared, is not to be bound to see to their execution. Simpson v. Molsons Bank, [1895] A.C. 270.

Where an executor filed with the bank a declaration under sec. 47, and a copy of the probate under sec. 50, and required the bank to transfer the testator's stock to him as executor, which the bank refused to do, on the ground that by the will the stock was specifically bequeathed to be divided among certain legatees, it was held that it was the bank's duty to make the transfer, and that the bank was under no obligation to see that the bequests of the will were carried out by the executor. Boyd v. Bank of New Brunswick, 1891, N.B. Eq. Cas. 545; 1 J.C.B.A. 80.

Apart from the statute it is not clear that notice to the bank of a trust affecting its shares would cast upon it the duty of ascertaining the terms of the trust. Section 30 of the English National Debt Act, 1870, provides that no notice of any trust in respect to any stock certificate or coupon shall be receivable by the Bank of England. But even before the last mentioned act, it had been held that the Bank of England could not prevent an executor from selling stock or transferring stock into his own name. Bank of England v. Parsons, 1800, 5 Ves. 665; cf. Hartga v. Bank of England, 1796, 3 Ves. 55. In Lady Mayo's Case, 1772, Lofft, 65, a transfer of moneys in the bank in the name of a *feme covert* had been made by the husband. It was suspected that by virtue of a trust, the moneys were held to the wife's separate use, and the bank, on transferring the stock, made a memorandum of a defect of title suspected. It was held that to make such a memorandum was not permissible, and that no secret trust as against the party who had the open legal title, would affect the bank. Lord Mansfield added: "I won't say a word against the holder of the stock having his action against the bank for disparaging his title." Cf. Franklin v. Bank of England, 1829, 9 B. & C. 156; Humberstone v. Chase, 1836, 2 Y. & C. Ex. 209; Hart on Banking, 2nd ed., 1906, pp. 105-6.

By the clause now in question, however, the bank is relieved from the duty of making enquiry, and cannot be held respons-

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ible for registering a transfer, unless it can be shewn that the bank, at the time of the transfer, possessed actual knowledge sufficient to affect it with notice that the transfer is in breach of trust, or the circumstances connected with the transfer and breach of trust are such as to warrant a court in holding that the bank really and knowingly joined in committing the breach.

What amount of knowledge would be sufficient to imply that the bank must know that a transfer is in breach of trust depends on the circumstances of each case. In Simpson v. Molsons Bank, [1895] A.C. 270, a testator bequeathed stock in the Molsons Bank to his executors, of whom one was William Molson, president of the bank. Certain of the shares were to go to Alexander Molson, but with a substitution rendering it improper that the shares should be transferred absolutely to him, because he might, if that were done, defeat the substitution. A copy of the will was deposited with the bank (presumably to enable the bank to satisfy itself that the executors were entitled to be registered as owners), but there was apparently no evidence that the provisions relating to the substitution were brought specially to the bank's notice. The law agent of the bank was also law agent of the executors. Several transfers of shares from the same block as those in question in the action were transferred to trustees for the purpose of protecting similar substitutions. Subsequently the shares in question were conveyed outright to Alexander Molson, and he dealt with them as his own absolutely. Under a clause in the same words as those of the sub-section now under discussion, it was held that the bank was not liable, on the ground that it had not actual knowledge that a breach of trust was intended or was being committed by the transfer.

It was argued in Simpson v. Molsons Bank that by virtue of the law of Quebec the executors were mere depositaries of the stock without power of disposition or sale, except with the consent of the succession or by authorization of the court, but the Privy Council held that whatever might be the position in the absence of a bequest to the executors, in this case the shares were specifically bequeathed to the executors by the will with a direction as to the disposition of them in certain ways by the executors, and that therefore the title to the shares was vested in the executors.

In the province of Quebec a power of disposition is not a

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necessary incident to the execution of a trust. It has been suggested that notice to a bank that shares are held by a trustee in Quebec is in itself notice that the trustee is merely an administrator for the beneficiary without power of sale unless such a power is expressly given by the instrument creating the trust, and that the bank is therefore bound to examine the whole of the document in order to ascertain whether or not the trustee has the power to sell. If, however, the statute is to receive the same interpretation in all the provinces, it would seem to follow that, for the purpose of this section, a trust must mean the same thing in all the provinces. An essential of a trust is that the legal title or control should be in one person and the equitable or beneficial interest in another (*a*). Hardoon v Belilios, [1901] A.C. at p. 123; Porteous v. Reynar, 1887, 13 App. Cas. at pp. 131-132.

The legal title involves a power of sale. The trustee may pass the title, although in transferring the property, he commits a breach of trust. Shropshire v The Queen, 1875, L.R. 7 H.L. 496, at p. 513.

It is true that in Simpson v. Molsons Bank, *supra*, the members of the Judicial Committee did look at the trust document, but it does not appear that they did so for any other purpose than to see whether the prerequ site to the application of the statute existed, namely, whether there was a trust, *i.e.*, a legal estate in one person and a beneficial interest in another; having found that there was a trust, they then applied the statute and held that the bank was not bound to see that the person who had the legal estate should transfer the shares in accordance with the trust.

The statute relieves the bank from entering upon its books under secs. 50 and 51, notice of trusts as between the legal owner and other persons. Testamentary and other instruments or extracts therefrom may be produced to and left with the bank, and will constitute sufficient authority for the transfer of a share or the payment of a dividend. But in the case contemplated by those sections, the object of the legislature is not to make the bank responsible for the due administration of the fund according to the equitable right, but to enable it to ascertain who, under such instrument, is the person legally entitled Cf. Lewin on Trusts, 11th ed. 1904, pp. 31-2.

(*a*) The title of a trustee is usually but not necessarily a legal one. The testator or settlor might have only an equitable interest in property, and in such case his trustee could have only an equitable interest.

Sec. 52. Sufficiency of receipt.

The provision that the bank shall not be obliged to see to the due execution of any trust is unqualified. The question of notice under sub-sec. 2, only arises in regard to the sufficiency of the receipt of the person in whose name any share stands. The receipt of such person, or, if the share stands in the name of more than one, the receipt of one of such persons, is a sufficient discharge to the bank for any dividend or any other sum of money payable in respect of such share, unless express notice to the contrary has been given to the bank. If the receipt is sufficient, then the bank is not bound to see to the application of the money paid upon such receipt. Section 96 contains a somewhat similar provision in regard to deposits. See notes to that section, where the difference in the wording of the two sections is discussed.

Executor or trustee not personally liable.

53. No person holding stock in the bank as executor, administrator, guardian, trustee, tutor or curator—

(*a*) of or for any estate, trust or person named in the books of the bank as being represented by him; or,

(*b*) if the will or other instrument under or by virtue of which the stock is so held be named in the books of the bank in connection with such holding,

shall be personally subject to any liability as a shareholder; but the estate and funds in his hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such estate and funds would be, if living and competent to hold the stock in his own name.

Cestui que trust liable.

2. If the trust is for a living person or corporation, such person or corporation shall also be liable as a shareholder to the extent of his or its respective interest in the shares.

Executor or trustee liable if trust not named.

3. If the estate, trust or person so represented, or will or other instrument, is not named in the books of the bank, the executor, administrator, guardian, trustee, tutor or curator shall be personally liable in respect of the stock, as if he held it in his own name as owner thereof. 63-64 V., c. 26, s. 8. Am.

The original of this section was passed in 1880. Clause (*b*) of sub-sec. 1, the words "or corporation" and "to the extent of his or its respective interest in the shares" in sub-sec. 2,

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and the words "or will or other instrument" in sub-sec. 3, were added in 1913 and the division into sub-sections was made in 1906, but in other respects the section in its present form dates from 1900, when "tutor" and "curator" were added to the class of representatives, and the words "estate, trust or person so represented" were substituted for "testator, ward or person so represented."

A loan company which advances money on the security of bank shares which are transferred to it and accepted by it, in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower. In re Central Bank, Home Savings & Loan Co.'s Case, 1891, 18 O.A.R. 489.

Liability of trustee shareholder.

A person who is *sui juris* and beneficially entitled to shares which he cannot disclaim is personally bound to indemnify the registered holder thereof against calls upon them. Hardoon v. Belilios, [1901] A.C. 118. A trustee for infants or for tenants for life (S.C. at p. 127), can, of course, be indemnified only to the extent of the trust funds, because there is no beneficiary who can be required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership. Cf. the case of an executor. In re Cheshire Banking Co., Duff's Executors' Case, 1886, 32 Ch.D. 301.

If a trustee, executor or other person belonging to one of the classes of representative persons mentioned in sec. 53 does not desire to rely upon the precarious security of a right of indemnity, he may avoid all personal liability upon shares held by him, by naming in the books of the bank as such the estate, trust or person represented by him or by complying with clause (*b*). If he does not adopt this course he will himself be personally liable in respect of such shares, as if he held them in his own name as absolute owner, notwithstanding that he describes himself as trustee. Muir v.City of Glasgow Bank, 1879, 4 App. Cas. 337; re Standard Mutual Fire Ins. Co., Musson's Case, 1910, 1 O.W.N. 974.

In order to escape liability under this section, the person in whose name the shares stand must be able to shew that there is an existing and not a purely fictitious *cestui que* trust or trust estate. But on the other hand the whole of the trust funds might conceivably be invested in the shares of one bank, and in such event, upon the failure of the bank, there would be no assets of the estate available for the double liability.

CHAPTER XI.

Annual and Special Statements.

Statement to be laid before annual meeting.

54. At every annual general meeting of the shareholders for the election of directors, the outgoing directors shall submit a clear and full statement of the affairs of the bank, exhibiting, on the one part, the liabilities of the bank, and, on the other part, the assets and resources thereof, and the statement shall be signed by the general manager or other principal officer of the bank next in authority in the management of the affairs of the bank at the time at which the statement is signed, and shall be signed on behalf of the board by the president or a vice-president or any other two directors, neither of whom shall be an officer of the bank.

Liabilities.

2. The statement shall, without restricting the generality of the requirement of the next preceding subsection, include and show, on the one part, the amount of the—

(*a*) capital stock paid in,

(*b*) rest or reserve fund,

(*c*) dividends declared and unpaid,

(*d*) balance of profits, as per profit and loss account referred to in subsection 4 of this section,

(*e*) notes of the bank in circulation,

(*f*) deposits not bearing interest,

(*g*) deposits bearing interest, including interest accrued to date of statement,

(*h*) balances due to other banks in Canada,

(*i*) balances due to banks and banking correspondents in the United Kingdom and foreign countries,

(*j*) bills payable,

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(*k*) acceptances under letters of credit,

(*l*) liabilities not included in the foregoing;

and the statement shall include and show, on the other part, the amount of—

Assets.

(*a*) current coin held by the bank,

(*b*) Dominion notes held,

(*c*) notes of other banks,

(*d*) cheques on other banks,

(*e*) balances due by other banks in Canada,

(*f*) balances due by banks and banking correspondents elsewhere than in Canada.

(*g*) Dominion and provincial government securities, not exceeding market value,

(*h*) Canadian municipal securities, and British, foreign and colonial public securities other than Canadian,

(*i*) railway and other bonds, debentures and stocks, not exceeding market value,

(*j*) call and short (not exceeding thirty days) loans in Canada on bonds, debentures and stocks,

(*k*) call and short (not exceeding thirty days) loans elsewhere than in Canada,

(*l*) other current loans and discounts in Canada (less rebate of interest),

(*m*) other current loans and discounts elsewhere than in Canada (less rebate of interest),

(*n*) liabilities of customers under letters of credit as per contra,

(*o*) real estate other than bank premises,

(*p*) overdue debts, estimated loss provided for,

(*q*) bank premises, at not more than cost, less amounts (if any) written off,

(*r*) deposit with the Minister for the purposes of the Circulation Fund,

(*s*) deposit in the central gold reserves,

(*t*) other assets not included in the foregoing.

Sec. 54. Other particulars.

3. Any other or further particulars than those called for by subsection 2 of this section, which, in the opinion of the directors, are necessary to a full and clear statement of the affairs of the bank shall also be included and shown in such statement.

Profit and loss account.

4. A profit and loss account for the financial year of the bank next preceding the date of the annual general meeting shall accompany the statement and be attached thereto, and shall be signed on behalf of the board by the same persons as are required by this section to sign the statement referred to.

Copies of statement to be sent to shareholders and Minister.

5. A copy of the statement and of the profit and loss account, together with a copy of the minutes of the annual general meeting, shall be sent within four weeks thereafter to each shareholder at his last known post office address, as shown by the books of the bank, and a copy of each of these shall be sent to the Minister. 53 V., c. 31, s. 45. Am.

This section was much amplified in 1913, the provision as to the signatures to the statement and that requiring a copy of the statement and of the profit and loss account to be sent to each shareholder being new, and the information required being more detailed. By sec. 56 the auditors' report must be attached to the annual statement. The requirements as to signature and the attaching of the auditors' report are enforced by penalty under sec. 140A.

As to the annual and other meetings of the shareholders, see chapter 6 on Internal Regulations.

See sec. 153 as to the liability for the making of a false statement.

Further statements as required by by-law.

55. The directors shall also submit to the shareholders such further statements of the affairs of the bank as the shareholders require by by-law passed at the annual general meeting, or at any special general meeting of the shareholders called for the purpose.

When to be submitted.

2. The statements so required shall be submitted at the annual general meeting, or at any special general meeting

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called for the purpose, or at such time and in such manner as is set forth in the by-law of the shareholders requiring such statements. 63-64 V., c. 26, s. 9. Am.

This section was added to the act in 1900 as a sub-section of section 54. It provides in effect that whenever the shareholders by by-law require the directors to give any particular class of information at the annual or any special general meeting, the same is to be furnished in accordance with such by-law.

Cf. sec. 113, conferring power on the minister of finance to call for special returns in addition to the regular monthly returns required by sec. 112.

See sec. 153, as to the liability for the making of a false statement and sec. 56 requiring the auditors' report to be attached.

Inspection of customer's account.

Prior to 1913, the word "bank" in the second line was followed by the words "other than statements with reference to the account of any person dealing with the bank," such account being guarded from inspection on the part of the shareholders by former sec. 56, repealed in 1913. As to the obligation of the bank to keep its customer's affairs secret, see now notes to sec. 95.

CHAPTER XII.

Shareholders' Audit.

Selection of persons competent to be auditors.

56. The general managers of the banks (or in the absence of a general manager of any bank the official designated by him, or in default of such designation the principal officer of the bank next in authority) shall, at a meeting duly called by the president of the Association for the purpose before the thirtieth day of September, nineteen hundred and thirteen, and thereafter before the thirtieth day of June in each year, select by ballot persons deemed by them to be competent (no one of whom shall be a body corporate) not less than forty in number, any one of whom shall, subject to the provisions hereinafter contained, be eligible to be appointed an auditor under the provisions of this Act.

List to be sent to Minister.

2. A list of persons so selected, together with their post office addresses and occupations, shall forthwith be delivered or sent by registered post to the Minister, and the Minister may, in the case of the first selection, as hereinbefore provided, within ten days after the receipt of the list, and thereafter each year within sixty days after the receipt thereof, disapprove, as to eligibility to be appointed auditor of a particular bank or banks, or wholly disapprove, of the selection of any person named in the list, and such person shall not, to the extent of such disapproval, be qualified to be appointed an auditor under this section.

Disapproval, if any.

3. The Minister shall communicate his disapproval, if any, to the Association.

Publication in *Canada Gazette*.

4. The Association shall, as soon as may be after the expiry of the time given to the Minister for disapproval, cause the list of persons qualified as hereinbefore provided,

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with their respective post offices addresses and occupations, to be published in two successive issues of *The Canada Gazette*, and any limitation as to eligibility for the auditorship of a particular bank or banks of the persons named in the list shall be stated in the advertisement.

Qualification of auditors.

5. No person shall be qualified to act as an auditor of a bank under this Act unless his name appears in the published list for the year, but this subsection shall not apply to an appointment of an auditor made by the Minister in pursuance of the provisions of this Act.

Appointment of auditors.

6. The shareholders shall, at each annual general meeting, appoint an auditor or auditors, from the last published list of persons qualified, to hold office until the next annual general meeting.

Supersession of auditors.

7. After the appointment of an auditor or auditors under the next preceding subsection of this section, shareholders, the aggregate of whose paid-up capital stock is equal to at least one-third of the paid-up capital stock of the bank, who in writing under their respective hands allege that they are dissatisfied with the appointment so made, may, in and by the same writing, make application to the Minister to have the person or persons so appointed superseded, and the Minister may, after such inquiry as he may deem necessary, select an auditor or auditors instead of the auditor or auditors appointed at the annual general meeting, and the auditors so appointed shall thereupon cease to be the auditors of the bank and the auditors so selected shall be the auditors of the bank until the next annual general meeting.

Appointment by Minister on application of shareholder.

8. If an appointment of auditors is not made at an annual general meeting, the Minister shall, on the written application of a shareholder, appoint an auditor or auditors of the bank to hold office until the next annual general meeting, and the Governor in Council shall fix the remuneration to be paid by the bank for the services of the auditor or auditors so appointed.

Sec. 56.
Officers disqualified.

9. A director or officer of the bank shall not be capable of being appointed auditor of the bank.

Notice required of intention to nominate auditor.

10. A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless written notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the bank at its chief office, not less than twenty-one days before the annual general meeting, and the bank shall deliver a copy of any such notice to the retiring auditor, if any, and shall give notice of the names of the persons eligible for nomination at the said meeting, and by whom such persons are respectively intended to be nominated, to every shareholder of the bank, by mailing the notice in the post office, post paid, to the last known post office address of the shareholder as shown by the records of the bank, at least fourteen days prior to the annual general meeting.

Retiring auditor notified.

Notice to shareholders.

Vacancies.

11. If any casual vacancy occurs in the office of auditor the surviving or continuing auditor or auditors, if any, may act, but if there is no surviving or continuing auditor, and such vacancy has occurred more than three months before the annual general meeting, the directors shall, as hereafter in this section provided, call a special general meeting of the shareholders for the purpose of filling the vacancy.

Special meeting.

Public notice by advertisement.

12. Before calling such special general meeting the directors shall, as soon as may be after the vacancy occurs, give public notice by advertisement in six consecutive issues of one or more daily newspapers published in the place where the chief office of the bank is situate, and if no daily newspaper is published at that place, then by advertisement in two consecutive issues of a newspaper published weekly in that place, of the vacancy in the office of auditor, and that the vacancy will be filled in the manner provided by this Act.

Sec. 56.
Notice of nomination to fill vacancy.

13. A person shall not be capable of being appointed auditor to fill such vacancy unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the bank at its chief office within ten days after the last publication of the notice called for by the next preceding subsection.

Special general meeting.

14. The directors shall, as soon as may be after the expiry of the ten days mentioned in the next preceding subsection, call a special general meeting of the shareholders for the purpose of filling the vacancy, and notice of such meeting, specifying the object, and stating the names of the persons eligible for nomination, and by whom such persons are respectively intended to be nominated, shall be given to every shareholder of the bank by mailing the notice in the post office, post paid, to the last known post office address of the shareholder as shown by the records of the bank, at least fourteen days prior to the date fixed for the meeting.

Notice to shareholders.

Appointment of auditor by Minister in case of vacancy.

15. If the vacancy contemplated by subsection 11 of this section is not filled in the manner provided, or if a casual vacancy occurs in the office of auditor less than three months before the annual general meeting, the Minister in the former case shall, and in the latter case may, on the written application of a shareholder, appoint an auditor or auditors to hold office until the next annual general meeting, and the Governor in Council shall fix the remuneration to be paid by the bank for the services of the auditor or auditors so appointed.

Remuneration.

16. The remuneration of auditors appointed by the shareholders shall be fixed by the shareholders at the time of their appointment, and in the event of such appointees being superseded and other auditors selected, as provided by subsection 7 of this section, the remuneration so fixed shall be divided between them according to the length of time they respectively are auditors of the bank.

Sec. 56. Powers and rights of auditors.

17. Every auditor of a bank shall have a right of access to the books and accounts, cash, securities, documents and vouchers of the bank, and shall be entitled to require from the directors and officers of the bank such information and explanation as may be necessary for the performance of the duties of the auditors.

Audit of branches of agencies.

18. If the bank has branches or agencies it shall be sufficient for all the purposes of this section if the auditors are allowed access to the returns, reports and statements and to such copies of extracts from the books and accounts of any such branch or agency as have been transmitted to the chief office, but the auditors may in their discretion visit any branch or agency for the purpose of examining the books and accounts, cash, securities, documents and vouchers at the branch or agency.

Duty of auditors to check cash and verify securities.

19. It shall be the duty of the auditors once at least during their term of office, in addition to such checking and verification as may be necessary for their report upon the statement submitted to the shareholders under section 54 of this Act, and at a different time, to check the cash and verify the securities of the bank at the chief office of the bank against the entries in regard thereto in the books of the bank, and, should they deem it advisable, to check and verify in the same manner the cash and securities at any branch or agency.

Report of auditors to shareholders.

20. The auditors shall make a report to the shareholders—

(*a*) on the accounts examined by them;

(*b*) on the checking of cash and verification of securities referred to in the next preceding subsection; and,

(*c*) on the statement of the affairs of the bank submitted by the directors to the shareholders under section 54 of this Act during their tenure of office;

and the report shall state—

Particulars.

(*a*) whether or not they have obtained all the information and explanation they have required;

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(*b*) whether, in their opinion, the transactions of the bank which have come under their notice have been within the powers of the bank;

(*c*) whether their checking of cash and verification of securities required by subsection 19 of this section agreed with the entries in the books of the bank with regard thereto; and,

(*d*) whether, in their opinion, the statement referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the bank's affairs according to the best of their information and the explanations given to them, and as shown by the books of the bank.

Attached to annual statement and read.

21. The auditors' report shall be attached to the statement submitted by the directors to the shareholders under section 54 of this Act, and the report shall be read before the shareholders in the annual general meeting.

Audit and report on further statements.

22. Any further statement of the affairs of the bank submitted by the directors to the shareholders under section 55 of this Act shall be subject to audit and report, and the report of the auditors thereon shall state—

Particulars.

(*a*) whether or not they have obtained the information and explanation they have required;

(*b*) whether, in their opinion, such further statement is properly drawn up so as to exhibit a true and correct view of the affairs of the bank, in so far as the by-law requires a statement thereof, according to the best of their information and the explanations given to them, and as shown by the books of the bank.

Attached to statement and read.

Copies.

23. The report shall be attached to the further statement referred to in the next preceding subsection, and shall be read before the shareholders at the meeting to which such further statement is submitted, and a copy of the statement and report shall be sent by the directors at and after the meeting to any shareholder applying therefor.

Secs. 56 and 56A were added in 1913 to meet the demand for some form of external inspection of banks. They were the chief subject matter of the debate on the revision of the Bank Act which took place in that year. See review of banking legislation in chapter 2, *supra*. Sec. 56.

By sec. 140A a fine is payable in the event of the issue, circulation or publication of the statement required by sec. 54 without having a copy of the auditors' report attached thereto.

As to the former sec. 56, repealed in 1913, see notes to sec. 55.

AUDITORS' REPORT TO MINISTER.

Examination by auditor appointed by Minister.

56A. The Minister may direct and require any auditor appointed under the next preceding section of this Act, or any other auditor whom he may select, to examine and inquire specially into any of the affairs or business of the bank, and the auditor so appointed or selected, as the case may be, shall, at the conclusion of his examination and inquiry, report fully to the Minister the results thereof.

Powers of auditor.

2. For the purposes of this section the auditor appointed or selected as aforesaid shall have all the rights and powers given to an auditor under the next preceding section.

Remuneration.

3. For the performance of the duties imposed by this section the auditor shall be paid as remuneration, out of the Consolidated Revenue Fund, such sum as the Governor in Council may direct.

To be deemed auditor of bank.

4. The person selected by the Minister under this section shall, for the purposes of section 153 of this Act, be deemed to be an auditor of the bank.

CHAPTER XIII.

Dividends and Cash Reserves.

Sec. 57 authorizes the payment of dividends out of profits, sec. 58 prohibits their payment so as to impair the paid-up capital, and sec. 59 forbids their being paid to an amount exceeding 8 per cent. per annum unless a certain rest or reserve fund is maintained. The provisions of secs. 58 and 59 expressly apply to bonuses as well as dividends. A bonus is merely an extra dividend or allowance to the shareholders, and the power to declare a bonus is covered by the power to declare a dividend given to the directors by sec. 57.

As to liability of directors see notes to sec. 39 and also chapter 6, *supra*.

DIVIDENDS.

Quarterly or half yearly dividends.

57. The directors of the bank shall, subject to the provisions of this Act, declare quarterly or half yearly dividends of so much of the profits of the bank as to the majority of them seems advisable.

Notice.

2. The directors shall give public notice, published for at least four weeks, of the payment of such dividends previously to the date fixed for such payment.

Where payable.

3. Dividends shall, on and after the date fixed for payment, be payable at the chief office of the bank, and at such of its branches, and at such other places, as the directors prescribe.

Books closed.

4. The directors may close the transfer books during a certain time, not exceeding fifteen days, before the payment of each dividend.

Liability of bank.

5. The liability of any bank under any law, custom or agreement to pay dividends heretofore or hereafter declared and payable on its capital stock shall continue notwithstanding any statute of limitations or any enactment or law relating to prescription. 53 V., c. 31, ss. 47, 90; R.S., c. 29, ss. 36 (4), 126. Am.

No prescription.

Public notice.—The mode of publication is prescribed by sec. 2, sub-secs. 2 and 3. Sec. 57.

Section 77 gives the bank a lien on unpaid dividends for any indebtedness or liability of the shareholder.

Sub-secs. 1, 2 and 4 formed one section in the act of 1890 and were divided into sub-sections in 1906. In 1913 sub-sec. 3 was transferred from sec. 36, and sub-sec. 5 from former sec. 126.

Statute of limitations not applicable.

Sub-sec. 5 and a similar provision as to interest now contained in sec. 92, sub-sec. 2, date from 1890. It was proposed in that year to oblige banks to pay to the government for the public use of Canada any dividends and depositors' balances remaining unclaimed for a certain number of years, but the proposed amendment was modified so as to require only annual returns of such dividends and balances (sec. 114). The provisions in question expressly exclude the operation of any statute of limitations or any enactment or law relating to prescription in such a case. Unclaimed dividends and depositors' balances being simply debts due by the bank, the provincial law of limitations would otherwise apply, although no bank would be inclined to set up the lapse of time as a ground for refusing to pay. As an incidental consequence of the act, a bank must preserve for an indefinite time the vouchers for payments made by it.

Meaning of "profits."

In re The Spanish Prospecting Co. Ltd., [1911] 1 Ch. 92, is noteworthy for the exposition by the Court of Appeal of the meaning of the "profits" of a company. The fundamental meaning of profits is the increase in value of the total assets of a business existing at the latter of two specific dates (usually separated by an interval of a year), allowance being made for capital introduced, or withdrawn, during such interval. Profits arising from the *business of a company* are not necessarily the same as the profits of that company, *e.g.* the profit from fixed assets, say from the sale of a draper's warehouse, is no part of the profits of the business. 27 L.Q.R. 143 (April, 1911). The word "profits" in sec. 57 seems to be used in the wider and primary sense.

Power to declare dividends.

Whether the whole or any part of the profits should be divided, or what portion should be divided and what portion retained, are entirely questions of internal management which the directors, subject to the control of the shareholders, must decide for themselves, and the court has no jurisdiction to control or review their decision. Burland v. Earle, [1902]

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A.C. at pp. 95-97;(a) but the power to declare dividends is, in the case of a bank, subject to the limitations imposed by secs. 58 and 59.

Rights of purchaser of shares.

In the absence of any express or implied term in the bargain to the contrary the purchaser of shares will be entitled to all benefits incidental to the ownership of the shares as from the time of sale. In Black v. Homersham, 1878, 4 Ex. D. 24, shares of a company had been sold by auction on the 1st of August, and a deposit had been paid. By the conditions of sale, the purchase was to be completed on the 29th of August, which accordingly was done, and the transfers were signed. On the 24th, a dividend was declared in respect of a period antecedent to the sale by auction. The conditions of sale containing no provision as to dividends, it was held that the dividend belonged to the purchaser.

If under this section the transfer books are closed for a period after the declaration but before the payment of the dividend, the person in whose name a share stands at the time of the closing of the books is entitled to the dividend. The usage of the stock exchange is in accordance with this rule. If a sale is made after the closing of the books but before the payment of the dividend the vendor is nevertheless entitled to the dividend.

After a transfer of shares the seller becomes a trustee for the buyer, and is not entitled, except by arrangement with the buyer, to receive any advantage in respect of them by reason of his being the registered holder. Hart on Banking, p. 966; Rooney v. Stanton, 1900, 17 T.L.R. 28.

Dividend not to impair capital.

58. No dividend or bonus shall be declared so as to impair the paid-up capital of the bank.

Directors liable for such dividend.

2. The directors who knowingly and wilfully concur in the declaration or making payable of any dividend or bonus, whereby the paid-up capital of the bank is impaired, shall be jointly and severally liable for the amount of such dividend or bonus, as a debt due by them to the bank. 53 V., c. 31, s. 48.

The original of this section was passed in 1871. By it no dividend or bonus is to be declared so as to impair the paid-up

(a) See chapter 6, *supra*, on Internal Management.

capital. If the capital is impaired then all the net profits are to be applied to make up the loss, and in addition to this calls are to be made upon unpaid subscribed stock to an amount equivalent to the loss (sec. 39). The directors knowingly and wilfully concurring in a declaration of dividends or bonus contrary to this section are jointly liable for the amount thereof as a debt due by them to the bank. Sec. 58.

It was the frequent practice formerly for a bank, the capital of which had been impaired, to apply to parliament for a reduction of its capital so as to enable it to continue payment of dividends. Now the shareholders may by sec. 35, reduce the capital under certain conditions and subject to the approval of the treasury board.

Where a banking company with a paid up capital of £500,000, sold part of its undertaking for £875,000, and after deducting the paid up capital and other incidental expenses, there remained a net balance of £205,000, and the directors proposed to treat this balance as profit, it was held that the £205,000 was profit on capital, and not part of the capital itself, and that the directors would be justified in carrying this sum to the profit and loss account, and after appropriating to the reserve fund so much as they thought proper, might distribute the remainder as dividends. Lubbock v. British Bank, [1892] 2 Ch. 198. Dividends not to be paid out of capital.

When it is said that dividends are not to be paid out of capital, the word "capital" means the money subscribed, or what is represented by that money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders. Verner v. General, etc., Trust, [1894] 2 Ch. 239, 265; cf. Bond v. Barrow, [1902] 1 Ch. 353.

The question, what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year as well as profit and loss, and a realized accretion to the estimated value of one item of the capital assets cannot be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken. Foster v. New Trinidad, [1901] 1 Ch. 208. The dictum in this case that dividends may be paid out of earned profits in proper cases, notwithstanding that there has been a depreciation of capital, is inapplicable to the case of a bank under the act. Cf. Stavert v. Lovitt, 1908, 42 N.S.R. 449, 487, 5 E.L.R. 33, 49.

Dividend limited unless there is a certain reserve.

59. No division of profits, either by way of dividends or bonus, or both combined, or in any other way, exceeding the rate of eight per cent per annum, shall be made by the bank, unless, after making the same, the bank has a rest or reserve fund, equal to at least thirty per cent of its paid-up capital after deducting all bad and doubtful debts. 53 V., c. 31, s. 49.

The original of this section was passed in 1871 and required a rest or reserve fund equal to 20% of the paid up capital. The object was to prevent a repetition of such extravagant distribution of assets under the guise of profits as had hastened the failure of some of the earlier banks, notably the Bank of Upper Canada. The percentage was increased to 30% in 1890.

Before any division of profits exceeding 8% is made, there must be a rest or reserve fund equal to 30% of the paid up capital after deducting all bad and doubtful debts. Directors are not liable for including in their accounts as good, debts which are in fact bad, when they are not affected with knowledge of the fact or with negligence in regard thereto. Dovey v. Cory, [1901] A.C. 477.

Meaning of "reserve."

The Bank Act uses the word "reserve" in two senses. The reference in sec. 59 ("rest or reserve" fund) is to what in the United States is called the "surplus." In sec. 60 the act mentions "cash reserves," meaning the amount of legal tender held by a bank. This is the ordinary use of the word "reserves" among bankers in Canada as well as in the United States. Johnson, The Canadian Banking System, p. 67.(*b*).

CASH RESERVES.

Cash reserves in Dominion notes.

60. The bank shall hold in Dominion notes not less than forty per cent of the cash reserves which it has in Canada.

Supply of Dominion notes.

2. The Minister shall make such arrangements as are necessary for ensuring the delivery of Dominion notes to any bank, in exchange for an equivalent amount of gold

(*b*) At pp. 130 ff., the same author criticizes the "rest fund fad," and expresses the opinion that the banks in Canada have made a mistake in increasing their rest funds in deference to sentiment, rather than their capital, and thus rendering necessary the excess note circulation authorized in 1908 (see notes to sec. 61.)

coin lawfully current at the several branch offices of the Department of Finance at which Dominion notes are redeemable, in Toronto, Montreal, Halifax, St. John, Winnipeg, Victoria, Charlottetown, Regina and Calgary respectively. Sec. 60.

3. Such notes shall be redeemable at any of the branch offices mentioned in subsection 2 hereof. 53 V., c. 31, s. 50 Am. Redemption.

The act of 1871 required the bank always to hold, as nearly as might be practicable, one-half of its cash reserves in dominion notes, the proportion held in such notes never to be less than one-third. In 1880 one-third was changed to 40 per cent. The present provision dates from 1890, except that in 1913, in addition to other verbal alterations, the section was amended by the addition of the words "which it has in Canada," in sub-sec. 1, and by the naming of Regina and Calgary as additional places for the supply of dominion notes. The corresponding section of the act of 1890 contained, as part of sub-sec. 1, a clause imposing upon the bank a penalty for contravention of the sub-section. This penalty clause is now sec. 134.

As to gold coin lawfully current, see chapter 28, *infra*.

As to dominion notes, see chapter 29, *infra*.

Requirement as to holding dominion notes.

There is no reason at present why the law should compel banks to hold dominion notes. As these are practically gold certificates, the only apparent effect of sec. 60, as banking operations enlarge, is to compel the government to increase its issue of notes and guard an increasing amount of gold coin. If the notes were mere credit instruments, their issue would be equivalent to an involuntary loan to the government and the requirement that not less than 40% of the bank's cash reserves shall be in dominion notes would ensure the permanence of the issue and save finance ministers from being worried over demands for their redemption. But since all notes in excess of $30,000,000 are secured by a deposit of gold, their issue in no way increases the funds of the government. The 40% requirement, as a matter of fact, is entirely unnecessary; the notes, being in large denominations, are preferred by banks to gold, and would be used by them even though the law did not

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require it. Johnson, The Canadian Banking System, pp. 67-8.(*c*)

No fixed reserve.

The question whether banks should be obliged to keep a fixed cash reserve was discussed in connection with the banking acts of 1871 and 1890, and was decided in the negative. See review of banking legislation in chapter 2, *supra*.

Discretion as to rest or reserve fund.

The court has no jurisdiction to say what is a fair or reasonable sum to retain undivided out of profits, or what reserve fund may properly be required, and it makes no difference whether the undivided balance is retained to the credit of profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the business. The power to form a reserve fund or retain a balance of undivided profits, involves the power to invest the moneys so retained. The investments may be on such securities as the directors may select(*d*), subject to the control o a general meeting, although different considerations might arise if it appeared that, under the guise of investing undivided profits or the reserve fund, the directors were in fact embarking the moneys of the company in speculative transactions, or otherwise abusing the powers vested in them for the management of its business. Burland v. Earle, [1902] A.C. at pp. 95-97.

(*c*) See pp. 67 ff. for a brief discussion of the bank reserves in Canada.

(*d*) Having regard, of course, in the case of a bank, to the special limitations on investments imposed by the act.

CHAPTER XIV.

The Issue and Circulation of Notes.

Distinctive features of note issue.

The distinctive features of the note issue of Canadian banks have been already mentioned.(a) Under the provisions added to sec. 61 in 1913 a bank may issue notes, in excess of the amount of its unimpaired paid-up capital to an amount not exceeding the amount of current gold coin and dominion notes held for the bank in the central gold reserves. With this exception the notes of a bank are not secured by the pledge or special deposit with the government of bonds or other securities, but are simply credit instruments based upon the general assets of the bank issuing them. In order, however, that they may be not less secure than notes issued against bonds deposited with the government, they are made a first charge upon the assets (sec. 131). To avoid discount for geographical reasons each bank is obliged to arrange for the redemption of its notes in the commercial centres throughout the Dominion (sec. 70). Finally, to perfect the security for redemption and to avoid discount after the suspension of a bank, either because of delay in payment of note issues by the liquidator or of doubt as to ultimate payment, each bank is obliged to keep in the hands of the government a deposit equal to 5% of its average circulation (sec. 64). Should any liquidator fail to redeem the notes of an insolvent bank, recourse may be had to the entire fund if necessary. As a matter of fact, liquidators almost invariably are able to redeem notes as they are presented, but in order that the notes of an insolvent bank may be held or accepted without loss pending redemption, these notes bear 5% interest from the date of suspension to the date of the liquidator's announcement that he is ready to redeem (sec. 65).

Bank note.

A bank note is the promissory note of a bank payable to bearer on demand. See sec. 176 of the Bills of Exchange Act. In Canada the issue of notes intended to circulate as

(a) See review of legislation of 1880, 1890, 1900, 1908 and 1913, in chapter 2, *supra*. For an account of the practical operation of the present system see Johnson, The Canadian Banking System, pp. 21 ff., 58 ff., 94 ff., 130.

money is the exclusive privilege of the Dominion government (see chapter 29, *infra*), and the banks chartered under the Bank Act (see sec. 136 of the Bank Act).

Bank note.

Bank notes are not legal tender (see chapter 28, *infra*), but must be received in payment or redeemed on demand by the issuing bank (see sec. 71).

A bank note contains a contract which is ambulatory by reason of the mere passing of it from hand to hand. It is also a thing which is in itself valued as money and currency. A material alteration will invalidate it—such an alteration including the alteration of the number which does not in fact affect the contract or promise to pay. Suffell v. Bank of England, 1882, 9 Q.B.D. 555, 567; 3 R.C. 640, 651. But, as a result of sec. 145 of the Bills of Exchange Act, the alteration of a bank note, if it is not apparent, does not invalidate the note in the hands of a holder in due course so as to prevent his suing on it according to its original tenor.

A stolen note or a note obtained by fraud, being like cash, must on presentation be paid by the bank to any holder who is not shewn to have come by it dishonestly. Miller v. Race, 1758, 1 Burr. 452; 3 R.C. 626. But the bank is entitled to delay payment of a stopped note for a reasonable time in order to make enquiries. Solomons v. Bank of England, 1791, 12 East 135 n., 3 R.C. 634, 12 R.R. 341. Cf. notes to sec. 56 of the Bills of Exchange Act, as to a holder in due course.

ISSUE AND CIRCULATION OF NOTES.

Issue of notes.

61. The bank may issue and re-issue its notes payable to bearer on demand and intended for circulation: Provided that—

Proviso.

(*a*) the bank shall not, during any period of suspension of payment of its liabilities, issue or re-issue any of its notes; and,

(*b*) if, after any such suspension, the bank resumes business without the consent in writing of the curator, hereinafter provided for, it shall not issue or re-issue any of its notes until authorized by the Treasury Board so to do.

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$5, or multiples.

2. No such note shall be for a sum less than five dollars, or for any sum which is not a multiple of five dollars.

Amount limited.

3. Except as hereinafter provided, the total amount of the notes of a bank in circulation at any time shall not exceed the aggregate of—

(*a*) the amount of the unimpaired paid-up capital of the bank; and,

(*b*) the amount of current gold coin and of Dominion notes held for the bank in the central gold reserves hereinafter mentioned.

Appointment of trustees.

4. The Association may, with the approval of the Minister, appoint three trustees and the Minister may appoint a fourth trustee, and the trustees so appointed shall receive such amounts in current gold coin and Dominion notes, or either, as any bank may desire from time to time to deposit with them. The amounts so deposited are herein referred to as "central gold reserves" and shall be held and dealt with in accordance with the provisions of this Act.

"Central gold reserves."

By-laws respecting.

5. The Association may make by-laws, rules and regulations under section 124 of this Act respecting the custody and management of the central gold reserves and the carrying out of the provisions of this Act relating to such reserves.

Excess of notes over paid up capital.

6. When and so long as the amount of the notes of a bank in circulation in excess of its unimpaired paid-up capital is less than the amount deposited by it in the central gold reserves, the excess of the amount so deposited shall belong to the bank as its property, and the bank may apply to the trustees for a return of the excess last mentioned, and upon receiving from the bank a statement signed by the chief accountant and by the general manager or other principal officer next in authority in the management of the affairs of the bank at the time the statement is signed, and otherwise in the form provided by said by-laws, rules or regulations, setting forth to the best of the information and belief of these officers the amount of the notes of the

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bank in circulation on the date of such statement, the trustees shall return the whole or part of the deposit of the bank, as the case may be. On and from the date when such statement is transmitted by registered post or delivered to the trustees, the amount applied for shall, for the purpose of the statement to be made by the trustees to the Minister under subsection 7 of this section, and for the purpose of calculating the total amount of the authorized note circulation of the bank, be deemed to have been withdrawn from the central gold reserves and shall not be taken into account in such statement nor included in such calculation; provided always that should the total amount of the notes of the bank in circulation be found, by reason of such withdrawal, to be in excess of the circulation of the bank authorized by this Act the bank shall not be deemed to be released or relieved from any of the penalties imposed by this Act for circulation of the notes of a bank in excess of the amount authorized by this Act.

Statement to be sent to Minister.

7. The trustees shall prepare and transmit by registered post or deliver to the Minister within the first twenty days of each month a statement to be signed by them showing the amount on each juridical day of the preceding month of the deposit of each bank in the central gold reserves and not withdrawn or deemed to be withdrawn under the provisions of this section.

Inspection and audit of gold coin and notes.

8. The Minister shall, from time to time, and not less frequently than twice in each year, cause an inspection and audit of the gold coin and Dominion notes held by the trustees to be made by officers of the Department of Finance.

Particulars of inspection.

9. It shall be the duty of such officers—

(*a*) to inspect and ascertain the amount of the gold coin and Dominion notes held by the trustees for the respective banks at the date of inspection; and

(*b*) to ascertain from the books and accounts, documents and vouchers of the trustees the amounts of gold coin

and Dominion notes held by the trustees for the respective banks at any preceding date named by the Minister. Sec. 61.

10. Every such officer shall have a right of access to the gold coin and Dominion notes held and to the books and accounts, documents and vouchers of the trustees, and shall be entitled to require from the trustees such information and explanation as may be necessary for the performance of his duties. Powers of inspecting officer.

11. Should the bank become insolvent within the meaning of this Act, the amount held for it in the central gold reserves shall be paid by the trustees to the liquidator or other person entitled by law to collect and receive the assets of the bank and shall be applied in redeeming the notes of such bank in circulation and for no other purpose, or in making the payment to the Minister required by section 116 of this Act. When bank insolvent.

12. When a vacancy in the office of a trustee appointed by the Association occurs, by resignation, death or other cause, the trustee to fill the vacancy shall, subject to the approval of the Minister, be appointed by the Association; and when a vacancy occurs in the office of a trustee appointed by the Minister, the trustee to fill the vacancy shall be appointed by the Minister. Vacancy in office of trustee.

13. The remuneration of trustees, including that of the trustee appointed by the Minister, and all charges and expenses incidental to the establishment and maintenance of the central gold reserves, shall be borne by the Association as the Association may, by by-law, rule or regulation, determine. Remuneration of Trustees.

14. During the usual season of moving the crops, that is to say, from and including the first day of September in any year to and including the last day of February next ensuing in addition to the said amount of notes hereinbefore authorized to be issued for circulation, the bank may issue Additional issue during moving of crops.

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its notes to an amount not exceeding fifteen per cent of the combined unimpaired paid-up capital and rest or reserve fund of the bank as stated in the statutory monthly return made by the bank to the Minister for the month immediately preceding that in which the additional amount is issued.

Notice of additional issue.

15. Whenever, under the authority of the next preceding subsection of this section, the issue of an additional amount of notes of the bank has been made, the general manager, or other principal officer next in authority in the management of the affairs of the bank for the time being, shall forthwith give notice thereof by registered letter addressed to the Minister and to the president of the Association.

Interest on additional issue.

16. While its notes in circulation are in excess of the aggregate referred to in subsection 3 of this section, the bank shall pay interest to the Minister at such rate, not exceeding five per cent per annum, as is fixed by the Governor in Council, on the amount of its notes in circulation in excess from day to day; and the interest so paid shall form part of the Consolidated Revenue Fund.

Return by bank.

17. A return shall be made and sent by the bank to the Minister showing the amount of its notes in circulation for each juridical day during any month in which any amount of notes in excess of the amount of the unimpaired paid-up capital of the bank has been issued or is outstanding.

Time and form of return.

18. Such return shall be made up and sent within the first thirty days after the last day of the month in which any such amount in excess has been issued or is outstanding, and shall be accompanied by declarations which shall be a part of the return, and the declarations shall be in the form set forth in Schedule E to this Act, and shall be signed by the chief accountant, and by the president or a vice-president or the director then acting as president, and by the general manager or other principal officer next in authority in the management of the affairs of the bank at the time at which the declaration is signed.

Signatures thereto.

Sec. 61. Bank of British North America.

19. Notwithstanding anything in this section hereinbefore contained, the total amount of such notes of the Bank of British North America in circulation at any time shall not exceed the aggregate of seventy-five per cent on the unimpaired paid-up capital of the Bank, and the amount of current gold coin and of Dominion notes held by the Bank in the central gold reserves; provided that the Bank may, in lieu of current gold coin and Dominion notes, deposit with the trustees securities of the Dominion of Canada to an amount (taken at a valuation not greater than market value) not exceeding twenty-five per cent. of the unimpaired paid-up capital of the Bank, and such deposit of securities to the extent thereof shall be deemed to be, for the purposes of this section, a deposit of current gold coin and Dominion notes held by the trustees in the central gold reserves and shall be available in the event of the suspension of payment by the Bank for the redemption of the notes of the Bank.

Issue of notes of Bank of B.N.A. during moving of crops.

20. The last mentioned Bank may, during the said season of moving of crops, in addition to the circulation of its notes hereinbefore in the next preceding subsection of this section authorized, issue its notes to an amount not exceeding ten per cent of the combined unimpaired paid-up capital and rest or reserve fund of the Bank as stated in the statutory return made by the Bank for the month immediately preceding that in which the said additional amount is issued, and the said additional amount shall be otherwise subject to all the provisions of this section respecting circulation in addition to or in excess of the unimpaired paid-up capital permitted to other banks. 53 V., c. 31, s. 51; 63-64 V., c. 26, s. 10; 7-8 E. VII., c. 7, s. 1; 2 G. V., c. 5, s. 4. Am.

Under the act of 1871 a bank was permitted to issue notes for $4 or more each, but in 1880 the present limitation to notes for $5 or a multiple thereof was introduced. By sec. 8. of the

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Currency Act (chapter 28, *infra*), no bank note payable in any other currency than the currency of Canada shall be issued or re-issued by any bank. This, however, is subject to sec. 62, which permits the issue of notes for one pound sterling or a multiple thereof in British possessions other than Canada.

The provisions authorizing the issue of notes in excess of the unimpaired paid-up capital during the usual season of moving crops were added in 1908 and amended in 1912. Interest is payable by a bank on this excess circulation. The provisions in regard to the central gold reserves were added in 1913, and the requirements as to the returns to be made to the minister were amended in the same year. The failure to make returns of excess circulation is the subject of penalty under sec. 147A.

Right to issue notes ceases.

The proviso to sub-sec. 1 was added in 1900, and is the subject of penalty by sec. 138. This proviso is designed to guard against the possible fraudulent action of the directors in issuing notes after the suspension of a bank, *e.g.*, to any depositors or any class of depositors, and thus giving such depositors a prior lien upon the assets of the bank. When a bank suspends payment its right to issue notes ceases until (1) it resumes business with the consent in writing of the curator, or (2) having resumed business without such consent, it is authorized by the treasury board to issue notes.

The authority from the treasury board is required as a safeguard against a bank's only nominally resuming business, and then issuing notes and thus defeating the purpose of the other provisions of the section. The danger of course is that notes once issued, even illegally, will be a charge on the redemption fund in case of the insolvency of the bank. The penalty imposed for contravention of the section is therefore made very heavy.

Limitation of note issue.

The limitation of the total amount of notes in circulation at any time to the amount of the unimpaired paid up capital has been in force since the passing of the act of 1871. This limitation as modified in 1908 and 1913 is enforceable by penalty under sec. 135.

As the creation of the bank circulation redemption fund in 1890 (see sec. 64), gave added security to bank notes, and facilitated their circulation in larger quantities, the penalties upon excess of circulation were at the same time increased to

the amounts mentioned in sec. 135, (being nearly ten times as large as the penalties provided by the previous acts). See 61.

The form of monthly return (schedule E) provides for a statement of the greatest amount of notes in circulation for each juridical day during the month to which the return relates, and by sec. 153 the making of any wilfully false or deceptive statement in any return, etc., is made an offence. Monthly return.

See also secs. 63 and 139 forbidding under heavy penalties the pledging, assignment or hypothecation by a bank of its notes, and sec. 140 imposing a penalty for issuing with intent to defraud, or accepting with knowledge of such intent, bank notes intended for circulation and not then in circulation.

The Bank of British North America is not subject to the double liability provision of sec. 125 (see sec. 6). That bank has therefore more limited powers of issuing notes than the other banks.

62. Notwithstanding the provisions of the last preceding section any bank may issue and re-issue, at any branch, agency or office of the bank in any British colony, or possession other than Canada, notes of the bank payable to bearer on demand and intended for circulation in such colony or possession, for the sum of one pound sterling each, or for any multiple of such sum, or for the sum of five dollars each, or for any multiple of such sum of the dollars in commercial use in such colony or possession, if the issue or re-issue of such notes is not forbidden by the laws of such colony or possession. Note issue at agency in British possessions other than Canada.

2. No issue of notes of the denomination of five such dollars, or any multiple thereof, shall be made in any such British colony or possession unless and until the Governor in Council, on the report of the Treasury Board, determines the rate, in Canadian currency, at which such notes shall be circulated as forming part of the total amount of the notes in circulation within the meaning of the last preceding section. Governor in Council to fix rate for circulation.

3. The notes so issued shall be redeemable at par at any branch, agency or office of the bank in the colony or posses- Redemption.

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sion in which they are issued for circulation, and not elsewhere, except as in this section specially provided; and the place of redemption of such notes shall be legibly printed or stamped across the face of each note so issued.

Redemption if agency is abolished.

4. In the event of the bank ceasing to have a branch or agency or office in any such British colony or possession, all notes issued in such colony or possession under the provisions of this section shall become payable and redeemable at the rate of four dollars and eighty-six and two-thirds cents per pound sterling, or, in the case of the issue of notes of the denomination of five dollars, or any multiple thereof, of the dollars in commerical use in such colony or possession, at the rate established by the Governor in Council as required by this section, in the same manner as notes of the bank issued in Canada are payable and redeemable.

Total amount of circulation.

5. The amount of the notes at any time in circulation in any such colony or possession, issued under the provisions of this section, shall, at the rate mentioned in the last preceding subsection, form part of the total amount of the notes in circulation within the meaning of the last preceding section, and, except as herein otherwise specially provided, shall be subject to all the provisions of this Act.

No re-issue in Canada.

6. No notes issued for circulation in a British colony or possession other than Canada shall be re-issued in Canada.

Section limited.

7. Nothing in this section shall be construed to authorize any bank—

(*a*) to increase the total amount of its notes in circulation in Canada and elsewhere beyond the limit fixed by the last preceding section; or,

(*b*) to issue or re-issue in Canada notes payable to bearer on demand, and intended for circulation, for a sum less than five dollars, or for a sum which is not a multiple of five dollars. 4 E. VII., c. 3, ss. 1, 2, 3 and 4.

This section does not apply to the Bank of British North

America (sec. 6). It dates from 1899, except for the insertion in 1913 of the word "branch" in sub-secs. 1, 3 and 4. Sec. 62.

The circulation of notes of a Canadian bank in any country other than Canada is of course subject to the law of that country. Cf. Grant, p. 448.

63. The bank shall not pledge, assign, or hypothecate its notes; and no advance or loan made on the security of the notes of a bank shall be recoverable from the bank or its assets. 53 V., c. 31, s. 25. Pledge of notes prohibited.

No advance or loan made on the security of the notes of a bank is recoverable from the bank or its assets, but if such notes came into the hands of some innocent holder he could enforce payment by the bank, and in the event of insolvency of the bank claim against its assets and against the bank circulation redemption fund. The issue or pledge of notes within the prohibition of this section might possibly thus amount to giving a creditor a "fraudulent, undue or unfair preference over other creditors," an offence which is rendered criminal by sec. 155.

The prohibition of this section is made the subject of penalties under sec. 139; cf. also sec. 140. Both the last mentioned sections with sec. 63 constituted one section in the act of 1890. These sections are aimed, not so much against a bank's issuing a larger amount of its notes than it is authorized to do (see sec. 135), as against the fraudulent issue of notes otherwise than for circulation in the legitimate course of business, by the indirect method of pledging, assigning or hypothecation, or by the issue or delivery with intent to defraud or the taking or accepting with knowledge of such intent of notes intended for circulation, but not actually in circulation.

THE BANK CIRCULATION REDEMPTION FUND.

The provisions of the important group of sections relating to the bank circulation redemption fund may be summarized as follows:—

A fund is formed by a contribution from every bank of an amount equal to 5% of the average amount of its notes in circulation. When a new bank is authorized to commence business the sum of $5,000 is retained for the purposes of the fund out of the money in the government's hands under sec. 13. Bank circulation redemption fund.

Sec. 63. Bank circulation redemption fund.

A re-adjustment of the fund is made as soon after the 30th of June of each year as is possible in such a way as to make the amount at the credit of each bank equal to 5% of the average note circulation of such bank during the twelve months next preceding the time of adjustment, or, in the case of a new bank, the average amount of its notes in circulation from the time it commenced business to the time of adjustment. The average is to be based upon the greatest amount of notes in circulation in each month as shewn by the monthly returns to the government. The fund bears interest at the rate of 3%.

The purpose of the fund is to secure the payment of notes of any insolvent bank. When a bank suspends payment, its notes issued or re-issued and intended for circulation and then in circulation bear interest at 5% from the day of suspension. The liquidator may stop such interest from running by the publication of a notice and the payment in pursuance thereof of notes as they are presented. In the event of failure on the part of the liquidator to arrange within two months of the suspension for the payment with interest of all notes as they are presented the minister of finance may arrange for payment out of the fund of all outstanding notes and interest, the notes ceasing to bear interest from the day named by the minister for payment. Recourse may be had to the fund without regard to the amount contributed thereto by the insolvent bank, but when an amount has been paid out of the fund in excess of what had been paid into the fund by the insolvent bank, including interest thereon, the solvent banks are obliged on demand to make good the excess in payments not exceeding in any one year 1% of the average amount of the notes of each bank in circulation. Such payments are to be returned to the contributing banks when the excess is repaid to the fund by the insolvent bank. The impairment of the fund will be only temporary, except in the unlikely event that the assets of an insolvent bank, including the double liability, are not sufficient ultimately to meet all its notes. Any portion of an insolvent bank's contribution and interest thereon which is not used to pay the notes of such bank, and the interest on such notes, may be paid to the liquidator when proper arrangements have been made to pay the notes still unpresented. Any amount paid out of the fund in excess of the amount to the credit of the insolvent bank bears interest at 3% payable out of the assets of such bank.

All the provisions of secs. 64 to 69, both inclusive, except in so far as they are the result of the amendments made in 1900 and 1913 and noted under the respective sections affected, were contained in sec. 54 of the act of 1890. The division into separate sections, and the subdivision of such sections, are the result of the revision of 1906. Sec. 63. Bank circulation redemption fund.

It is in theory possible that a bank with relatively small capital may issue notes largely in excess of its authorized amount, that the proceeds may be misappropriated, and that the other banks may in effect have to redeem its notes. Practically, however such a contingency is effectually guarded against by the system of frequent returns to the government, and by the heavy penalties imposed for making false returns and for excessive note issue, and also, by the action of the banks in promptly presenting for redemption notes of other banks. See also the supervisory powers of the Canadian Bankers' Association under sec. 124. The by-law passed by the association for the purpose of that section is printed at the end of this chapter.

64. The moneys heretofore paid to and now deposited with the Minister by the banks to which this Act applies, constituting the fund known as the Bank Circulation Redemption Fund, shall continue to be held by the Minister for the purposes and subject to the provisions in this section mentioned and contained. Bank circulation redemption fund continued.

2. The Minister shall, upon the issue of a certificate under this Act authorizing a bank to issue notes and commence the business of banking, retain, out of any moneys of such bank then in his possession, the sum of five thousand dollars, which sum shall be held for the purposes of this section, until the annual adjustment hereinafter provided for takes place in the year then next following. $5,000 to be retained upon issue of certificate.

3. The amount at the credit of such bank shall, at such next annual adjustment, be adjusted by payment to or by the bank of such sum as is necessary to make the amount of money at the credit of the bank equal to five per cent of Adjustment.

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Five per cent of average circulation.

the average amount of its notes in circulation from the time it commenced business to the time of such adjustment and such sums shall thereafter be adjusted annually as hereinafter provided.

Circulation fund.

4. The amounts heretofore and from time to time hereafter paid, to be retained and held by the Minister as by this section provided, shall continue to form and shall form the Circulation Fund.

Its purposes.

5. The Circulation Fund shall continue to be held as heretofore for the sole purpose of payment, in the event of the suspension by a bank of payment in specie or Dominion notes of any of its liabilities as they accrue, of the notes then issued or re-issued by such bank, intended for circulation, and then in circulation, and interest thereon.

Fund to bear interest.

6. The Circulation Fund shall bear interest at the rate of three per cent per annum.

Adjustment annually.

7. The Circulation Fund shall be adjusted, as soon as possible after the thirtieth day of June in each year, in such a way as to make the amount at the credit of each bank contributing thereto, unless herein otherwise specially provided, equal to five per cent of the average note circulation of such bank during the then last preceding twelve months.

Average note circulation, how determined.

8. The average note circulation of a bank during any period shall be determined from the average of the amount of its notes in circulation, as shown by the monthly returns for such period made by the bank to the Minister; and where, in any return the greatest amount of notes in circulation at any time during the month is given, such amount shall, for the purposes of this section, be taken to be the amount of the notes of the bank in circulation during the month to which such return relates: Provided, however,

Proviso.

that in determining the average note circulation of a bank under this subsection the daily average for each month of the amount of the bank's deposit (if any) in the central gold reserves which has not been withdrawn or deemed to

be withdrawn within the meaning of this Act shall be deducted from the greatest amount of the notes of the bank in circulation at any time during the month. Sec. 64.

9. The Minister shall, with respect to all notes paid out of the Circulation Fund, have the same rights as any other holder of notes of the bank: Provided that all such notes, and all interest thereon, so paid by the Minister, after the amount at the credit of such bank in the Circulation Fund, and all interest due or accruing due thereon, has been exhausted, shall bear interest, at the rate of three per cent per annum, from the time such notes and interest are paid until such notes and interest are repaid to the Minister by or out of the assets of such bank. 53 V., c. 31, s. 54; 63-64 V., c. 26, s. 13. Rights of Minister. Proviso.

See notes, *supra*, as to the bank circulation redemption fund.

The proviso to sub-sec. 9 was added in 1900, and the proviso to sub-sec. 8 was added in 1913.

65. In the event of the suspension by a bank of payment in specie or Dominion notes of any of its liabilities as they accrue, the notes of the bank, issued or re-issued, intended for circulation, and then in circulation, shall bear interest at the rate of five per cent per annum, from the day of the suspension to such day as is named by the directors, or by the liquidator, receiver, assignee, or other proper official, for the payment thereof. Notes of bank suspending payment to bear interest.

2. Notice of such day shall be given by advertisement in at least three consecutive issues of a daily newspaper, published in the place in which the chief office of the bank is situate, and if there is no daily newspaper published there, then by advertisement in two consecutive issues of any weekly newspaper published in that place. Notice of time for payment.

3. If any notes presented for payment on or after any day named for payment thereof are not paid, all notes then unpaid and in circulation shall continue to bear interest As to notes not then presented.

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until such further day as is named for payment thereof, of which day notice shall be given in manner hereinbefore provided.

Notes not redeemed to be paid out of circulation fund.

4. If the directors of the bank or the liquidator, receiver, assignee or other proper official fails to make arrangements within two months from the day of the suspension of payment by the bank, for the payment of all of its notes and interest thereon, the Minister may make arrangements for the payment out of the Circulation Fund, of the notes remaining unpaid and all interest thereon, and the Minister shall give such notice of the payment as he thinks expedient.

Interest to cease.

5. Notwithstanding anything herein, all interest upon such notes shall cease upon and from the date named by the Minister for such payment.

Government not liable.

6. Nothing herein shall be construed to impose any liability upon the Government of Canada, or upon the Minister, beyond the amount available from time to time out of the Circulation Fund. 53 V., c. 31, s. 54; 63-64 V., c. 26, s. 11. Am.

See notes preceding sec. 64, as to the bank circulation redemption fund.

The rate of interest was changed from 6% to 5% in 1900. Sub-sec. 2 was amplified in 1913.

By sec. 159 of the Winding-up Act (R.S.C. 1906, c. 144), publication in the *Canada Gazette* and in the official gazette of each province, and in two newspapers issued at or nearest to the place where the head office of a bank is situate, of notice of any proceedings of which, under that act, creditors should be notified, is sufficient notice to holders of bank notes in circulation. If the head office is situated in the province of Quebec, one of the newspapers is to be a newspaper published in English and the other a newspaper published in French.

Payment from fund.

66. All payments made from the Circulation Fund shall be without regard to the amount contributed thereto by the bank in respect of whose notes the payments are made.

Sec. 66. If fund exceeded.

2. If the payments from the Circulation Fund exceed the amount contributed to the Circulation Fund by the bank so suspending payment, and all interest due or accruing due to such bank thereon, the other banks to which this Act applies shall, on demand, make good to the Circulation Fund the amount of the excess, proportionately to the amount which each such other bank had or should have contributed to the Circulation Fund, at the time of the suspension of the bank in respect of whose notes the payments are made: Provided that—

Proviso.

(*a*) each of such other banks shall only be called upon to make good to the Circulation Fund its share of the excess in payments not exceeding, in any one year, one per cent. of the average amount of its notes in circulation;

(*b*) such circulation shall be ascertained in such manner as the Minister decides; and,

(*c*) the Minister's decision shall be final.

Amounts recovered, how distributed.

3. All amounts recovered and received by the Minister from the bank on account of which such payments were made shall, after the amount of such excess has been made good as aforesaid, be distributed among the banks contributing to make good such excess, proportionately to the amount contributed by each. 53 V., c. 31, s. 54; 63-64 V., c. 26, s. 12.

See notes preceding sec. 64, as to the bank circulation redemption fund.

The words "which each bank had or should have contributed to the fund at the time of the suspension of the bank in respect of whose notes the payments are made" were substituted in 1900 for the words "which each bank has at that time contributed to the fund" in sub-sec. 2.

Refund of deposit if bank is wound-up.

67. In the event of the winding-up of the business of a bank by reason of insolvency or otherwise, the Treasury Board may, on the application of the directors, or of the

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liquidator, receiver, assignee or other proper official, and on being satisfied that proper arrangements have been made for the payment of the notes of the bank and any interest thereon, pay over to the directors, liquidator, receiver, assignee or other proper official, the amount of the Circulation Fund at the credit of the bank, or such portion thereof as it thinks expedient. 53 V., c. 31, s. 54.

See notes preceding sec. 64 as to the bank circulation redemption fund.

Treasury Board rules.

68. The Treasury Board may make all such rules and regulations as it thinks expedient with reference to—

(*a*) the payment of any moneys out of the Circulation Fund, and the manner, place and time of such payment;

(*b*) the collection of all amounts due to the Circulation Fund;

(*c*) all accounts to be kept in connection therewith; and,

(*d*) generally the management of the Circulation Fund and all matters relating thereto. 53 V., c. 31, s. 54.

No rules and regulations have been made by the treasury board under this section.

Minister may enforce payments.

69. The Minister may, in his official name, by action in the Exchequer Court of Canada, enforce payment, with costs of action, of any sum due and payable by any bank which should form part of the Circulation Fund. 53 V., c. 31, s. 54.

Arrangements to be made for circulation at par, and redemption.

70. The bank shall make such arrangements as are necessary to ensure the circulation at par, in any and every part of Canada, of all notes issued or re-issued by it and intended for circulation; and towards this purpose the bank shall establish agencies for the redemption and payment of its notes at Toronto, Montreal, Halifax, St. John, Winnipeg, Victoria, Charlottetown, Regina and Calgary, and at such

other places as are, from time to time, designated by the Treasury Board. 53 V., c. 31, s. 55. Am. Sec. 70.

This section was enacted in 1890 to meet the inconvenience resulting from the fact that bank notes circulating at a distance from the office where they were payable were frequently subject to a discount. Regina and Calgary were added in 1913 to the specified cities.

The arrangements made by the banks under this section and the establishment of the bank circulation redemption fund under secs. 64 *et seq.*, have resulted in maintaining the bank notes of all banks at par everywhere in Canada. Canadian bank notes now circulate as freely as if they were secured by a deposit of bonds.

A bank must ensure the circulation of its notes at par, and, if necessary for this purpose, it must establish agencies for the redemption and payment of its notes at places other than those mentioned in the section or those which may be named by the treasury board. If, however, a bank neglected to establish an agency for redemption and payment of its notes at one of the places mentioned, the absence of such agency would probably not constitute dishonour of its notes at such place. Bank notes to circulate at par.

No places have been designated by the treasury board under this section.

71. The bank shall always receive in payment its own notes at par at any of its branches, agencies or offices, and whether they are made payable there or not. Bank must take its own notes.

This section was amended in 1913 by the insertion of the words "branches, agencies or" before the word "offices," and by the omission of sub-sec. 2, which provided: "The chief place of business of the bank shall always be one of the places at which its notes are made payable."

The obligation of this section is confined to *receiving in payment*. The section does not oblige a bank to redeem its notes at any place except the office at which such notes are payable, but see sec. 70, which requires arrangements to be made for redemption of bank notes at various principal cities in order to ensure their circulation at par throughout Canada. Obligation confined to receiving in payment.

As a matter of practice a bank always accepts at par the

Sec. 71.

notes of other Canadian banks either in payment of a debt due to it or as a deposit by its customer. Any other practice would tend to disturb the confidence of the public in bank notes, a confidence which is largely a result of the arrangements made under sec. 70 and the establishment of the redemption fund under sec. 64. As a matter of legal right a bank is not obliged to accept in payment anything but legal tender (see chapter 28, *infra*), or its own notes. There would be no legal objection to a bank's refusing to accept the notes of another bank in payment or to its charging a discount upon such notes as a condition of taking them or upon notes of another bank deposited by a customer.

Payment in Dominion notes.

72. The bank, when making any payment shall on the request of the person to whom the payment is to be made, pay the same, or such part thereof, not exceeding one hundred dollars, as such person requests, in Dominion notes for one, two, or five dollars each, at the option of such person.

No torn or defaced notes.

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

Disinfection of notes.

3. The Treasury Board may make regulations providing for the disinfection and sterilization by the several banks of all bank notes and Dominion notes which have come into the bank's possession before a re-issue thereof to the public; and the bank, its officers, clerks and servants, shall carry out and execute the regulations made under the authority of this section. 53 V., c. 31, s. 57. Am.

Sub-sec. 1 was amended in 1913 by the substitution of the word "five" for the word "four." Strictly read, the section seems to authorize a person to whom a payment is to be made to require payment of the whole amount in dominion notes of the denominations specified, although the amount exceeds $100, but the intention probably is that the amount which may be required to be so paid shall be limited to $100 in any event. The payee is of course entitled to require payment in legal tender (see chapter 28, *infra*), and subject to this section the bank may pay in any form of legal tender.

Payee entitled to legal tender.

The words "unclean or" in sub-sec. 2 were added in 1913. In other respects the sub-section dates from 1890, when it was added in the Senate. Sec. 72.

Sub-sec. 3 was added in 1913. When the bill passed the House of Commons, sub-sec. 3 had "shall" in the first line in the place of "may," but the sub-section was changed to its present permissive form in the Senate.

Bills or notes binding though not sealed.

73. The bills or notes of the bank signed by the president, a vice-president, the general manager or other officer appointed by the directors of the bank to sign the same, promising the payment of money to any person, or to his order, or to the bearer, though not under the corporate seal of the bank, shall be binding and obligatory on the bank, in like manner and with the like force and effect as they would be upon any private person, if issued by him in his private or natural capacity, and shall be assignable in like manner as if they were so issued by a private person in his natural capacity.

Directors may depute officer to sign.

2. The directors of the bank may, from time to time, authorize or depute the general manager, a manager or other officer of the bank, or any director other than the president or a vice-president, or any manager of any branch or office of discount and deposit of the bank, to sign the notes of the bank intended for circulation. 53 V., c. 31, s. 58. Am.

This section in substance dates from 1871. Prior to 1913 it contained as sub-sec. 1 the following provision: "The bonds, obligations and bills, obligatory or of credit, of the bank under its corporate seal, signed by the president or vice-president, and countersigned by a cashier or assistant cashier, which are made payable to any person, shall be assignable by endorsement thereon." Some verbal alterations in the remaining sections were also made in 1913 in the enumeration of the officers who may be appointed or deputed to sign documents.

Bills may be signed by machinery.

74. All bank notes and bills whereon the name of any person entrusted or authorized to sign such notes or bills on behalf of the bank is impressed by machinery provided for that purpose, by or with the authority of the bank, shall be good and valid to all intents and purposes, as if such notes and bills had been subscribed in the proper handwriting of the person entrusted or authorized by the bank to sign the same respectively, and shall be bank notes and bills within the meaning of all laws and statutes whatever, and may be described as bank notes or bills in all indictments and civil or criminal proceedings whatever: Provided that if all such names are impressed by machinery, at least one such name to each note or bill, together with a distinguishing device and number, shall be impressed or engraved under the authority of the bank after the notes are received by the bank from the engraver and printer, and shall not be otherwise impressed or engraved. 53 V., c. 31., s. 29. Am.

The proviso was enacted in 1913 in place of one in the following words: "Provided that at least one signature to each note or bill must be in the actual handwriting of a person authorized to sign such note or bill."

Counterfeit or fraudulent notes to be stamped.

75. Every officer charged with the receipt or disbursement of public moneys, and every officer of any bank, and every person acting as or employed by any banker, shall stamp or write in plain letters, upon every counterfeit or fraudulent note issued in the form of a Dominion or bank note, and intended to circulate as money, which is presented to him at his place of business, the word "Counterfeit," "Altered" or "Worthless."

If wrongfully stamped.

2. If such officer or person wrongfully stamps any genuine note he shall, upon presentation, redeem it at the face value thereof. 53 V., c. 31, s. 62.

SUPERVISION OF THE BANK NOTE CIRCULATION BY THE CANADIAN BANKERS' ASSOCIATION. Sec. 75.

Under sec. 119, in the case of a bank which has suspended payment, the association may, through a curator appointed by it, exercise supervision of all necessary arrangements for the payment of the notes of the bank issued for circulation and, at the time of the appointment of the curator, outstanding and in circulation. The association may also exercise supervision, in respect of the matters mentioned in sec. 124, over the notes of all banks doing business under the act. In pursuance of the power conferred by this section, the following by-law was passed at a general meeting of the association held in Toronto on the 15th of November, 1900, and amended at a general meeting held in Montreal on the 15th of April, 1901, and approved by the treasury board on the 10th of May, 1901.

By-law as to note circulation.

CIRCULATION.

By-law No. 13.

(*a*) A monthly return shall be made to the president of the Canadian Bankers' Association by all banks doing business in Canada, whether members of the Canadian Bankers' Association or not, in the form hereinafter set forth; said return shall be made up and sent in within the first fifteen days of each month, and shall exhibit the condition of the bank's note circulation on the last juridical day of the month next preceding; and every such monthly return shall be signed by the chief accountant or acting chief accountant and by the president or vice-president, or by any director of the bank, and by the general manager, cashier, or other chief executive officer of the bank at its chief place of business. Every such monthly return which shews therein notes destroyed during such month shall be accompanied by a certificate or certificates in the form hereinafter set forth, covering all the notes mentioned as destroyed in such return, signed by at least three of the directors of the bank, and by the chief executive officer or some officer of the bank acting for him, stating that the notes mentioned in such certificate or certificates have been destroyed in the presence of and under the supervision of the persons respectively signing such certificate or certificates respectively.

Sec. 75. By-law as to note circulation.

FORM OF MONTHLY RETURN OF CIRCULATION ABOVE MENTIONED.

CIRCULATION STATEMENT OF THE

(Here state name of bank)

for the month of.....190 .

Credit balance of bank note accounts on last day of preceding month (inclusive of unsigned notes) .....$

Add notes received from printers during month, viz:

From.....$

" .....$ $

Less notes destroyed during month (as per certificate herewith).....$

Balance of bank note accounts on last day of month.....$

Less notes on hand, viz:

Signed.....$

Unsigned.....$ $

Notes in circulation on last day of month.....$

.....

Chief Accountant.

We declare that the foregoing return, to the best of our knowledge and belief, is correct, and shews truly and clearly the state and position of the note circulation of said bank during and on the last day of the period covered by such returns.....this.....day of.....19..

.....

President

.....

General Manager.

FORM OF CERTIFICATE OF DESTRUCTION OF NOTES ABOVE MENTIONED.

Sec. 75. By-law as to note circulation.

Certificate of Destruction of Notes of the (*here mention name of bank*) accompanying monthly Circulation Statement for month of.....A.D. 190..

We the undersigned, hereby certify that we have examined bank notes of this bank amounting to $.....consisting of the following, viz: (here set out the denominations) and have burned and destroyed the same, and that the said notes so burned and destroyed by us are not included in any other certificate of destruction of notes signed by us or any of us, or to the best of our knowledge and belief, by any other person to accompany the present or any monthly circulation statement made or to be made to the president of the Canadian Bankers' Association.

.....this.....day of.....19..

.....
.....
.....
Directors of said bank.

.....
General Manager.

(*b*) For all purposes of this by-law, the chief place of business of the Bank of British North America shall be the chief office of the said bank at the city of Montreal, in the province of Quebec.

And in the case of the said Bank of British North America the said monthly circulation return shall be signed by the general manager's clerk, or acting general manager's clerk, and by the general manager or the acting general manager of the said bank; and the said certificate of destruction of notes shall be signed by the general manager or acting general manager, the inspector or assistant inspector, and the local manager of the Montreal branch or the acting local manager of the Montreal branch of the said bank, instead of by the persons respectively hereinbefore directed to sign the said returns respectively.

(*c*) Every bank which neglects to make up and send in as aforesaid any monthly return required by this by-law within the time by this by-law limited, shall incur a penalty of fifty

Sec. 75. By-law as to note circulation.

dollars for each and every day after the expiration of such time during which the bank neglects so to make up and send in such returns.

(*d*) The executive council of the association shall have power, by resolution, at any time to direct that an inspection shall be made of the circulation accounts of any bank by an officer or officers to be named in such resolution, and such inspection shall be made accordingly.

(*e*) Some person or persons appointed from time to time by the executive council of the association shall during the year 1901 (and during every year thereafter) make inspection of the circulation accounts of every bank doing business in Canada, whether members of the association or not, and shall report thereon to the council; and upon every such inspection all and every the officers of the bank whose circulation account shall be so inspected, shall give and afford to the officer or officers making such inspection, all such information and assistance as he or they may require to enable him or them fully to inspect said circulation account, and to report to the council upon the same, and upon the means adopted for the destruction of the notes.

(*f*) The amount of all penalties imposed upon a bank for any violation of this by-law shall be recoverable and enforceable with costs, at the suit of the Canadian Bankers' Association and such penalties shall belong to the Canadian Bankers' Association for the uses of the association.

(*g*) The president of the Canadian Bankers' Association shall each month have printed and forwarded to the chief executive officer of every bank in Canada subject to the Bank Act, whether a member of the association or not, a statement of the circulation returns of all the banks in Canada for the last preceding month, as received by him.

(*h*) In this by-law it is declared for greater certainty that the Canadian Bankers' Association herein mentioned and referred to is the association incorporated by special act of parliament of Canada, 63 and 64 V., c. 93. (*b*)

(*b*) The act of incorporation is set out in full in chapter 23, *infra*.

CHAPTER XV.

Business and Powers of a Bank.

A bank chartered under the Bank Act, in addition to being a corporation with certain specified powers and subject to certain specified restrictions, is by sec. 76 of that act authorized to "engage in and carry on such business generally as appertains to the business of banking."

Nature of the business of banking.

The nature of the business of banking is part of the law merchant, and will be judicially noticed by the courts. Per Lord Campbell in Bank of Australasia v. Breillat, 1847, 6 Moo. P.C. 152; see chapter 1, *supra*. The specific provisions of the Bank Act must be considered as applied to a corporation which has general banking powers.

The heart of the law of banking is that a bank has such powers as are requisite for the safe and convenient attainment of the purposes of its incorporation, the chief of these being to provide a place of safety in which the public may keep money and other valuables, and to lend its own money, and that of others deposited with it (unless specially deposited) for a profit, and to act as agent in the remission and collection of money. If it is by its organic law, a bank of issue, it has one more fundamental purpose, namely, to provide the public with a convenient currency in the shape of promissory notes intended to circulate as money. Morse on Banks and Banking, 4 ed., 1903, sec. 46 A.

In regard to matters not clear upon statute or binding decisions, it is a proper method of ascertaining what is legitimately within the scope of the business of banking, and what are the powers of corporations formed for the purpose of carrying on that business, to refer to the history of banking and the definitions of lexicographers (*ibid.*).

A "banker" is defined in Hart(*a*) as "one who in the ordinary course of his business receives money, which he repays by honouring the cheques of the persons from or on whose account he receives it," and a "customer" as "one who has

(*a*) Banking, 2 ed. 1906, p. 1.

Nature of the business of banking.

an account with a banker"(*b*). See also Morse, chapter 1, where the definition of a bank is elaborately discussed. The following analysis of the business and powers of a bank is based upon that of Hart.

1. *It follows from the definition of a banker which is given above that normally a bank is the debtor of its customer and bound to discharge its indebtedness by honouring its customer's cheques.*

A bank may be considered as primarily and naturally the depositary of money and the drawee of cheques. The balance standing to the credit of a customer represents money he has lent to the bank. The property in cash deposited, and in the proceeds of drafts and cheques collected for the customer, passes to the bank and forms part of its trading capital. Its liability to the customer is purely a personal obligation to honour cheques drawn upon it by him.

Bank of deposit.

A bank under the Bank Act is a bank of deposit. Secs. 92 and 95 recognize the power of the bank to receive and repay deposits, and permit the bank to a certain extent to deal in this respect with persons incapable by law of entering into ordinary contracts. The rights and liabilities of the bank in regard to deposits made with it and cheques drawn upon it will be considered in the notes to sec. 95 and in Part III. of the Bills of Exchange Act entitled "Cheques on a Bank."

2. *A bank usually undertakes expressly or impliedly to honour bills of exchange accepted by its customer, and made payable at the bank, to the extent of its customer's balance, or to an agreed amount.*

A bank may without specific instructions pay a bill accepted by its customer payable at the bank. Kymer v. Laurie, 1849, 18 L.J.Q.B. 218. The making of the acceptance payable at the bank is tantamount to an order to pay the bill for the account of the acceptor. Robarts v. Tucker, 1851, 16 Q.B. 560, 578, 3 R.C. 680, 694; Negotiable Instruments Law, sec. 87, to the same effect(*c*).

In Hubbert v. Home Bank, 1910, 20 O.L.R. 651, a note was payable at a bank in which the customer had a savings

(*b*) *Ibid.*, pp. 2, 512-515, citing Great Western Ry. Co. v. London and County Banking Co., [1901] A.C. 414, where the term "customer" is discussed.

(*c*) In the province of Quebec, it is said, special authority from the customer is required.

account subject to special conditions as to withdrawal by receipt or cheque and as to notice of withdrawal. It was said at pp. 653-4 that the bank had the legal right without special instructions to charge up the amount of the note, although as a matter of banking practice it ought not to have done so, as the requirements as to notice of withdrawal might well be invoked by the bank to guard against possible fraud or forgery or lest for any reason the customer might desire to contest the third party's claim. It is submitted, however, that as a matter of law there ought in the case of such an account to be no implied authority on the bank's part to pay and charge up an acceptance or note without instructions and in the absence of special circumstances from which such authority might be inferred, and that a more reasonable rule is stated in Grissom v. National Bank, 1889, 87 Tenn. 350, and cases there cited.

Bank may pay acceptances payable at the bank.

Apart from express agreement or circumstances from which an implied agreement might be inferred other than the mere relation of banker and customer, a bank is under no obligation to its customer to pay bills accepted by the latter payable at the bank. Robarts v. Tucker, *supra;* Bank of England v. Vagliano, [1891] A.C. 107, at p. 157.

No obligation to pay acceptances.

As a rule a bank is under no obligation to the holder (see notes to sec. 127 of the Bills of Exchange Act), but if money is paid in specifically for the payment of a particular bill and is accepted by the bank for that purpose, the bank is liable to the holder. Prince v. Oriental Bank, 1878, 3 App. Cas. 325, at p. 334.

3. *A bank invariably acts as the collecting agent of its customer.*

The current account involves the collection of cheques and other documents delivered to the bank by its customer in order that their proceeds may be credited to him. Incidentally the discounting of bills, etc., involves their collection. Secs. 93 and 94 contain specific provisions for certain collection and agency charges in addition to the discount where such bills, etc., are payable at an office other than the office of discount.

A bank undertaking the duty of collecting mercantile paper is bound as agent to use due diligence in performing the duties of collection (Bank of Van Diemen's Land v. Bank of Victoria, 1871, L.R. 3 P.C. 526), and is liable to its principal for negli-

Bank as collecting agent.

gence in the performance of its duty, as for instance for failure to use due diligence in presenting a bill for acceptance, where acceptance is necessary (Bank of Van Diemen's Land v. Bank of Victoria, *supra;* Bills of Exchange Act, secs. 75, 76 and 77), and for payment (*Ibid.*, secs. 85 *et seq.;* Browne v. Commercial Bank, 1853, 10 U.C.R. 129; as to presentment of cheque for payment, see notes to sec. 166 of the Bills of Exchange Act).

A bank which engages to collect an unaccepted bill may leave it for two days with the drawee, in order that he may decide during that time whether he will accept. The duty of the bank is to obtain acceptance if possible, but not to press unduly for acceptance in such a way as to lead to refusal, provided the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the principal's right against the drawer. Bank of Van Diemen's Land v. Bank of Victoria, *supra;* Bills of Exchange Act, sec. 80.

A bank undertaking to collect an accepted bill must not part with the bill or permit it to be tampered with until it is paid, or if a conditional payment is made, until the condition has been accepted by the principal. Bank of Scotland v. Dominion Bank, [1891] A.C. 592.

As to notice of dishonour when a bill is dishonoured in the hands of an agent, see Bills of Exchange Act, sec. 100.

The collecting of a bill is an act of conversion for which a bank is liable to the true owner if it turns out that the person for whom the bank collected the instrument had no title to it. See notes immediately preceding sec. 51 of the Bills of Exchange Act.

A bank to which a promissory note is endorsed for collection becomes for that purpose the agent of the endorser, to whom it is bound to account for the amount collected. Perreault v. Merchants Bank, 1905, Q.R. 27 S.C. 149. The bank is the holder, but subject to any defence which might be set up against the principal. C., who resides abroad, transmits a bill for collection to his agent in England. C. has obtained this bill by fraud, but his agent does not know it. At the time the agent receives the bill, C. is indebted to him on the balance of account. The agent is not a holder in due course and cannot recover on the bill. *Aliter*, if the bill had been transmitted to the agent in payment of his debt. De la Chaumette v. Bank of England, 1829, 9 B. & C. 208, as explained by Currie v. Misa, 1875, L.R. 10 Ex. at p. 164; and McLean v.

Clydesdale Bank, 1883, 9 App. Cas. at p. 114. As to the rights and powers of the holder of a bill, see notes to sec. 74 of the Bills of Exchange Act.

Bank as collecting agent.

If a cheque is deposited for collection and presented with due diligence to the drawee bank and dishonoured, the mere fact that the collecting bank has credited the payee with the amount of the cheque is not evidence that the cheque was intended to be discounted, and the entry in the books of the collecting bank may be reversed and the payee of the cheque charged with the amount. Reg. v. Bank of Montreal, 1886, 1 Can. Ex. C.R. 154. A bank accepting the deposit of a certified cheque and crediting the depositor with the amount accepts it for the purpose of cashing it as the depositor's agent, and cannot, in the absence of express agreement to that effect, be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank. Gaden v. Newfoundland Savings Bank, [1899] A.C. 281. But it has been held in Capital and Counties Bank v. Gordon, [1903] A.C. 240, that where a bank credits a customer with the amount of a crossed cheque deposited by him, and allows him to draw against the amount so credited before the cheque is cleared, the bank becomes a holder for value, and therefore, when the cheque is paid, the bank does not receive payment merely as agent for collection and "for its customer" within the protection of sec. 175 of the Bills of Exchange Act. See notes to that section.

A collecting bank in accordance with the ordinary rule governing agents, can receive payment of a draft sent to it for collection in money only, and cannot bind its principal by setting off an amount due to it by the acceptor against the amount of the draft. Donogh v. Gillespie, 1894, 21 O.A.R. 292.

As to the employment of an agent by the collecting bank, see notes to sec. 76 of the Bank Act, *infra*.

As to the collection of undue bills, see Grant, 6 ed., pp. 209 ff.; Hart, pp. 478 ff.

As to the position of a collecting banker, see also Grant, pp. 45 ff.; Halsbury vol. 1, pp. 590 ff.

4. *Incidentally the business of a bank as a dealer in money, etc., involves the issue in exchange for money of instruments whereby the bank in effect acknowledges its obligation to pay money to or honour drafts of the holder or other person entitled under the terms thereof, as the case may be.*

Letters of credit.

A bank which sells a draft payable at another place is, in one view of the transaction, an agent for the transmission of money, but the transaction may also be regarded as a dealing in money and instruments of credit. Sec. 76 authorizes the bank to carry on business as a dealer in gold and silver coin and bullion, bills of exchange, etc.

As to letters of credit, see notes at the end of chapter 30, *infra*.

5. *A bank may serve the purpose of providing the public with a paper currency in the shape of its promissory notes.*

Bank of issue.

A bank under the Bank Act is a bank of issue. By sec. 61 it is authorized to issue and re-issue notes payable to bearer on demand and intended for circulation. See chapter 14, *supra*.

6. *A bank is also a lender of money.*

The profitable conduct of the business of banking necessarily involves the lending of money by way of allowing overdrafts on current accounts, making loans in the form of advances on discounting bills and notes, etc. Lending is naturally accompanied by the acquisition of various kinds of security.

Bank as lender of money.

In so far as the bank lends to a customer the normal relation of the parties is inverted.

A bank chartered under the Bank Act is a bank of discount. To ascertain its lending powers reference must be had particularly to sec. 76, which specifies various kinds of property upon the security of which a bank may lend money, and other kinds of property upon the security of which it may not do so, except as expressly authorized in other parts of the act. See notes to that section where reference is made to all the sections relating to the lending powers of a bank.

The funds in the hands of a bank available for lending, or its trading capital, are made up of

1. The invested capital, that is the cash paid up on subscribed shares.

2. The borrowed capital, derived from

Bank as lender of money.

(*a*) Notes in circulation—the amount of which must not exceed the invested capital (except during the usual season of moving the crops) unless the excess is secured by an equivalent deposit in the central gold reserves.

(*b*) Deposits of customers—the amount of which may be and usually is many times the invested capital.

(*c*) Money received for drafts, letters of credit, etc., which must be repaid in another place and at a future time.

The trading capital, borrowed from one group of persons in one way or another, is loaned to another group of persons in various ways. The difference between the amount the bank earns on its capital, its exchange and collection charges, charges for keeping accounts and for acting as depositary of valuables, etc., on the one hand, and on the other hand, the amount it pays to those from whom it borrows, expenses of the bank, deductions for bad debts, etc., form its profits. Out of these profits it may pay dividends and bonuses and create a rest or reserve fund for contingencies.

7. *A bank is sometimes the bailee of title deeds and other valuables in small compass entrusted to it by its customer for safe custody.*

Bank as bailee of property.

The bank is a mere bailee of property deposited for safe keeping by the customer, and if it receives no special remuneration for allowing the deposit, it is not liable for loss by the theft of a bank servant, provided it took such care as a man would take of his own property. Giblin v. McMullen, 1869, L.R. 2 P.C. 318; 16 E.R. 578, and cases noted at end of latter report; 3 R.C. 613. The doctrine of Giblin v. McMullen is probably not applicable to cases of bailment arising under the Civil Code of Lower Canada.(*d*) But the law of Quebec, like that of the other provinces, recognizes the distinction between a bailment for reward and a gratuitous bailment, the latter being more properly called a deposit.

If a commission is paid for the safe-keeping, a higher degree of care is required than in the case of a gratuitous bailment. (In re United Service Co., Johnston's Claim, 1870, L.R. 6 Ch. 212.) The last mentioned case and Giblin v. McMullen are

(*d*) See an article by E. Fabre Surveyer in II J. C.B.A. 346, 4 Can. L.R. 39, where the whole subject of the liability of a depositary or bailee is discussed with special reference to the law of Quebec.

Bank as bailee of property.

discussed, in connection with the case of Langtry v. Union Bank, in an article in the Solicitors Journal for the 28th September, 1895; quoted at some length in 3 J.C.B.A. 196. In Langtry v. Union Bank, a theft of jewels deposited with a bank was effected by means of a forged delivery order presented to the bank. The case was settled before the trial, but it is probable that the bank would have been held liable.(e)

In this country the safe custody of valuables is usually undertaken by trust companies or safe deposit agencies which have special facilities for the purpose.

Property deposited for safe-keeping only is not subject to the bank's general lien; see notes to sec. 77.

BUSINESS AND POWERS OF A BANK.

Business and powers of bank.

76. The bank may—

(*a*) open branches, agencies and offices;

(*b*) engage in and carry on business as a dealer in gold and silver coin and bullion;

(*c*) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign, and other public securities; and,

(*d*) engage in and carry on such business generally as appertains to the business of banking.

Exceptions.

2. Except as authorized by this Act, the bank shall not, either directly or indirectly,—

(*a*) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever;

(*b*) purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or,

(*e*) See Grant, 6 ed. 279.

(*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise. 53 V., c. 31, s. 64. Sec. 76.

The negative portions of this section, except as to lending money on the shares of other banks, are taken from the act of 1871. The remainder of the section, granting certain powers to the bank, was expressed in that act in the short clause: "The bank may open branches or agencies and offices of discount and deposit and transact business, at any place or places in the Dominion." These powers were amplified in subsequent acts. The section was divided into its present sub-sections and clauses in 1906. In other respects the section in its present form dates from 1890, and is a consolidation of secs. 45, 46, 59 and 60 of R.S.C., 1886, c. 120.

This section expressly authorizes a bank to do certain specified classes of acts, and forbids it to do certain other specified classes of acts—the prohibition, however, being subject to a very important qualification. Authorized transactions.

The authorized acts are as follows:—

(*a*) To open branches, agencies and offices.

(*b*) To engage in and carry on business as a dealer in gold and silver coin and bullion.

(*c*) To deal in / To discount / To lend money and make advances on the security of, and to take as collateral security for any loan made by it — bills of exchange and promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British foreign and other public securities.

(*d*) To engage in and carry on such business as generally appertains to the business of banking.

To open branches, agencies and offices.

Branch banks are merely separate offices of the principal bank (Prince v. Oriental Bank, 1878, 3 App. Cas. 325), so that

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accounts kept at different branches may be consolidated by the bank. Garrett v. McKewan, 1872, L.R. 8 Ex. 10. And a sum payable at a branch may be paid by the bank at the head office. Irwin v. Bank of Montreal, 1876, 38 U.C.R. 375; Bain v. Torrance, 1884, Man. R. 32.

Branches and agencies.

Branches are, however, treated as distinct banks for purposes of notice of dishonour and payment of cheques. Prince v. Oriental Bank, *supra;* London City, etc., Bank v. Gordon, [1903] A.C. 240; Reg. v. Bank of Montreal, 1886, 1 Can. Ex. C.R. 154, and cases cited; Rex v. Lovitt, [1912] A.C. 212, at p. 219. See sec. 100 of the Bills of Exchange Act as to notice of dishonour.

An agency is a different thing from a branch. An agent or correspondent bank collects cheques, notes, etc., cashes drafts drawn against it, retires bills according to instructions, and does almost all that a branch bank may do. The main difference is that an agency receives a commission as its remuneration while a branch is merely an office of the bank, and its profits belong to, and its expenses and losses are borne by, the bank of which it is a branch.

A bank acting as agent may be liable for negligence according to the ordinary principles of the law of agency applicable to the particular circumstances; see notes, *supra*, in regard to the bank as collecting agent.

The agent bank is the agent of the bank which employs it, and not the agent of the latter's customer, so that if the agent collects money for the customer's account, the customer's bank is liable to account for the money collected. MacKersy v. Ramsay, 1843, 9 Cl. & F. 818; Prince v. Oriental Bank, 1878, 3 App. Cas. 325; cf. Grant, pp. 297 ff.

As to the locality of deposits, and the position of a bank which is served with an attaching order through one of its branches, see notes to sec. 95.

To deal in, discount, etc.

To deal in bills of exchange, etc., is to traffic or trade in them, *i.e.*, to buy and sell them, or to lend on them. Cf. Jones v. Imperial Bank, 1876, 23 Gr. 268, at p. 275; Montgomery v. Ryan, 1908, 16 O.L.R. 75, 98.

Discount of bill.

A bill is *discounted* when in consideration of a sum paid by the bank, the transferor endorses it to the bank, or when, without endorsement, he becomes liable to the bank by agreement

or custom in respect of the payment of the amount of the bill. Hart on Banking, 2nd ed., 1906, p. 616. As to the discounting banker, see also Grant, pp. 282 ff. Sec. 76.

The discount is the deduction or drawback made from an advance of money upon a bill; the difference between the price paid and the face value of the bill. In re Land Securities Co., Ex parte Farquhar, [1896] 2 Ch. 320; cf. London Financial Association v. Kelk, 1883, 26 Ch.D. 107, at pp. 134-5. Discount of bill.

Hart on Banking (p. 616) states further that discounting as carried on by banks is essentially a form of lending, and that the advance upon every bill or note discounted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money (citing Fleckner v. Bank of the U.S., 1823, 21 U.S. (8 Wheaton) 338, at p. 350, and National Bank v. Johnson, 1881, 104 U.S. 271, at pp. 276-7). But, as pointed out by a reviewer in 22 L.Q.R. 453, an ordinary discounting is an absolute sale of a claim against a third party (embodied in a negotiable instrument of which the ownership passes to the purchaser), with an implied guarantee, on the vendor's part, of the payment of the claim at maturity. A bank which discounts a bill holds it, not as a mortgagee or pledgee, but as an out and out holder. In re Hallett & Co., [1894] 2 Q.B. 256. In every borrowing transaction the borrower has to repay the amount lent to him at a fixed date or at a fixed period after notice or on demand; if any property is transferred to the lender by way of security for the loan, the borrower is entitled to redeem such property on repayment of the loan with interest. On the other hand, a bank which discounts a bill for a customer does not become entitled to a claim for the repayment of the amount paid or credited to the customer; in the event of the bill being dishonoured, the bank, if it complies with the prescribed formalities, acquires a claim for damages under secs. 134 *et seq.*, of the Bills of Exchange Act, but this claim for damages is in the nature of a claim for breach of warranty, and cannot by any stretch of language be described as a claim for the repayment of a loan. (*f*) The bank, while it holds the bill, is the absolute

(*f*) But, as Hart says at p. 617, it is convenient to bear in mind that the word "discount" is often used in a very elastic and comprehensive sense. See Re Ontario Bank, 1910, 21 O.L.R. 1, at p. 29, as to "purchase by way of discount and rediscount;" s.c. *sub nom.* McFarland v. Bank of Montreal, [1911] A.C. 96, more fully referred to in the notes to sec. 99, *infra*.

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owner thereof; the customer would not under any circumstances have a right to redeem it.

The discounted paper becomes the property of the bank, and if it is lost or destroyed the loss falls upon the bank. Carstairs v. Bates, 1812, 3 Camp. 301.

Pledge of bill.

A bill is *pledged* when the holder in consideration of a loan, deposits the bill with the lender merely as a security. In this case the interest of the lender in the bill is limited to the amount secured by the deposit. Reid v. Furnival, 1833, 1 Cr. & M. 538.

As to the position of a discounter and a pledgee respectively, see also the notes to sec. 54 of the Bills of Exchange Act.

Purchase of bill.

A bill is *bought* when, in consideration of a sum paid, it is transferred without endorsement, or endorsed without recourse, and the transferor does not become responsible for its payment to the person who takes it. This is a different transaction from one in which a person desiring to remit money to a distant place buys from a bank, and the bank sells to him, a bill drawn by it upon its correspondent in the place of payment. See Misa v. Currie, 1876, 1 App. Cas. 554; cf. Chalmers, p. 94.

All these forms of dealing in bills are covered by the comprehensive language of sec. 76. The powers given also include that of taking bills, etc., as collateral security for past loans. By sec. 53 of the Bills of Exchange Act, an antecedent debt or liability is sufficient consideration for a bill.

Collateral security.

Collateral means literally situated at the side, hence parallel or additional, and not, if the nature of the transaction does not require it, secondary. In re Athill, 1880, 16 Ch.D. 211. (*g*)

Collateral security.

Collateral security is any property which is assigned or pledged to secure the performance of an obligation and as additional thereto, and which upon the performance of the obligation is to be surrendered or discharged. If the creditor upon payment of the debt fails to return the property taken as collateral security, he must account to the debtor for the face

(*g*) A surety, *e.g.*, is collaterally liable, but not necessarily secondarily liable. Forster v. Ivey, 1900, 2 O.L.R. 480, at p. 486. His liability is necessarily accessory to a principal or original liability. But apart from some special provision in the contract by which he becomes liable, the surety is liable as soon as default is made by the principal debtor.

Sec. 76. Collateral security.

value of the property, in the absence of evidence to shew that such value could not be realized. Union Bank v. Elliott, 1902, 14 Man. R. 187; Ryan v. McConnell, 1889, 18 O.R. 409.

If a bill is taken as security merely, the right of action on the debt is not suspended. But the creditor becomes bound to perform the duties of holder, and if by his neglect, *e.g.*, by his omission to give notice of dishonour, the bill is rendered worthless or deteriorated in value, the bill must be treated as payment of the debt to the amount of the bill. Peacock v. Purssell, 1863, 14 C.B.N.S. 728, 4 R.C. 526.

A bank can sue upon paper taken as collateral security when it becomes due, and before the maturity of the debt secured by such paper. Shaw v. Crawford, 1857, 16 U.C.R. 101; Ross v. Tyson, 1869, 19 U.C.C.P. 294; Ward v. Quebec, Bank, 1894, Q.R. 3 Q.B. 122. As to realization of security, after default in payment of the secured debt, see notes to sec. 78.

But, when a bank gives a customer "a line of credit, to be secured by collections deposited," it is bound to credit the customer with the payments made from time to time on collateral notes deposited with the bank by the customer in accordance with the memorandum. It cannot hold the payments in a suspense account until the maturity of the paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper. Molsons Bank v. Cooper, 1898, 26 O.A.R. 571 (P.C., affirming 26 S.C.R. 611). What is meant is that effective credit for the collateral paper realized by the bank must be given to the customer on account of the loan, because the amount of the indebtedness is reduced by the money received by the bank, not that credit must be given in the customer's current account. The practice is a common one of placing such payments in a "suspense" or "collateral" account. See S. C. Norsworthy, in 14 J.C.B.A. 375 (July, 1907).

Documents which may be taken as Collateral Security.

Bills of exchange and promissory notes.

See Bills of Exchange Act, *infra*, which includes cheques.

Other negotiable securities.

See chapter 30, where the subject of negotiable securities, other than bills, notes and cheques, is discussed.

Sec. 76. *Stocks, bonds, debentures and obligations of corporations.*

The power to lend money upon shares, etc., involves the power to do any prudent or proper act with a view of obtaining the benefit of such security, as for instance to have the shares transferred absolutely to the bank and to register the bank as shareholder. In re Asiatic Banking Corporation, Royal Bank of India's Case, 1869, L.R. 4 Ch. 252. As to powers of realizing securities, see notes to sec. 78.

Bonds as collateral security.

A bank is expressly authorized to take as collateral security bonds of corporations. By this means it may, in effect, lend money to the holder of such bonds on a mortgage of lands. The bank cannot take direct to itself a mortgage of lands except as additional security, but if a company issues bonds secured by mortgage and pledges the whole issue to the bank, the transaction will then be within the enabling clauses of this section. The company might be incorporated for the express purpose of acquiring lands and issuing bonds to be secured by mortgage of such lands, so as to enable the bank to lend money upon what would otherwise be unlawful security.

As to the validity and negotiability of bonds, etc., see chapter 30, *infra*.

A bond or debenture containing a charge upon the property of the company as security for payment need not be registered under a chattel mortgage act requiring every "mortgage or conveyance intended to operate as a mortgage of goods and chattels" to be registered. Johnston v. Wade, 1908, 17 O.L.R. 372; cf. National Trust Co. v. Trusts and Guarantee Co., 1912, 26 O.L.R. 279, in which the charge was created not by the bonds, but by a mortgage to a trustee for the bondholders, and Johnston v. Wade was distinguished on this ground.

The nature of the charge created by bonds or debentures is what is called a floating security. "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may

exercise his right whenever he pleases after default." Governments Stock, etc., Co. v. Manila Ry. Co., [1897] A.C. 81, at p. 86. Cf. Union Bank of Halifax v. Indian and General Investment Trust, 1908, 40 S.C.R. 510, at p. 520.

Sec. 76. Bonds as collateral security.

Trusts and Claims of Third Parties relating to Shares and Negotiable Securities taken by a Bank as Collateral Security.

Under sec. 52 a bank is not bound to see to the execution of any trust to which any share of its own stock is subject. If, however, it takes as security shares held in trust with actual notice of the trust, as for instance, when the shares prior to their transfer to the bank stand in the transferor's name "in trust" (Bank of Montreal v. Sweeny, 1887, 12 App. Cas. 617; Birkbeck v. Johnston, 1902, 3 O.L.R. at p. 507, S.C. 6 O.L.R. 258), the bank must decline to accept the property until it has ascertained that the transfer is authorized by the trust, or it must take the chance of finding that there is somebody with a prior title to demand a transfer from the transferor. Cf. Sheffield v. London Joint Stock Bank, 1888, 13 App. Cas. 333, 3 R.C. 660, distinguished in London Joint Stock Bank v. Simmonds, [1892] A.C. 201; Raphael v. McFarlane, 1890, 18 S.C.R. 183; London and Canadian v. Duggan, [1893] A.C. 506; Petry v. Caisse d'Economie, 1891, 19 S.C.R. 713.

Claims of third parties to property pledged.

Pledges of negotiable securities, or securities treated by the market as negotiable (see chapter 30, *infra*), to a bank, which lends money upon them, in good faith and without notice that they are the property of a third person, pledged without his authority, can be held as security by the bank against the owner. The bank can hold the securities notwithstanding that they are pledged in a block by a broker who in the common course is known to hold securities belonging to his principals. London Joint Stock Bank v. Simmonds, [1892] A.C. 201. The same rule applies to the proceeds of a cheque carried to broker's account by a bank which did not know, and had made no enquiry, whether the money paid in was in the broker's hands as agent or otherwise. Thompson v. Clydesdale Bank, [1893] A.C. 282.

Where a principal entrusts an agent with securities, and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities, and fraudulently

Sec. 76. Claims of third parties to property pledged.

appropriates the difference (the lender acting in good faith and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loans by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no enquiry. Brocklesby v. Temperance Building Society, [1895] A.C. 173(*h*); Fry v. Smellie, [1912] 3 K.B. 282.

Share certificates are not negotiable instruments. See notes at end of chapter 30, *infra*. As to transfer of shares, see notes to sec. 43, *supra*.

General banking powers.

See notes at the beginning of this chapter.

A bank may take as collateral security the assignment of a policy of fire insurance upon property in which the bank has no interest. The bank is entitled to payment of the proceeds of insurance maintained by the owner of the property and made payable in case of loss to the bank as its interest may appear under a verbal agreement between the bank and the owner that the property shall be insured in the bank's favour as security for advances which the bank may make from time to time. This is within the general banking powers and not within the prohibition of sec. 76. Re Shediac Boot & Shoe Co., 1905, 37 N.B.R. 98.

General banking powers.

A bond of the customer and other parties (Moffatt v. Merchants Bank, 1885, 11 S.C.R. 46), or an assignment of a debt (Rennie v. Quebec Bank, 1902, 3 O.L.R. 541; Merchants Bank v. Darveau, 1898, Q.R. 15 S.C. 325), may be taken as security.

A bank may also make advances upon the assignment of moneys payable under contracts existing or future, or upon the security of any chose in action, except in so far as the Bank Act expressly excludes such transactions. Molsons Bank v. Carscaden, 1892, 8 Man. R. 451; cf. Norton v. Canadian Bank of Commerce, 1908, 1 S.L.R. 448.

PROHIBITIONS OF SEC. 76 OF THE BANK ACT.

The second part of the section is in restriction of the powers of the bank, and provides that, except as authorized by this act, the bank shall not, either directly or indirectly,

(*h*) The principle of this case is applicable also to bills and notes. See Lloyd's Bank v. Cooke, [1907] 2 K.B. 735, cited in the notes to sec. 32 of the Bills of Exchange Act, *infra*.

Sec. 76. Prohibited transactions.

(*a*) Deal in the buying, or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever;

(*b*) Purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or

(*c*) Lend money or make advances upon the security, mortgage, or hypothecation of any land, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

Except as authorized by this Act.

The exceptions provided for by this clause are important, and are contained in the first sub-section of this section and in secs. 77 to 89; see especially secs. 80, 84, 86 and 88.

Effect of the act upon transactions entered into in contravention of its provisions.

It has been said that the prohibition of the act is a law of public policy in the public interest, and any transaction in violation thereof is necessarily null and void; that no court can be called upon to give effect to any such tranasction or to enforce any contract or security on which money is lent or advances as thus prohibited are made. Bank of Toronto v. Perkins, 1883, 8 S.C.R. 603, Ritchie, C.J., at p. 610; cf. Bathgate v. Merchants Bank, 1888, 5 Man. R. at p. 215. See, also, Stavert v. McMillan, 1910, 21 O.L.R. 245, 251, referred to more fully below in the notes in regard to the prohibition against a bank's dealing in shares of its own capital stock.

Invalidity of transactions forbidden by the act.

In Rolland v. Caisse d'Economie, 1895, 24 S.C.R. 405, it was held that the borrower who has received the money cannot, in his own defence, question the bank's power to lend, or the validity of the security, nor can his creditors, who have no other rights in this respect than the debtor himself. The fact that the taking of the security is *ultra vires* of the bank may perhaps affect the pledge as regards third parties interested in the property pledged but does not affect the borrower's contract to pay. In this case, however, there was in the charter of the bank no direct prohibition of the transaction in question, and Bank of Toronto v. Perkins was distinguished on this ground.

Sec. 76. Invalidity of transactions forbidden by the act.

If a bank takes in respect of an advance or indebtedness a security of a kind forbidden by the statute, it cannot enforce the security and it incurs a penalty under sec. 146. The contract of loan, however, is not a nullity (National Bank of Australasia v. Cherry, 1870, L.R. 3 P.C. 548, at p. 307), and the property in the lands or goods conveyed or assigned by way of security, passes to the bank, notwithstanding the prohibition of the statute. Ayers v. South Australian Banking Co., 1871, L.R. 3 P.C. 548, at p. 559.

In Bank of Toronto v. Perkins, *ubi supra*, at pp. 612-613, Strong, J., refers as follows to the two Privy Council cases cited above: "In the National Bank of Australasia v. Cherry, the question arose as to the validity of an equitable mortgage of lands by deposit of title deeds originally given to secure advances to be made by a bank which was prohibited from lending money on such security by a provision in its statute of incorporation expressed in these words: 'Provided always, that, save and except as hereinbefore specially authorized, it shall not be lawful for the said corporation to advance or lend any money on the security of lands or houses.' It was argued that this prohibition was not founded on any considerations of public policy, but was simply a regulation for the internal management of the bank, and, therefore, a security taken in infringement of the proviso was not void in the hands of the bank, and might be enforced as effectually as if it had been given to secure a past debt. The Privy Council, however, although holding under the particular facts of that case, that by force of a subsequent arrangement the security originally given for future advances had been converted into one for a pre-existing debt, virtually held that the clause of the Act there in question, although not in express words avoiding a mortgage for future advances given in violation of its terms, did, in effect, make such a security void in the hands of the bank. It is true that in a case, reported in the same volume, of Ayers v. The South Australian Banking Company, the Privy Council expressed doubts as to the effect of a similar clause in the charter of a bank: whether the consequences of an infraction of it invalidated the security, or had any greater or other effect than to warrant proceedings on the part of the Crown for a forfeiture of the charter. But the distinction between this case and that first referred to consists in this, that whilst in the first case the prohibition was embodied in an

Act of Parliament, in the latter it was a mere provision of a Royal Charter, so that it could not be said to be illegal in the sense in which a direct contravention of a statutory prohibition is to be so regarded." It is to be observed further, that in the Ayers Case there was no plea of illegality, but the case appears, nevertheless, to have been accepted as establishing that the property passes to the bank, although the security is of a kind forbidden by statute. See, *e.g.*, Exchange Bank v. Fletcher, 1891, 19 S.C.R. 278, at p. 289; Euclid Avenue Trusts Co. v. Hohs, 1911, 23 O.L.R. 377, at p. 388; Ontario Bank v. McAllister, 1910, 43 S.C.R. 338, at p. 376.

Sec. 76. Invalidity of transactions forbidden by the act.

It was held in Exchange Bank v. Fletcher, *supra*, that upon repayment of the loan the bank is bound to restore the property or to pay its value. But the borrower need not wait until repayment of the loan; he can at any time require the invalid security to be restored to him until or unless he has precluded himself from doing so by entering into an independent and valid agreement of a kind permitted by the statute. National Bank of Australasia v. Cherry, 1870, L.R. 3 P.C. 299, at p. 309.

The invalidity of the security taken does not affect the existence of the debt; even if the contract is deemed to be non-existent, the bank is entitled to recover the money advanced. In re Langlois, 1893, Q.R. 4 S.C. 65; Canadian Bank of Commerce v. McDonald, 1906, 3 W.L.R. 90 (Yukon).

Transactions entered into in contravention of the statute are not only *ultra vires*, but illegal in the narrower sense. Ontario Bank v. McAllister, 1910, 43 S.C.R. 338, at p. 367. The Bank Act, sec. 4, provides that except in certain particulars the act itself shall form and be the charter of each bank, so that it is strictly correct to use the term *ultra vires* in this connection, the powers of the bank being tested by its act of incorporation or constating instrument. Cf. Exchange Bank v. Fletcher, 1891, 19 S.C.R. 278, at p. 286.

It being *ultra vires* of a Canadian bank to enter into a transaction forbidden by the Bank Act, the bank is equally bound by the prohibitions of the statute in respect of transactions outside of Canada, for the bank is everywhere limited by the terms of its constitution. Its capacity is likewise limited by the law of the country where a given transaction takes place. It cannot do any act forbidden by the law of such country.

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Thus a Canadian bank authorized by its constitution to issue notes, cannot do so in England. Cf. Grant, p. 448.

A transaction forbidden by the statute cannot be the foundation of a valid claim, the consideration or object being illegal. The test of a person's right to recover is whether or not, in the presentation of his case, he must rely upon the illegal agreement as the basis of his claim. If he must rely upon the illegal agreement or upon a part of it which is not severable from the illegal part he cannot succeed. Ontario Bank v. McAllister, 43 S.C.R., at p. 372 ff.(*i*).

Whether or not a prohibiting statute necessarily imports nullity if the transaction is otherwise valid,(*j*) it has been held that if a bank seeks to obtain a priority over other creditors by virtue of the act, and the general law confers no priority, it is necessary for the bank as against the creditors of the transferor to shew that the transaction was in precise accordance with the provisions of the act. Royal Canadian Bank v. Ross, 1877, 40 U.C.R. 466, and cases cited at p. 473; Banque Nationale v. Royer, 1910, Q.R. 20 K.B. 341, 47 C.L.J. 596, 20 J.C.B.A. 19.

Dealing in the buying or selling of goods or engaging in trade or business.

Already in this act (in this same section and also in sec. 14) the expression "the business of banking" has been used, and the word "business," in the sense of "the occupation of conducting trade or monetary transactions of any kind" (Century Dictionary) would include banking. Trade comprehends every species of exchange or dealing, either in the produce of land, in manufactures, or in bills or money. It is chiefly used, however, to denote the barter or purchase and

(*i*) The case of Ontario Bank v. McAllister is discussed below under the heading "Dealing in the buying or selling of goods." In the present connection the judgments of Duff and Anglin, JJ., are of special importance. They dissented from the judgment of the majority in regard to the disposal of the appeal, but two of the remaining judges held the agreement in issue to be severable from the alleged illegal agreement, and only one of the judges composing the majority found it necessary to decide upon the question of illegality.

(*j*) See Exchange Bank v. Fletcher, 1891, 19 S.C.R. 278, at p. 278, where it is pointed out that on this point as on any other, the Bank Act must receive the same construction in every province. What it allows or prohibits in Quebec it must allow or prohibit in every other province.

sale of goods, wares and merchandise, either by wholesale or retail. Sec. 76.

A bank could not be bound by a warranty, express or implied, on the sale of goods acquired by it in contravention of the act. Radford v. Merchants Bank, 1883, 3 O.R. 529. Bank must not engage in trade.

But the act does not forbid the guaranteeing by the bank of the purchase-price of goods (Molsons Bank v. Kennedy, 1879, 10 Rev. Leg. 110), or a transaction by which the bank incurs a direct and principal liability to persons who sell goods to the bank's customer, the bank's agent being in control of the purchasing of goods for the customer, with a view to reducing the customer's indebtedness to the bank. Simpson v. Dolan, 1908, 16 O.L.R. 459, at p. 470.

The prohibition of the act is against dealing in the buying or selling of goods, etc., that is against a transaction which is primarily a purchase or sale. The bank must not traffic in goods; it cannot buy them with a view to selling them again at a profit. Such traffic would not fall within any department of banking, but would be engaging in trade or business. If, however, a borrower who has pledged goods to a bank as security for a debt, makes default and gives the bank a release of his interest in such goods, the bank would not be prohibited from selling them, and to that extent engaging in the buying and selling of goods.

The act is directed against trafficking in or carrying on the business of buying and selling goods, wares, and merchandise, and it has been said that the prohibition is not applicable to an isolated transaction entered into for a wholly different purpose, namely the settlement of the bank's overdue debt, *e.g.*, taking an absolute transfer of the debtor's leasehold property and other assets in consideration of a release of the debtor from further liability. Peterborough Hydraulic Power Co. v. McAllister, 1908, 17 O.L.R. 145, 163, C.A. In this case the bank and the debtor entered into a further agreement (bearing even date with the settlement), by which, for the more convenient liquidation of the assets and with a view "to disposing of the company's business, as a going concern, at the earliest date possible," it was agreed that the business should be carried on under the management of one of the debtors in the old firm name for the benefit of the bank. The Court of Appeal for Ontario did not decide whether such carrying on of business was *ultra vires* of the bank, being of opinion that

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the assignment of the lease and other property was in itself *intra vires*, and was separable from the agreement for the carrying on of the business and holding that the bank was liable to indemnify the debtors against rent subsequently accruing due. On appeal to the Supreme Court, *sub nomine* Ontario Bank v. McAllister, 1910, 43 S.C.R. 338, the judgment holding the bank liable to indemnify the original lessees (the debtors) against the payment of rent was affirmed by a majority judgment. Fitzpatrick, C.J., and Idington, J., held the assignment of the lease to be valid (substantially adopting the reasons of Osler, J.A., in the court below), and expressed no opinion as to the agreement in regard to carrying on the business, while Davies, J., who held the two things not to be severable, came to the aid of his colleagues by holding both one and the other to be *intra vires*. Duff, J., and Anglin, J., dissenting, held that the assignment was not severable from the agreement, and that the latter was *ultra vires*. When, therefore, we count heads on the important question of the power of the bank to carry on the business under the existing circumstances and for the purpose mentioned, we have the opinions of two judges against one in the Supreme Court adverse to the existence of the power. The trial judge (Boyd, C.), held that the bank had the power; Riddell, J., in the Divisional Court considered it "more than doubtful"; in the Court of Appeal, Garrow, J.A., expressed the opinion that the bank had the power, while Maclaren, J.A., expressed the contrary opinion. Under the circumstances the case of Ontario Bank v. McAllister, does not give a definite answer to the question to what extent, if at all, a bank may carry on a debtor's business for the purpose of realizing an overdue debt. The judgments may, however, serve, at least, to indicate some of the limitations of the bank's power in this respect in view of the prohibitory provisions of sec. 76.

The view most favourable to the exercise of the power may perhaps be expressed as follows:—

If the substance of the transaction is a *bonâ fide* compromise or settlement of a past due debt (a matter of fact to be decided on the circumstances of each case), the carrying on of business for a reasonable time to enable the assets to be disposed of as a going concern is impliedly authorized by the words "engage in and carry on such business generally as appertains to the business of banking," and is not within the prohibition against

dealing in buying or selling, etc., or engaging in trade or business. A bank's power to take property from a debtor in absolute payment and discharge of its debt is not excluded by secs. 80 to 82, but may be exercised in addition to the powers conferred by those sections, which provide for the manner in which mortgages or hypothecs may be taken as security and in which such security may be realized. 43 S.C.R., at pp. 351-353, Davies, J.

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It is submitted, however, that the following view of the matter is based upon a more correct construction of the act:—

Even if sec. 76 (1) (d) standing alone might be thought to confer by implication the power to take specific property (of a kind the bank is not authorized to trade in) in payment of a debt under such circumstances as to involve the bank in the necessity of carrying on a distinct business in order to realize that property, it is impossible to give that effect to the sub-section when read together with sub-sec. 2 (*a*). *Ibid*, at pp. 363 sqq. Duff, J.(*k*) If a bank might carry on a mercantile business to save itself from loss where money loaned by it is in jeopardy, the prohibition of sub-sec. 2 (*a*) would be practically removed from the statute. Such a carrying on of business is not something which "appertains to the business of banking," and is not permissible as subsidiary to the legitimate purpose of realizing a valid banking claim. *Ibid.* Anglin, J., at pp. 373 sqq.

Share of its own capital stock or of the capital stock of any bank.

The prohibition against a bank's lending on the security of its own shares was contained in the act of 1871. See, however, sec. 77 of the present act, which gives the bank a privileged lien upon its own shares for a debt due to it from a shareholder.

The privilege of taking as security the shares of another bank was not abolished until 1879. Cf. Carnegie v. Federal Bank, 1884, 5 O.R. 418. The prohibition against making advances on the security of shares of another bank applies

Lending on bank shares prohibited.

(*k*) At pp. 365-366 Duff, J., refers to the history of the legislation and of the judicial decisions as confirming this view. In Radford v. Merchants Bank, 1893, 3 O.R. 529, it was *held* that it was *ultra vires* of a bank to take over unfinished goods, finish them and then sell them, with a view of preventing a loss in respect of a loan.

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to the bank and not to the borrower. Exchange Bank v. Fletcher, 1890, 19 S.C.R. 278, and see note, *supra*, under this section, as to the effect of transactions entered into in contravention of the act.

The word "bank" is defined by sec. 2 as any bank to which this act applies, but *quære* whether dealing in the shares of a foreign bank is not within the prohibition of this section.

The prohibition is subject to sec. 80.

One of the obvious objections to permitting a bank to hold its own stock absolutely, is that the double liability imposed upon shareholders by sec. 125 would be rendered illusory as regards stock held by the bank itself. The pledge to a bank of shares of its own stock would be objectionable on the same ground because there would always be the possibility of the borrower's making default or becoming bankrupt and the bank's having to acquire the shares absolutely.

If a bank acquires shares of its own stock by forfeiture under sec. 40 for non-payment of calls, it is obliged under sec. 41 to sell them within six months.

Bank must not traffic in its own shares.

Where a bank in contravention of the act traffics in its own shares, and in the course of such traffic certain shares are transferred to the cashier in trust for the bank, his transferees may perhaps have a right to rescind before the failure of the bank, but cannot do so afterwards. The transaction becomes, by the suspension of the bank, of unimpeachable validity as between the transferee and the liquidator. Re Central Bank, Nasmith's Case, 1888, 16 O.R. 293, 18 O.A.R. 209; cf. Henderson's Case, 1889, 17 O.R. 110. The liquidator in such case has a right of action superior to that which the solvent bank would have had. See Stavert v. McMillan, 1910, 21 O.L.R. 245, at p. 252. See also the notes to sec. 130.

It is said by Boyd, C., in Re Central Bank, Nasmith's Case, *ubi supra*, that the transaction in question was not an absolute nullity, but at most a matter which the shareholders could waive as voidable. This dictum does not seem to be reconcilable with the decision of the same judge in Stavert v. McMillan, *ubi supra*, at p. 251, where he says that the original acquisition of shares by a bank through its nominees was not merely voidable, but void, and that it was a nullity, not to be validated by lapse of time or by any action of the bank or its shareholders. See cases there cited.

Sec. 76. Bank must not traffic in its own shares.

It is clear, at any rate, that different considerations apply before and after the suspension of the bank. In Stavert v. McMillan, the money of the Sovereign Bank was used in purchasing shares of its own stock. The shares were purchased to be sold again, the object being to keep up the price of the stock and to make possible profits. The shares so acquired were placed in the names of various nominees of the bank who undertook no personal responsibility. It was held that the transaction amounted to an illegal trafficking in the bank's own shares, following Hope v. International Financial Society, 1876, 4 Ch.D. 327, 339, and Trevor v. Whitworth, 1887, 12 App. Cas. 409, 417, 419, 428.

Instead of repudiating the original illegal transaction, and seeking restitution from the persons whose stock was acquired by the money of the bank, or bringing suit against the directors, said to be privy to or implicated in the illegality, the bank divided up the shares or a portion thereof among its directors and some of their friends, in consideration of which the transferees gave promissory notes, which were endorsed to the bank, and subsequently endorsed by the bank to the plaintiff. This transaction was an attempt, not to undo the first wrong step, but to prosecute the illegal dealing to a fruitful result by a further act of illegality in violation of the statute, inasmuch as sale as well as purchase is forbidden. It was held by Boyd, C., that the bank had no legal title to the shares, and could confer none, so that in the hands of the plaintiff, who knew of the illegality, the notes could not be enforced by action. Stavert v. McMillan, 1910, 21 O.L.R. 245. On appeal, however, the judgment of Boyd, C., was reversed, and it was held by the Court of Appeal that the proper inference from the facts was that the promissory notes were given for the purpose of recouping to the bank the money which had been unlawfully and without authority, employed in the purchase of the shares, and that such money and such recoupment, and not merely the price of the shares, which was a purely collateral matter, formed the true consideration as between the bank and the makers of the notes; and that the plaintiff was entitled to recover upon the notes; and that the defendants were not entitled to be indemnified by the bank, which had been brought in as a third party. 24 O.L.R. 456. Cf. Great Eastern Ry. Co. v. Turner, 1872, L.R. 8 Ch. 149, specially referred to in the judgment of the Court of Appeal.

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Security mortgage or hypothecation of any lands, tenements or immovable property.

The prohibition as to mortgages of real estate is subject to sec. 80.

Lending on mortgage of lands prohibited.

The object of this prohibition and, to a less degree, that against engaging in trade or business or dealing in the buying, selling or bartering of goods, is to prevent a bank from locking up its assets and to oblige it to keep them in the form that renders them most available. Under the system governed by the act, the greater part of the assets of a bank including its paid-up capital, its deposits, and the amount of its note issue, are constantly in process of being collected or paid in and again loaned out or circulated. This system is designed to enable the bank to meet the demands of the people and to supply them with the money for the proper conduct of commercial transactions. It facilitates the bringing to the markets of the world of the lumber, wheat, and other products of the Dominion.

Or of any ships or other vessels.

See McDonell v. Bank of Upper Canada, 1850, 7 U.C.R. 252; Lyman v. Bank of Upper Canada, 1851, 8 U.C.R. 354.

This prohibition is now subject to the provisions of sec. 85.

Goods, wares and merchandise.

Lending on goods prohibited.

One clause of this section forbids dealing in the buying, selling, etc., of goods. Another clause prohibits lending money on their security. The clauses are subject to the provisions of secs. 86 to 90, as well as of sec. 80.

The expression "goods, wares, and merchandise," is defined by sec. 2 (*g*) to include, in addition to the things usually understood thereby, products of agriculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers, petroleum and crude oil, and other articles of commerce.

Debts are not included in goods, wares, and merchandise, and therefore, a bank may take an assignment of a debt due to the borrower from his co-partners. Rennie v. Quebec Bank, 1902, 3 O.L.R. 541, at p. 545.

Bank to have lien upon the stock of its debtors.

77. The bank shall have a privileged lien, for any debt or liability for any debt to the bank, on the shares of its own capital stock, and on any unpaid dividends of the debtor or person liable, and may decline to allow any transfer of the shares of such debtor or person until the debt is paid.

Sale of shares.

2. The bank shall, within twelve months after the debt has accrued and become payable, sell such shares: Provided that notice shall be given to the holder of the shares of the intention of the bank to sell the same, by mailing the notice, in the post office, post paid, to the last known address of the holder, as shown by the records of the bank, at least thirty days prior to the sale.

Notice.

Transfer.

3. Upon the sale being made the president, a vice-president or the general manager shall execute a transfer of the shares to the purchaser thereof in the usual transfer book of the bank.

Effect of transfer.

4. Such transfer shall vest in the purchaser all the rights in or to the said shares which were possessed by the holder thereof with the same obligation of warranty on his part as if he were the vendor thereof, but without any warranty from the bank or by the officer of the bank executing the transfer. 53 V., c. 31, s. 65. Am.

Under the act of 1871 the lien of the bank upon a debtor's shares or unpaid dividends secured only an "overdue debt" to the bank. See Cook v. Royal Canadian Bank, 1873, 20 Gr. 1; cf. In re Stockton Malleable Iron Co., 1875, 2 Ch.D. 101. In 1880 the lien was extended so as to cover "any debt or liability for a debt" to the bank.

In 1913 the words "as shewn by the records of the bank" were inserted in sub-sec. 2, and the words "or the general manager" were substituted for the words "manager or cashier" in sub-sec. 3.

Lien on shares.

Cf. secs. 43 and 44, which impliedly preserve the bank's lien in case of attempted transfer by the debtor, or of a sale under a writ of execution, of the shares to which the lien extends.

Such lien may be discharged by a new arrangement between

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the bank and the debtor, the terms of which are incompatible with the retention of the lien or which shew an intention to waive it. Bank of Africa v. Salisbury, [1892] A.C. 281.

Section 76 forbids a bank to make an advance upon the security or pledge of shares of its own capital stock. The bank is by sec. 145 liable to a penalty, if it neglects to sell such shares within 12 months or if it sells them without 30 days' previous notice in writing to the holder of the shares.

As to the effect of the bank's representation in regard to the amount of its claims against a shareholder made to a person who purposes making a loan to a third party upon the security of shares of the bank, see Cook v. Royal Canadian Bank, *supra*. It is incumbent upon the person seeking the information to notify the person of whom the enquiry is made of the purpose for which the information is sought, in order that the latter may have the opportunity of making such investigation as will enable him to reply correctly and with due caution. Otherwise the enquirer is not entitled to act upon the representation made or bind by such representation the person making it, or his principal (*ibid.*).

General lien.

The bank also has in the absence of any inconsistent special agreement (In re Bowes, 1886, 33 Ch.D. 586), a general lien for all that is due to it from the customer. Re Williams, 1903, 7 O.L.R. 156.

Banker's lien.

The lien extends to all the securities and moneys of the customer in its hands which have not been deposited for a particular purpose (Davis v. Bowsher, 1794, 5 T.R. 488, 3 R.C. 587; Brandao v. Barnett, 1864, 12 Cl. & F. 787, 3 R.C. 592; Riddell v. Bank of Upper Canada, 1859, 18 U.C.R. 139), but not to property merely deposited for safekeeping. Brandao v. Barnett; Leese v. Martin, 1873, L.R. 17 Eq. 224. In the case of In re London and Globe Finance Corporation, [1902] 2 Ch. 416, it was held that securities deposited with brokers, as cover for specific advances, but left in the brokers' hands after repayment, became liable to the general lien. Neither the general lien (Jeffryes v. Agra Bank, 1866, L.R. 2 Eq. 674), nor an express charge, can extend to further advances made after notice that the property sought to be charged belongs, or is mortgaged to, a third person. London

& County Bank v. Ratcliff, 1881, 6 App. Cas. 722; Bradford Banking Co. v. Briggs, 1886, 12 App. Cas. 29. Sec. 77. Banker's Lien.

The general lien exists only for debts due to the bank, whereas the statutory lien upon its own shares covers not only any debt, but also any liability for a debt.

No lien arises in respect of an advance of a specified amount made for a definite period until the arrival of the due date, as there is no debt till then; nor can the banker retain moneys of the customer against bills discounted by him for the customer, but not yet due, except perhaps in the case of the customer's bankruptcy. Halsbury, vol. 1, p. 623, citing Bowen v. Foreign, etc., Gas Co., 1874, 22 W.R. 740, and Jeffryes v. Agra and Masterman's Bank, 1866, L.R. 2 Eq. 674; cf. Hart, p. 740; Grant, p. 89; Merchants Bank of Canada v. Thompson, 1911, 23 O.L.R. 502, at p. 512, S.C., reversed on other grounds, 1912, 26 O.L.R. 183; McCready v. Alberta Clothing Co., 1910, 3 A.L.R. 67, in which it was held that a bank cannot appropriate the credit balance of a customer's account without his consent to meet a bill not yet due, so as to prevent an attaching order from affecting the whole balance.

Inasmuch as the relation between a bank and its customer in respect of money deposited is that of debtor and creditor, and there is no specific property in the bank's hands against which it may assert a lien, *i.e.*, a right to retain possession, the so-called banker's lien as applied to a cash balance is more accurately described as a right of set-off. Royal Trust Co. v. Molsons Bank, 1912, 27 O.L.R. 441, at p. 444. Cf. Hart, p. 742. In the case cited the bank had money to its customer's credit bearing interest at 3%, and refused to allow the money to be withdrawn until some settlement should be made in regard to some overdue notes of which the customer was endorser and upon which interest was charged at 5%. It was held that the bank's right was to set off its indebtedness to the customer against the customer's indebtedness to it, and only the excess of the latter indebtedness over the former bore interest at 5% from the time of the refusal to allow the deposit to be withdrawn. In the alternative, if the bank did not exercise its right of set-off, it was liable to pay interest at 5% upon the deposit from the time of its wrongful refusal to allow it to be withdrawn, the result being the same as if there had been an actual set-off. Set-off against deposit.

Sec. 77. *Enforcement of lien.*

Usually a mere lien carries with it no right of sale. Donald v. Suckling, 1866, L.R. 1 Q.B. 585, at p. 604. But the court may treat a mere deposit, *e.g.*, of share certificates, as a mortgage, and foreclosure may be obtained. Harrold v. Plenty, [1901] 2 Ch. 314. In Brandao v. Barnett, *supra*, Lord Campbell says the right acquired by a general lien is an implied pledge, and a banker's lien is usually so treated. Cf. Grant, p. 310.

Enforcement of lien.

In the case of the statutory lien, the bank has a right to sell the shares at any time within twelve months after the debt has accrued and become payable, subject to the condition as to notice mentioned in the section. If the bank allows the twelve months to elapse without exercising the power of sale, it would not only become liable to a penalty under sec. 145, but it would then be confined to the appropriate remedy given by provincial law. The lien would still exist, but the statutory right of sale would be gone. As to the principles governing the conduct of the pledgee in selling the property pledged, see notes to sec. 78.

By sec. 54 of the Bills of Exchange Act, where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Collateral securities may be sold.

78. The stock, bonds, debentures or securities, acquired and held by the bank as collateral security, may, in case of default in the payment of the debt, for the securing of which they were so acquired and held, be dealt with, sold and conveyed, either in like manner and subject to the same restrictions as are herein provided in respect of stock of the bank on which it has acquired a lien under this Act, or in like manner as and subject to the restrictions under which a private individual might in like circumstances deal with, sell and convey the same: Provided that the bank shall not be obliged to sell within twelve months.

Right of sale may be waived.

2. The right so to deal with and dispose of such stock, bonds, debentures or securities in manner aforesaid may be waived or varied by any agreement between the bank

and the owner of the stock, bonds, debentures or securities. Sec. 78.
53 V., c. 31, s. 66. Am.

The bank has a right to realize security which matures before the maturity of the debt secured and apply the proceeds in payment of the debt. See notes to sec. 76 (collateral security). Sec. 78 has reference to the realization of securities after the maturity of the debt. Realization of security.

In the event of default in repayment of an advance made upon the security of stock of corporations other than the bank or upon other security, the bank has a power of sale similar to that which it has in regard to shares of its own stock upon which it has acquired a privileged lien under sec. 77, but without obligation to sell the same within 12 months. This obligation is designed only to prevent a bank's dealing in its own stock as prohibited by sec. 76.

See also sec. 80, which confers the same rights upon the bank in regard to personal or movable property as in regard to real or immovable property mortgaged or hypothecated to it. These rights include the power to purchase or sell given by sec. 81.

When the purchasers of goods give promissory notes for the price, and also hire receipts by which the property remains in the vendor until payment is made, and the vendor or other holder of the notes discounts them with a bank, the bank is entitled also to the hire receipts. The receipts are merely securities accessory to the debts represented by the notes, the bank not being able effectually to recover on the notes until the hire receipts are forthcoming. Central Bank v. Garland, 1890, 20 O.R. 142, affirmed 1891, 18 O.A.R. 438.

A bank selling under the first part of this section merely transfers the rights of the pledgor and a warranty of title by him, but gives no such warranty itself (see sec. 77). The case is different, however, when the bank sells pursuant to sec. 89; see notes to that section.

Sub-sec. 1 of sec. 78 in its present form dates from 1890, the part of sub-sec. 1 after the words "this Act" having been inserted in that year. The effect of the amendment is to confirm the general right of realizing securities which the bank has in common with other pledgees of personalty. Donald v. Suckling, 1866, L.R. 1 Q.B. 585, at p. 604. A pledge as distinguished from a lien (see notes to sec. 77), enables the pledgee to sell on default in payment, after notice

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to the pledgor. Deverges v. Sandeman, [1902] 1 Ch. at p. 593, and authorities there cited.

Sec. 78 refers to securities held by a bank under the general powers contained in sec. 76, and does not refer to the special securities authorized by secs. 86 and 88. Re Victor Varnish Co., Clare's Claim, 1908, 16 O.L.R. 338, at p. 343.

The method of realization is subject to the contract made at the time of the pledge. If the contract of pledge of stock to secure an advance authorizes the bank, in the event of default, to sell or dispose of the security without notice, and to apply the proceeds in liquidation of the advance, a sale or loan of the security before default made is tortious, and the pledgor may elect, either to claim damages, or to affirm the sale and claim profits made by the bank. One element of the measure of damages is the highest point of the stock market between the conversion and the first default. Carnegie v. Federal Bank, 1884, 5 O.R. 418.

Formerly the agreement referred to in sub-sec. 2 must have been "made at the time at which such debt was incurred, or, if the time of payment of the debt has been extended, then by agreement made at the time of the extension." These qualifying words were struck out in 1913, with the result that the section now authorizes such agreement to be made at any time without reference to the time the debt was incurred or an extension granted.

Where the authority was "from time to time to sell the said securities—by giving 15 days' notice in one daily paper published in the city of Ottawa—with power to the bank to buy in and resell without being liable for any loss occasioned thereby," it was held that the power given was to sell by auction, and that the bank had no power to sell by private contract. Toronto General Trusts v. Central Ontario Ry. Co., 1905, 10 O.L.R. 347.

A mortgagee may be liable for want of care or wilful default in exercising his power of sale, but it has been held in recent cases of high authority that he is not a trustee for the mortgagor and is not necessarily liable if he does not exercise all the care which a prudent man would exercise in selling his own property. He must not sacrifice the mortgagor's interest "fraudulently, wilfully or recklessly," but if he observes the limits of the power, and acts in good faith, that is to say, exercises the power

fairly for the purpose for which it was given, his conduct as to the sale cannot be impeached merely because he has consulted his own interest before that of the mortgagee (especially where the security is difficult of realization), or merely because the sale is disadvantageous (unless indeed the price is so low as in itself to be evidence of fraud). Kennedy v. De Trafford, [1897] A.C. 180; British Columbia, etc., Agency v. Ishitaka, 1911, 45 S.C.R. 302, at pp. 316-7; Haddington Island Quarry Co. v. Huson, [1911] A.C., at p. 729; Wilson v. Taylor, 1912, 4 O.W.N. 253, 23 O.W.R. 359. Sec. 78.

79. The bank may acquire and hold real and immovable property for its actual use and occupation and the management of its business and may sell or dispose of the same, and acquire other property in its stead for the same purpose. Acquisition of real estate.

2. The bank shall annually, during the month of January, make to the Minister a return showing in detail the fair market value of its real and immovable property held under this section. 53 V., c. 31, s. 67. Return to Minister.

A power of the kind conferred by this section will be construed liberally. Morse on Banks and Banking, 4th ed., 1903, sec. 74.

Where a company was empowered to acquire and hold for the purpose of its business, real or immovable estate, not exceeding a certain sum in yearly value, it was held that the company acting in good faith must be the sole judge of what is required for the purpose of its business. Montreal v. Robert, [1906] A.C. 196.

Sub-sec. 2 was added in 1913 in committee after a good deal of discussion of the policy adopted by some of the banks of building expensive buildings not merely for use as bank premises but also for the purpose of leasing them, in part, to other persons.(*l*) Sec. 147 B prescribes a penalty for failure to comply with sub-sec. 2.

80. The bank may take, hold and dispose of mortgages and hypothèques upon real or personal, immovable or mov- Mortgages and hypothèques of realty.

(*l*) Debates, H. of C., 1912-3, col. 10570, 10589.

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able property, by way of additional security for debts contracted to the bank in the course of its business.

As to personalty.

2. The rights, powers and privileges which the bank is by this Act declared to have, or to have had, in respect of real or immovable property mortgaged to it, shall be held and possessed by it in respect of any personal or movable property which is mortgaged or hypothecated to the bank. 53 V., c. 31, s. 68.

This section was divided into sub-sections in 1906. In other respects it is a transcript of the provision contained in the acts of 1867 and of 1871, except that the words "movable" and "immovable" have been added wherever they occur in the present section.

Mortgage as additional security.

The section is one of the important exceptions to the prohibition of sec. 76 against lending on the security or mortgage of lands, ships or goods. The investment of the money of a bank in property of this description would have the effect of locking up the assets of the bank and making them not promptly available either for mercantile purposes, or for the purposes of meeting claims of depositors and of redeeming notes, etc. The same objection does not apply when additional security is taken on such property after an advance has once been made. Cf. Rennie v. Quebec Bank, 1902, 3 O.L.R. 541, and cases cited at p. 551. If the security taken is really *additional*, it may at least save the bank from ultimate loss, even if it does not add to the liquid assets.

Primarily "contracted to the bank in the course of its business" means contracted in the past, and refers to advances made or indebtedness incurred prior to the giving of the mortgage.

Sometimes, however, it is sought to support a mortgage which is taken contemporaneously with the discounting of a bill or note. In such a case it has been said that it would be a question of fact for the judge or jury to determine whether the mortgage was in truth taken to secure the transaction on the bill or note, or whether the bill or note was created for the mere purpose of upholding and giving colour to the mortgage—a question of fact upon which the conclusion would be in general so uncertain as to make the mortgage very doubtful security. Commercial Bank v. Bank of Upper Can-

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ada, 1859, 7 Gr. 430. In Bank of Toronto v. Perkins, 1882, 8 S.C.R. 603, it was decided that a mortgage made as collateral security for a note discounted by the bank, the proceeds of which were placed to the mortgagor's credit on the same day as that on which the mortgage was made, was invalid. Cf. Bates v. Kirkpatrick, 1912, 21 W.L.R. 607; Thien v. Bank of British North America, 1912, 4 A.L.R. 228; Thomson v. Stikeman, 1913, 4 O.W.N. 1546, to be reported in the Ontario Law Reports.

In the case of Re The Essex Land & Timber Co., Trout's Case, 1891, 21 O.R. 367, the facts briefly stated were as follows: One Trout had before the 27th of January, 1890, become responsible to the Bank of Montreal for the sum of $14,500 for the accommodation of a company of which he was president. About that date he was requested to become further responsible by an endorsement of the company's notes, which he agreed to do, upon receiving from the company a mortgage upon certain lands. The mortgage was conditioned upon the payment by the company of the notes. It was assigned to the bank prior to the endorsement of the notes or the payment of the advances by the bank. Held no violation of this section.

The giving of a mortgage by way of security against which the customer may draw, is not authorized by this section, but in the event of a conflict of evidence as to whether a mortgage was taken to secure past advances only, or future advances as well, the court will lean to the construction which will make the transaction a lawful one. Royal Canadian Bank v. Cummer, 1869, 15 Gr. 627.

The bank may take a valid mortgage as additional security for an existing indebtedness, although the effect is to enable the customer to obtain further advances. In one case a mortgage so taken provided that it should continue a security for the existing indebtedness and all renewals or substitutions therefor and all indebtedness of the customer in respect thereof. After the mortgage was given the customer's line of credit was increased, but no separate account was kept of the liabilities secured by the mortgage and these further advances. The proceeds of the discounts and cash deposits were carried to the customer's credit in one open current account against which he drew cheques to retire the notes secured by the mortgage as they matured. It was held that this mode of book-keeping had not operated as a discharge of the mortgage debt. Camer-

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on v. Kerr, 1878, 3 O.A.R. 30; cf. Royal Canadian Bank v. Cummer, *supra;* Moffatt v. Merchants Bank, 1884, 11 S.C.R. 46.

If a bank holding a mortgage as additional security for the payment of certain notes, substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in the same chain of liability which is secured by the mortgage. Although as a matter of book-keeping, the bank may have treated the first notes, and the subsequent substituted notes, as paid by the application of the proceeds from time to time of the renewals, there is no payment in fact of the notes for which the mortgage was given. Dominion Bank v. Oliver, 1889, 17 O.R. 402, and cf. Commercial Bank v. Bank of Upper Canada, 1859, 7 Gr. 430.

If a mortgage given to a bank is invalid on account of being security for future or contemporaneous advances in contravention of the act, another mortgage upon the same or different property may be executed as additional security after the debt has been contracted in the course of business or the advances made. Such mortgage is perfectly good. Commercial Bank v. Bank of Upper Canada, *supra*; Grant v. Banque Nationale, 1885, 9 O.R. 411, 423; and cf. National Bank of Australasia v. Cherry, 1870, L.R. 3 P.C. 299.

The taking of collateral security by way of mortgage does not effect a merger, or relieve the parties to any bills or notes from meeting them according to their terms before the mortgage itself comes due. If the bills or notes secured are renewed beyond the term of the mortgage, the security is not enforceable until the maturity of the bills or notes. Molsons Bank v. McDonald, 1877, 2 O.A.R. 102.

What property may be taken as additional security.

The property which may be mortgaged to the bank under this section is described in the widest possible language and would include any of the kinds of property referred to in sec. 76. It has been held, for instance, that a bank may under this section take a bill of sale of horses by way of additional security from the owner, and may recover on promisssory notes made in its favour by a person who purchases the horses from the owner. Bank of Hamilton v. Donaldson, 1901, 13 Man. R. 378.

A bank may take a mortgage of timber limits. Grant v. Banque Nationale, 1885, 9 O.R. 411. It may take as security

the interest of a railway company in a contract for the construction of certain cars and may lease them to the company. Bank of Upper Canada v. Killaly, 1861, 21 U.C.R. 9. It may also take a mortgage of stock in trade and all future stock in trade to be acquired during the currency of the mortgage, and an assignment of book debts and an agreement to assign all future book debts of the business. Gillies v. Commercial Bank, 1895, 10 Man. R. 460, 464. Sec. 80.

No special priority is given by this section to mortgages authorized by it. It allows mortgages to be taken by the bank under certain circumstances, but their validity and priority must be determined by provincial law. Such mortgages are subject to the registry and chattel mortgage acts of the province in which the property is situate. Re Victor Varnish Co., Clare's Claim, 1908, 16 O.L.R. 338, at p. 342. Registry and chattel mortgage acts must be complied with.

Rights, powers and privileges.

Sub-section 2 makes applicable to personal or movable property mortgaged to the bank the rights, powers and privileges which the bank has in regard to real or immovable property, *i.e.*, those given by secs. 81, 82 and 83.

81. The bank may purchase any lands or real or immovable property offered for sale— Purchases of realty.

(*a*) under execution, or in insolvency, or under the order or decree of a court, as belonging to any debtor to the bank; or,

(*b*) by a mortgagee or other encumbrancer, having priority over a mortgage or other encumbrance held by the bank; or,

(*c*) by the bank under a power of sale given to it for that purpose, notice of such sale by auction to the highest bidder having been first given by advertisement for four weeks in a newspaper published in the county or electoral district in which such lands or property is situate,

in cases in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the property which it may so purchase, and may

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acquire a title thereto as any individual, purchasing at sheriff's sale, or under a power of sale, in like circumstances could do, and may take, have, hold and dispose of the same at pleasure. 53 V., c. 31, s. 69. Am.

The original of this section was enacted by the act of 1867, from which it was transcribed into the act of 1871.

Purchases of realty.

According to these acts the execution under which the lands were offered for sale must have been issued "at the suit of the bank." This limitation was struck out by the act of 1880, which also added the words "or in insolvency, or under the order or decree of a court of equity, as belonging to any debtor to the bank." The section was enacted substantially in its present form in 1890, when the words "or offered for sale by a mortgagee or other encumbrancer having priority over a mortgage or other encumbrance held by the bank" were added. The provision in clause (c) requiring notice of sale by auction was added in 1913. The mode of publication is provided for by sec. 2, sub-sec. 3.

The powers given by this section also extend to personalty: see sec. 80, and notes to sec. 78.

Reference must be had to provincial law in each case in order to ascertain the rights of an individual to purchase under any of the circumstances mentioned.

Bank may acquire absolute title to mortgaged premises.

82. The bank may acquire and hold an absolute title in or to real or immovable property mortgaged to it as security for a debt due or owing to it, either by the obtaining of a release of the equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, or a transfer of title to real or immovable property can, by law, be effected, and may purchase and acquire any prior mortgage or charge on such property.

No Act or law to prevent.

2. Nothing in any charter, Act or law shall be construed as ever having been intended to prevent or as preventing the bank from acquiring and holding an absolute title to and in any such mortgaged real or immovable property, whatever the value thereof, or from exercising or acting

upon any power of sale contained in any mortgage given to or held by the bank, authorizing or enabling it to sell or convey any property so mortgaged. 53 V., c. 31, s. 71; 63-64 V., c. 26, s. 14. Sec. 82.

Power to acquire title to property on default.

Sub-section 1 dates from the acts of 1867 and 1871, except that in 1913 the words "or a transfer of title to real or immovable property can, by law, be effected" were added.

The section resolves any question that might have existed as to the bank's power to foreclose a mortgage which had been lawfully taken. Cf. Bank of Upper Canada v. Scott, 1858, 6 Gr. 451. If such power is expressly given by the terms of the mortgage it could be validly exercised without any assistance from the act. Bank of New South Wales v. Campbell, 1886, 11 App. Cas. 192.

As to the power of a bank to take an absolute transfer of a debtor's property in payment of his indebtedness, see also Ontario Bank v. McAllister, 1910, 43 S.C.R. 338, 17 O.L.R. 145, discussed in the notes to sec. 76 (Dealing in the buying or selling of goods).

The powers given by this section extend also to personalty—see sec. 80.

Sub-section 2 is a transcript of provisions contained in the acts of 1867 and 1871. It confers no power to acquire or sell lands, but provides that nothing in any charter act or law is to be construed as having prevented or as preventing the bank from acquiring, etc., or exercising any power of sale, etc.

The right of a bank to sell in pursuance of a power of sale contained in a mortgage is impliedly recognized by sec. 81.

Where no express power of sale is contained in the mortgage, the right nevertheless is implied by law in the case of a mortgage of personalty. Deverges v. Sandeman, [1902] 1 Ch. at p. 593, cited in notes to sec. 78.

Property to be sold within certain time.

83. No bank shall hold any real or immovable property, howsoever acquired, except such as is required for its own use, for any period exceeding seven years from the date of the acquisition thereof, or any extension of such period as in this section provided, and such property shall be absolutely sold or disposed of, within such period or extended

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period, as the case may be, so that the bank shall no longer retain any interest therein unless by way of security.

Extension of time.

2. The Treasury Board may direct that the time for the sale or disposal of any such real or immovable property shall be extended for a further period or periods, not to exceed five years.

Twelve years.

3. The whole period during which the bank may so hold such property under the foregoing provisions of this section shall not exceed twelve years from the date of the acquisition thereof.

Property not sold liable to forfeiture.

4. Any real or immovable property, not required by the bank for its own use, held by the bank for a longer period than authorized by the foregoing provisions of this section shall be liable to be forfeited to His Majesty for the use of the Dominion of Canada: Provided that—

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(*a*) no such forfeiture shall take effect until the expiration of at least six calendar months after notice in writing to the bank by the Minister of the intention of His Majesty to claim the forfeiture; and,

(*b*) the bank may, notwithstanding such notice, before the forfeiture is effected sell or dispose of the property free from liability to forfeiture.

Provisions apply to realty now held.

5. The provisions of this section shall apply to any real or immovable property heretofore acquired by the bank and held by it at the time of the coming into force of this Act. 63-64 V., c. 26, s. 14.

Sub-section 1 down to and including "seven years from the date of the acquisition thereof" dates from 1880. The remainder of the section was added in 1900. The division into the present sub-sections was made in 1906.

Prior to the last mentioned date, the section constituted one section with sub-sec. 1 of sec. 82. The words "howsoever acquired" refer to the acquiring of the absolute title in any of the ways mentioned in sec. 82. The seven years' limitation begins to run from the getting in of the absolute title, not from the taking of the security.

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The limitation is a safeguard against investments of too great permanence; cf. notes to sec. 76.

Forfeiture of property not sold.

Previous to 1900 there was an absolute prohibition against holding for a longer period than 7 years, but no provision as to sale or forfeiture of the property. By the amended section the bank must sell the property so as no longer to retain any interest therein unless by way of security (*i.e.*, for the purchase price); but the treasury board has power to extend the time for sale for a further period or periods not exceeding in all five years, beyond the original seven. If a bank holds property beyond the period authorized by the act, the property does not become *ipso facto* forfeited, but the finance minister by giving six months' notice may cause a forfeiture unless the property is sold before the expiration of such six months.

Probably under the act as it existed prior to 1900 the title to lands held beyond the authorized period would have remained in the bank, subject to any right of entry or defeasance which the crown might possess. McDiarmid v. Hughes, 1888, 16 O.R. 570.

Loans on standing timber.

84. The bank may lend money upon the security of standing timber, and the rights or licenses held by persons to cut or remove such timber.

This section was added to the act in 1900.

A timber limit or the right or license to cut timber has been held to be personal property. Bennett v. O'Meara, 1868, 15 Gr. 396; but see Grant v. Banque Nationale, 1885, 9 O.R. 411, where a timber limit seems to be regarded as land. In McPherson v. Temiskaming Lumber Co., [1913] A.C. 145, it was held that the holder of a timber license is the possessor of an asset of the nature of land and that this asset is exigible under a writ of *fi. fa.* The standing timber itself is real property as part of the land upon which it stands, and a mortgage thereof would, apart from the section, be within the prohibition of section 76.

Mortgage of timber or timber licence.

The effect of sec. 84 is that standing timber and the rights or licenses held by persons to cut or remove such timber may be the subject of a mortgage or a pledge to the bank and such mortgage or pledge is not confined to the case mentioned in sec. 80, that is it need not be "by way of *additional* security for debts contracted to the bank in the course of its business."

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It may be to secure contemporaneous or future advances. The mortgage of standing timber must be registered in accordance with provincial law in order to preserve its priority and it must contain a sufficient description of the land for the purpose of registration. The assignment or pledge of a timber limit must conform to the regulations of the proper government department, and must be registered with, or notice thereof must be given to such department in accordance with such regulations. Cf. Grant v. Banque Nationale, *supra*.

Loans to receiver or liquidator under Winding-up Acts.

84A. The bank may lend money to a receiver, to a receiver and manager, or to a liquidator appointed under any winding-up Act, provided such receiver, receiver and manager or liquidator has been duly authorized or empowered to borrow; and, in respect of any money so lent, the bank may take security, with or without personal liability, from such receiver, receiver and manager, or liquidator, to such an amount, and upon such property and assets, as may be directed or authorized by any court of competent jurisdiction. 63-64 V., c. 26, s. 16. Am.

Security fixed by court.

This section was added in 1913.

Advances for building ships.

85. Every bank advancing money in aid of the building of any ship or vessel shall have the same right of acquiring and holding security upon such ship or vessel, while building and when completed, either by way of mortgage, hypotheque, hypothecation, privilege or lien thereon, or purchase or transfer thereof, as individuals have in the province wherein the ship or vessel is being built.

Rights and obligations.

2. The bank may, for the purpose of obtaining and enforcing such security, avail itself of all such rights and means and shall be subject to all such obligations, limitations and conditions, as are, by the law of such province, conferred or imposed upon individuals making such advances. 53 V., c. 31, s. 72.

Sec. 85.

This section forms an exception to sec. 76, which prohibits the lending of money upon the security of any ships or other vessels.

Loan upon security of ship.

Secs. 80 and 85, being read together, permit a bank to acquire and hold security upon a ship, (1) for the repayment of advances made in aid of the building of the ship, (2) by way of additional security for any debt contracted to the bank in the course of its business.

In the first case the power is limited to security for advances made for a specific purpose, in the second case the power is limited to taking as advancing additional security. In both cases the rights of the bank are the same as those of individuals taking similar security under provincial law.

CHAPTER XVI.

Warehouse Receipts, Etc., as Collateral Security.

Review of earlier legislation.(*a*)

Prior to 1859 the rights of banks in the late province of Canada to acquire bills of lading and warehouse receipts as securities for advances depended upon the general law affecting private individuals and upon the provisions of the charter of each bank.

Loan on warehouse receipt, etc.

By an act of 1859 (22 V., c. 20) entitled an Act granting additional facilities in Commercial Transactions(*b*) it was provided that, notwithstanding anything to the contrary in the charter or act of incorporation of any bank(*c*) a bill of lading specification of timber or a receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares or merchandise, stored or deposited, or to be stored or deposited, in any warehouse, mill-cove,(*d*) or other place in the province, or shipped in any vessel, or delivered to any carrier for carriage, when endorsed to a bank by the owner or person entitled to receive such cereal grains, etc., as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, should vest in the bank from the date of the endorsement all the right and title of the endorser to the goods subject to the right of the endorser to have the same re-transferred to him if such bill or note were paid when due.(*e*)

(*a*) See article by Z. A. Lash, Warehouse Receipts, etc., in 2 J.C.B.A. 54-74 (Sept., 1894), and Debates, House of Commons, 1890, vol. 2, col. 4278 ff.

(*b*) Consolidated as part of C.S.C., 1859, c. 54, entitled—An Act respecting Incorporated Banks.

(*c*) This refers to the prohibition contained in bank charters since 1841 against lending money on the security of any goods, wares or merchandise.

(*d*) Misprint for "mill, cove": see Royal Canadian Bank v. Miller, 1870, 29 U.C.R. 266, at p. 271.

(*e*) This act, like the other statutes passed prior to 1867 which are hereinafter referred to, was not confined in its application to banks. It authorized the endorsing of any of the documents in question to a private person as collateral security for the due payment of any debt due to such private person. After Confederation the legislation in regard to private individuals as it existed in 1867 remained in force. Cf. Cockburn v. Syl-

Endorsement of warehouse receipt.

The act made an important change in the law in regard to warehouse receipts, in addition to extending the power of a bank to lend money on the security of goods. Banks were prohibited by their charters from lending money on the security of goods, and were limited to taking a mortgage of goods by way of additional security, but apart from this prohibition, goods before the statute could be pledged to a lender by any legal mode of conveyance, *e.g.*, by deed or by delivery of possession. The effect of the statute was to provide a simpler mode of conveyance. At common law the endorsement and delivery of a warehouse receipt did not have the effect of transferring the title to the goods, but operated merely as an authority to the endorsee to take possession of the goods. Under the statute the acquisition of the receipt operated as a conveyance of the goods by way of security, like the acquisition of a bill of lading at common law.(*f*)

The act of 1859 also provided that no transfer of any warehouse receipt, etc., should be made under the act to secure payment of any bill, note or debt, unless such bill, note or debt be negotiated or contracted at the same time with the endorsement of such receipt, etc.(*g*)

vester, 1876, 27 U.C.C.P. 34, at p. 41, s.c. 1 O.A.R. 471. It ceased of course to have any application to banks when it was superseded by dominion legislation in 1867. This provincial legislation was re-enacted in Ontario, practically without change. It was embodied in the Mercantile Amendment Act, R.S.O. 1877, c. 116, R.S.O. 1887, c. 122, and R.S.O. 1897, c. 145. The last mentioned statute remained in force until 1910, when by the Mercantile Law Amendment Act, 10 E. 7, c. 63, in some important particulars the dominion law in regard to banks was re-enacted and made applicable to private individuals. See notes to sec. 89. For the sake of simplicity the phrases in the pre-confederation statutes which are specially applicable to private individuals are omitted in the text.

(*f*) See notes to sec. 2, *supra, sub tit.* "Warehouse Receipt" and "Bill of Lading"; cf. Thompson v. Molsons Bank, 1889, 16 S.C.R. 664, at p. 683. The statute did not render the endorsement and delivery of a warehouse receipt a valid conveyance of goods absolutely sold and not merely pledged. Glass v. Whitney, 1863, 22 U.C.R. 290. As a private individual was not under any disability to lend money on the security of goods, the act so far as he was concerned merely gave to the transfer of a warehouse receipt an effect which it did not have at common law. Royal Canadian Bank v. Miller, 1870, 29 U.C.R. 266, at p. 274.

(*g*) Discussed in Cockburn v. Sylvester, 1877, 1 O.A.R. 471. The words "debt contracted" under the original statute referred to security taken not by a bank but by a private individual, but in the dominion act of 1871 presently to be referred to wider language was used in regard to security taken by a bank. The provision in the text was the basis of the more extended provisions now contained in sec. 90. See notes to that section as to the changes made in this respect by the act of 1871 and later acts.

Loan to owner of goods.

In 1861 the act of 1859 was amended by the addition of a proviso that if a person engaged in the calling of a warehouseman, by whom a receipt might be given in such his capacity, was at the same time the owner of, (or entitled otherwise than as warehouseman, to receive), cereal grains, etc., any such receipt given and endorsed by him should be as valid and effectual for the purpose of the act as if the person giving and endorsing the receipt were not one and the same person (24 V., c. 23).

The effect of the amendment was to introduce, for the first time, the principle that the owner of goods might practically give the bank a mortgage upon his goods in the form of a warehouse receipt. The persons entitled to do this, however, were confined to the five classes mentioned in the act of 1859 above cited, and the receipt must have been given by a person who in his capacity of warehouseman, etc., was entitled to issue receipts, otherwise it was of no value as a transfer of property. Ontario Bank v. Newton, 1869, 19 U.C.C.P. 258.

Endorsement by agent.

In 1865 the class of persons who might endorse a warehouse receipt was extended so as to allow of its being done by the attorney or agent of the owner. This provision was, however, subsequently limited by the act of 1871, which enacted that the receipt, etc., endorsed to the bank should vest in the bank "all the right and title of the last previous holder thereof, and if such holder be the agent of the owner within the meaning of the fifty-ninth chapter of the Consolidated Statutes of the late Province of Canada, then all the right and title of the owner thereof."(*h*)

The act of 1871—34 V., c. 5—was a general statute in regard to banking. It re-enacted and extended the provisions of the earlier acts authorizing a bank to acquire warehouse receipts, etc., including the privilege of acquiring a receipt issued by the owner of goods who was engaged in the calling of warehouseman, etc.(*i*)

Custodier principle retained until 1880.

In all the legislation on this subject prior to 1880 the custodier principle was retained, that is, the person giving in respect of his own goods a receipt capable of being acquired by a bank under the statutory authority must be a person

(*h*) See notes to sec. 87 as to the factors acts.

(*i*) See notes to secs. 86 and 88 in regard to the changes effected, both in regard to the manner in which the documents in question might be acquired, and the purpose for which they might be acquired.

engaged in one of a number of named callings who in that capacity was entitled to issue receipts. This principle was not infringed by the addition in the years 1865, 1871 and 1872 of persons engaged in specified callings other than those previously mentioned because the privilege was granted only to a person by whom a receipt might be given in such his capacity, as provided in the original act of 1861(*j*).

Custodier principle retained until 1880.

Even if a receipt was issued by a person not as owner of the goods but as bailee of the owner, the custodier principle was recognized, in that in order to validate the transfer of the receipt to a bank evidence was required that the person issuing the receipt was really engaged in the calling of a warehouseman. See Milloy v. Kerr, 1878, 3 O.A.R. 350; affirmed by a divided court, 1880, 8 S.C.R. 474; cf. Merchants Bank v. Smith, 1883, 8 S.C.R. 512, reversing 8 O.A.R. 15. The decision in Milloy v. Kerr was however followed almost immediately by the far-reaching changes in the law made by parliament in 1880 by the statute 43 V., c. 22.

Legislation of 1880.

By the last mentioned statute the language of the act of 1871 was much changed. Warehouse receipt was defined to mean any receipt given by any person for any goods, wares and merchandise in his actual visible and continued possession, as bailee, in good faith, and not as of his own property, and to comprise a receipt given by the keeper of any harbour, cove, pond, wharf, yard, warehouse, shed, storehouse, tannery, mill or other place in Canada, for goods, wares and merchandise, being in the place or in one or more of the places so kept by him, whether such person is engaged in other business or not, and to comprise specifications of timber. Bill of lading was declared to comprise all receipts for goods, wares and merchandise, accompanied by an obligation to transport the same from the place where they were received to some other place, whether by land or water, or partly by land and partly by water, and by any mode of carriage whatever.

These definitions are practically the same as those contained in sec. 2 of the present act(*k*). The act of 1880 also contained provisions substantially the same as the present secs. 86 and 87, substituting for the former enumeration of various kinds of custodiers a general enactment allowing a

(*j*) In the acts of 1880 and 1888 further classes of persons were mentioned.

(*k*) Except that the phrase "specification of timber" has been omitted. See note (n), *infra*.

Legislation of 1880.

bank to acquire bills of lading and warehouse receipts. The specific mention of classes of custodiers in the definition of warehouse receipt is merely illustrative of the general terms of the definition. See notes to sec. 86, *infra*.

The act contained provisions similar to those of 1859, as amended in 1871, vesting in the bank upon endorsement of such warehouse receipt or bill of lading, all the right and title of the previous holder or owner (including the case where the previous holder was the owner's agent), and also, in amendment of the previous statutes, provided for the vesting in the bank of all the right and title of the person from whom the goods, etc., were received or acquired by the bank, if the receipt or bill of lading was made directly in favour of the bank, instead of being made to the previous holder or owner.(*l*)

The act of 1880 likewise enumerated the privileged classes of occupations, in any of which, if a person were engaged, as his ostensible business, he might grant a receipt or a bill of lading upon his own goods, the acquisition by the bank of such receipt or bill to have the same effect as if the owner and the person giving the receipt or bill of lading were different persons. But the act omitted the important qualification contained in the former acts, namely, that the person issuing the document must be a person by whom a receipt or bill of lading might be given in his capacity as custodier of other persons' goods. This qualification was retained in the Ontario legislation in regard to pledging of warehouse receipts and bills of lading, and the difference between dominion and provincial legislation in this respect raised an important question of legislative power which is discussed in the notes to sec. 88, *infra*.

Legislation of 1890.

In 1890, by the statute 53 V., c. 37, the law was greatly changed in form. The bank was still authorized to acquire and hold a warehouse receipt or bill of lading as collateral security upon goods of persons other than the issuer of the receipt or bill of lading. But the right of the owners of goods to use a warehouse receipt or bill of lading as a mean of obtaining advances upon his own goods was abolished, this right having been considerably abused. See Royal Canadian Bank v. Ross, 1877, 40 U.C.R. 466, at p. 473; Bank of British North America v. Clarkson, 1869, 19 U.C.C.P. 182, at p. 188.

(*l*) This provision gave effect to the judicial construction of the act of 1871. See the present sec. 86 (2) (b) and the notes thereto.

New form of security.

In place of the abolished right, a new form of security was authorized by sec. 74 of the act of 1890 (now sec. 88). The privilege of pledging the pledger's own goods for advances was no longer limited to certain named classes of persons, but any person engaged in business as a wholesale manufacturer of goods, wares and merchandise, and any wholesale purchaser or shipper of products of agriculture, the forest and mine, or the sea, lake and rivers, and any wholesale purchaser or shipper of live stock or dead stock and the products thereof, was authorized to give to the bank security, as mentioned in the act.

The changes made by the acts of 1880 and 1890 respectively in regard to the purpose for which a bank might acquire warehouse receipts and bills of lading are stated in the notes to sec. 86.

Warehouse receipts and bills of lading.

86. The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour, or as security for any liability incurred by it for any person, in the course of its banking business.

Effect of taking.

2. Any warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof,—

(*a*) all the right and title to such warehouse receipt or bill of lading and to the goods covered thereby of the previous holder or owner thereof; or,

(*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods, wares and merchandise. 53 V., c. 31, s. 73; 63-64 V., c. 26, s. 15. Am.

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This section prior to 1906 constituted one section with what is now sec. 87. It was divided into its present subsections in that year.(*m*)

This section and sec. 88 must be read subject to the provisions of sec. 90. They are both important exceptions to the provisions of sec. 76, which forbid a bank to lend money or make advances upon the security of any goods, wares and merchandise.

Legislative power.

The question of legislative power in regard to warehouse receipts is discussed in the notes to sec. 88.

The bank may acquire.

Method of acquiring warehouse receipt.

The method of acquiring is not prescribed. Cf. notes *infra* as to sub-sec. 2 (*b*) authorizing the receipt or bill of lading to be made directly in favour of the bank.

A warehouse receipt or bill of lading may be transferred either by delivery, after endorsement in blank (Bank of Hamilton v. Noye, 1885, 9 O.R. 631), or by special endorsement to the bank completed by delivery. If the document at the time of delivery to the bank has not been endorsed by the person in whose favour it is, the omission could doubtless be supplied subsequently.

But the absence of the endorsement puts the bank upon enquiry, and the mere delivery of the document to the bank by the person who has possession of it will not by itself affect the outstanding interest of the person in whose favour the document is made out. Gosselin v. Ontario Bank, 1905, 36 S.C.R. 407.

Warehouse receipt.

A statement of the place where the goods are stored is not essential to the bank's security.

Warehouse receipt as used in this act is defined by sec. 2 in such a way as to exclude a receipt issued by the owner in respect of his own goods.

(*m*) Cf. the Mercantile Law Amendment Act, 10 E. 7, c. 63, s. 8 (Ont.), which contains substantially similar provisions for the transfer by endorsement of a warehouse receipt or bill of lading by one person to another as collateral security for any debt owing by the transferor. There is no provision in the Ontario statute corresponding to sub-sec. 2 (b).

Sec. 86. Warehouseman must not be the owner of the goods.

Inasmuch as the present act, unlike the acts in force prior to 1890, does not provide for a warehouseman, etc., who is also the owner of goods giving a receipt to the bank upon his own goods, it would seem to follow that if a person, though apparently a warehouseman, were really the owner of the goods mentioned in the receipt issued by him, such a receipt would not afford to the bank any security as against execution creditors or others not claiming through the owner. A banker, before making an advance upon the security of a warehouse receipt, ought to satisfy himself that the receipt has been issued by a person whose possession is actual, visible and continuous, and who is himself a bailee in good faith.

The definition of warehouse receipt discriminates between three classes of receipts, namely:

Receipt must be issued by bailee.

1. A receipt given by any person for goods in his actual visible and continued possession as bailee thereof in good faith and not as of his own property.

2. A receipt given by any person who is the owner or keeper of a warehouse, etc., or other place for the storage of goods, for goods delivered to him as bailee, and actually in the place or one of the places owned or kept by him, whether he is engaged in other business or not.

3. A receipt given by any person in charge of logs or timber in transit from timber limits or other lands to their place of destination.

It has been said that the same sort of proof is not required in the case of a warehouseman giving such receipts as in the case of a mere bailee of the goods. If a receipt is issued by a warehouseman, the test of its validity does not necessarily depend upon proof that he was actually, visibly and continuously in possession. Boyd, C., in Re Monteith, 1886, 10 O.R. at p. 540; but see judgment of Proudfoot, J., in the same case at p. 549.

Owner cannot pledge goods in his own possession.

In giving effect to the transfer of documents of the class of warehouse receipts, the legislature has added a mode of transferring personal property to those previously known to the law. The legislation which permits a change of property to be effected by the endorsement of the receipt of the custodier of the property does not, however, ignore the principle of the bills of sale acts, because it deals only with property which is out of the actual possession of its owner. Similarly when the owner, under former acts, now repealed, was in some cases

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enabled to give his own receipt as security, that power was extended only to an owner who was engaged in the calling of a warehouseman, etc., and who gave receipts in his capacity as such. But the attempt to transfer the property by transfer of warehouse receipt while retaining the actual possession, is not authorized by this section. Cf. Milloy v. Kerr, 1878, 3 O.A.R. at p. 368, S.C. affirmed, 8 S.C.R. 474. See, however, sec. 88, which does authorize a transfer which conflicts directly with the principle of the bills of sale acts.

Under the statute in force prior to 1880 it was said that the legislature had not authorized the "casual creation of a warehouseman for a temporary purpose" (Moss, C.J.A., in Milloy v. Kerr, 1878, 3 O.A.R. at p. 360), but this is no longer the law.

Goods must be in actual possession of bailee.

The possession must not be fictitious and the premises in which the goods are stored must be kept by the bailee *bonâ fide* (Re Monteith, 1885, 10 O.R. 529) but it is not strictly necessary that the premises must be kept by him for the purpose of warehousing goods in general, or the goods mentioned in the receipt in particular. A receipt granted by any person who has actual possession in the sense of the act, and who is not the owner, is valid whether he keeps a warehouse or not, *e.g.*, if a person puts some furniture in his neighbour's house and takes a receipt in proper form, that is a warehouse receipt under the act, though not, perhaps, a desirable banking security.

In Ontario Bank v. O'Reilly, 1906, 12 O L.R. 420, a storage and warehouse firm consisted of A. and B., and a commission and produce firm consisted of A., B. and C. The commission firm purchased goods and warehoused them with the storage firm. A. issued receipts in the name of the storage firm to C., as representing the commission firm. The receipts were endorsed by C. to the plaintiff bank as security for notes discounted. It was held that A., in signing such receipts, was not in any sense giving receipts "as of his own property" within the meaning of sec. 2 of the Bank Act, the two firms being distinct entities, which, since the Judicature Act, were capable of suing each other.

In Banque Nationale v. Royer, 1910, Q.R. 20 K.B. 341, 47 C.L.J. 596, 20 J.C.B.A. 19, wholesale grocers gave possession of a portion of their stock to a clerk employed by them, setting the goods apart in premises leased to him by them at a nominal

rental. It was held by a majority of the judges of the court that the clerk was a "bailee in actual visible and continued possession" of the goods within the meaning of sec. 2 (*g*), and that a warehouse receipt for the goods given by him to a bank as security for advances to his employers conferred upon the bank the rights mentioned in sec. 86. Sec. 86.

A warehouse receipt within the act could not formerly be given to a bank for logs or timber in transit from the woods where they were cut to the mill, because they were not actually in a place owned or kept by the warehouseman, etc. (Tennant v. Union Bank, 19 O.A.R. 4, 13, S.C., [1894] A.C. 31), but in 1900 the definition of warehouse receipt was enlarged so as to include receipts given by any person in charge of logs or timber in transit from timber limits or other lands to their place of destination. Receipt for logs, etc.

On the other hand lumber stored in a millyard is in a place "kept by" the miller within the act. 19 O.A.R. at p. 14.

Except as noted above, the section practically in its present form dates from 1890. Specifications of timber are expressly included in the term warehouse receipt under the act of 1880, but are not mentioned in the definition contained in sec. 2 of the present act.(*n*)

Bill of lading.

See notes to sec. 2 (c).

Collateral security.

As to the meaning of collateral security and the obligation of the lender, on payment of the debt secured, to return or account for the property taken as security, see notes to sec. 76.

On the re-endorsement and delivery of a receipt by the bank, the pledgor is in as of his former title, not as assignee of the bank with the rights given to the latter by the Bank Act. Mason v. Great Western Ry., 1871, 31 U.C.R. 73; cf. Re Victor Varnish Co., Clare's Claim, 1908, 16 O.L.R. 338, at p. 345.

(*n*) Even prior to 1880 the terms of the legislation had been wide enough to embrace a specification of timber apart from its express mention. Royal Canadian Bank v. Miller, 1870, 29 U.C.R. 266, at p. 271. In the Ontario statute, 10 E. 7, c. 63, s. 2, the phrase "specification of timber" is retained.

Sec. 86. *For any debt . . . or liability incurred.*

The debt or liability must be incurred either contemporaneously with the taking of the security or upon a written promise or agreement, etc. See sec. 90.

It is not essential that the borrower should be the owner or holder of the warehouse receipt. The bank may acquire it as collateral security for him from a third person, or the receipt may be issued to a third person for the purpose of being endorsed by him to the bank. Tennant v. Union Bank, 19 O.A.R. at p. 6; S.C. [1894] A.C. 31.

The bank may acquire the receipt from a previous private lender, in which case such lender might be regarded either as the "previous holder" or, the transfer being made at the request of and for the owner, as the agent of the owner.

Security for any debt or liability.

In regard to the purpose for which a bank might take a warehouse receipt or bill of lading, the act of 1871 enabled the bank to acquire and hold such documents not only for the due payment of any bill or note discounted by the bank in the regular course of its banking business, (as provided in the act of 1859), but also "for any debt which might become due to the bank under any credit opened or liability incurred by the bank for or on behalf of the holder or owner of such bill of lading, etc., or for any other debt to become due to the bank." In 1880, however, the right of the bank was confined to acquiring these documents as "collateral security for the payment of any debt incurred in its favour in the course of its banking business."

This provision was carried into the Bank Act of 1890 and remained unchanged until 1900, when the words "or as security for any liability incurred by it for any person" were added.

The words added in 1900 permit a bank to take security under sec. 86 for any liability incurred by it, that is, for that which will or may result in a debt as, for instance, in the case of a letter of credit issued by the bank, where no money actually passes from the bank to the customer at the time the liability is incurred, but the credit of the bank is pledged to payment at a future time.

The distinction between a debt and a liability is well known to the law; a liability of a guarantor, for instance, becomes a

debt only when default is made by the principal debtor. Cockburn v. Sylvester, 1877, 1 O.A.R. 471. (*o*)

Section 86. Security for any debt or liability.

Shall vest in the bank.

The property in the goods passes to the bank with the risk of loss, so that if an insurance policy is subject to a condition that the insurance must be in the name of the owner, the bank must be named as the assured (McBride v. Gore Insurance Co., 1870, 30 U.C.R. 451), although the assignor also has an insurable interest in the goods (Parsons v. Queen Insurance Co., 1878, 29 U.C.C.P. 188).

Bank entitled to possession of goods.

The bank as owner is entitled to take possession of the goods whenever it deems it advisable.(*p*) If the assignor refuses to give possession of the goods upon demand, the bank may take such appropriate proceedings under the law of the province where the goods are situated as any other owner of goods may take in the case of goods wrongfully detained by another person, and can follow the goods to the same extent as any such owner. The person withholding possession from the bank is also liable to a penalty (sec. 144).

Bank as pledgee of bill of lading.

The bank as pledgee of a bill of lading may return it to the pledgor for a limited purpose, (as for instance, to enable the pledgor to obtain delivery and sell on behalf of the pledgee, and account for the proceeds towards satisfaction of the debt), without thereby losing its rights under the contract of pledge. North-Western Bank v. Poynter, [1895] A.C. 56; Inglis v. Robertson, [1898] A.C. 616, 626. The fact that the bank endorses the bill of lading to the consignee in order to enable him to examine the goods does not transfer the right of property in them to the consignee, and if the latter deals with the goods as his own by re-shipping and selling them, he becomes liable to the bank, in an action for conversion, for the goods or their value. Imperial Bank v. Hull, 1901, 4 Terr. L.R. 498, varied 5 Terr. L.R. 313.

(*o*) This was a case under the act of 1859, which authorized the transfer of a warehouse receipt, etc., to a private person "as collateral security for the due payment of any debt due to such private person," but did not contain any reference to security for a liability incurred.

(*p*) The effect of a legal mortgage is to entitle the mortgagee to take possession at any time, even before default, unless the right to remain in possession till default is reserved to the mortgagor. Doe *dem.* Mowat v. Smith, 1851, 8 U.C.R. 139; Moss v. Gallimore, 1779, Douglas, 279, 18 R.C. 404.

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From the date of its acquisition.

If the receipt or bill of lading is acquired in conformity with the act, the time of its acquisition is the test of its priority over an assignment or mortgage of the same goods to another party. If the law of the province in which the goods are situated requires a chattel mortgage or bill of sale to be registered in order to be valid as against creditors or a subsequent assignee or mortgagee for value without notice, then the taking of the receipt by the bank in good faith gives the bank priority over an unregistered assignment or mortgage in favour of a private person of any date whatsoever. If an assignment or mortgage by the law of the province is valid without registration as against creditors, etc., or has been registered in accordance with provincial law, priority of delivery is the sole test. The priority conferred by the act upon the bank is not, however, available to a third party to whom the bank assigns the security. Re Victor Varnish Co., Clare's Claim, 1908, 16 O.L.R. 338 (a case under sec. 88).

Priority of bank's claim.

In Dominion Bank v. Davidson, 1885, 12 O.A.R. 90, a bank advanced money for the purchase of goods upon the security of the shipping receipt and then, in return for the purchaser's receipt and undertaking to sell the property and collect the proceeds and deposit same in the bank, (the purchaser thereby acknowledging himself to be bailee of the goods for the bank), returned the shipping receipt to the purchaser. The purchaser received the goods from the carriers and warehoused them, taking in his own name warehouse receipts, which he endorsed to the bank, the bank then giving up the bailee receipt. It was held that no property in the goods had passed to the purchaser when the bank made the advance, and the bank was therefore entitled at least as equitable owner, as against execution creditors of the purchaser. See also Cameron v. Perrin, 1887, 14 O.A.R. 565, 576.

Previous holder or owner.

A previous holder may be either a previous lender on the security of the same goods, or a person to whom the receipt or bill of lading is issued, to be by him endorsed to the bank, or a person who comes within one of the classes mentioned in sec. 87.

The bank has no other or higher right than the consignor. Imperial Bank v. Hull, 1901, 4 Terr. L.R. 498, S.C. 5 Terr. L.R. 313.

If the warehouse receipt or bill of lading is made directly in favour of the bank. Sec. 86.

Receipt may be direct to bank.

This clause which dates from 1880 impliedly authorizes the receipt to be made direct to the bank, instead of its being made to the previous holder or owner and by him endorsed to the bank. It is preferable, however, that the document should be in the form of a receipt to the bailor or shipper and that the bank should acquire it by endorsement in the usual way.

Under the original act of 1859, which provided for a receipt, etc., being transferred to the bank by endorsement, it was held that a receipt could not be given direct to the bank within the act. Bank of B.N.A. v. Clarkson, 1869, 19 U.C.C.P. 182; Royal Canadian Bank v. Miller, 1870, 29 U.C.R. 266. But under the act of 1871 which authorized a bank to acquire a receipt without specifying the mode of acquisition, it was held by the Supreme Court that in the case of a warehouse receipt given by the owner of goods who was engaged in the calling of warehouseman, it was not necessary for the owner to issue a receipt to himself and then endorse it to the bank. A simple acknowledgment that the goods had been received, from the bank, which was the consignee of the goods, with a note that the document was to be regarded as a receipt under the provisions of the statute, was held to be sufficient. Merchants Bank v. Smith, 1884, 8 S.C.R. 512. This short cut is now authorized in the case of a receipt issued by a bailee of the goods of other persons.

Goods, wares and merchandise.

The transfer of the receipt, etc., vests in the bank only the particular goods mentioned in such receipt, and not goods substituted for such goods. Llado v. Morgan, 1874, 23 U.C.C.P. 517. But see now sub-sec. 4 of sec. 88, as to goods substituted in cases within that sub-section, and see sub-sec. 1 of sec. 89, as to goods manufactured or produced from the goods covered by a receipt, etc.

The phrase "goods, wares and merchandise" is defined by sec. 2. Cf. notes to sec. 76.

Goods not kept separate.

If the person who gives the receipt fails to keep the goods mentioned therein separate and distinguishable from other goods and sells some of them, so that he no longer has a suffi-

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cient quantity in all to answer the quantity mentioned in the receipt, the bank is, perhaps, entitled to hold all the goods in store of the kind mentioned in the receipt. Smith v. Merchants Bank, 1881, 28 Gr. 629, and cases cited at p. 639; S.C. 8 S.C.R. 512.

It has been said that if, after a wrongful commingling of goods, the receiptor indicates certain goods as equivalent to, and partly the same as, those covered by the receipt, the bank is entitled to such goods. Bank of Hamilton v. Noye, 1885, 9 O.R. 631; cf. Banque d'Hochelaga v. Merchants Bank, 1895, 10 Man. R. 361.

As to realization of the security, see sec. 89, sub-sec. 3.

Sec. 143 renders it a criminal offence to make any false statement in any warehouse receipt, etc., given to a bank under this section.

When previous holder is an agent.

87. If the previous holder of such warehouse receipt or bill of lading is any person—

(*a*) entrusted with the possession of the goods, wares and merchandise mentioned therein, by or by the authority of the owner thereof; or,

(*b*) to whom such goods, wares and merchandise are, by or by the authority of the owner thereof, consigned; or,

(*c*) who, by or by the authority of the owner of such goods, wares and merchandise, is possessed of any bill of lading, receipt, order or other document covering the same, such as is used in the course of business as proof of the possession or control of goods, wares and merchandise, or as authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such a document to transfer or receive the goods, wares and merchandise thereby represented;

the bank shall be, upon the acquisition of such warehouse receipt or bill of lading, vested with all the right and title of the owner of such goods, wares and merchandise, subject to the right of the owner to have the same retransferred to him if the debt or liability, as security for which such warehouse receipt or bill of lading is held by the bank, is paid.

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Presumption of possession.

2. Any person shall be deemed to be the possessor of such goods, wares and merchandise, bill of lading, receipt, order or other document as aforesaid—

(*a*) who is in actual possession thereof; or,

(*b*) for whom, or subject to whose control such goods, wares and merchandise are, or bill of lading, receipt, order, or other document is held by any other person. 53 V., c. 31, s. 73; 63-64 V., c. 26, s. 15. Am.

Section derived from the factors acts.

It has appeared from the review of earlier legislation at the beginning of this chapter that the act of 1871 included in the term "previous holder" an agent of the owner within the meaning of chapter 59 of the Consolidated Statutes of Canada, 1859, (a statute founded on the English Factors Act of 1842 and being the predecessor of article 1740 of the Civil Code of Lower Canada and of the Ontario statute entitled an Act respecting Contracts in relation to Goods entrusted to Agents, R.S.O., 1897, c. 150.(*q*) In the Bank Act of 1880, also, the consolidated statute was referred to in regard to the meaning of agent, but in the Revised Statutes of Canada 1886 the reference to C.S.C., c. 59 was omitted and a definition of agent was substituted. This definition was carried into the act of 1890 with little modification.

Sub-secs. 2 and 3 of sec. 73 of the last mentioned act are as follows:

"2. If the previous holder of such warehouse receipt or bill of lading is the agent of the owner of the goods, wares and merchandise mentioned therein, the bank shall be vested with all the right and title of the owner thereof, subject to his right to have the same re-transferred to him, if the debt, as security for which they are held by the bank, is paid:

Definition of agent in the act of 1890.

"3. In this section the expression agent means any person intrusted with the possession of goods, wares and merchandise, or to whom the same are consigned, or who is possessed of any bill of lading, receipt, order or other document used in the course of business as proof of the possession or control of goods, wares and merchandise, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive the goods, wares and

(*q*) Repealed by 10 E. 7, c. 66, which adopted the English Factors Act, 1889, 52 & 53 V., c. 45.

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merchandise thereby represented; and such person shall be deemed the possessor of such goods, wares and merchandise, bill of lading, receipt, order or other document as aforesaid as well if the same are held by any person for him or subject to his control as if he is in actual possession thereof."

In the revision of 1906 these two sub-sections were re-enacted as a separate section (87), the clauses being re-arranged. The new section contains all the elements of the former definition of agent, but the word agent itself is omitted.

Sec. 87 wider than the factors acts.

The terms of sec. 87 and of the definition of agent in the act of 1890 are wider than those of the factors acts, and decisions must be read with due regard to the differences in wording. An agent under the act of 1890, or the person referred to in sec. 87 of the present act, means (1) Any person entrusted with the possession of goods, wares and merchandise; (2) or to whom the same are consigned; (3) or who is possessed of (not "entrusted with the possession of" as in the earlier factors acts), a bill of lading or other document of title as mentioned in the act, whether the goods are in his actual possession or only held by another person for him or subject to his control. The act contains no provision similar to that of the factors acts with regard to the effect of notice to the pledgee of the fact of the pledgor's want of authority to make a pledge.

Sec. 87 may have to be qualified.

Under the factors acts a document of title to goods may be safely taken by way of pledge from one known to be an agent without any enquiry as to his authority. London Joint Stock Bank v. Simmons, [1892] A.C. at p. 217. The same is doubtless true under the Bank Act, but it is probable that such a pledge would be valid only if it is taken in good faith, and without notice that the agent making the same has no authority to do so or that he is acting *mala fide* against the owner of the goods, notwithstanding the omission from the Bank Act of the words to this effect in the factors acts.

The words of sec. 87 seem wide and general, but, when the legislation from which it was derived is referred to, it seems clear that all that was intended was to import the provisions of the factors acts into the Bank Act, and to give to a bank dealing in good faith with a factor or agent entrusted with the possession of goods, etc. the same protection as is given to private individuals so dealing with such factor or agent. Tennant v. Union Bank, 1892, 19 O.A.R. at p. 19, S.C., [1894] A.C. 31.

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Agent means mercantile agent.

Under the earlier factors acts, the terms used were simply "person" or "agent" entrusted etc., but it was held that the acts applied only to mercantile transactions, and that the term "person" or "agent" did not include a mere servant or caretaker, or one who had possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponded to that of some known kind of commercial agent like that class (factors) from which the acts took their name. Cole v. North Western Bank, 1875, L.R. 10 C.P. at pp. 372, 373; cf. City Bank v. Barrow, 1880, 5 App. Cas. at p. 678; Bush v. Fry, 1888, 15 O.R. 122, and cases there cited. The present English and Ontario acts refer expressly to a "mercantile agent." Cf. Oppenheimer v. Attenborough, [1908] 1 K.B. 221, at p. 225.

Goods in agent's hands with owner's consent.

The present English and Ontario acts resemble clauses (*b*) and (*c*) of sec. 87 in this respect, that they do not require the goods or the documents of title to be "entrusted" to the agent, (as in the earlier acts), but it suffices that they are in his possession with the owner's consent. Under both the earlier and the later factors acts it has been held that possession obtained under a contract voidable as fraudulent is sufficient. However fraudulent the person in actual custody may have been in obtaining the possession, provided his conduct did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. Oppenheimer v. Frazer, [1907] 2 K.B. 50, and cases cited at p. 70. Chalmers(*r*) remarks that it is not clear how far the alteration of language extends the operation of the act, and that if it was intended to alter the rule that where a mercantile agent was entrusted with goods in some other capacity, he could not sell or pledge them contrary to instructions, it is a pity that so important a change in the law has not been more clearly enunciated.

Goods subject to owner's control.

It was held under the earlier factors acts that the agent's powers were not exhausted by a single transaction. If he pledges goods to one person for a debt which does not exhaust the whole value of the goods, they are still in his control, being

(*r*) Sales of Goods Act, 7 ed. p. 158.

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held by the pledgee "for him and subject to his control," to the extent to which they are not exhausted by the pledge, and subject to such pledge they may be further pledged. Portalis v. Tetley, 1867, L.R. 5 Eq. 140.

Nemo dat quod non habet.

"At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge, as the case may be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves.(*s*)

Object of the factors acts.

"We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. If such had been their object, it could easily have been so enacted in terms; which certainly has not been done. The general rule of law is, that, where a person is deceived by another into believing that he may safely deal with property, he bears the loss, unless he can shew that he was misled by the act of the true owner. The legislature seems to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who *bonâ fide* deals with the agent and makes a purchase from or an advance to him

(*s*) Cole v. North Western Bank, 1875, L.R. 10 C.P. 354, at pp. 362-3.

without notice that he was not authorized to sell or to procure the advance."(*t*) Sec. 87.

Sec. 87 relates only to security taken under sec. 86, and does not render valid an unauthorized pledge by an agent under sec. 88. Barry v. Bank of Ottawa, 1908, 17 O.L.R. 83.

Loans upon live or dead stock.

88. The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock or the products thereof, upon the security of such products, or of such live stock or dead stock or the products thereof.

Grain.

2. The bank may lend money to a farmer upon the security of his threshed grain grown upon the farm.

Loans to wholesale manufacturers.

3. The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture.

Removal of goods.

4. If with the consent of the bank, the products, goods, wares and merchandise, live stock or dead stock or the products thereof, upon the security of which money has been loaned under the authority of this section, are removed and

(*t*) *Ibid.*, p. 372. In the judgment quoted from, Blackburn, J., reviews the history and policy of the factors acts. See also summary of the English legislation from 1823 to 1889 in Chalmers, Sales of Goods Act, 7 ed. p. 152. Ewart, with much reason, criticizes the factors acts because the acts have been taken to be a legislative declaration of the whole scope of the law in regard to estoppel by ostensible ownership or ostensible agency (whereas their real object was to change the law as erroneously declared by the courts on specific points, and to bring it into accord with commercial custom and the principles of estoppel, *e.g.*, to declare in effect that if an owner entrusts goods to a factor, and the factor without authority *pledges* the goods to a third person who advances money in good faith, the owner is estopped from denying the factor's authority to pledge), and because in so far as they accord with the general principles of estoppel they are not only unnecessary but injurious (for they divert attention from those principles and fix it upon interpretation of the language of statutes) and in so far as they conflict with the law of estoppel they are vicious (for they are then unsupported by principle and unamenable to reason). Estoppel by Misrepresentation, pp. 350 ff.

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Sub-stitution.

other products, goods, wares and merchandise, live stock or dead stock or the products thereof of substantially the same character are respectively substituted therefor, then to the extent of the value of the products, goods, wares and merchandise, or live stock or dead stock or the products thereof so removed the products, goods, wares and merchandise, live stock or dead stock or the products thereof so substituted shall be covered by such security as if originally covered thereby; but failure to obtain the consent of the bank to any such substitution shall not affect the validity of the security either as respects any products, goods, wares and merchandise, or live stock or dead stock or the products thereof actually substituted as aforesaid or in any other particular.

Security.

Owner may give the security.

5. Any such security, as mentioned in the foregoing provisions of this section, may be given by the owner of the said products, goods, wares, and merchandise, stock or products thereof, or grain.

Form of security.

6. The security may be taken in the form set forth in Schedule C to this Act, or to the like effect.

Same rights as upon warehouse receipts.

7. The bank shall, by virtue of such security, acquire the same rights and powers in respect of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby as if it had acquired the same by virtue of a warehouse receipt; provided, however, that the wages, salaries or other remuneration of persons employed by any wholesale purchaser, shipper or dealer, by any wholesale manufacturer or by any farmer in connection with any of the several wholesale businesses referred to, or in connection with the farm, owing in respect of a period not exceeding three months, shall be a charge upon the property covered by the said security in priority to the claim of the bank thereunder, and such wages, salaries or other remuneration shall be paid by the bank if the bank takes possession or in any way disposes of the said security or of the products, goods, wares and

merchandise, stock or products thereof, or grain covered thereby. 53 V., c. 31, s. 74; 63-64 V., c. 26, s. 17. Am. Sec. 88.

This section reproduces the effect of sec. 74 of the act of 1890, as amended in 1900 and 1913. It will be convenient for the purpose of referring to the earlier statutes to note that the sub-sections of the present section are derived as follows: sub-sec. 1 from the act of 1890, as amended in 1900; sub-sec. 2 added in 1913; sub-sec. 3 from the act of 1890; sub-sec. 4 from the act of 1900, as amended in 1913; sub-sec. 5 from the act of 1890, as amended in 1913; sub-sec. 6 from the act of 1890; sub-sec. 7 from the act of 1890, as amended in 1913.

The section must be read subject to sec. 90.

Previous legislation.

New form of security in 1890.

At the beginning of this chapter reference is made to some of the earlier statutes which allowed the owner of goods to borrow money upon such goods by means of the fiction that he was a warehouseman issuing in respect of goods in his custody a receipt which he then endorsed to the bank—a fiction which was only slightly disguised when the transaction took the form of a receipt issued direct by the owner to the bank.

The act of 1890 abolished the use for this purpose of a warehouse receipt issued by the owner, and substituted a new security, which is in form an assignment to the bank of goods, wares and merchandise, to secure the payment of advances made on bills or notes discounted or a debt contracted.

Although the form was the creation of the act, its effect was to be the same as if the bank had acquired the same by virtue of a warehouse receipt. It is to be borne in mind that when in 1890 the law was thus re-framed respecting advances made upon the security of goods in the owner's possession, it was assumed that the form and not the essence was to be changed. The statute extended the classes to whom advances could be made to others than the specified classes of persons to whom it was previously limited. Except as above stated there is little difference between the law governing assignments under sec. 88 and that which formerly governed warehouse receipts given by parties for their own goods.

Sec. 88. *Legislative power.—Conflict with provincial legislation.*

This section and sec. 86 raise an important question of legislative power as between the dominion and the provincial legislatures.

Conflict between dominion and provincial legislation.

Under the banking acts in force between 1880 and 1890, as we have seen, a bank might acquire and hold, as security for a loan, a warehouse receipt or bill of lading from any person engaged in certain named occupations, (*e.g.*, a saw miller), upon such person's own goods, which warehouse receipt or bill of lading should be as valid and effectual as if the owner and the person making such warehouse receipt or bill of lading were different persons, and the warehouse receipt or bill of lading was equally valid and effectual, although such person's business might be confined to the manufacture of his own timber. Tennant v. Union Bank, [1894] A.C. at p. 44.

The Ontario Mercantile Amendment Act(*u*) also dealt with warehouse receipts and other mercantile documents. It not only recognized the transferability of warehouse receipts by custodiers who were not the owners of goods; it extended the privilege to receipts by one who was both owner and custodier, but only in cases where the grantor of the receipts was, from the nature of his trade or calling, a custodier for others as well as for himself, and therefore in a position to give receipts to third parties. The enactments of the Bank Act therefore went beyond the provisions of the Mercantile Amendment Act. They omitted the limitation of the provincial statute, which required, in order to validate a warehouse receipt by a custodier who was also owner, that the trade or calling in which he is ostensibly engaged must be one that admitted of his granting receipts on behalf of other owners.(*v*)

The receipts in question in the case of Tennant v. Union Bank did not comply with the Mercantile Amendment Act, because it was neither averred nor proved that the firm giving the receipt had the custody of any goods except its own. It was argued as against the bank's claim that the subject of warehouse receipts and of other mercantile documents which pass the property in goods without delivery relates to "Property

(*u*) Formerly R.S.O. 1887, c. 122; R.S.O. 1897, c. 145; now revised as 10 E. 7, c. 63.

(*v*) The special provision in question is now to be found in simplified form in 10 E. 7, c. 63, s. 9. Apart from this provision there is nothing in the provincial statute corresponding to sec. 88 of the Bank Act.

and Civil Rights in the Province," within clause 13 of sec. 92 of the British North America Act, 1867, and is therefore within the exclusive jurisdiction of the province. The trial Judge and the Court of Appeal considered themselves bound by the decision of the Supreme Court of Canada in Merchants Bank v. Smith, 1882, 8 S.C.R. 512, upholding the jurisdiction of parliament. The Judicial Committee held that warehouse receipts taken as security by a bank in the course of the business of banking are matters coming within the class of subjects described in clause 15 of sec. 91 as "Banking, incorporation of banks and the issue of paper money," and that the provisions of the Bank Act with respect to such receipts are *intra vires*, even though the effect is to modify civil rights in the province. Tennant v. Union Bank, [1894] A.C. 31, affirming 19 O.A.R. 1. Sec. 88 also is clearly within this ruling and *intra vires* of the dominion parliament, and may confer upon a bank privileges as a lender which provincial legislation does not recognize.

Sec. 88.

Legislative power as to banking includes form and validity of security.

This section may also conflict with, and for the protection of a bank override the provincial statutes in regard to conveyances or mortgages of goods where possession is retained by the transferor. Provincial statutes providing that a bill of sale or chattel mortgage, if not duly registered, shall be void as against creditors of the grantor or mortgagor, must give way in favour of a bank which takes security in accordance with this section. Tennant v. Union Bank, [1894] A.C. at p. 40.

The principle of the provincial bills of sale acts is, perhaps, infringed rather in theory than in effect by the Bank Act. It is well-known that it is the practice of the banks to make advances to wholesale manufacturers, dealers, etc., for the purpose of enabling them to carry forward their enterprises until the products are put upon the market, and private lenders will not be inclined to make advances to such persons without assuring themselves as best they can that the goods proposed to be pledged have not been already assigned to a bank.

It can now be taken as definitely settled that the exclusive power to confer upon banks contractual and loaning rights, and to provide the forms that all securities shall take in connection therewith, is in the dominion parliament as incidental to banking, and that its enactments are *intra vires*, even if they are

Sec. 88. Legislative power as to banking includes form and validity of security.

inconsistent with the provincial law relating to property and civil rights. Cf. Cushing v. Dupuy, 1880, 5 App. Cas. 409. But the provincial legislature has exclusive jurisdiction with regard to warehouse receipts, bills of lading and other documents of title, and with regard to chattel mortgages and other matters of civil rights in the province, otherwise than in connection with banking or some other subject over which exclusive jurisdiction is given to parliament.

May lend money.

The loan must be made direct to the manufacturer, etc., and not to some other person, as for instance, a private banker, on the security of such manufacturer's note. The language of this section is not so wide as that of sec. 86 which permits the bank to acquire a warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour or as security for any liability incurred by it *for any person, etc.*

Wholesale purchaser, etc.

No definition of the word "wholesale" is given in the statute. In the Century Dictionary it is defined as "buying and selling by the piece or in large quantity; as, a *wholesale* dealer," but it is clear under the statute that the largeness or smallness of the transaction is not the determining factor. A rancher, whose business is raising cattle, is not a "wholesale purchaser or shipper of or dealer in live stock" within sec. 88, no matter how large his transactions are, any more than a farmer is a dealer in grain which he raises in large crops. The rancher makes his money not as a wholesale purchaser or shipper or dealer, but as a cattle-grower or cattle-breeder, and the fact that he sells in large or small numbers is merely an incident. Hatfield v. Imperial Bank, 1907, 6 Terr. L.R. 296.(*w*)

(*w*) In 1913 the bill as reported by the banking and commerce committee contained a clause authorizing loans under sec. 88 to a rancher upon the security of his cattle, but the clause was struck out in committee of the whole. See Debates, H. of C., 1912-3, col. 10564-6, where it is stated by the minister of finance that the amendment was intended to be declaratory of the law.

Sec. 88. "Wholesale."

The word "wholesale" is a relative term and comprises, generally speaking, those sales which are not "retail."(x) That is to say, its main determinant is the quality of the purchaser. A wholesale purchaser is not a consumer, but a person who buys to sell again; and the quality of the purchaser is to be considered with regard, not to his general status, but to the particular transaction. A retail dealer may thus be a wholesaler with regard to part of his stock if he sells it to those who are buying not to consume but to sell again. Not that one such sale will constitute the seller a wholesaler, but habitual sales of that kind will do so. A middleman may sometimes be a wholesaler, so long as he preserves his intermediary character at a stage before the consumer is reached. The particular circumstances of each case would have to be considered. See also Townsend v. Northern Crown Bank, 1912, 27 O.L.R. 479, at p. 480, affirmed, 1913, 4 O.W.N. 1165, at p. 1166.

Farmer—Threshed grain grown upon the farm.

Sub-sec. 2 was added in 1913. See notes under "Manufacturer, etc."

By sec. 2 (*h*) "grain" is defined as meaning wheat, oats, barley, rye and flax.

Manufacturer, etc.

In the act of 1890 two classes of persons were mentioned to whom the bank might lend money under this section: (1) Wholesale manufacturers of any goods, wares and merchandise, and (2) wholesale purchasers or shippers of products of agriculture, the forest, etc., or of live stock or dead stock and the products thereof, the loan to be made upon the security of such goods, etc., products, stock and products thereof respectively.

"Producer."

The bill introduced into the House of Commons contained the words "manufacturer or producer," but it was pointed out that in the interpretation clause goods, wares and merchandise were defined as including "agricultural produce" and that a producer would therefore include a farmer. The words

(x) See definition of these terms by W. F. Chipman preliminary to an acute discussion of the distinction between wholesale manufacturers on the one hand and wholesale purchasers, shippers or dealers on the other contained in an article in 16 J.C.B.A. 88 (Jan., 1909). Cf. Debates, House of Commons, 1890, vol. 2, col. 4288.

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"or producer" were struck out, as it was not intended that a farmer should be entitled to pledge his produce by virtue of this section.(*y*) As already noted a farmer has now been included by the amendment of 1913.

"Dealer."

The words "or dealer in" were inserted in 1900.

"Manufacturer."

The word "manufacturer" as defined by sec. 2 (*i*) "includes manufacturers of logs, timber, or lumber, maltsters, distillers, brewers, refiners and producers of petroleum, tanners, curers, packers, canners of meat, pork, fish, fruit or vegetables, and any person who produces by hand, art, process or mechanical means any goods, wares or merchandise."

The word in its widest sense of one who "makes" or "fabricates," or even in the narrower sense of one who "works materials into the form of" or "brings material into being as" (cf. McNichol v. Pinch, [1906] 2 K.B. 352), would doubtless include the various classes of persons mentioned in clause (*i*). The clause was framed, however, so as clearly to bring within the operation of the act certain classes which might not be included in the popular meaning of manufacturer. It was thought that, as popularly understood, the term manufacturer is rather applied to products which are not so entirely changed in substance and appearance from the articles from which they are made, as for instance, distilled or malt liquor. Distillers, maltsters and brewers were therefore expressly included. Similarly express mention is made of other classes of persons who are manufacturers in the strict legal sense, but not perhaps in the popular sense.(*z*)

A manufacturer of "logs, timber and lumber," was, by the amendment of 1900,(*a*) declared to be included in the term manufacturer in order to permit of the pledge of logs, timber and lumber under sec. 88 as well as under sec. 86. The rest of clause (*i*) dates from 1890.

The goods of a manufacturer, upon the security of which the bank may under this section make advances, must be goods actually manufactured by him or procured for such manufacture. They must not be goods procured by him to be sold in substantially the same condition.

(*y*) Debates, H. of C. 1890, vol. 2, col. 4281, 4287, 4292, 4311, 4514.

(*z*) See Debates, H. of C., 1890, vol. 2, col. 4515.

(*a*) Cf., similar amendment in 1900 of the definition of warehouse receipt so as to include receipts given by any person in charge of logs or timber in transit from timber limits or other lands to their place of destination.

6. Products of agriculture, the forest, etc. Sec. 88.

The word "quarry" was added in 1900.

Under the act of 1890 it was held by a judge of the Superior Court in Quebec that lumber which has passed through the saw mill (in this case beams and rough deal boards) is no longer the product of the forest within sub-sec. 1. In the Court of King's Bench, Lacoste, C.J., expressed an opinion in favour of this construction of the act; Hall, J. expressed the contrary opinion, and the third member of the court on other grounds concurred with the chief justice in affirming the judgment. Molsons Bank v. Beaudry, 1901, Q.R. 11 K.B. 212, 1 Com. L.R. 201.

On the other hand, a manufacturer of sawn lumber was within sub-sec. 3 by virtue of the definition of goods, wares and merchandise in the act of 1890 as including timber, deals, boards, staves, saw-logs and other lumber.

Products contrasted with manufactured goods.

Thus Molsons Bank v. Beaudry drew the distinction between products on the one hand and manufactured goods on the other, and the definition of goods just cited obliterated any such distinction as far at least as concerned lumber and timber. Logs which admittedly are products of the forest under sub-sec. 1 are manufactured goods under sub-sec. 3. It was evident, therefore, that sub-sec. 1 must be interpreted by itself, and without reference to sub-sec. 3, and that the words of the latter could not be used to limit the meaning of the word "product" in the former(*b*).

The case of Molsons Bank v. Beaudry was considered and the dissenting judgment of Hall, J. was approved in the recent case of Townsend v. Northern Crown Bank, 1912, 27 O.L.R. 479(*c*).

Broad construction of "products."

In the latter case the narrow construction of the word "products," according to which a product of the forest, etc, means a product in a state of nature and ceases to be a product when labour is applied to it, was rejected. Sub-sec. 1 indicates the sources of the things produced, not the means whereby they are produced. The narrower construction, logically pursued, would have confined the operation of the sub-sec-

(*b*) See W. F. Chipman's article in 16 J.C.B.A. 88 (already referred to) at p. 96. The subject matter of the article is, however, to a large extent rendered purely academic by the amendments of 1913.

(*c*) An appeal from the divisional court judgment was dismissed, 1913, 4 O.W.N. 1165, and will be reported in the Ontario Law Reports.

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tion to things such as standing timber and windfalls, fish, etc.

In 1913 the broad interpretation of the word "product" was confirmed by the insertion in sec. 2 of definitions of products of the forest, etc., so as to include various things other than direct products in a state of nature. The definition of goods, wares and merchandise was also enlarged so as to include all the products mentioned in sub-sec. 1 of sec. 88.

Substituted goods, wares and merchandise.

The original of sub-sec. 4 was added in 1900 as sub-sec. 2 of sec. 88. It applied only to security taken under sub-sec. 1. As a result of the re-arrangement of the sub-sections in 1913, the substitution clause applies to securities taken under any of the earlier sub-sections.

Substituted goods.

The clause constitutes a departure from the policy prevailing prior to 1900 in regard to the rights of a bank to grain and other similar merchandise, when the specific goods in existence at the time the security is taken have been removed and other goods substituted by the owner. Cf. Llado v. Morgan, 1874, 23 U.C.C.P. 517. See also the notes to sec. 86 as to the commingling of goods covered by a warehouse receipt.

Prior to 1913 the substitution clause was as follows: "The bank may allow the goods, wares and merchandise covered by such security to be removed and other goods, wares and merchandise, such as mentioned in the last preceding subsection, to be substituted therefor, if the goods, wares and merchandise so substituted are of substantially the same character, and of substantially the same value as, or of less value than, those for which they have been so substituted; and the goods, wares and merchandise so substituted shall be covered by such security as if originally covered thereby."

Under the present act the substituted goods may be of greater value than the goods for which they are substituted, but the security is good under this section only to the extent of the value of the last-mentioned goods.

The present act also provides that the failure to obtain the bank's consent shall not affect the validity of the security. These words presumably mean that if the bank has security by a new assignment under this section or in any way otherwise than by virtue of the substitution in respect of which the consent of the bank has not been obtained, the failure to obtain

Sec. 88. Substituted goods.

the bank's consent is not to affect the validity of such security. If the bank does not consent to the removal of the former goods, its title to them remains, but it can have no title to the substituted goods merely by virtue of sub-sec. 4 unless its consent to the substitution is obtained.

It is advisable to have the evidence of the bank's consent in writing prior to or contemporaneously with the removal and substitution, the most satisfactory way being that the customer make a formal application for the bank's consent, and it is advisable subsequently from time to time to obtain from the customer statements of the goods removed and substituted. Cf. Barry v. Bank of Ottawa, 1908, 17 O.L.R. 83, at pp. 89, 91.

The goods substituted must be of substantially the same character as those for which they have been substituted. If this condition is not fulfilled the assignment would be entirely worthless as a security on the substituted goods, and the bank's consent to the removal of the original goods would estop it from claiming the original goods as against a third party acquiring title upon the faith of such consent. When there is any doubt as to the character of the substituted goods it is advisable, if there is a sufficiently comprehensive written promise, to take a new assignment of the substituted goods.

The bank's right to hold substituted goods under this section must be distinguished from the right under sec. 89 to retain its security on goods manufactured from the goods originally assigned to it. The latter right extends both to goods covered by a warehouse receipt and to goods assigned under sec. 88.

May be given by the owner . . . may be taken in the form set forth in Schedule C to this Act or to the like effect.

The security for loans authorized by this section may be taken in any form allowed by the law of the place where the transaction occurs and where the goods or products are; but, if the security is not taken in the form of schedule C, the local law must be observed. If, for instance, the goods are in Ontario and a bank takes a chattel mortgage as security, it must protect itself by filing it in the proper office and otherwise complying with the bills of sale acts. Halsted v. Bank of Hamilton, 1896, 27 O.R. at p. 440; Barry v. Bank of Ottawa, 1908, 17 O.L.R. 83, at p. 90.

Sub-sec. 6, however, permits the security to be taken in a

Sec. 88. Priority if special form used.

special form, and sub-sec. 7 declares the rights acquired by the bank under such form. If this form is used it is valid notwithstanding that it does not comply with provincial law. Tennant v. Union Bank, *supra*.

The form is set out in schedule C to the act and, as amended in 1900 and with some verbal alterations introduced in 1906 and 1913, is as follows:—

SCHEDULE C.

Schedule C.

In consideration of an advance of dollars made by the Bank to A.B., for which the said Bank holds the following bills or notes: (*describe the bills or notes, if any*), [*or*, in consideration of the discounting of the following bills or notes by the Bank for A.B.: (*describe the bills or notes*),] the products of agriculture, the forest, quarry and mine, [*or*, the sea, lakes and rivers, *or*, the live stock or dead stock, or the products thereof, *or*, the goods, wares and merchandise, *or*, the grain, (*as the case may be*),] mentioned below are hereby assigned to the said Bank as security for the payment on or before the day of of the said advance, together with interest thereon at the rate of per cent. per annum from the day of [*or*, of the said bills or notes, or renewals thereof, or substitutions therefor, and interest thereon, *or as the case may be*].

This security is given under the provisions of section eighty-eight of The Bank Act, and is subject to the provisions of the said Act.

The said products of agriculture, the forest, quarry and mine, [*or*, the sea, lakes and rivers, *or*, the live stock or dead stock, or the products thereof, *or*, the goods, wares and merchandise, *or*, the grain, (*as the case may be*),] are now owned by , are now in the possession of , and are free from any mortgage, lien or charge thereon (*or as the case may be*), and are in (*place or places where the goods are*) and are the following (*description of goods assigned*).

Dated, etc.

(N.B.—*The bills or notes and the property assigned may be set out in schedules annexed.*)

Probably the intention of the act is that under sub-sec. 3, the same person shall own the goods as well as manufacture

them or procure them for manufacture, but this point is not clear. Sec. 88.

The form apparently contemplates that the person to whom the advance is made and the person by whom the goods are owned may be different persons.

The form contained in schedule C to the Bank Act of 1890 contemplated only the net amount of the advance being expressed as the consideration for the assignment. The present form, substituted in 1900, contains an alternative consideration clause which expressly sanctions the practice of mentioning, in the case of a discount, only the gross amount of the bills or notes. It might be inconvenient in some cases to have to calculate the charges and deduct them, so as to arrive at the net amount of the advance, before the completion of the document. The form of 1890 also required the bills or notes, if any, to be *fully* described. The present form omits the word "fully." Statement of the consideration.

Where a new assignment is taken under a written promise in connection with a regular line of credit, the advance being made by way of overdraft, it is advisable that such new assignment should be drawn to cover all the certain goods covered by the promise as security for the whole overdraft at such time.

The name of the owner of the goods and also the name of the person in whose possession they are (who may be a different person, as, for instance, when the goods are at a railway station where the agent cannot give a warehouse receipt, or in bond under the charge of the customs or the excise department), and any mortgage lien or charge on such goods, should be mentioned. Names of the owner and of the bailee.

The form also provides for the mentioning of the "place or places where the goods are" and the "description of the goods assigned." The latter is an important essential of the form and usually involves the former. The description in schedule C to the act of 1890 required the description to be "particular," a word which is omitted in the present form. It cannot be assumed, however that the change in wording is intended to do away with the necessity for identifying the goods by the description, and it would be well to comply with the rule laid down in the Ontario Bills of Sale Act, namely, that all instruments under the act shall contain such sufficient and full description of the goods that the same may be thereby readily and easily known and distinguished. Cf. Hatfield v. Description of the goods pledged.

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Imperial Bank, 1907, 6 Terr. L.R. 296; Imperial Paper Mills v. Quebec Bank, 1912, 26 O.L.R. 637, at p. 646.

Description of the goods pledged.

The cases are collected in Barron and O'Brien on Chattel Mortgages and Bills of Sale (1897), at pp. 360 *et seq.* The following are some of the cases which seem to be applicable to a security under this section of the Bank Act.

The description need not be such a one as that, with the deed in hand, without other enquiry, the property could be identified, but there must be such material on the face of the mortgage as would indicate how the property may be identified if proper enquiries are instituted. McCall v. Wolff, 1885, 13 S.C.R. at p. 133.

It is not necessary that the property should be so described as to enable a person to distinguish the article without having recourse to extrinsic evidence, and merely by casting his eye on them. Rose v. Scott, 1858, 17 U.C.R. 385, 387; Holt v. Carmichael, 1878, 2 O.A.R. 639, 641.

Written descriptions are to be interpreted in the light of the facts known to, and in the minds of, the parties at the time; they are not prepared for strangers, but for those they are to affect—the parties and their privies (Willey v. Snyder, 1876, 34 Mich. 60); yet they must be such as will enable the articles to be identified as against third parties, creditors or others, claiming an interest in the property. McCall v. Wolff, *supra.*

A mortgage of 100,000 feet of white pine saw logs now on North Branch, so called "Thunder Bay River," no data being furnished for distinguishing the logs from the mass bearing the same mark, is void for uncertainty (Richardson v. Alpena, 1879, 40 Mich. 203); but a description identifying the property by its mark would be sufficient, if it provided a means of separating the mortgaged property from others of a like kind. Merchants National Bank v. McLaughlin, 1880, 1 McCreary, 258. It is not sufficient to state merely the street in which the property mortgaged happens to be without saying that it is on the premises of a named person situate in that street. Wilson v. Kerr, 1858, 17 U.C.R. 168.

The words "also the stock of gold and silver watches, jewellery and electro-silver plate, which at the date hereof is in the possession of the mortgagor in his said store" is a sufficient description, notwithstanding that the electro-plated goods and watches were numbered, and might have been identified thereby. Segsworth v. Meriden, 1883, 3 O.R. 413.

Sec. 88. Description of the goods pledged.

A description of goods as being "now in and upon a certain locality," limits the goods to which the mortgage refers to those goods only that were, at the time of the execution of the mortgage, "now in and upon" the *locus in quo*, although goods upon other premises were intended to be covered by the mortgage. Donnelly v. Hall, 1885, 7 O.R. 581.

Where the mortgage is of "all the staves I have in M. the same which I purchased from F.," and it appears that the mortgagor has no staves in M., but has some close thereto and purchased from F., the first part of the description may be rejected as false, the remainder being sufficient to pass the property, it being merely a matter of identification. Pettis v. Kellogg, 1851, 7 Cush. (Mass.) 456.

The best description often is a general one, such as "all the logs, lumber and products thereof, which are now in the following places, namely, ." Such a description would be suitable even if it occurs in an assignment which is additional to one previously taken, and would, if it were valid in other respects, transfer the goods mentioned in the previous assignment subject to such previous assignment, and in addition, any goods added since such previous assignment or not covered thereby.

If a contest afterwards arises as to whether certain goods are covered by the mortgage, it will be necessary for the mortgagee to shew that such goods were the property of the mortgagor and in the specified place at the time of the execution of the mortgage.

If general words are employed it is necessary that the location of the property at the moment of the execution of the deed should be defined, and the statement should be added that the articles are all the goods answering the description on the premises (McCall v. Wolff, 1885, 13 S.C.R. 130; Harris v. Commercial Bank, 1857, 16 U.C.R. 437, 444; Howell v. McFarlane, 1857, 16 U.C.R. 469; Re Thirkell, 21 Gr. 492; Ross v. Conger, 1856, 14 U.C.R. 525; Fraser v. Bank of Toronto, 1860, 19 U.C.R. 381; Powell v. Bank of Upper Canada, 1871, 11 U.C.C.P. 303), or all the goods, etc., *of the mortgagor* on the premises described. Whiting v. Hovey, 1887, 14 S.C.R. 515; Thompson v. Quirk, 1889, 18 S.C.R. (Appendix) 695, S.C. Cas. 436.

Sec. 88. *The same rights and powers . . . as if it had acquired the same by virtue of a warehouse receipt.*

See sec. 86 and notes thereto as to the effect of the security taken, and see sec. 90 as to the conditions of its validity.

Sec. 87 does not apply to a security taken under sec. 88 so as to validate such security given by an unauthorized agent of the owner of the goods. Barry v. Bank of Ottawa, 1908, 17 O.L.R. 83.

Security not assignable.

A security acquired under sec. 88 is not assignable by the bank to a third party so as to transfer to such party the special lien or priority conferred by the statute, the purpose of the security being satisfied when the debt secured is paid to the bank. Consequently a guarantor on paying the debt of his principal to the bank does not stand in any better position than any other private individual who holds an unregistered transfer of the debtor's goods. Re Victor Varnish Co., Clare's Claim, 1908, 16 O.L.R. 338.

Sub-sec. 7 was amended in 1913 by the addition of the proviso.

Goods manufactured from articles pledged.

89. If goods, wares and merchandise are manufactured or produced from the goods, wares and merchandise, or any of them, included in or covered by any warehouse receipt, or included in or covered by any security given under the last preceding section, while so covered, the bank holding such warehouse receipt or security shall hold or continue to hold such goods, wares and merchandise, during the process and after the completion of such manufacture or production, with the same right and title, and for the same purposes and upon the same conditions, as it held or could have held the original goods, wares and merchandise.

Prior claim of bank over unpaid vendor.

2. All advances made on the security of any bill of lading or warehouse receipt, or of any security given under the last preceding section, shall give to the bank making the advances a claim for the repayment of the advances on the products or stock, goods, wares and merchandise therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor:

Provided that such preference shall not be given over the claim of any unpaid vendor who had a lien upon the products or stock, goods, wares and merchandise at the time of the acquisition by the bank of such warehouse receipt, bill of lading, or security, unless the same was acquired without knowledge on the part of the bank of such lien. Sec. 89. Proviso.

3. In the event of the non-payment at maturity of any debt or liability secured by a warehouse receipt or bill of lading, or secured by any security given under the last preceding section, the bank may sell the products or stock, goods, wares and merchandise or grain, mentioned therein, or so much thereof as will suffice to pay such debt or liability with interest and expenses, returning the surplus, if any, to the person from whom the warehouse receipt, bill of lading, or security, or the products or stock, goods, wares and merchandise or grain mentioned therein, as the case may be, were acquired: Provided that such power of sale shall be exercised subject to the following provisions namely:— Sale of goods on non-payment of debt. Proviso.

(*a*) No sale, without the consent in writing of the owner of any products of the forest shall be made under this Act until notice of the time and place of such sale has been given by a registered letter, mailed in the post office, post paid, to the last known address of the pledgor thereof, at least thirty days prior to the sale thereof: Notice of sale of saw logs, railway ties and lumber.

(*b*) No such products or stock, other than products of the forest, and no goods, wares and merchandise, and no grain, shall be sold by the bank under this Act without the consent of the owner, until notice of the time and place of sale has been given by a registered letter, mailed in the post office, post paid, to the last known address of the pledgor thereof, at least ten days prior to the sale thereof; Notice of sale of goods.

(*c*) Every sale, under such power of sale, without the consent of the owner, shall be made by public auction, after notice thereof by advertisement, in at least two Sale by auction.

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newspapers published in or nearest to the place where the sale is to be made, stating the time and place thereof; and, if the sale is in the province of Quebec, then at least one of such newspapers shall be a newspaper published in the English language, and one other such newspaper shall be a newspaper published in the French language. 53 V., c. 31, ss. 76, 77 and 78; 63-64 V., c. 26, s. 19. Am.

This section is a combination of secs. 76 and 77 of the act of 1890, and of sec. 78 of the same act, as amended by sec. 19 of the act of 1900. Some verbal amendments were made in 1913.

Goods manufactured or produced from goods pledged.

The act of 1880 provided that a warehouse receipt given by a miller, maltster, or packer or cutter of pork, for cereal grains or hogs, should also vest in the bank the title to flour or malt, pork, bacon or hams manufactured out of the grains or hogs while held under such receipt. Sub-sec. 1 in its present form dates from 1890, and contains a similar provision of general application to any goods, wares or merchandise included in any warehouse receipt or any security given under sec. 88. A bill of lading is not mentioned because it covers goods in transit only.(*d*)

Having regard to the usual course of business in such matters, flour which is set apart as being the product of wheat need not be that which has been made from the identical wheat mentioned in the receipt, it being physically impossible in many instances, as the mills are conducted, that the wheat delivered, and that only, should produce the flour given for it. Mason v. Great Western, 1871, 31 U.C.R. 73, 93; cf. Llado v. Morgan, 1874, 23 U.C.C.P. 517, 525.

Rights to proceeds in case of sale by the receiptor.

In Re Goodfallow, Traders Bank v. Goodfallow, 1890, 19 O.R. 299, a miller, as security for an advance, gave a ware-

(*d*) Sub-sec. 1 has been substantially re-enacted in Ontario by the Mercantile Law Amendment Act, 10 E 7, c. 63, s. 10, applicable to transactions between private individuals. See note (*e*) at the beginning of this chapter.

house receipt to a bank on some wheat "and its product" stored in his mill. He died not long afterwards. In the interval, wheat was constantly going out of the mill, and fresh wheat coming in. Just before the receiptor's death, the bank took possession, and found a large shortage in the wheat, which had commenced shortly after the receipt had been given and had continued to a greater or less degree all the time. In the administration of the estate it appeared that during the period of shortage some of the wheat had been converted into flour which had been sold, and the proceeds, which were less than the value of the shortage, were paid to the administrator. It was held that the bank was entitled to the purchase money of the flour. Sec. 89.

Right to proceeds in case of sale.

Re Goodfallow was a contest between the bank and the pledgor's administrator (whose rights were no higher than those of the pledgor himself), and the case was distinguished on this ground by the Supreme Court of Nova Scotia in Union Bank of Halifax v. Spinney, 1906, 1 E.L.R. 277. In this case one Churchill, who had pledged corn to a bank by assignment in the form of schedule C, ground the corn into meal, sold the product, and fraudulently sought to divert the purchase money to one of his creditors, the defendant Spinney, by making drafts upon the purchaser in Spinney's favour instead of the bank's. On appeal to the Supreme Court of Canada, however, it was held, reversing the court below, that Spinney knew, or, under the circumstances, ought to have known, that the meal was the property of the bank, and therefore, not being a purchaser in good faith for value and without notice of the bank's claim, he was liable to the bank for the purchase money in his hands: 38 S.C.R. 187.

Prior claim over unpaid vendor.

The act of 1861 gave to a bank, which had made advances on the security of a bill of lading or receipt, a claim on the goods covered by the security, prior to and by way of preference over the claim of any unpaid vendor—an important provision, because, under the law of Lower Canada, and under certain circumstances under the law of Upper Canada, the claim of the unpaid vendor of the goods would prevail over that of a person making advances upon the security of the goods.

Sec. 89. Priority over unpaid vendor.

The act of 1865 gave the bank priority in regard to advances on the security of timber, etc., over the claim of any unpaid vendor *or other creditor save and except claims for wages of labour performed in making and transporting such timber, etc.* In 1871, however, the italicized words were omitted.(*e*)

Sub-sec. 2, in its present form, dates from 1890. It is to be noted that any unpaid vendor who has had a lien on the goods at the time of the acquisition by the bank of the warehouse receipt or bill of lading is now protected unless the same was acquired without knowledge on the part of the bank of such lien.

The words "or into which they have been converted" refer to the provisions of sub-sec. 1.

Sale of goods on non-payment of debt.

Sub-sec. 3 dates from 1890, except that in 1900(*f*) the words "or liability" were inserted after the word "debt," where it first occurs—an amendment rendered necessary by the insertion of these words in sec. 86—and that in 1913 the words "products of the forest" were substituted for the words "timber, boards, deals, staves, saw-logs or other lumber" in the proviso, and the words "products or stock" and "grain" were inserted in several places (notwithstanding that by sec. 2 goods, wares and merchandise include grain and other products).

Sale of goods on non-payment of debt.

The express power of sale given by this section is subject to the following conditions:

1. There must be default in payment at maturity of the debt secured by the document under which the goods are held.

2. Except by the consent of the owner, 30 days prior notice by registered letter to the last known address of the pledgor must be given of the time and place of sale of any products of the forest and ten days' notice in the case of other products or goods.

3. Except by the consent of the owner, the sale must be by public auction, of which a notice is to be duly published as required by the section.

(*e*) The words in italics have been retained in the corresponding provision of the Ontario Mercantile Law Amendment Act, 10 E. 7, c. 63, s. 12.

(*f*) Sub-sec. 3, substantially in the form in which it stood prior to 1913, was re-enacted in Ontario by 10 E. 7, c. 63, s. 13.

Sec. 89. Sale of goods on non-payment of debt.

In so far as a security is valid only by virtue of secs. 86 and 88, these conditions must be strictly observed in order to constitute a valid sale, and the bank is liable to a penalty (sec. 142) if it sells without complying with the conditions. If a security, however, is valid apart from secs. 86 and 88, there is by the common law prevailing in the provinces other than Quebec, an implied power of sale on default in payment of the debt secured (see notes to sec. 81), and such a power would probably not be subject to the conditions of this section. The conditions ought to be read as referring only to a sale made by virtue of the act.

The owner may not only waive the necessity of notice and public sale, but may also agree that the goods shall become the property of the bank, and authorize it to sell them by private sale and apply the proceeds upon the debt. Such a transaction gives the bank an absolute title notwithstanding that at its inception the pledge was invalid by reason of being for a past debt, the rights of creditors not having arisen at the time of the agreement releasing the title in the goods to the bank. Armstrong v. Buchanan, 1903, 35 N.S.R. 559, 1 Com. L.R. 506.

If goods are lawfully sold under this section, the money that remains after applying the proceeds of the sale to the debt secured by the warehouse receipt, bill of lading or security is simply money held to the use of the person from whom the document or the goods was or were acquired. Such money may be made the subject of a collateral agreement, oral or written, and it is competent for the bank and the borrower to agree that in the event of sale the surplus shall be applied by the bank in payment of other debts due by the borrower to the bank. Thompson v. Molsons Bank, 1889, 16 S.C.R. 664.

If the goods are of such a nature that they are capable of division a bank is not justified in selling a quantity greatly in excess of what will realize enough to pay its debt. Gibbs v. Dominion Bank, 1879, 30 U.C.C.P. 36; cf. Prentice v. Consolidated Bank, 1886, 13 O.A.R. 69 and Toronto General Trusts v. Central Ontario Ry. Co., 1905, 10 O.L.R. 347, cited in the notes to sec. 78.

If a bank sells goods pledged under a bill of lading and endorses the bill to the purchaser but has not itself a good title the purchaser may recover the price from the bank as upon an implied warranty of title and failure of consideration (Peuchen

Sec. 89. Sale of goods on non-payment of debt.

v. Imperial Bank, 1890, 20 O.R. 325), or may sue upon the implied warranty for the value of the goods. Confederation Life v. Labatt, 1900, 27 O.A.R. 321.

The section authorizes the sale of the goods mentioned in the security; it does not authorize the transfer of the security itself. Re Victor Varnish Co., Clare's Claim, 1908, 16 O.L.R. 338, at p. 343.

A bank which has endorsed and delivered a bill of lading is not obliged by law to give notice of the arrival of the goods to the endorsee, even if the bank has itself received notice. Masson v. Merchants Bank, 1898, Q.R. 14 S.C. 293.

Conditions under which bank may take security.

90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt, or liability, unless such bill, note, debt or liability is negotiated or contracted,—

(*a*) at the time of the acquisition thereof by the bank; or,

(*b*) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank:

Proviso.

Provided that such bill, note, debt or liability may be renewed, or the time for the payment thereof extended, without affecting any such security.

Exchanging of warehouse receipt for bill of lading and *vice versa*.

2. The bank may—

(*a*) on the shipment of any products or stock, goods, wares and merchandise, or grain, for which it holds a warehouse receipt, or any such security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange therefor; or,

(*b*) on the receipt of any products or stock, goods, wares, and merchandise, or grain, for which it holds a bill of lading, or any such security as aforesaid, surrender such bill of lading or security, store the products or stock, goods, wares and merchandise, or grain, and take a warehouse receipt therefor, or ship the products or stock, goods, wares and merchandise, or grain, or part of them, and take another bill of lading therefor. 53 V., c. 31, s. 75; 63-64 V., c. 26, s. 18.

Sec. 90. Earlier legislation.

The statute of 1859, already referred to in the review of legislation at the beginning of this chapter, provided that no transfer of a bill of lading or receipt should be made to secure the payment of any bill, note or debt unless such bill, note or debt was negotiated or contracted at the same time with the endorsement of such bill of lading or receipt. Substantially this provision was preserved in all the subsequent banking statutes.

By the Bank Act of 1871 these words were added "or upon the understanding that such bill of lading, etc., would be transferred to the bank, but such bill, note or debt may be renewed or the time for the payment thereof extended without affecting such security." Royal Canadian Bank v. Ross, 1877, 40 U.C.R. 466.

In 1886 the word "promise" was substituted for the word "understanding." R.S.C., 1886, c. 120, s. 53 (4).

A new section was substituted in 1890, which, as amended in 1900, and with some verbal alterations made in 1906 and 1913, is re-enacted in the present section.(*g*)

Conditions under which security may be taken.

Mortgages whether of real or personal property may be taken by a bank only by way of additional security (see sec. 68). Security under secs. 86 and 88 cannot be taken for a past advance, except upon a written promise or agreement contemporaneous with the advance. The object of the special powers given to banks to advance money to wholesale purchasers, shippers and dealers and to manufacturers is to enable such persons to bring their goods and products to completion and to the market, *i.e.*, to tide over the time between the purchase and the sale, between the raw product and the finished article, to facilitate the "moving of the crops," etc. This object may be accomplished by a transaction which results in an advance being made at the time of the pledge, or thereafter from time to time as it may be required, but would not be assisted by allowing a bank to take security of this kind for an advance which had been already made.

(*g*) Cf. the Mercantile Law Amendment Act, 10 E. 7, c. 63, s. 11, amending the law of Ontario by the addition of words corresponding to clause (*b*). The provincial act also contains a provision limiting the time for which the pledgee may hold the goods to six months, a provision which was omitted from the Bank Act in 1871. Cf. Royal Canadian Bank v. Ross, 1877, 40 U.C.R. 466, at p. 477.

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Debt or liability.

As to the meaning of debt or liability, see notes to sec. 86. The words "or liability" were added to this section and to sec. 89 in 1900, on account of the similar addition made in that year to sec. 86.

Negotiated or contracted.

Notes are not "negotiated or contracted at the time of the acquisition" of a warehouse receipt where there is simply a renewal of notes already in the hands of the bank, and a warehouse receipt is procured on the occasion of such renewal; no new advance is made and no valuable consideration is given or surrendered contemporaneously by the bank which might represent the inception of a new transaction or negotiation of securities. In the section "renewed" is put in contrast with "negotiated"; the latter term refers to the original transfer of the negotiable instrument from the maker or holder to the bank, but not to intermediate transfers or renewals taking place during the currency of the liability whereby no change is made in the condition of the parties except the mere giving of time. Dominion Bank v. Oliver, 1889, 17 O.R. 402; Bank of Hamilton v. Halstead, 1897, 28 S.C.R. 235.

Negotiated or contracted.

Similarly the substitution of a note for an overdrawn account, (as, for instance, in a produce account where the customer is permitted to overdraw or pay for grain, etc., and to cover by the discounting of a note as soon as he knows what his requirements are), does not constitute a debt contracted at the time of the discounting of the note so as to support a security taken at that time.

The fact that for the debt when originally contracted the bank held security, which it gave up when the renewals were made and new security taken, cannot assist it. A bill or note may be renewed without affecting the original security, but it is not contemplated by the act that the original security may be given up and fresh security taken on the renewal. Bank of Hamilton v. Shepherd, 1894, 21 O.A.R. 156, overruling Bank of Hamilton v. John T. Noye Mfg. Co., 1885, 9 O.R. 631; but see Townsend v. Northern Crown Bank, 1912, 27 O.L.R. 479, at p. 482; S.C. 4 O.W.N. 1165.

A bill or note taken by a bank on acquiring a security under this section is not "negotiated at the time of the acquisition

Sec. 90. Negotiated or contracted.

thereof" when the person giving the security and to whose account the proceeds of the bill or note are credited, is not at liberty to draw against them except on fulfilling certain other conditions. Halsted v. Bank of Hamilton, 1896, 27 O.R. 435, affirmed, 24 O.A.R. 152, and by the Supreme Court, *sub nom.* Bank of Hamilton v. Halstead, 1897, 28 S.C.R. 235.

Bank of Hamilton v. Halstead was distinguished by the Court of Appeal for Ontario in Ontario Bank v. O'Reilly, 1906, 12 O.L.R. 420. Moss, C.J.O., at p. 432, says: "In regard to the warehouse receipts now in question, each one was transferred by indorsement and instrument of hypothecation contemporaneously with the discount of a promissory note made by the holders or owners of the warehouse receipts. As a result of each transaction the plaintiffs acquired and became the holders of a promissory note on which the makers were liable, and the latter received in their current account the proceeds of the discount, and in consideration thereof made a transfer or hypothecation of a warehouse receipt. There was, therefore, a negotiation of a note and an actual advance at the time of the acquisition of the warehouse receipt. No doubt, it was the case that on most occasions when a discount was effected the account was overdrawn, but that was in the course of dealing, and the circumstance did not deprive the transaction of its character of a negotiation of the note, for the proceeds were placed freely at the disposal of the customers, and the drawings on the account continued as before. Therein lies the broad distinction between this case and Halsted v. Bank of Hamilton, . . . , a distinction which renders this case analogous to the decision of the Master of the Rolls in In re Carew's Estate Act, 1862, 31 Beav. 39, to which reference is made by the learned Chief Justice of the Common Pleas in 27 O.R. at p. 439. On the same page the learned Chief Justice states his reasons for thinking it impossible to treat any of the notes in respect of which the securities in question were given as having been 'negotiated' in the sense in which the term is used in sec. 75 [now sec. 90] of the Bank Act. He says: 'It is true that the form was gone through of taking the notes and passing the amount of them to the credit of one of the accounts, but contemporaneously with this an equal amount was placed to the debit of another of the accounts, and not a farthing of the amounts which the notes represented could be touched by Zoellner or made available by him for any

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purpose, unless he should bring to the defendants and leave for collection or discount customers' paper, which would entitle him to credit in account No. 2, for an amount equal to that which he proposed to withdraw.' In other words, the proceeds of the discounts were placed entirely out of the control of the customer, and he could make no use of them except upon further securing the amount of the withdrawals. No such state of facts exists in this case, and the decision does not assist the defendants."

Ontario Bank v. O'Reilly has been followed in Toronto Cream, etc., Co. v. Crown Bank, 1908, 16 O.L.R. 400, and Canadian Bank of Commerce v. Wilson, 1908, 9 W.L.R. 359 (Yukon).

Upon the written promise or agreement.

If the bill, note, debt or liability is not negotiated or contracted at the time of the acquisition of the security by the bank, then the negotiation or contracting must be upon the written promise or agreement that such security shall be given. The writing must be given to the bank either at the time of the negotiation or contracting of the debt or anterior thereto, for a bill, etc., could not be said to be negotiated or contracted *upon* a written promise which is not then in existence.

Written promise or agreement.

In Re Central Bank, Canada Shipping Co.'s Case, 1891, 21 O.R. 515, a case arising under the corresponding section of R.S.C. 1886, c. 120, at the time of an advance of money to pay for cattle, the purchaser agreed that upon the shipment of the cattle the bill of lading should be issued to the bank as security for repayment of the advance. The cattle were delivered to the carriers who had notice and assented to the special property of the bank. It was held (following, but not altogether approving, Merchants Bank v. Suter, 1876, 24 Gr. 356) that the bank had priority over creditors who had attached the cattle on their delivery to the carriers, but before the bill of lading was made out. The effect of the case is that a bank may acquire by anticipation a property in a non-existing bill of lading, and this must be to acquire by anticipation some right or title of the previous owner to the goods, of which the document is but the symbol, before the date of the acquisition of the symbol.

A liberal construction has been given to the provision in question and to the corresponding provisions in earlier statutes.

Sec. 90. Written promise or agreement.

A substantial compliance with the statute is sufficient. The precise amount of the debt to be secured need not be stated in the promise. See Imperial Paper Mills v. Quebec Bank, 1912, 26 O.L.R. 637, and cases cited at p. 653.(*h*)

That such warehouse receipt, etc. would be given.

It has been held that the goods need not be *in esse* or in the possession of the borrower at the time the promise or agreement to give the warehouse receipt is made. Royal Canadian Bank v. Ross, 1877, 40 U.C.R. 466.

There has been no decision, however, as to whether a general promise to give a warehouse receipt upon goods would be sufficient, or whether it is necessary to refer to the precise warehouse receipt which is afterwards actually acquired, *e.g.*, by mentioning the warehouse, the warehouseman, the quantity and the description of the goods. The latter would be sufficient, but in practice it would be well to avoid too much particularity, for if the receipt actually given did not correspond exactly to the description of it contained in the promise, the validity of the security might be questioned.

The use of the word "such" seems to indicate that more is required than a general promise to give a warehouse receipt. The goods need not be in existence at the time of the making of the promise, but their existence must be in contemplation, and it should be practicable to give sufficient particulars to identify them, as, *e.g.*, all the goods of a certain kind in a specified place. Such a description contained both in the promise and in the warehouse receipt afterwards given in pursuance of the promise would be sufficient. Cf. Imperial Paper Mills v. Quebec Bank, *supra*.

Line of credit.

Where a regular line of credit is granted, it is essential that *before* or *at the time* that the first advance is made thereunder, a written promise should be taken to give security, and ordinarily no promise will meet the varying conditions of an active account except a general one by which the customer agrees to give security from time to time on all his goods, etc., for all advances made under the credit. The written promise must mention any class of product on which the bank afterwards

(*h*) An appeal to the Privy Council is pending in this case.

Sec. 90. Written promise or agreement.

lends, and any places where the goods, etc., are stored at the time of the taking of the security. In practice it would be advisable to include all classes of product on which it is likely the bank may be asked to lend and all places where the customer is likely to store goods. Such a promise will enable the bank to take security on such portions of his goods as may seem necessary from time to time.

If subsequently it is desired to make advances larger than those mentioned in the written promise, but upon goods of the same nature and stored in the same places as those mentioned in the promise, a new written promise may be taken covering the additional amount of advances to be made. If, however, it is desired to make advances upon goods of a different nature, or, whether of the same or of a different nature, stored in different places from those mentioned in the original promise, then a new promise must be taken for the amount of advances to be made upon such goods. In this case a separate account must be kept of advances made under the second promise, and the proceeds of advances made under one promise must not be used to repay advances made under the other promise.

When new security is taken under a written promise it is advisable usually that the bank should retain the old security until the final repayment of all the advances.

May be renewed or the time for payment thereof extended.

The renewal or extension is only a continuation of the old indebtedness. In the absence, however, of special agreement, payments made by the debtor after the making of the advances are in the ordinary course between debtor and creditor placed against the earliest items of the indebtedness, when no special direction has been given by the debtor and no special appropriation made by the creditor. Gibbs v. Dominion Bank, 1879, 30 U.C.C.P. 36. See the notes to sec. 95 as to appropriation of payments.

Exchange or substitution of securities.

A borrower had been in the habit of buying hops from time to time and giving the bank pledges of the same for the purpose of raising money to pay for them, and then at the request of the bank, he constituted his bookkeeper his warehouseman, and the latter issued warehouse receipts to the bank in substi-

tution for the pledges theretofore held, there being no further advance made when the new securities were given. It was held that this exchange of securities should be treated as authorized under sub-sec. 2 of this section. Conn v. Smith, 1897, 28 O.R. 629. Sec. 90.

In the case of a casual or isolated loan it is necessary that a security taken by a bank under section 86 or section 88 should not be given up, but should be held by the bank until the debt or liability has been absolutely extinguished, unless such security is taken in pursuance of a written agreement drawn so as to admit of the substitution of a new security, or unless the substitution falls within the provisions of sub-sec. 4 of sec. 88. Otherwise the bank could not validly take any security other than the one taken at the time the loan is made. It is often advisable even when the loan is made at the time of the taking of the security that there should be a written promise to give further security, so that the bank would be in a position to take further security if it deemed it necessary without making any further advance. Exchange or substitution of securities.

Curing defects.

If an assignment taken is defective the security may be perfected by a new assignment in pursuance of a written promise made at the time of or before the making of the advances. If there is no written promise, but subsequent advances are made upon the security of new assignments, with or without a written promise to give further assignments, the liability account relating to the first advance should be closed so far as new advances are concerned. The old loan cannot of course be paid out of the proceeds of the new loan, but subsequent receipts on the customer's account can be applied on the repayment of the old loan, which may thus be ultimately wiped out, the effect being to leave the outstanding advances all covered by the new assignment.

Penalties.

See secs. 143 and 144.

CHAPTER XVII.

Interest and Collection Charges.

Interest at 7 per cent may be charged.

91. The bank may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank.

Return to Minister.

2. The bank shall make a quarterly return to the Minister, as of the last juridical day of the months of March, June, September and December in each year, giving such particulars as may be prescribed by regulations made by the Treasury Board of the interest and discount rates charged by the bank.

Signature to returns.

3. Such returns shall be made up and sent in within the first thirty days after the respective juridical days aforesaid, and shall be signed by the same persons as are required to sign the monthly returns made to the Minister under section 112 of this Act. 53 V., c. 31, s. 80. Am.

Usury laws.

Prior to the statute 29 and 30 V., c. 10 (1866) a bank exacting a higher rate of interest and discount than seven per cent. was liable under the law of the late province of Canada to the penalties and forfeitures of C.S.C., 1859, c. 58—these having been kept in force as regards banks after they were repealed against individuals. Drake v. Bank of Toronto, 1862, 9 Gr. 116, 133. The first mentioned statute enacted that no bank should be liable to any penalty or forfeiture for usury under C.S.C., c. 58, but that the amount of interest or commission should remain as limited thereby. It was held that the amending statute relieved the bank not only from the penal consequences of contravening the former act, but also from the loss or forfeiture of the money advanced and of the security received. Commercial Bank v. Cotton, 1867, 17 U.C.C.P. 447.

In 1867 the provision was enacted which was re-enacted

by the general banking act of 1871, and from there transcribed into the act of 1890, as sec. 80, in the following words: Sec. 91.

"80. The bank shall not be liable to incur any penalty or forfeiture for usury and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank; and the bank may allow any rate of interest whatever upon money deposited with it." Former legislation as to interest.

In the revision of 1906 the first clause of the section just quoted was omitted, and the remainder of the section was re-enacted in the present secs. 91 and 92. Sub-secs. 2 and 3 of sec. 91 were added in 1913.(a) A bank failing to make the returns directed by the section is liable to a penalty under sec. 147C.

In 1872 a further statute relating to interest was passed. It recited the provisions of the act of 1871 (sec. 80 of the act of 1890 above referred to), and recited further that in some of the provinces of Canada laws might be in force imposing penalties on parties other than banks for taking, or stipulating, or paying more than a certain rate of interest, and that doubts might arise as to the effect of such laws in certain cases as to parties, other than the bank, to negotiable securities discounted or otherwise acquired and held by any bank. The statute then enacted the provisions which were afterwards re-enacted in the

(a) Sec. 91 was the subject of a good deal of discussion in parliament. The section as it stood in the revision of 1906 was struck out by the banking and commerce committee and the following was substituted: "The bank may stipulate for, take, reserve or exact such rate of interest or discount per annum as may be agreed upon, and may receive and take in advance any such rate, but no higher rate of interest than seven per cent. shall be recoverable by the bank." The avowed intention in making the change was to shew on the face of the new section the actual legal result of the old section in view of the decisions of the courts, especially that of the Privy Council in McHugh v. Union Bank of Canada, [1913] A.C. 299. Probably the only result of the proposed change would have been that if a bank brought suit for payment of interest under a contract providing for a higher rate than 7%, under the proposed section the bank could recover 7%, whereas in McHugh v. Union Bank it was held in similar cirumstances that the banker could recover only 5%, the stipulation for interest being contrary to the statute and therefore void. In committee of the whole, however, objection was taken to the frank recognition of the principle that a bank may charge any rate of interest it chooses if it takes the interest in advance or if the customer voluntarily pays the interest charged. The old section with its apparent, but quite illusory, prohibition was restored, and the second and third sub-sections were added to it. See Debates, H. of C., 1912-3, col. 10591, 10599, 10609, 10631.

Sec. 91. Former legislation as to interest.

Bank Act of 1890, as sec. 81. This section was omitted from the Bank Act in the revision of 1906. It became practically obsolete in 1890, when by 53 V., c. 34, the various provincial statutes relating to interest and usury consolidated in R.S.C., 1886, c. 127, secs. 9 to 30, were repealed. Cf. sec. 59 of the Bills of Exchange Act, *infra*.

Interest Act.

The Interest Act (R.S.C. 1906, c. 120), provides (secs. 2 and 3): "2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon. 3. Except as to liabilities existing immediately before the seventh day of July, one thousand nine hundred, whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum." Prior to the 7th of July, 1900, the rate in such cases was six per cent. The expression "liabilities existing" means liabilities for interest, so that interest falling due on or after the 7th of July, 1900, where no rate is fixed by agreement or by law, is payable at the rate of 5% notwithstanding that it is payable in respect of a debt, agreement or transaction arising before that date. Plenderleith v. Parsons, 1907, 14 O.L.R. 619. Cf. Kerr v. Colquhoun, 1911, 2 O.W.N. 521.

The Money-Lenders' Act (R.S.C. 1906 c. 122), which limits the rate of interest in certain cases, applies only to "money-lenders" as defined in the act and to loans of less than $500.

There is, then, no law now in force which renders a bank "liable to incur any penalty or forfeiture for usury."

Recovery back of excess.

If a bank retains or debits the debtor's account with interest in excess of seven per cent., the debtor is entitled to recover back the excess or is entitled to credit for the excess so charged in an action by the bank. Canadian Bank of Commerce v. McDonald, 1906, 3 W.L.R. 90, at pp. 101, *et seq.*; Banque de St. Hyacinthe v. Sarrazin, 1892, Q.R. 2 S.C. 96. To allow recovery back of such interest is not in effect to enforce a penalty or forfeiture for usury; it is not a proceeding for usury, though the action is brought on account of usury. Kierzkowski v. Dorion, 1868, L.R. 2 P.C. 291, at p. 314.

Sec. 91. Stipulation for more than 7 per cent. invalid.

A bank may stipulate for any rate of interest or discount whatever without thereby invalidating the contract of loan or pledge. Quinlan v. Gordon, 1861, 20 Gr. (Appendix) 1; Adams v. Bank of Montreal, 1899, 8 B.C.R. at p. 316, 1 Com. L.R. at p. 250; S.C. 32 S.C.R. 719. It has been held that the contract is valid except in so far as it stipulates for more than 7%, and that the stipulation for a higher rate than 7% is unenforceable by action though not illegal, and that if the bank is obliged to sue for the interest, it cannot recover the excess. Bank of Montreal v. Hartman, 1905, 12 B.C.R. 375; Williams v. Canadian Bank of Commerce, 1907, 13 B.C.R. 70. But in Bank of British North America v. Bossuyt, 1903, 15 Man. R. 266, Richards, J., held that if a bank stipulates for more than 7% it can recover nothing in respect of the stipulation for interest, although the express stipulation would not prevent the bank from recovering 5% if the transaction were such that a contract to pay interest might be implied. The correctness of the view of the statute taken in the last mentioned case is virtually established by the recent case of McHugh v. Union Bank of Canada, [1913] A.C. 299, 316 (reversing 44 S.C.R. 473), in which it was held that sec. 91 renders it *ultra vires* on the part of a bank to stipulate for more than 7%, that a stipulation for payment of a higher rate than 7% is therefore inoperative and that the interest under the mortgage there in question must be calculated at the rate of 5%.

Compound interest not authorized.

The section does not authorize the charging of compound interest at 7%. Where the bank makes a discount or an advance for a specified time, it may deduct the interest in advance. In other cases, where there is an overdraft, and payments are made, interest should be reckoned up to the date of each payment, and the sum paid should be applied to the discharge of the interest in the first place and any surplus that may remain to the discharge of so much of the principal. The fact that the customer has month by month confirmed the statements contained in the pass book does not amount to a ratification of or acquiescence in a charge of compound interest. Montgomery v. Ryan, 1908, 16 O.L.R. 75, C.A., Maclaren, J.A., at p. 102; cf. Clute, J., at p. 88.

If the debtor voluntarily pays the excess of interest over 7% as, *e.g.*, by giving his cheque to the bank for such excess as shewn by the bank's monthly statement, he cannot recover back the excess and is not entitled in an action by the bank to

Sec. 91.

If excess paid by debtor, he cannot recover it back.

have the amount of the excess so paid applied on account of the principal or on account of the interest calculated at 7% only. Canadian Bank of Commerce v. McDonald, *supra;* Bank of B.N.A. v. Bossuyt, *supra;* Quinlan v. Gordon, *supra;* Hutton v. Federal Bank, 1883, 9 O.P.R. at p. 581. The dictum of Pagnuelo, J., in Banque de St. Hyacinthe v. Sarrazin, *supra,* to the effect that the prohibition of the act is one "of public order," and that, therefore, a person who has paid to a bank interest in excess of the rate fixed by the act, may recover back the excess, was not necessary to the decision of the case. In that case the excess of interest was retained by the bank, but was not in any other sense *paid* by the debtor. In McHugh v. Union Bank of Canada, [1913] A.C. 299, 316, it was held that the borrower must be taken to have known that the bank had no right to stipulate for and no power to recover interest at a higher rate than 7%, but that when he voluntarily assented to a settlement of accounts which was equivalent to payment of interest at a higher rate, he had no right to recover back any excess which he had thus voluntarily paid.

It has been held that a third party, *e.g.,* an execution creditor of the debtor, is not entitled to compel the bank to account for interest charged by it in excess of 7%. Benallack v. Bank of B.N.A., 1905, judgment of the Territorial Court of the Yukon Territory (cf. 36 S.C.R. 120), as explained in Ritchie v. Canadian Bank of Commerce, 1905, 2 W.L.R. 499, at p. 501.

A bank may also receive and retain, in addition to the discount, the collection or agency charges authorized by secs. 93 and 94.

Rate of interest after maturity.

In Royal Canadian Bank v. Shaw, 1871, 21 U.C.C.P. 455, it was held, under a similar section, that on a note bearing no rate of interest on its face and discounted at 8%, the bank could charge only 6% (which was then the rate of interest where no rate was fixed by agreement or law), notwithstanding a provision of the bank's charter permitting it to charge the same rate after maturity that it had charged on discounting the note.

If a negotiable instrument or other document provides for payment of interest at a given rate and there is no unequivocal stipulation that in the event of default in payment interest shall be paid after maturity at the same rate or at some other named rate, then the rate mentioned is payable only during

the currency of the instrument. An agreement to pay interest at a given rate upon the principal "until paid" or "until such principal money and interest shall be fully paid and satisfied" means merely that interest is to be paid at such rate until the day fixed for payment, and not that it is to be paid at the same rate after maturity. St. John v. Rykert, 1884, 10 S.C.R. 278; People's Loan and Deposit Co. v. Grant, 1890, 18 S.C.R. 262. Sec. 91. Rate of interest after maturity.

After maturity interest is payable not *qua* interest under the contract but *qua* damages for the wrongful detention of the money(*b*), and the rate payable in the absence of an unequivocal stipulation to the contrary is 5% (if the liability as to interest(*c*) accrued on or after the 7th of July 1900, otherwise 6%). *Ibid.* Cf., however, the opinion expressed in Powell v. Peck, 1888, 15 O.A.R. 138, at p. 147, that the rate stipulated for during the currency of the agreement may, *primâ facie*, be adopted as the reasonable rate of interest payable by way of damages for detention. As shewing the leaning of the courts towards construing an agreement as one providing only for payment *ad diem* and not for payment *post diem*, see Biggs v. Freehold Loan and Savings Co., 1900, 31 S.C.R. 13 reversing 26 O.A.R. 232.

92. The bank may allow any rate of interest whatever upon money deposited with it. Any rate may be allowed.

2. The liability of the bank, under any law, custom or agreement to repay moneys heretofore or hereafter deposited with it and interest, if any, shall continue, notwithstanding any statute of limitations, or any enactment or law relating to prescription. 53 V., c. 31, s. 90; R.S., c. 29, s. 126. Liability of bank on deposits.

Prior to 1906 the first sub-section of this section formed one section with sub-sec. 1 of sec. 91.

Sub-sec. 2 was transferred from sec. 126 in 1913. See notes to sec. 57, which contains a similar provision in regard to dividends.

Interest is not payable upon a deposit or loan except by statute or by express agreement (Edwards v. Vere, 1833, 5 Interest on deposit.

(*b*) See sec. 134 of the Bills of Exchange Act (measure of damages where a bill is dishonoured); cf. sec. 28 of the same act.

(*c*) Plenderleith v. Parsons, *supra*.

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B. & Ad. 282; In re Gosman, 1881, 17 Ch. D. 771), or where a contract to pay interest may be implied from the mode of dealing between the parties (In re Duncan & Co., [1905] 1 Ch. 307; In re East of England Banking Co., 1868, L.R. 4 Ch. 14), the usage of trade, or other circumstances. Cf. Hart p. 182.

If a bank wrongfully refuses to allow money to be withdrawn, it is chargeable with interest from the time of refusal. Royal Trust Co. v. Molsons Bank, 1912, 27 O.L.R. 441. See also the notes to sec. 95, as to damages for refusing to honour a customer's cheque.

Three kinds of deposits.

Deposits by the public are of three kinds—deposits payable on demand, deposits payable after notice, and deposits payable at a fixed date. The deposits payable after notice are commonly known as savings bank deposits, and interest is allowed on the minimum monthly balance at 3% per annum. The deposits payable at a fixed date are technically known as "time deposits," and are represented by deposit certificates or receipts (as to which see the notes to sec. 95). Interest at 3% is usually allowed on these deposits also. In the monthly statement (schedule D) the deposits in Canada payable after notice and on a fixed day are classed together, but as the two classes are quite different in character, it being the practice to allow savings bank depositors to withdraw by cheque without notice, whereas deposits payable on a fixed day are comparatively permanent, it would seem worth while to report them under separate heads.(*d*)

Percentage chargeable for collection.

93. When any note, bill, or other negotiable security or paper, payable at any of the bank's places or seats of business, branches, agencies or offices of discount and deposit in Canada, is discounted at any other of the bank's places or seats of business, branches, agencies or offices of discount and deposit, the bank may, in order to defray the expenses attending the collection thereof, receive or retain in addition to the discount thereon, a percentage calculated upon the amount

(*d*) Johnson, The Canadian Banking System, pp. 52-3; and see his suggestions, at p. 56, as to the advisability of making a greater distinction between demand and savings deposits with a view to the payment of a higher rate of interest than 3% on genuine savings accounts.

of such note, bill, or other negotiable security or paper, not exceeding one-eighth of one per cent.; provided that the bank may make a minimum charge of fifteen cents. 53 V., c. 31, s. 82. Sec. 93.

In 1913 the words "one eighth of one per cent; provided that the bank may make a minimum charge of fifteen cents," were substituted for a scale of charges ranging from one-eighth of one per cent. to one-half of one per cent. according to the time which the discounted paper had to run. In other respects the section dates in substance from the acts of 1867 and 1871. Cf. sec. 91, as to rate of interest allowed by law, and sec. 94 as to collection fees on negotiable paper payable at places other than the place of discount or a branch or agency of the same bank. Percentage chargeable for collection

A bank is not entitled to charge any discount or commission for the cashing of any official cheque of the government of Canada, or of any department thereof, whether drawn on the bank cashing the cheque or on any other bank (sec. 98).

94. The bank may, in discounting any note, bill or other negotiable security or paper, bona fide payable at any place in Canada, other than that at which it is discounted, and other than one of its own places or seats of business, branches, agencies or offices of discount and deposit in Canada, receive and retain, in addition to the discount thereon, a sum not exceeding one-fourth of one per cent. on the amount thereof; provided that the bank may make a minimum charge of twenty-five cents. 53 V., c. 31, s. 83. Agency charges.

This section dates from the acts of 1867 and 1871, except that in 1913 "one-fourth" was substituted for "one-half" and the proviso was added.

CHAPTER XVIII.

Deposits and the Current Account.

The receiving of deposits and the honouring of cheques upon them may be considered as the primary function of a bank, see chapter 15, *supra*, on the "Business and Powers of a Bank." In the notes to sec. 95 are discussed a number of important topics connected with the rights and liabilities of a bank as a depositary of its customers' money. See also secs. 165 ff. of the Bills of Exchange Act.

The subject of a bank's lien upon securities or money of the customer in its hands is discussed in the notes to sec. 77.

Deposits may be received from persons unable to contract.

95. The bank may, subject to the provisions of this section, without the authority, aid, assistance or intervention of any other person or official being required,—

(*a*) receive deposits from any person whomsoever, whatever his age, status or condition in life, and whether such person is qualified by law to enter into ordinary contracts or not; and,

(*b*) from time to time repay any or all of the principal thereof, and pay the whole or any part of the interest thereon to such person, unless before such repayment the money so deposited in the bank is lawfully claimed as the property of some other person.

Payments by consent.

2. In the case of any such lawful claim the money so deposited may be paid to the depositor with the consent of the claimant, or to the claimant with the consent of the depositor.

Deposit limited to $500.

3. If the person making any such deposit could not, under the law of the province where the deposit is made, deposit and withdraw money in and from a bank without this section, the total amount to be received from such person on deposit shall not, at any time, exceed the sum of five hundred dollars. 53 V., c. 31, s. 84. 53 V., c. 31, s. 80. Am.

Sec. 95.

This section dates from 1890, except for some re-arrangement of the wording in 1906. The corresponding sections in the acts of 1867 and 1871 authorized the bank merely to open offices of discount and deposit.

Deposits from persons incapable of contracting.

This section enables a bank in receiving deposits, to some extent, to deal with persons otherwise incompetent by provincial law to contract. Re Central Bank, Morton and Block's Claims, 1889, 17 O.R. at p. 584. Up to an aggregate amount of $500 the bank may receive deposits from any person without regard to whether by provincial law such person could deposit money in, and withdraw money from, a bank.(a)

Deposit by an infant.

It is to be observed that there is no restriction upon repayment. The restriction is upon the amount of deposit; and if, as a matter of policy, the legislature requires an infant's account to be kept under $500, and a bank, in ignorance of the fact that the depositor is an infant, receives a sum exceeding this limitation, it becomes the duty of the bank, on learning of his infancy, immediately to repay the excess to the infant. But *semble*, there is no "law of the province" which prevents an infant from depositing money and withdrawing it from a bank, even assuming that the expression "law of the province" is not to be confined to an express statutory provision. Freeman v. Bank of Montreal, 1912, 26 O.L.R. 451, 456-7. In this case the plaintiff during his infancy had deposited $1,800 in the defendant bank and had withdrawn the amount by a cheque in favour of a third party. After coming of age he sued the bank for repayment of $1,300 on the ground that the previous payment was illegal except as to $500. It was, however, held that the action failed, not only on the ground already indicated, but also because under sec. 48 of the Bills of Exchange Act the drawing of the cheque by the infant entitled the holder to receive payment.

A current account may be opened with an infant, so long as it is not allowed to be overdrawn; for an infant may be a creditor. A cheque drawn by an infant entitles the holder to receive payment, and so constitutes a discharge. An infant cannot claim again money paid out to him or others upon his cheque. Halsbury, vol. 1, p. 587; cf. Grant, p. 31; Freeman v. Bank of Montreal, *supra*.

(a) As to the jurisdiction of Parliament to override provincial law in this respect, cf. Tennant v. Union Bank, discussed in the notes to sec. 88.

Sec. 95. *Locality of deposits.*

A bank with regard to deposits received and deposit receipts issued is resident in the province where the transaction takes place, and the deposit receipt has a locality in that province, so that the estate to which it belongs may be liable to succession duty in respect of it, although the deceased payee was domiciled in a foreign country (Attorney-General v. Newman, 1901, 1 O.L.R. 511; In re Succession Duty Act, 1902, 9 B.C.R. 174), and the bank may be served and the deposit attached in that province as a debt due to the depositor. County of Wentworth v. Smith, 1893, 15 O.P.R. 372. The bank is protected by payment into court in pursuance of an order of court made in the province where the deposit is situate. Harris v. Cordingly, 1899, Q.R. 16 S.C. 501.

Locality of deposit.

In Rex v. Lovitt, [1912] A.C. 212, the question was whether the province of New Brunswick was entitled to succession duty upon money on deposit in a New Brunswick branch of a bank having its head office at London, England, the domicile of the deceased depositor having been in Nova Scotia. It was argued that the *situs* of this simple contract debt was either at the residence of the debtor, *i.e.*, in London, or that of the creditor, *i.e.*, in Nova Scotia, and that the property was therefore situate outside of the province of New Brunswick. The Privy Council held that the debt was primarily payable at St. John, New Brunswick, and that it had a *situs* within that province, and that for the present purpose the maxim *mobilia sequuntur personam* had no application. See also notes to sec. 43, as to the locality of shares, for the purpose of succession duty.

Rex v. Lovitt was distinguished in Royal Bank of Canada v. The King, [1913] A.C. 283. In the latter case the bank received on deposit at its branch in New York the proceeds in London of a mortgage bond issue of the Alberta and Great Waterways Railway Company guaranteed by the province of Alberta. Under instructions from the bank's head office in Montreal a special railway account in the name of the treasurer of the province was opened at a branch in Alberta (no money being sent there in specie and the account remaining under the control of the head office) for purposes connected with railway construction wholly within the province as provided by certain provincial statutes of 1909, and subsequent orders in council and

Sec. 95. Locality of deposit.

contracts. A provincial statute of 1911 recited that the railway had made default in payment of the interest on the bonds and in construction of the line, ratified the guarantee of the bonds, and enacted that the whole of the proceeds of the bonds, including the amount deposited with the bank, should form part of the general revenue fund of the province, free from all claim of the railway company or its assigns, and should be paid over to the treasurer of the province. Action was thereafter brought on behalf of the crown and the provincial treasurer to recover the amount of the deposit. It was held, reversing Rex v. Royal Bank of Canada, 1912, 4 A.L.R. 249, that the bondholders having subscribed their money for a purpose which had failed were entitled to recover their money from the bank at its head office in Montreal, that this was a civil right existing and enforceable outside the province, and that the provincial legislation in derogation of that right was *ultra vires*. It was also argued that the provincial legislation was really banking legislation because its effect was to convert a special deposit which was conditionally payable to the depositor, or to be invested for his benefit, into an unconditional deposit payable on demand to a person other than the depositor. This argument was answered in the negative in the provincial courts, and on appeal it was not considered necessary to decide it.

The right to attach money due by a bank to its customer is not dependent upon the *situs* of the debt within the province. In McMulkin v. Traders Bank of Canada, 1912, 26 O.L.R. 1, the primary debtor had deposited money in a branch in Alberta of a bank having its head office in Ontario. The attaching order was served on the bank at the head office and was received by the branch in Alberta before any demand by the debtor.(*b*) It was held that the debt was liable to attachment under the Ontario rules, which require merely the existence of a debt and the right of the creditor to sue the debtor in the province.

Bank a debtor in respect of deposits.

The bank is a debtor to the customer (Foley v. Hill, 1848, 2 H.L.C. 28; Robarts v. Tucker, 1851, 16 Q.B. 560, 3 R.C.

(*b*) As actual notice of the attaching order reached the branch bank before it had paid out the amount of the deposit to its customer, this case leaves open the question whether a bank, upon being served with an attaching order, must for its own protection telegraph notice of the order to every branch at which the customer whose debts are attached is likely to have money on deposit.

Sec. 95.

680; Webb v. Derbyshire, [1906] 1 Ch. 135), not a bailee or a trustee (Ex parte Waring, 1886, 36 L.J. Ch. 151), in respect of money deposited with it, and not actually appropriated to a particular purpose. Farley v. Turner, 1857, 26 L.J. Ch. 710. The money deposited is the property of the bank, which simply owes an equivalent amount to the depositor. Foley v. Hill, 2 H.L.C. at pp.36 ff.; Everly v. Dunkley, 1912, 27 O.L.R. 414.

Bank a debtor in respect of deposit.

And the relation is still that of debtor and creditor if the customer has overdrawn his account. Cunliffe Brooks v. Blackburn, 1884, 9 App. Cas. 857.

It follows that upon the insolvency of the bank the customer has merely a right of proof in respect of his current or deposit accounts. Re Barned's Bank, 1870, 39 L.J. Ch. 635.

It follows also that the bank can be discharged only by payments made to the customer, his agent or principal (Sims v. Bond, 1833, 5 B. & Ad. 389), or to some person who by mercantile law can give a good discharge. As to the recovery of money paid by mistake to a person who is not entitled to payment and who cannot give a good discharge, see notes to sec. 50 of the Bills of Exchange Act.

Interest on deposits.

See notes to sec. 92.

Interest bearing deposits must be distinguished from other deposits in the annual statement (sec. 54).

Obligation to repay deposits and to honour cheques.

The bank must pay its customer's cheque on presentation if it has funds sufficient to meet the cheque. Marzetti v. Williams, 1830, 1 B. & Ad. 415, 3 R.C. 746; Perreault v. Merchants Bank, 1905, Q.R. 27 S.C. 149.

But there must be sufficient funds to cover the whole amount of the cheque presented. For the bank is not obliged to pay any part of a cheque for an amount exceeding the available balance (Carew v. Duckworth, 1869, L.R. 4 Ex. 313), save under instructions. Halsbury, vol. 1, p. 605; cf. Grant, p. 82. Probably if a cheque is presented for an amount greater than the amount at the credit of the drawer's account, the bank ought not to state the amount of the deficiency, or say more than "not sufficient funds." Foster v. Bank of London, 1862, 3 F. & F. 214.

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Substantial damages may be given for the dishonouring of a customer's cheque, even though proof of special damage be inadmissible. Fleming v. Bank of N.Z., [1900] A.C. 577. But if a non-trading depositor in the savings department of a bank has made his deposit subject to special terms, he may, on the wrongful refusal of the bank to pay him personally the amount of the deposit, recover as damages only the interest and the money. The bank having received a deposit subject to certain notice of withdrawal, if required, cannot set up, as a defence to an action for the deposit, the absence of such notice, unless the refusal to pay was based on that ground. Henderson v. Bank of Hamilton, 1894, 25 O.R. 641, 22 O.A.R. 414.

Unless there is a direct contract between the bank and the holder, the bank is under no obligation to the holder to honour an uncertified cheque. See sec. 127 and the notes to sec. 165 of the Bills of Exchange Act.

If a customer's cheque is presented for payment, the bank must decide whether the state of the account between it and the customer will justify it in paying the cheque. If the cashier or teller counts out the amount of the cheque and places the money upon the counter or the ledge of the wicket in front of him, the payment is complete and cannot be revoked by the bank, even though the money has not been counted and accepted by the person presenting the cheque. Chambers v. Miller, 1862, 13 C.B. N.S. 125; and cases cited in Hall v. Hatch, 1901, 3 O.L.R. 147. The property in the money passes from the bank to the payee of the cheque so that it can be attached as his property even before he has touched it with his hand. Hall v. Hatch, *supra*.

The bank must pay cheques in the order of presentation (Kilsby v. Williams, 1822, 1 B. & Ald. 815), unless the bank has notice of the death of the customer or of a countermand of payment by him (Bills of Exchange Act, sec. 167). In Marzetti v. Williams, *supra*, and Robarts v. Tucker, 1851, 16 Q.B. 560, 3 R.C. 680, it is said that the banker is entitled to a reasonable time to satisfy himself of the genuineness of the signature to a cheque or bill of exchange. Cf. Todd v. Union Bank, 1887, 4 Man. R. 204. But in Bank of England v. Vagliano, [1891] A.C. at p. 157, Lord Macnaghten states that bankers who undertake the duty of paying their customers' acceptances must pay off-hand, and this reasoning would seem to apply equally to cheques. As to the payment by a

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bank of its customers' acceptances made payable at the bank, see chapter 15, *supra*.

A bank contracting for valuable consideration with a customer's agent or a third party to honour the customer's outstanding cheques is liable to be sued by the customer for breach of contract in the event of the specified cheques being subsequently dishonoured. Fleming v. Bank of New Zealand, [1900] A.C. 577.

As to the position of the bank in regard to a postdated cheque, see the notes to sec. 27 of the Bills of Exchange Act.

Pass-book and vouchers.

The effect of receipt from a bank of a pass-book and vouchers, and their retention without comment by a customer, are considered in Rex v. Bank of Montreal, 10 O.L.R. 117, by Anglin, J., who decided that there is no contractual obligation on the part of the customer to examine his pass-book. This case was affirmed by the Court of Appeal, 1906, 11 O.L.R. 595. Maclaren, J.A., at p. 605, says: "The trial judge has reviewed very fully the leading English and American cases in which the effect of the receipt from a bank of a pass-book and vouchers, and their retention by the customer have been considered and discussed. He comes to the conclusion that under the principles laid down in Leather Manufacturers' Bank v. Morgan, 1866, 117 U.S. 96, and De Frees Critten v. Chemical National Bank, 1902, 171 N.Y. 219, the customer might be held in the United States to be estopped from objecting where he had failed to check over his pass-book himself or had not exercised reasonable supervision over the clerk to whom he had entrusted it under circumstances where he would not be estopped in England. In support of this conclusion he refers particularly to the case of Chatterton v. London and County Bank, 1890-1, a summarized report of which appears in Paget on Banking, at pp. 120 *et seq.*, and also to the cases discussed in Hart on Banking at pp. 200-203. It is to be observed that in most of these cases the question considered is whether the customer who receives his pass-book and vouchers owes a duty to the bank to examine them, and whether he is estopped from objecting if he does not do so, or does not object before the bank has altered its position. In the present case there is more. The department regularly notified the bank each month

Pass-book and vouchers.

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that the cheques and statement had been found correct. Such receipts are not at all on the same footing as those that are frequently signed by the messenger of the customer when he receives the cheques and vouchers at the end of the month or at other periods. These latter can have little binding effect unless there is an express or implied contract that the customer will examine them and report within a reasonable time as to their correctness. Ordinarily the retention of the pass-book and the vouchers without objection could only operate against the customer where there existed such a contract by way of estoppel, and where the facts of the particular case were such as to justify the application of this doctrine." Rex v. Bank of Montreal was affirmed by the Supreme Court of Canada, *sub nom.* Bank of Montreal v. The King, 1907, 38 S.C.R. 258.

In Kepitigalla Rubber Estates v. National Bank of India, [1909] 2 K.B. 1010, Bray J. took a similar view, namely that the customer is not obliged to examine his pass-book, "but it may be remarked that much stricter views on this subject prevail in the United States. The Supreme Court there has held that the sending of the pass-book by the customer to be written up and returned with the vouchers is a demand to know what the bank claims to be the state of the customer's account, that the return of the book with the vouchers is the answer to that demand, and imports a request by the bank that the customer will in proper time examine the account so rendered, and either sanction or repudiate the items. If the customer fails to do so, he may be estopped from questioning the conclusiveness of the account. This seems good sense, and more businesslike than our English methods. It must be remembered, however, that in America cheques are not stamped and the practice of crossing is unknown; in England, on the other hand, many bankers do not, unless specially requested, return vouchers with the pass-book." 26 L.Q.R. 5 (Jan. 1910). See also Halsbury, vol. 1, p. 619; Grant, p. 188.

The property in and right to the possession of a cheque varies with its history. A cheque taken in payment remains the property of the payee so long as it is unpaid. After payment the property passes to the drawer and remains in him. But the right to the possession of the cheque depends on the state of accounts between the drawer and the banker. The banker is entitled to keep it as a voucher until his account with

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his customer is settled. After that the drawer is entitled to it as a voucher between him and the payee. Grant, p. 93, citing Charles v. Blackwell, 1877, 2 C.P.D. at pp. 162, 163; Reg. v. Watts, 1850, 19 L.J.M.C., at p. 195, 2 Den. C.C., p. 21.

A banker's pass-book, which is numbered and in which it is stipulated that the deposits recorded in it will not be repaid without its production, is a proper subject of *donatio mortis causa*, and delivery of such a book in anticipation of death operates as a transfer of the debt to take effect upon death. Brown v. Toronto General Trusts, 1900, 32 O.R. 319. But in the absence of very special circumstances a cheque not paid either actually or constructively, during the lifetime of the drawer, is not capable of being the subject of *donatio mortis causa*. McLellan v. McLellan, 1911, 25 O.L.R. 214, affirming 23 O.L.R. 654, and cases there cited.

Appropriation and set-off in the current account.

Payments to and drawings upon current accounts are taken to be set off against each other automatically, the earliest drawing against the earliest payment and so on. The "rule in Clayton's Case," Devaynes v. Noble, 1816, 1 Mer. 608, 3 R.C. 329, 15 R.R. 161, discussed in The Mecca, [1897] A.C. at pp. 293-296; Deeley v. Lloyds Bank Limited, [1912] A.C. 756; 29 L.Q.R. 11 (Jan. 1913); Grant, pp. 246 ff.

Appropriation and set-off in the current account.

The rule does not apply to a case where there is no account current between the parties, or where a contrary intention appears from the circumstances. City Discount Co. v. McLean, 1874, L.R. 9 C.P. 692; Gillies v. Commercial Bank, 1895, 10 Man. R. 460, 479. It may appear from an account rendered or other circumstances that the creditor intended not to make any appropriation, but to reserve the right. The general rule is that when a debtor is making a payment to his creditor, he may appropriate the money as he pleases and the creditor must apply it accordingly. McArthur v. McMillan, 1886, 3 Man. R. 377. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves upon the creditor, and he has the right of election "up to the very last moment" (The Mecca, *supra*) and he may make an appropriation even when he is being examined as a witness in an action by him against the debtor. Seymour v. Pickett, [1905] 1 K.B. 715; Thomson v. Stikeman, 1913, 4 O.W.N. 1546, to be reported in the Ontario Law Reports.

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Where an account is continued after dissolution of partnership in the same mode as before, the rule in Clayton's Case will apply (Laing v. Campbell, 1865, 36 Beav. 3), but it will be otherwise where distinct accounts are kept and the new firm, as creditors, have appropriated a payment to the new account. Simson v. Ingham, 1823, 2 B. & C. 65. As to what dealings with a firm's account will discharge a retired partner from liability for an old overdraft, see Rouse v. Bradford, [1894] A.C. 586.

Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts. Richards v. Bank of British North America, 1901, 8 B.C.R. 143, 209; Watts v. Christie, 1849, 11 Beav. 546.

On the death of a surety for a current account, it is common practice for the bank to close the account and open a fresh one with the customer. This prevents the surety's estate getting the benefit of subsequent payments to current account by the customer. In re Sherry, 1884, 25 Ch.D. 692.

Where an insolvent testator, having a deposit to his credit in a bank at the time of his death, was indebted to the bank on a note under discount, which had not then matured and the executors did not withdraw or demand the deposit before the maturity of the note, it was held that the bank might set off the debt on the note against the deposit, and rank for the balance of the debt against the estate. Ontario Bank v. Routhier, 1900, 32 O.R. 67; cf. Thomas v. Smith, 1900, Q.R. 16 S.C. 354.

The rule in Clayton's Case, *supra*, attributing the first drawings out to the first payments in does not apply where a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner. The drawer must be taken to have drawn out his own money in preference to the trust money. In re Hallett's Estate, Knatchbull v. Hallett, 1879, 13 Ch.D. 696; In re Oatway, Hertslet v. Oatway, [1903] 2 Ch. 356. But the rule does apply as between two *cestuis que trust* whose money the trustee has paid into his own account, so that the first sum paid in will be held to have been first drawn out. In re Hallett's Estate, *supra;* In re Stenning, Wood v. Stenning, [1895] 2 Ch. 433; Bailey v. Jellett, 1884, 9 O.A.R. 187.

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If money held by a person in a fiduciary character has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands (In re Hallett's Estate, *supra*), but for this purpose there must be a specific fund, capable of being identified, into which the trust money has been converted. In re Hallett & Co., Ex parte Blane, [1894] 2 Q.B. 237.

If a customer keeps several accounts at a bank they may be treated as one by the bank for the purpose of setting off a debit balance in one against a credit balance in another. In re European Bank, Agra Bank's Claim, 1872, L.R. 8 Ch. 41; cf. Johnson v. Roberts, 1875, L.R. 10 Ch. 505; Mutton v. Peat, [1900] 2 Ch. 79, and see also the subject of a bank's general lien discussed in the notes to sec. 77.

Obligation not to disclose customer's affairs.

Prior to 1913, the Bank Act contained the following provision, originally passed in 1871, but omitted from the present act: "The books, correspondence and funds of the bank shall, at all times, be subject to the inspection of the directors. No person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank."

Obligation not to disclose customer's affairs.

At an early date it was held in Upper Canada that a shareholder of a bank, merely as such, has no right to inspect the stock books or other books of the bank. In re The Bank of Upper Canada v. Baldwin, 1829, Draper 55. The repealed section did not, however, create any privilege so as to enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them and shews good cause for requiring the information he seeks. Re Chatham Banner Co., Bank of Montreal's Claim, 1901, 2 O.L.R. 672.

The evidence as to a customer's account is not privileged at common law, and the section constituted only a prohibition against the bank's voluntarily permitting any examination of its customers' accounts save by a director. An officer of a bank, when served with a subpoena *duces tecum* to attend as a witness in an action, is bound, whether the bank is a party or not, to produce the bank books specified in the subpoena which are in his custody and control, and which contain any entry

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relevant to the matters in question in the action. He must also give evidence as to such entries. The books of a branch bank are *primâ facie* deemed to be in the custody and control of the local manager and their production within the scope of his authority. Hannum v. McRae, 1898, 18 O.P.R. 185. Inconvenience to the bank is no ground for refusing production. There is no statute in force in Canada corresponding to the English Bankers' Books Evidence Act, which was passed to remedy the inconvenience of producing the original books, and which allows examined copies of entries to be produced in their place. Even in England, however, a banker remains bound at common law to produce his books, except in so far as the inconvenience may be modified by statute. *Ibid.*, pp. 187, 196; cf. Halsbury, vol. 1, pp. 643 ff.

The question of the legal duty of a bank to keep its customers' affairs secret is not clear. The balance of judicial opinion seems to favour the view that there is an implied undertaking in the contract between bank and customer that the bank will not unreasonably disclose the state of its customer's account, the damages for breach being confined to actual damage sustained by the customer. Foster v. Bank of London, 1862, 3 F. & F. 214; Tassel v. Cooper, 1850, 9 C.B. 509; Hardy v. Veasey, 1868, L.R. 3 Ex. 107; Hart on Banking, 2nd ed., 1906, p. 214.

Even under the repealed section, a bank might assign the customer's indebtedness and the securities held in connection therewith to a third person, and might allow the purchaser to inspect the customer's account with the bank. Montgomery v. Ryan, 1908, 16 O.L.R. 75.

A bank ought not to give to another bank information that a person has an account or funds to his credit unless and until the customer's authority is obtained. Hubbert v. Home Bank of Canada, 1910, 20 O.L.R. 651, at p. 653.

As to disclosure by a bank to a guarantor of repayment of an advance to a customer, see Hart, p. 678; London General Omnibus Co., Ltd., v. Holloway, [1912] 2 K.B. 72.

Deposit receipts.

A bank may under the Bank Act issue a certificate or receipt, commonly known as a "deposit receipt," acknowledging the deposit with the bank of a certain sum of money and the

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obligation of the bank to pay or account for the same with interest to the depositor or to the depositor "or order." The effect of the endorsement of such a receipt by the depositor depends largely on the wording of the receipt.(c)

Negotiability of deposit receipts.

There is high authority in favour of the view that a document which is a receipt for a certain sum "payable to" the depositor or order, or "which the bank will repay" to the depositor or order, possesses all the qualities of a promissory note notwithstanding that it also contains clauses providing that the sum deposited, in order to bear interest, must remain in the bank for a certain period, and that it cannot be withdrawn except on a certain number of days' notice, and that the receipt must be given up to the bank when payment is required. Richer v. Voyer, 1874, L.R. 5 P.C. at p. 477; Re Central Bank, Morton & Block's Claims, 1889, 17 O.R. 574. It has been said (Re Central Bank, *supra*, at p. 585) that the term requiring the receipt to be given up merely expresses what the law would imply and may be regarded as surplusage, and that the other clauses referred to have not the effect of preventing the receipt from being a promissory note, as they do not make the time of payment uncertain. It is merely a matter of computation, having regard to the date of the receipt, to ascertain when the money may be withdrawn, and the requirements of previous notice merely make the receipt one payable so many days after the occurrence of a specified event, which the holder can determine, such as "after sight" or "after demand." Cf. Security National Bank v. Pritt, 1910, 3 S.L.R. 188.

If a deposit receipt is a promissory note the effect of endorsement to a holder in due course would be to pass the legal right to the money payable thereunder to the endorsee, who might recover in his own name and free from all the equities that might exist between the original holder and the bank. If it is not a promissory note, but yet is expressed to be payable to the depositor or his order, it may nevertheless be so far negotiable as to pass a good title to a purchaser in good faith for value who takes without notice of any infirmity of title. This is on the ground of representation and estoppel. Re Central Bank, *supra*, at p. 586 and cases there cited.

It is said in Re Central Bank, at p. 583, that where the receipt is expressed to be payable to the depositor, and not

(c) See article by the present writer in 16 J.C.B.A. 209 (April, 1909).

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also to his order, negotiability is negatived. The case was decided before the passing of the Bills of Exchange Act. Now, by sec. 22 of that act, a note payable to a named person is in effect payable to such person or his order, and consequently, if a deposit receipt is in other respects a promissory note, no inference that it is not to be negotiable can be drawn from the omission of the word "order."

Where the receipt is worded "for which the bank will account to"(*d*) the depositor, it cannot be transferred merely by endorsement and delivery so as to entitle the holder to demand payment of the money represented by it. Saderquist v. Ontario Bank, 1889, 15 O.A.R. 609; Lee v. Bank of British North America, 1879, 30 U.C.C.P. 255, and cases cited. But if the depositor for valuable consideration endorses such a receipt, and delivers it to another person with the intention of passing all his right and title to the money represented by the receipt, which money the bank pays to such other person, this would be a good defence on equitable grounds to an action by the original depositor against the bank. Mander v. Royal Canadian Bank, 1869, 20 U.C.C.P. 125; S.C. 21 C.P. 492; cf. Scott v. Bank of New Brunswick, 1891, 31 N.B.R. 21.

A deposit receipt which on its face states that it is not transferable and that cheques cannot be drawn against it is clearly not a negotiable instrument, but the endorsement upon it of an order to pay and the delivery of the document operate as an equitable assignment of the fund. It is not necessary to give notice to the bank in order to complete the assignment (In re Griffin, [1899] 1 Ch. 408; cf. In re Commercial Bank of Manitoba, Barkwell's Claim, 1897, 11 Man. R. 494), although notice may be necessary as against a subsequent assignee.

A deposit receipt is merely the evidence of a debt, and, notwithstanding a condition in the receipt requiring its production before payment, the bank cannot refuse to pay the assignee in insolvency of the depositor himself, provided it is indemnified not only against double liability, but against double vexation. Bank of Montreal v. Little, 1870, 17 Gr. 313, 316.

(*d*) In the article cited in the last preceding note it is submitted that the dicta in some English text books (*e.g.*, Hart, p. 560; Halsbury, vol. 1, p. 589), that deposit receipts are not negotiable, are based on cases in which a bank undertook to "account for" money or in which there was no promise to "pay." The documents in question are called by Grant, p. 269, "accountable receipts."

Bank not bound to see to trust in deposits.

96. The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit made under the authority of this Act is subject.

Receipt of one of two joint depositors sufficient.

Or of a majority.

2. Except only in the case of a lawful claim, by some other person, before repayment the receipt of the person in whose name any such deposit stands, or, if it stands in the names of two persons, the receipt of one, or, if it stands in the names of more than two persons, the receipt of a majority of such persons, shall, notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust, and with which the deposit has been made had notice thereof, be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit.

Application.

3. The bank shall not be bound to see to the application of the money paid upon such receipt. 53 V., c. 31, s. 84.

Section 52 provides that the bank shall not be bound to see to the execution of any trust to which any share of its stock is subject. This section contains a similar provision as to any trust to which any deposit made under the authority of this act is subject.

Sufficiency of receipt.

There are, however, differences in the wording of the two sections. Firstly, in the case of shareholders, the receipt of one of two or more persons in whose name shares stand is sufficient receipt to the bank for any money payable in respect of such shares. In the case of a deposit, the receipt of one of two persons in whose name the deposit stands is sufficient, but if it stands in the name of more than two, the receipt of a *majority* is required. Apart from this section the receipt of one of two joint depositors, not being partners in trade, would not have been sufficient. Innes v. Stephenson, 1831, 1 M. & Rob. 145; Husband v. Davis, 1851, 10 C.B. 645; 25 L.Q.R. 89-90 (Jan. 1909).

As to deposits in the names of two persons jointly, and the rights of the survivor, see Schwent v. Roetter, 1910, 21 O.L.R. 112; Everly v. Dunkley, 1912, 27 O.L.R. 414, and cases cited in the judgments.

Secondly, the provision as to the sufficiency of shareholders' receipts is subject to the clause "unless express notice to the contrary has been given to the bank." In the case of depositors "except only in the case of a lawful claim, by some other person before repayment," the receipt is declared to be sufficient "notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust, and with which the deposit has been made, had notice thereof." Sec. 96. Sufficiency of receipt.

The practical effect of the two sections, as regards the sufficiency of a receipt, is perhaps not very different. In the one case an "express notice" that the receipt is insufficient, in the other case a "lawful claim" by some person other than the person giving the receipt, before payment, is required.

A "lawful claim" means one which is *primâ facie* substantial. In re Bank of Toronto & Dickinson, 1906, 8 O.W.R. 323. In this case money had been deposited to the credit of "the executors of the estate of the late J.D." One of the executors subsequently served formal written notice on the bank forbidding it to pay out money except on cheques signed by all three executors. It was held that the case came within the exception to sub-sec. 2, and an order was made for payment of the money into court, unless the parties would agree that it should be retained as if it were in court. Cf. Dominion Bank & Kennedy, 1906, 8 O.W.R. 755, 834.

So far as the obligation to see to the execution of any trust is concerned, sec. 96 is in the same terms as sec. 52, and the notes to the latter section may usefully be consulted. As there pointed out, the provision seems to be directly applicable to trusts of which the bank has notice, for it would require no legislative provision to free the bank from responsibility for not seeing to the execution of a trust, the existence of which has not in some way been brought to its knowledge. Bank not obliged to see to execution of trust.

A bank is liable if it knowingly participates in a breach of trust. Cf. Gray v. Johnston, 1868, L.R. 3 H.L. 1. Where it is proposed by the customer of the bank to apply a balance standing to the credit of the customer on a trust account or other trust moneys in discharge or reduction of a debt due from the customer upon his private account, the bank, *ex hypothesi*, knows the intended application of the trust moneys and therefore may readily be held to have known that the transaction was a breach of trust. But, although the bank

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knows that the money with which the customer repays an overdraft on his private account is derived from the funds of a third party, it does not necessarily follow that it knows of a misapplication. The circumstances of the case may be consistent with a right on the part of the customer to make the transfer or application in question. Cf. Hart, pp. 161; and see cases below.

It has been held that a bank which discounts the personal notes of a customer endorsed by him as agent of a third party, also a customer, having a current account, and which sees by its books that all the funds of the principal pass by this transaction to the credit of the agent, has notice which suffices to put it on enquiry. If, without receiving satisfactory explanations, it continues to discount such notes, it becomes the accomplice of the agent in his abuse of confidence and is liable to the principal for the sums thus diverted. Gratton v. Hochelaga Bank, 1910, Q.R. 37 S.C. 324.

The bank may treat all a customer's personal accounts as one (In re European Bank, Agra Bank Claim, 1872, L.R. 8 Ch. 41), but may not use the balance of an account, as to which it has notice that it is not a personal account, to meet a deficiency on a personal account. Ex parte Kingston, 1871, L.R. 6 Ch. 632; cf. Union Bank of Australia v. Murray-Aynsley, [1898] A.C. 693; Shields v. Bank of Ireland, [1901] 1 Ir. R. 222; Bank of New South Wales v. Goulburn Valley Butter Co., [1902] A.C. 543.

If, however, the bank receives money in good faith as money belonging to an estate of which it is a creditor, without notice of any trust, it may retain the same as against an alleged *cestui que trust* of such money. Giraldi v. Banque Jacques Cartier, 1883, 9 S.C.R. 597.

Where a customer, who is a trustee, draws a cheque upon a trust account in favour of a third party, the bank will have its attention drawn to the object or purpose of the payment only under exceptional circumstances. It is under no obligation to enquire as to the purpose for which a cheque is drawn, and as it is not likely that the customer will voluntarily explain that he is about to misapply trust funds, it will obviously be very seldom that the bank will have notice of the breach intended. Hart, p. 163.

In order to hold a bank justified in refusing to pay a demand of a customer, the customer being a trustee and drawing a cheque as trustee, there must, in the first place, be some mis-

application, some breach of trust, intended by the trustee, and there must, in the second place, be proof that the bank is privy to the intent to make this misapplication of the trust funds. The existence of a personal benefit to the bank, designed or stipulated for, as a consequence of the payment, would be strong evidence that the bank was privy to the breach of trust.(*e*) Gray v. Johnston, *supra;* Bailey v. Jephcott, 1884, 9 O.A.R. 187; Clench v. Consolidated Bank, 1880, 31 U.C.C.P. 169. Ross v. Chandler, 1911, 45 S.C.R. 127; Toronto Club v. Dominion Bank, 1909, 25 O.L.R. 330, at p. 343.

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97. If a person dies, having a deposit with the bank not exceeding the sum of five hundred dollars, the production to the bank of—

If depositor dies, claim not exceeding $500, how proved.

(*a*) any authenticated copy of the probate of the will of the deceased depositor, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland or any British colony, or of any testament, testamentary or testament adtive expede in Scotland; or,

(*b*) an authentic notarial copy of the will of the deceased depositor, if such will is in notarial form, according to the law of the province of Quebec; or,

(*c*) if the deceased depositor died out of His Majesty's dominions, any authenticated copy of the probate of his will, or letters of administration of his property, or other document of like import, granted by any court or authority having the requisite power in such matters;

shall be sufficient justification and authority to the directors for paying such deposit, in pursuance of and in conformity to such probate, letters of administration, or other documents as aforesaid.

Deposit of copy of document.

2. When the authenticated copy or other document of like import is produced to the bank under subsection 1 of this

(*e*) But in point of law, the personal interest is immaterial, and actual notice of, and participation in, the breach of trust is sufficient ground of liability. Hart, p. 165.

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section, there shall be deposited with the bank a true copy thereof. 63-64 V., c. 26, s. 20.

In 1913 the words "and deposit with it" after the word "bank" in the third line of the section were omitted, and subsec. 2 was added, the result being that it is no longer necessary to deposit with the bank the authenticated or authentic copy. If such a copy is produced for the inspection of the bank it is sufficient to leave with the bank a true copy thereof.

In other respects the section dates from 1900 except for some re-arrangement of the wording in 1906.

Letters of administration are valid so long as they are unrevoked, even though their grant was based upon fraud or forgery, and a bank paying money in good faith to an administrator who, by the law of the province where the money is payable, is entitled to receive it, is protected from liability to pay a second time Irwin v. Bank of Montreal, 1876, 38 U.C.R. 375; cf. Bélanger v. Bélanger, 1911, 24 O.L.R. 439.

Proof of transmission.

By this section special provision is made authorizing the bank to pay the amount of a deposit, not exceeding $500, upon the production and deposit with it of an authentic notarial copy of the will, or an authenticated copy of the probate of the will or of letters of administration, etc., granted by a court of competent jurisdiction. This provision dispenses with the necessity of having letters of a foreign court resealed, or of obtaining grant of letters to a representative resident with n the province where the debt is situate.

Even if the deposit exceeds $500, and a representative of the deceased depositor is appointed in another province where the bank has an office, the bank might pay such representative at the latter place. Cf. notes to sec. 76 (Branches, agencies and offices).

DOMINION GOVERNMENT CHEQUES.

Dominion government cheques to be paid at par.

98. The bank shall not charge any discount or commission for the cashing of any official cheque of the Government of Canada or of any department thereof, whether drawn on the bank cashing the cheque or on any other bank. 53 V., c. 31, s. 103.

Cf. secs. 93 and 94 as to agency and collection charges in other cases.

CHAPTER XIX.

The Purchase of the Assets of a Bank.

Bank may sell assets to another bank.

99. Any bank may sell the whole or any portion of its assets to any other bank which may purchase such assets; and the selling and purchasing banks may, for such purposes, enter into an agreement of sale and purchase, which agreement shall contain all the terms and conditions connected with the sale and purchase of such assets.

Consent of Minister.

2. No agreement by a bank to sell the whole or any portion of its assets to another bank shall be made unless and until the Minister, in writing, consents that an agreement under subsection 1 of this section may be entered into between the two banks. 63-64 V., c. 26, s. 33. Am.

Except for the addition of sub-sec. 2 of sec. 99, and some other amendments made in 1913 as noted under the various sections, the provisions contained in secs. 99 to 111 were first enacted by the Bank Act Amendment Act, 1900, and the act amending the same (63 V., c. 27).

The first order in council passed under these provisions of the act was that of the 31st of December, 1900, approving an agreement, dated the 15th day of December, 1900, between the Bank of British Columbia and the Canadian Bank of Commerce, and a proposed increase of the capital stock of the latter bank from $6,000,000 to $8,000,000 in order to provide for the payment to the former bank of $2,000,000 of fully paid-up shares of the latter bank as provided in the said agreement. See Dominion statutes, 1902, p. lv.

It is commonly understood that the legislation was passed in anticipation of this transaction, as well as to render it unnecessary in the case of other bank mergers in the future to apply to parliament. The example given was, however, followed so frequently in the interval between 1900 and 1913(a)

(a) See notes to sec. 5 for the more recent bank mergers.

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that in the latter year it was considered advisable to add the present sub-sec. 2 to sec. 99, by which the previous consent in writing of the minister is now necessary to the validity of an agreement by one bank to sell the whole or any portion of its assets to another bank.

Purchase by way of discount and rediscount.

By an agreement dated the 13th October, 1906, between the Ontario Bank and the Bank of Montreal it was recited, *inter alia*, that the directors of the Ontario Bank deemed it necessary and expedient to make immediate provision for payment or taking up of its debts and liabilities, and had applied to the Bank of Montreal for that purpose, and it was thereupon agreed, *inter alia*, (1) that the Bank of Montreal should "purchase by way of discount and rediscount at the rate of six per cent. all the call and current loans and overdue debts of the Ontario Bank" and should be entitled to a transfer of all securities held for such loans and debts; (2) that the proceeds arising from such discount and rediscount should be retained and applied by the Bank of Montreal in and towards the payment of the notes in circulation and other debts and liabilities of the Ontario Bank to the public; (3) that the Ontario Bank should sell the residue of its property and assets and pay the proceeds to the Bank of Montreal to be applied as above; (4) that the Ontario Bank should not carry on business except for the purpose of selling its assets and of otherwise providing and by means of the shareholders' double liability furnishing the moneys necessary for the payment of its notes in circulation, debts, liabilities and obligations, including the advances made by the Bank of Montreal under the agreement; (5) that the Bank of Montreal should pay any surplus moneys in its hands to the Ontario Bank, in addition to the sum of $150,000 for the indirect benefit accruing to the Bank of Montreal under the agreement. An order having been made for the winding-up of the Ontario Bank, and the Bank of Montreal having presented a claim as a creditor it was held that the agreement was not a sale of the assets of the Ontario Bank within secs. 99 to 111, and was within the power of the directors to make without complying with those sections, and that the Bank of Montreal was entitled to base its claim as a creditor upon the agreement. Re Ontario Bank, 1909, 21 O.L.R. 1, affirmed *sub nom.* McFarland v. Bank of Montreal, [1911] A.C. 96.

Consideration.

100. The consideration for any such sale and purchase may be as agreed upon between the selling and purchasing banks.

If in shares of capital stock.

2. If the consideration, or any portion thereof, is shares of the capital stock of the purchasing bank, the agreement shall provide for the amount of the shares of the purchasing bank to be paid to the selling bank.

Not considered issued until sold or distributed.

3. Until such shares so paid to the selling bank have been sold by such bank, or have been distributed among and accepted by the shareholders of such bank, they shall not be considered issued shares of the purchasing bank for the purposes of its note circulation. 63-64 V., c. 26, s. 34.

By sec. 61 the total amount of a bank's notes in circulation at any time shall not exceed the amount of the unimpaired paid-up capital of the bank.

Agreement of sale to be submitted to selling shareholders at meeting.

101. The agreement of sale and purchase shall be submitted to the shareholders of the selling bank, either at the annual general meeting of such bank or at a special general meeting thereof called for the purpose.

Copy to each shareholder by mail.

2. A copy of the agreement shall be mailed, postpaid, to each shareholder of such bank to his last known address, at least four weeks previously to the date of the meeting at which the agreement is to be submitted, together with a notice of the time and place of the holding of such meeting. 63-64 V., c. 26, s. 35.

A special general meeting of the shareholders may be called as provided by sec. 31. As to the annual meeting, see notes to sec. 18.

Agreement may be executed if they approve.

102. If at such meeting the agreement is approved by resolution carried by the votes of shareholders, present or represented by proxy, representing not less than two-thirds of the amount of the subscribed capital stock of the bank, the agreement may be executed under the seals of the banks,

Sec. 102.

parties thereto, and application may be made to the Governor in Council, through the Minister, for approval thereof.

Approval of Governor in Council.

2. Until the agreement is approved by the Governor in Council it shall not be of any force or effect. 63-64 V., c. 26, s. 36.

As to proxies and voting rights of shareholders, see sec. 32 and notes.

The minister means the minister of finance and receiver general (sec. 2).

Approval of shareholders of purchasing bank.

103. If the agreement provides for the payment of the consideration for such sale and purchase in whole or in part, in shares of the capital stock of the purchasing bank, and for such purpose it is necessary to increase the capital stock of such bank, the agreement shall not be executed on behalf of the purchasing bank, unless nor until it is approved by the shareholders thereof at the annual general meeting, or at a special general meeting of such shareholders. 63-64 V., c. 26, s. 37.

Necessary increase of stock may be approved.

104. The Governor in Council may, on the application for his approval of the agreement, approve of the increase of the capital stock of the purchasing bank, which is necessary to provide for the payment of the shares of such bank to the selling bank, as provided in the said agreement. 63-64 V., c. 26, s. 38.

Ordinary provisions for increase not to apply.

105. The provisions of this Act with regard to—

(*a*) the increase of the capital stock of the bank by by-law of the shareholders approved by the Treasury Board; and,

(*b*) the allotment and sale of such increased stock;

shall not apply to any increase of stock made or provided for under the authority of the last two preceding sections. 63-64 V., c. 26, s. 38.

The provisions referred to are contained in secs. 33 and 34.

Conditions on which Governor in Council may approve agreement.

106. The approval of the Governor in Council shall not be given to the agreement, unless—

(*a*) the consent of the Minister as prescribed by subsection 2 of section 99 of this Act has been given;

(*b*) the approval of the agreement is recommended by the Treasury Board;

(*c*) the application for approval thereof is made, by or on behalf of the bank executing it, within three months from the date of execution of the agreement; and,

(*d*) it appears to the satisfaction of the Governor in Council that all the requirements of this Act in connection with the approval of the agreement by the shareholders of the selling and purchasing banks have been complied with, and that, after the approval by the shareholders of the selling bank, notice of the intention of the banks to apply to the Governor in Council for the approval of the agreement has been published for at least four weeks in *The Canada Gazette*, and in one or more newspapers published in places where the chief offices of the banks are situate.

Information.

2. Such banks shall afford all information that the Minister requires.

Approval may be refused.

3. Nothing herein contained shall be construed to prevent the Governor in Council or the Treasury Board from refusing to approve of the agreement or to recommend its approval. 63-64 V., c. 26, s. 39. Am.

This section was amended in 1913 by the insertion of clause (*a*) and of the words "after the approval by the shareholders of the selling bank" in clause (*d*).

Further conditions.

107. The agreement shall not be approved of unless it appears that—

(*a*) proper provisions have been made for the payment of the liabilities of the selling bank;

(*b*) the agreement provides for the assumption and pay-

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ment by the purchasing bank of the notes of the selling bank issued and intended for circulation, outstanding and in circulation; and,

(*c*) the amounts of the notes of both the purchasing and selling banks, issued for circulation, outstanding and in circulation, as shown by the then last monthly returns of the banks, do not together exceed the then paid-up capital of the purchasing bank and the amount (if any) held for both of the said banks in the central gold reserves referred to in section 61 of this Act; or if the amount of such notes does exceed such paid-up capital and the amount so held, an amount in cash, equal to the excess of such notes over such paid-up capital and the amount so held, has been deposited by the purchasing bank with the Minister.

Deposit.

2. The amount so deposited under paragraph (*c*) of subsection 1 of this section shall be held by the Minister as security for the redemption of the said excess of notes; and when the amount of the notes of the two banks outstanding and in circulation is less than the aggregate of the paid-up capital of the purchasing bank, the amount aforesaid (if any) held in the central gold reserves, together with the amount so deposited, the difference shall, from time to time, be repaid by the Minister out of the deposit, to the extent thereof, to the purchasing bank, but without interest, on the application of such bank, and on the production of such evidence as the Minister may require to show the amount of the notes of the two banks then outstanding and in circulation. 63-64 V., c. 27, s. 1. Am.

The language of clause (*c*) and sub-sec. 2 was amended in 1913 in view of the provisions contained in sec. 61 in regard to the central gold reserves.

Notes of selling bank to become notes of purchasing bank.

108. The notes of the selling bank so assumed and to be paid by the purchasing bank shall, on the approval of the agreement, be deemed to be, for all intents and purposes,

notes of the purchasing bank issued for circulation; and the purchasing bank shall be liable in the same manner and to the same extent as if it had issued them for circulation. Sec. 108.

2. The amount at the credit of the selling bank in the Circulation Fund shall, on the approval of the agreement, be transferred to the credit of the purchasing bank. Circulation fund.

3. The trustees shall not permit any part of the deposit (if any) of the selling bank in the central gold reserves to be withdrawn under the provisions of this Act after the last juridical day of the month in which notice of intention to apply to the Governor in Council for approval of the agreement has been given and pending such approval, unless and until the trustees are notified in writing by the Minister of his consent thereto; and on the approval of the agreement the trustees shall hold the deposit (if any) for and as if such deposit had been originally made by the purchasing bank. As to withdrawal of deposit in central gold reserves.

4. The notes of the selling bank shall not be re-issued, but shall be called in, redeemed and cancelled as quickly as possible. 63-64 V., c. 26, s. 41. Notes to be called in.

Sub-sec. 3 was added in 1913.

As to the issue and circulation of notes, see sec. 61. The circulation fund is provided for by secs. 64 *et seq.*

109. The approval by the Governor in Council of the agreement shall be evidenced by a certified copy of the order in council approving thereof. Evidence of approval by Governor in Council.

2. A copy of such order in council or extract thereof, and a copy of such agreement, purporting to be certified to be true by the clerk or assistant or acting clerk of the King's Privy Council for Canada shall, in all courts of justice and for all purposes, be prima facie evidence of the said agreement, and of its due execution, and of its approval by the Governor in Council, and of the regularity of all proceedings in connection therewith. 63-64 V., c. 26, s. 42. Am. Order in council conclusive.

Sub-sec. 2 was amended in 1913.

On approval of Governor in Council the assets pass.

110. On the agreement being approved of by the Governor in Council, the assets therein referred to as sold and purchased shall, in accordance with and subject to the terms thereof, and without any further conveyance, become vested in the purchasing bank.

Further assurance.

2. The selling bank shall, from time to time, subject to the terms of the agreement, execute such formal and separate conveyances, assignments and assurances, for registration purposes or otherwise, as are reasonably required to confirm or evidence the vesting in the purchasing bank of the full title or ownership of the assets referred to in the agreement. 63-64 V., c. 26, s. 43.

Selling bank to cease business and be wound up.

111. As soon as the agreement is approved of by the Governor in Council, the selling bank shall cease to issue or re-issue notes for circulation, and shall cease to transact any business, except such as is necessary to enable it to carry out the agreement, to realize upon any assets not included in the agreement, to pay and discharge its liabilities, and generally to wind up its business; and the charter or Act of incorporation of such bank, and any Acts in amendment thereof then in force, shall continue in force only for the purposes in this section specified. 63-64 V., c. 26, s. 44.

CHAPTER XX.

Returns by a Bank.

The following returns to the government are required by the Bank Act.

Sec. 61, a return showing amount of the bank's notes in circulation in excess of unimpaired paid-up capital.

Sec. 79, a return showing the fair market value of the real property held by the bank.

Sec. 91, a return of the interest and discount rates charged by the bank.

Sec. 112, monthly returns in the form set forth in schedule D.

Sec. 113, special returns called for by the minister of finance.

Sec. 114, a return of all dividends, etc., unpaid for more than five years.

Sec. 114, a return of all certified cheques, drafts or bills of exchange issued by the bank and unpaid for more than five years.

Sec. 114, a certified list of shareholders.

Secs. 147 to 151 impose penalties upon a bank which neglects to transmit any of the above mentioned returns.

Sec. 152 provides that when any return is transmitted by post, the date of deposit in the post office, as shewn by the post office mark or stamp upon the envelope or wrapper enclosing the return, shall be taken *primâ facie* to be the day when the return was transmitted.

By sec. 153 provision is made for the criminal liability of persons who make any wilfully false or deceptive statement in any account, statement, return, report, or other document respecting the affairs of a bank, or who use a false or deceptive statement in any account, etc., with intent to deceive, or who negligently prepare, sign, approve or concur in any account, etc., containing any false or deceptive statement.

Minister in the act means the minister of finance and receiver general (sec. 2).

RETURNS.

Monthly returns.

112. Monthly returns shall be made by the bank to the Minister in the form set forth in Schedule D to this Act.

Within first 20 days.

2. Such returns shall be made up and sent in within the first twenty days of each month, and shall exhibit the condition of the bank on the last juridical day of the month last preceding.

When return last received may be used.

3. Notwithstanding anything in this section, whenever in the usual course of the post, the return of a branch or agency for the last juridical day of the month, mailed at the branch or agency on or before the second day of the following month, does not reach—

(*a*) the chief office of the bank on or before the eighteenth day of the month; or,

(*b*) the office of the general manager, if the office of the general manager is at a place other than the chief office of the bank, on or before the fifteenth day of the month,

the return last received from any such branch, exhibiting as far as that branch is concerned the condition of the bank at the date for which it purports to be made, may be used in the compilation of the monthly return called for by this section.

How signed.

4. The monthly returns shall be signed by the chief accountant or by the acting chief accountant and by the president, or a vice-president, or the director then acting as president, and by the general manager or other principal officer of the bank next in authority in the management of the affairs of the bank at the time at which the declaration is signed.

Names of directors, president and vice-president, sent to Minister.

5. As soon as may be after the annual general meeting there shall be sent to the Minister the names of the directors elected thereat and the names of the president and vice-presidents, and should any casual vacancy occur in the membership of the board of directors, or in the office of president, or vice-president, the Minister shall forthwith be notified of the name of the person by whom the vacancy has been filled.

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Notice to Minister of change of officers.

6. If any change is made in the holder of the office of chief accountant or of general manager, the Minister shall forthwith be notified of the name of the person by whom the vacancy has been filled.

Monthly returns of Bank of British North America, how signed.

7. In the case of the Bank of British North America the returns called for by this section shall be signed by the officer of that bank known as the assistant secretary in the place of the chief accountant as hereinbefore in this section prescribed, and by the general manager at the chief office of that bank under this Act, in the place of the president and general manager as hereinbefore prescribed, and the part of such return containing the respective forms of declaration in Schedule D shall, for the purposes of returns by the said bank, be modified accordingly.

Other returns by Bank of British North America.

8. Any other returns required to be made by a bank under the provisions of this Act shall in like manner in the case of the Bank of British North America be signed by the officers of that bank who are referred to in the next preceding subsection; and that part, if any, of such returns containing the respective forms of declaration shall, for the purposes of returns by the said bank, be modified accordingly 53 V., c. 31, s. 85. Am.

This section was much amplified in 1913. Sub-secs. 3, 5, 6, 7 and 8 were added, sub-sec. 2 was amended by substituting "twenty" for "fifteen," and verbal changes were made in sub-sec. 4.

Cf. sec. 113 which empowers the minister of finance to call for special returns.

Monthly returns have been required since 1871.

The form prescribed in the act of 1871 was itself an elaboration of the form of statement required to be published in certain cases under chapter 21 of the Consolidated Statutes of Canada, 1859. By statutes subsequent to 1871 changes were made from time to time, the changes being designed to make the information given more detailed and trustworthy, without however disturbing that general continuity of form which is desirable for the purpose of comparison. The present form was adopted

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in 1900, with some additions made in 1913. It is printed among the schedules in chapter 26, *infra*.

The officers making the return should be careful to classify the items of assets and liabilities under the proper heads. Improper classification of items may constitute a false or deceptive statement within sec. 153.

The monthly returns of the various banks are published each month in a consolidated form by the government.

Special returns.

113. The Minister may also call for special returns from any bank, whenever, in his judgment, they are necessary to afford a full and complete knowledge of its condition.

How made.

2. Such special returns shall be made and signed in the manner and by the persons specified in the last preceding section.

Within 30 days from demand.

3. Such special returns shall be made and sent in within thirty days from the date of the demand therefor by the Minister: Provided that the Minister may extend the time for sending in such special returns for such further period, not exceeding thirty days, as he thinks expedient. 53 V., c. 31, s. 86.

The special returns which may be called for under this section are in addition to the monthly returns required to be made by sec. 112.

Annual returns of unpaid dividends and balances.

114. The bank shall within twenty days after the close of each calendar year, transmit or deliver to the Minister a return—

(*a*) of all dividends which have remained unpaid for more than five years; and,

(*b*) of all amounts or balances in respect of which no transactions have taken place, or upon which no interest has been paid, during the five years prior to the date of such return:

Provided that, in the case of moneys deposited for a fixed period, the said term of five years shall be reckoned from the date of the termination of such fixed period.

2. The return mentioned in the last preceding subsection shall set forth— Sec. 114.

What return shall show.

(*a*) the name of each shareholder or creditor to whom such dividends, amounts or balances are, according to the books of the bank, payable;

(*b*) the last known address of each such shareholder or creditor;

(*c*) the amount due to each such shareholder or creditor;

(*d*) the branch or agency of the bank at which the last transaction took place;

(*e*) the date of such last transaction; and

(*f*) if such shareholder or creditor is known to the bank to be dead, the names and addresses of his legal representatives, so far as known to the bank.

Further annual return.

3. The bank shall likewise, within twenty days after the close of each calendar year, transmit or deliver to the Minister a return of all certified cheques, drafts or bills of exchange, issued by the bank to any person, and remaining unpaid for more than five years prior to the date of such return, setting forth so far as known,—

Particulars.

(*a*) the names of the persons to whom, or at whose request, such drafts, certified cheques, or bills of exchange were issued;

(*b*) the addresses of such persons;

(*c*) the names of the payees of such drafts or bills of exchange;

(*d*) the amounts and dates of such certified cheques, drafts or bills of exchange;

(*e*) the names of the places where such certified cheques, drafts or bills of exchange were payable; and,

(*f*) the branches or agencies of the bank respectively from which such drafts, certified cheques, or bills of exchange were issued.

Amounts under five dollars.

4. If a dividend, amount or balance, certified cheque, draft, or bill of exchange is for a less sum than five dollars,

Sec. 114.

and returns in respect thereof have been made under the preceding provisions of this section for five consecutive years, the bank may hereafter omit from the respective returns particulars required by the said provisions with regard to any such dividend, amount or balance, certified cheque, draft or bill of exchange.

Declarations and signatures.

5. The returns required by the foregoing provisions of this section shall be accompanied by declarations which shall be a part of the return, and the declarations shall be in the form set forth in Schedule F to this Act, and shall be signed by the chief accountant, and by the president or a vice-president or the director then acting as president, and by the general manager or other principal officer of the bank next in authority in the management of the affairs of the bank at the time at which the declaration is signed.

Notice that dividend draft or cheque remains unpaid.

6. The bank shall transmit by registered post to the person to whom any such dividend, amount or balance is payable, and to the person to whom (in so far as known to the bank) and to the person at whose request any such draft, certified cheque or bill of exchange was issued, to the last known post office address of each person as shown by the books of the bank, a notice in writing stating that such dividend remains unpaid, or that in respect of such amount or balance no transaction has taken place or no interest has been paid, or that such draft, certified cheque or bill remains unpaid, as the case may be.

When notice to be given.

7. The notice called for by the next preceding subsection is required to be given once only, namely during the month of January next after the end of the first five year period in respect of which—

(*a*) the dividend has remained unpaid; or,

(*b*) no transaction has taken place or no interest has been paid in connection with such amount or balance; or,

(*c*) the draft, certified cheque or bill has remained unpaid.

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Certified annual list of shareholders transmitted to Minister.

8. The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister a list, certified by the general manager or other principal officer of the bank next in authority in the management of the affairs of the bank at the time at which the list is certified, and by the officer of the bank in charge of the register of shareholders, to be a correct list and in accordance with the books of the bank with regard thereto; and the list shall show—

(*a*) the names of the shareholders of the bank on the last day of such calendar year, with their last known post office addresses and descriptions;

(*b*) the number of shares then held by them respectively; and,

(*c*) the amount paid thereon.

Laid before Parliament.

9. The Minister shall lay such returns and lists before Parliament at the next session thereof. 53 V., c. 31, ss. 87 and 88; 63-64 V., c. 26, s. 21. Am.

Sub-secs. 1 and 2 date from 1890. The act does not deprive a bank, so long as it is solvent, of the benefit of unpaid dividends and other amounts and balances in respect of which transactions have ceased to take place or interest ceased to be paid. Until the dividends, etc., are claimed, the sole obligation of the bank is to make the required returns so as to give notice by means of the government publications to any persons who may be entitled and allow them an opportunity to claim payment, except that under sub-sec. 6 notice must be sent once by registered post to the individual shareholders, etc.

Statutes of limitations not applicable.

Under secs. 57 and 92 the liability of a bank for moneys deposited with it or dividends declared and payable on its capital stock is never barred by any statute of limitations or any enactment or law relating to prescription. It is therefore necessary, in the event of the winding-up of a bank, to provide a fund to meet claims which may be made from time to time to unpaid dividends and deposits, and interest, if any. This is done by sec. 115.

Sub-sec. 3 dates from 1900 except for the insertion of the words "certified cheques" in several clauses in 1913. Its

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purpose is to give notice to persons in whose favour any drafts or bills may have been issued, and to allow them an opportunity to claim the proceeds.

The lists of shareholders are published annually by the government.

Sub-secs. 5, 8 and 9 date from 1890, but were amended in 1913. Sub-secs. 4, 6 and 7 were added in 1913.

CHAPTER XXI.

Payments to the Minister upon Winding-up.

Unclaimed moneys paid to Minister on winding-up of bank.

115. If, in the event of the winding-up of the business of the bank in insolvency, or under any general winding-up Act, or otherwise, any moneys payable by the liquidator, either to shareholders or depositiors, remain unclaimed—

(*a*) for the period of three years from the date of suspension of payment by the bank; or,

(*b*) for a like period from the commencement of the winding-up of such business; or,

(*c*) until the final winding-up of such business, if the business is finally wound up before the expiration of the said three years;

With interest.

such moneys and all interest thereon shall, notwithstanding any statute of limitations or other Act relating to prescription, be paid to the Minister, to be held by him subject to all rightful claims on behalf of any person other than the bank.

Governor in Council may order payment to person entitled.

2. If a claim to any moneys so paid is thereafter established to the satisfaction of the Treasury Board, the Governor in Council shall, on the report of the Treasury Board, direct payment thereof to be made to the person entitled thereto, together with interest on the principal sum thereof,

Interest.

at the rate of three per cent per annum for a period not exceeding six years from the date of payment thereof to the Minister as aforesaid: Provided that no such interest shall be paid or payable on such principal sum unless interest thereon was payable by the bank paying the same to the Minister.

Bank discharged.

3. Upon payment to the Minister as herein provided, the bank and its assets shall be held to be discharged from further liability for the amounts so paid. 53 V., c. 31, s. 88.

Sec. 115.

By secs. 57 and 92 the liability of the bank, under any law, custom or agreement, to repay moneys deposited with it and interest, if any, and to pay dividends declared and payable on its capital stock, shall continue, notwithstanding any statute of limitations, or any enactment or law relating to prescription. Hence the necessity for this section. Cf. sec. 114.

The sections providing for the insolvency of a bank are secs. 125 ff. As to the application to a bank of the provisions of the Dominion Winding-up Act, see chapter 24 *infra*.

Circulation outstanding at distribution of assets.

116. Upon the winding-up of a bank in insolvency or under any general winding-up Act, or otherwise, the assignees, liquidators, directors, or other officials in charge of such winding-up shall, before the final distribution of the assets, or within three years from the commencement of the suspension of payment by the bank, whichever shall first happen, pay over to the Minister a sum, out of the assets of the bank, equal to the difference between the amount then outstanding of the notes intended for circulation issued by the bank, together with any interest on such outstanding notes which may have accrued under section 65 of this Act, and the aggregate of the amount at the credit of the bank in the Circulation Fund and the amount (if any) paid to the Minister by the trustees under section 61 of this Act.

Bank relieved.

2. Upon such payment being made, the bank and its assets shall be relieved from all further liability in respect of such outstanding notes.

Minister to redeem.

3. The sum so paid shall be held by the Minister and applied for the purpose of redeeming, whenever presented, such outstanding notes, without interest, except such as may have been paid over under this section. 53 V., c. 31, s. 88. Am.

This section is designed to guard against the charging of the bank circulation redemption fund with the payment of the notes of an insolvent bank which are presented after the liquidator has distributed the assets. This safeguard is necessary because by sec. 64 the principle is laid down that every bank

note, once in circulation, shall be redeemable, no matter how long it may be outstanding. An incidental result of the section is that an insolvent bank is deprived of the profit, if any, derived from the loss or destruction of outstanding bank notes. Sec. 116.

The section was amended in 1913 so as to provide that, in order to ascertain the amount to be paid to the minister of finance, there should be added to the amount of notes outstanding the interest already accrued under sec. 65, and there should be deducted the amount at the credit of the bank in the circulation fund and the amount (if any) paid to the minister by the trustees under sec. 61.

Provision for outstanding notes in case of insolvency.

See also sec. 158 of the Winding-up Act, R.S.C. 1906, c. 144, which provides that the liquidators shall ascertain as nearly as possible the amount of notes of the bank intended for circulation and actually outstanding and shall reserve dividends on any part of the said amount in respect of which claims are not filed, until the expiration of at least two years after the date of the winding-up order, or until the last dividend, if such last dividend is not made until after the expiration of the said time. And further (by sub-sec. 2) that if claims are not filed and dividends applied for in respect of any part of the said amount before the period by this section limited, the dividends so reserved shall form the last or part of the last dividend.

CHAPTER XXII.

The Curator.

Owing to the establishment in 1890 of the bank circulation redemption fund (secs. 64 ff.) every chartered bank now has an interest in seeing that the affairs of a bank which has suspended payment shall be properly managed and that proper measures are taken for the redemption of the outstanding notes of such bank. The Canadian Bankers' Association, formerly existing as an unincorporated society, was incorporated in 1900 (see the next chapter), as a suitable medium for exercising the necessary supervision. Power is given to the association by the next following sections of the act to appoint a curator in the event of the suspension of payment by a bank. The powers and duties of the curator are governed by these sections and also by "by-laws, rules and regulations" made by the association in pursuance of the further authority conferred upon it by sec. 124 (see end of this chapter where the by-laws passed by the association on this subject are set out).

CURATOR.

Association to appoint curator.

117. The Association shall, if a bank suspends payment in specie or Dominion notes of any of its liabilities as they accrue, forthwith appoint a curator to supervise the affairs of such bank.

Removal.

2. The Association may at any time remove the curator, and may appoint another person to act in his stead. 63-64 V., c. 26, s. 24.

The "Association" is defined by sec. 2 to mean the Canadian Bankers' Association.

Appointment by Association.

118. The appointment of the curator shall be made in the manner provided for in the by law of the Association made in that behalf as hereinafter provided.

2. If there is no such by-law the appointment shall be made in writing by the president of the Association, or by the person acting as president. 63-64 V., c. 26, s. 25. Sec. 118. If no by-law.

The by-laws referred to are made in pursuance of sec. 124, and are set out below.

119. The curator shall assume supervision of the affairs of the bank, and of all necessary arrangements for the payment of the notes of the bank issued for circulation, and, at the time of his appointment, outstanding and in circulation. Powers and duties of curator.

2. The curator shall generally have all powers and shall take all steps and do all things necessary or expedient to protect the rights and interests of the creditors and shareholders of the bank, and to conserve and ensure the proper disposition, according to law, of the assets of the bank; and, for the purposes of this section, he shall have free and full access to all books, accounts, documents and papers of the bank. Generally.

3. The curator shall continue to supervise the affairs of the bank until he is removed from office, or until the bank resumes business, or until a liquidator is duly appointed to wind up the business of the bank. 63-64 V., c. 26, s. 26. Supervision.

A bank which has suspended payment is forbidden by sec. 61 to issue or re-issue its notes payable to bearer on demand and intended for circulation until it resumes business with the consent in writing of the curator or, having resumed business without such consent, until it is authorized by the treasury board to issue or re-issue such notes.

Where a curator has been appointed, he is by secs. 119 and 121, vested with all the powers which directors and solicitors had before his appointment; and after the appointment of a curator, the directors have no power to give a solicitor authority to consent to a winding-up order or to do anything which may have any effect upon the rights and interests of creditors; and a solicitor has no such authority derivable from his former Directors superseded by curators.

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retainer by the bank. Re Farmers Bank of Canada, 1910, 22 O.L.R. 556.

Sec. 147 B renders it an offence for any director, officer, etc., who has knowledge of the suspension of the bank, to pay or cause to be paid any debt or liability of the bank without the consent of a curator or liquidator duly appointed.

Officers and clerks to assist curator.

120. The president, vice-president, directors, general manager, managers, clerks and officers of the bank shall give and afford to the curator all such information and assistance as he requires in the discharge of his duties. 63-64 V., c. 26, s. 27.

No act of directors valid unless approved by curator.

121. No by-law, regulation, resolution or act, touching the affairs or management of the bank, passed, made or done by the directors during the time the curator is in charge of the bank, shall be of any force or effect until approved in writing by the curator. 63-64 V., c. 26, s. 27.

Curator to make returns as required by Minister.

122. The curator shall make all returns and reports, and shall give all information to the Minister, touching the affairs of the bank, that the Minister requires of him. 63-64 V., c. 26, s. 28.

Remuneration of curator.

123. The remuneration of the curator for his services, and his expenses and disbursements in connection with the discharge of his duties, shall be fixed and determined by a judge of a superior court in the province where the chief office of the bank is situate, and shall be paid out of the assets of the bank, and, in case of the winding-up of the bank shall rank on the estate equally with the remuneration of the liquidator. 63-64 V., c. 26, s. 29.

In 1913 the words "a judge of a superior court in the province where the chief office of the bank is situate" were substituted for the words "the Association."

By sec. 92 of the Winding-up Act all costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims.

BY-LAWS RESPECTING CURATOR. Sec. 123.

In pursuance of the powers conferred by sec. 124 the following by-laws were passed at a general meeting of the association held in Toronto on the 15th of November, 1900, and approved by the treasury board on the 10th of May, 1901.

CURATOR.

By-law No. 14.

Whenever any bank suspends payment, a curator, as mentioned in sec. 24 of the Bank Act Amendment Act, 1900, [sec. 117 of the present act], shall be appointed to supervise the affairs of such bank. Such appointment shall be made in writing by the president of the association or by the person who, during a vacancy in the office of, or in the absence of, the president, may be acting as president of the association.

If a curator so appointed dies, or resigns, another curator may be appointed in his stead in the manner aforesaid.

The executive council may by resolution at any time remove a curator from office and appoint another person curator in his stead. By-laws respecting curator.

A curator so appointed shall have all the powers and subject to the provisions of by-law no. 15, shall perform all the duties imposed upon the curator by the said Bank Act Amendment Act; he shall also furnish all such returns and reports, and give all such information touching the affairs of the suspended bank as the president of the association or the executive council may require of him from time to time.

The remuneration of the curator for his services and his expenses and disbursements in connection with the discharge of his duties shall be fixed and determined from time to time by the executive council.

By-law No. 15.

Whenever a bank suspends payment and a curator is accordingly appointed, the president shall also appoint a local advisory board consisting of three members, selected generally as far as possible from among the general managers, assistant general managers, cashiers, inspectors or chief accountants, or branch managers of any bank at the place where the head office of such suspended bank is situated, and the curator

Sec. 123. By-laws respecting curator.

shall advise from time to time with such advisory board, and it shall be his duty, before taking any important step in connection with his duties as curator, to obtain the approval of such advisory board thereto. With the sanction of such advisory board, he may employ such assistants as he may require for the full performance of his duties as curator.

CHAPTER XXIII.

By-laws of the Canadian Bankers' Association.

By-laws.

124. The Association may, at any meeting thereof, with the approval of two-thirds in number of the banks represented at such meeting, if the banks so approving have at least two-thirds in par value of the paid-up capital of the banks so represented, make by-laws, rules and regulations respecting—

As to what subjects.

(*a*) all matters relating to the appointment or removal of the curator, and his powers and duties;

(*b*) the supervision of the making of the notes of the banks which are intended for circulation, and the delivery thereof to the banks;

(*c*) the inspection of the disposition made by the banks of such notes;

(*d*) the destruction of notes of the banks;

(*e*) the custody and management of the central gold reserves and the carrying out of the provisions of this Act relating to such reserves; and,

(*f*) the imposition of penalties for the breach or non-observance of any by-law, rule or regulation made by virtue of this section.

Approval by Treasury Board.

2. No such by-law, rule or regulation, and no amendment or repeal thereof, shall be of any force or effect until approved by the Treasury Board.

Notice to other banks.

3. Before any such by-law, rule or regulation or any amendment or repeal thereof is so approved, the Treasury Board shall submit it to every bank which is not a member of the Association, and give to each such bank an opportunity of being heard before the Treasury Board with respect thereto.

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Enforcement of by-laws.

4. The Association shall have all powers necessary to carry out, or to enforce the carrying out, of any by-law, rule or regulation, or any amendment thereof, so approved by the Treasury Board. 63-64 V., c. 26, ss. 30 and 31.

In 1913 clause (*e*) was added in consequence of the provisions of sec. 61 in regard to the central gold reserves. In other respects this section, like secs. 117 to 123, dates from 1900. See the notes at the beginning of chapter 23, *supra*.

The "Association" is defined by sec. 2 to mean the Canadian Bankers' Association. Its act of incorporation is set out below.

The authority to appoint and remove a curator is conferred on the association by sec. 117 of the Bank Act. Further provisions as to his appointment, removal, powers and duties are contained in secs. 118 to 123, and in by-laws 14 and 15 passed in pursuance of the power conferred by sec. 124, and printed in chapter 22.

Under sec. 119, in the case of a bank which has suspended payment, the association may, through a curator appointed by it, exercise supervision of all necessary arrangements for the payment of the notes of the bank issued for circulation and, at the time of the appointment of the curator, outstanding and in circulation. The association may also exercise supervision over the notes of all banks doing business under the Act in respect of the matters mentioned in sec. 124. By-law No. 13, passed in pursuance of this power is set out at the end of chapter 14, *supra*.

Under sec. 7 of its act of incorporation the association has made rules and regulations in regard to clearing houses. See chapter 27, *infra*.

AN ACT TO INCORPORATE THE CANADIAN BANKERS' ASSOCIATION.

(63-64 Vict. c. 93, assented to 7th July, 1900.)

Preamble.

WHEREAS the voluntary association now existing under the name of the Canadian Bankers' Association has, by its petition, prayed that it may be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore Her Majesty, by and with the advice and

consent of the Senate and House of Commons of Canada, enacts as follows:— Sec. 124.

1. There is hereby created and constituted a corporation under the name of "The Canadian Bankers' Association," hereinafter called "the Association." Incorporation.

2. The Association shall consist of members and associates; Association how composed.

(a) The members, hereinafter referred to as members, shall be the banks named in the schedule(a) to this Act and such new banks hereafter incorporated by or under the authority of the Parliament of Canada as become entitled to carry on the business of banking in Canada, and to which The Bank Act in force at the time of its incorporation applies. Any bank to which the Bank Act applies, carrying on business in Canada, and not named in the schedule to this Act, shall on its own application at the time be admitted as a member of the Association by resolution of the Executive Council hereinafter named; Members.

(b) The associates, hereinafter referred to as associates, shall be the bank officers who are associates of the voluntary association mentioned in the preamble at the time this Act is passed, and such other officers of the banks which are members of the Association as may be elected at a meeting of the executive council hereinafter named or at any annual meeting of the Association. An associate may at any time by written notice to the president of the Association withdraw from the Association. Associates.

3. Upon the suspension of payment of a bank being a member of the Association, such bank shall cease to be a member. Provided, however, that if and when such bank resumes Effect of bank suspending.

(a) The schedule to the act is not printed. All the banks carrying on business under the Bank Act are members of the association. Banks incorporated since the 7th of July, 1900, become members as soon as they become entitled to carry on the business of banking in Canada, *i.e.*, when they have obtained the certificate of the treasury board under sec. 14 of the Bank Act.

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the carrying on of its business in Canada it may again become a member of the Association.

When associate ceases to be such.

4. Upon an associate ceasing to be an officer of a bank carrying on business in Canada, he shall, at the end of the then current calendar year, cease to be an associate.

Objects of Association.

5. The objects and powers of the Association shall be, to promote generally the interests and efficiency of banks and bank officers and the education and training of those contemplating employment in banks, and for such purposes, among other means, to arrange for lectures, discussions, competitive papers and examinations on commercial law and banking, and to acquire, publish and carry on the "Journal of The Canadian Bankers' Association."

Subsections of Association.

6. The Association may from time to time establish in any place in Canada a subsection of the Association under such constitution and with such powers (not exceeding the powers of the Association) as may be thought best.

Clearing houses.

7. The Association may from time to time establish in any place in Canada a clearing house for banks, and make rules and regulations for the operations of such clearing house: Provided always, that no bank shall be or become a member of such clearing house except with its own consent, and a bank may after becoming such member at any time withdraw therefrom.

Regulations.

2. All banks, whether members of the Association or not, shall have an equal voice in making from time to time the rules and regulations for the clearing house: but no such rule or regulation shall have any force or effect until approved of by the Treasury Board.

Voting powers.

8. Members of the Association shall vote and act in all matters relating to the Association through their chief executive officers. For the purpose of this Act the chief executive officer of a member shall be its general manager or cashier,

or in his absence the officer designated for the purpose by him, or in default of such designation the officer next in authority. Where the president or vice-president of a member performs the duties of a general manager or cashier he shall be the chief executive officer, and in his absence the officer designated for the purpose by him, and in default of such designation the officer next in authority to him. At all meetings of the Association each member shall have one vote upon each matter submitted for vote. The chairman shall, in additon to any vote he may have as chief executive officer or proxy, have a casting vote in case of a tie. Associates shall have only such powers of voting and otherwise taking part at meetings as may be provided by by-law. Sec. 124.

9. There shall be a president and one or more vice-presidents and an executive council of the Association, of which council five shall form a quorum unless the by-laws otherwise provide. Officers.

10. The persons who are the president, vice-presidents and executive council of the voluntary association mentioned in the preamble at the time this Act is passed shall be the president, vice-presidents and executive council respectively of the Association until the first general meeting of the Association or until their successors are appointed. Officers of existing association continued.

11. The first general meeting of the Association shall be held during the present calendar year at such time and place and upon such notice as the executive council may decide. Subsequent general meetings shall be held as the by-laws of the Association may provide at least once in each calendar year. General meetings.

12. At the first general meeting and at such annual meeting thereafter the members of the Association shall elect a president, one or more vice-presidents, and an executive council, all of whom shall hold office until the next general meeting or until their successors are appointed. Election of officers.

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Executive officers.

13. The president, vice-president and executive council shall be chosen from among the chief executive officers of members of the Association.

Executive Council.

14. Unless the by-laws otherwise provide, the executive council shall consist of the president and vice-president of the Association and fourteen chief executive officers, and five shall form a quorum for the transaction of business.

Dues.

15. Each member and associate shall from time to time pay to the Association for the purpose thereof such dues and assessments as shall from time to time be fixed in that behalf by the Association at any annual meeting, or at any special meeting called for the purpose, by a vote of not less than two-thirds of those present or represented by proxy.

By-laws governing Association.

16. The objects and powers of the Association shall be carried out and exercised by the executive council, or under by-laws, resolutions, rules and regulations passed by it, but every such by-law, rule and regulation, unless in the meantime confirmed at a general meeting of the Association called for the purpose of considering the same, shall only have force until the next annual meeting, and in default of confirmation thereat shall cease to have force. Provided always, that any by-law, rule or regulation passed by the executive council may be repealed, amended, varied or otherwise dealt with by the Association at any annual general meeting or at a special general meeting called for the purpose.

Power of executive to pass by-laws.

2. For greater certainty, but not so as to restrict the generality of the foregoing, it is declared that the executive council shall have power to pass by-laws, resolutions, rules and regulations, not contrary to law or to the provisions of this Act, respecting,—

(*a*) lectures, discussions, competitive papers, examinations;

(*b*) the journal of the Association;

(*c*) the sub-sections of the Association;

(*d*) clearing houses for banks;

(*e*) general meetings, special and annual, of the Association and of the executive council, and the procedure and quorum thereat, including the part to be taken by associates and their powers of voting; Sec. 124.

(*f*) voting by proxy at meetings of the Association and of the executive council;

(*g*) the appointment, functions, duties, remuneration and removal of officers, agents and servants of the Association.

3. No by-law, resolution, rule or regulation respecting clearing houses, and no repeal, amendment or variation of or other dealing with any such by-law, resolution, rule or regulation shall have any force or effect until approved of by the Treasury Board. Approval of Treasury Board.

17. The provisions of The Companies Clauses Act, being chapter 118 of the Revised Statutes [1886], shall not apply to the Association.(*b*) R.S.C. c. 118.

(*b*) The Companies Clauses Act is now part II. of the Companies Act, R.S.C., 1906, c. 79.

CHAPTER XXIV.

Insolvency of a Bank.

Secs. 125 to 129 are not applicable to the Bank of British North America (sec. 6).

In the event of the insolvency of a bank, proceedings may be taken for its winding-up under the Dominion Winding-up Act (R.S.C. 1906, c. 144) enacted by parliament by virtue of its jurisdiction over bankruptcy and insolvency. Schoolbred v. Clarke, 1890, 17 S.C.R. 265.

It would be competent for the parliament of Canada to pass a special winding-up act applicable to banks alone. Quirt v. The Queen, 1891, 19 S.C.R. 510. Instead of doing so, it has made applicable to banks, with some var ations, the general act for the winding-up of incorporated companies.

Application of Winding-up Act.

The Winding-up Act (sec. 6) applies "to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated trading companies doing business in Canada wheresoever incorporated and, (*a*) which are insolvent; or, (*b*) which are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of this Act."

Appointment of curator.

Upon suspension of payment by a bank, and pending the resumption of business or the appointment of a liquidator, a curator is to be appointed by the Canadian Bankers' Association, to supervise the affairs of the bank in order to protect the interests of shareholders and creditors, and ensure the proper disposition of the assets. See secs. 117 and 119 of the Bank Act.

Insolvency of bank.

If the suspension of payment continues for 90 days consecutively, or at intervals within 12 consecutive months, the bank becomes insolvent and its charter is forfeited as regards all further banking operations (sec. 126).

By sec. 128 the directors of an insolvent bank are required, after a certain time, and if no proceedings are taken under the Winding-up Act, to make calls on the shareholders under the

double liability clause, without waiting for the collection of debts or sale of assets.

It is outside the scope of this book to discuss all the provisions of the Winding-up Act which are of general application to insolvent companies. Certain sections of the act apply only to banks (see secs. 8 and 149) and will be noted under the sections of the Bank Act included in this chapter. Certain other sections which relate to subjects dealt with in the Bank Act will also be noted.

Other provisions as to suspension and insolvency.

In addition to the sections included in this chapter, the following earlier sections of the Bank Act contemplate the insolvency of a bank:

Sec. 61 forbids the issue by a bank of its notes during any period of suspension of payment, or, except under certain conditions, after the resumption of business.

Secs. 64 *et seq.* provide for payment out of the bank circulation redemption fund, under certain conditions, of outstanding notes of a bank which has suspended payment. The excess of any payments made for such purpose out of the fund over the amount in the fund to the credit of the bank in respect of whose notes the payments are made is recoverable out of the assets of such bank.

Sec. 115 provides for the payment to the minister of finance of the amount of any moneys payable to shareholders or depositors, which are unclaimed at the completion of the winding-up of a bank or at the expiration of three years from the suspension of payment or the commencement of winding-up proceedings. Sec. 116 contains a somewhat similar provision in regard to the amount of outstanding notes.

INSOLVENCY.

Double liability of shareholders.

125. In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, each shareholder of the bank shall be liable for the deficiency, to an amount equal to the par value of the shares held by him, in addition to any amount not paid up on such shares.

"Shareholder" defined.

2. "Shareholder," within the meaning of this section, shall include an undisclosed principal and, to the extent of his interest, a *cestui que trust*, on whose behalf or for whose benefit shares in the capital stock of the bank are held. 53 V. c. 31, s. 89

Sec. 125.

Sub-sec. 2 was added in 1913.

Double liability.

Sub-sec. 1 dates from 1871 and is commonly known as the double liability clause. Its effect is to render a shareholder liable (in addition to the extent to which his shares are not paid up) for an amount equal to the par value of the shares held by him, or so much of such amount as may be needed to pay the debts and liabilities of the bank.

As to what persons are shareholders, see secs. 36, 43 ff., 53 and 130, and notes to these sections.

The Winding-up Act (sec. 51) provides that "every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, *or on his liability to the company, or its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company,* or otherwise," and 'the amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act." Cf. also secs. 52 and 53 of the same Act.

Set-off.

The Winding-up Act also provides that the law of set-off, as administered by the courts, whether of law or equity, shall apply to claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up (sec. 71), except as to debts of the company transferred within 30 days next before the commencement of the winding-up of a company under the circumstances mentioned in sec. 100 of the act.

A contributory under the double liability clause cannot, however, set off against such liability a debt due to him by the bank, there not being that mutuality between the cross-demands which is essential to set-off. Maritime Bank v. Troop, 1888, 16 S.C.R. 456. *Quære*, whether the liability of a shareholder for the amount of his shares not paid up is in the same position as regards set-off.

As to acquiring debts for the purpose of set-off, see In re Central Bank and the Winding-up Act, 1888, 15 O.R. 625; Maritime Bank v. Robinson, 1887, 26 N.B.R. 297.

Enforcement of double liability.

See sec. 128 of the Bank Act and notes, as to the enforcement of the double liability. It was held in Brooke v. Bank of Upper Canada, 1869, 16 Gr. 249, in an action against the bank and certain creditors, that a bill would also lie in equity, at

the suit of a creditor, to enforce the double liability, but that such bill must be on behalf of all the creditors. Sec. 125.

An infant cannot be made liable upon shares standing in his name, he not having received the dividends and repudiating liability after coming of age. Re Central Bank & Hogg, 1890, 19 O.R. 7.

Suspension for 90 days to constitute insolvency.

126. Any suspension by the bank of payment of any of its liabilities as they accrue, in specie or Dominion notes, shall, if it continues for ninety days consecutively, or at intervals within twelve consecutive months, constitute the bank insolvent, and work a forfeiture of its charter or Act of incorporation, so far as regards all further banking operations. 53 V., c. 31, s. 91.

Prior to 1913, this section was sub-sec. 1 of sec. 127.(*a*)

The words "consecutively or at intervals within twelve consecutive months" were added in 1890. In other respects the section dates, substantially in its present form, from 1871.

After a suspension of payment for a less period than would constitute it insolvent under this section, a bank may resume business, but if it does so without the consent of the curator, its right to issue or re-issue notes is subject to the provisions of sec. 61. If the suspension continues for more than 90 days, either consecutively, or at intervals within 12 consecutive months, such suspension constitutes the bank insolvent and operates a forfeiture of its charter to the extent provided for by sec. 127.

When company deemed insolvent.

This section is supplementary to the provisions of the Winding-up Act, R.S.C. 1906, c. 144, by sec. 3 of which a company is deemed insolvent,—

(*a*) if it is unable to pay its debts as they become due;

(*b*) if it calls a meeting of its creditors for the purpose of compounding with them;

(*c*) if it exhibits a statement showing its inability to meet its liabilities;

(*d*) if it has otherwise acknowledged its insolvency;

(*a*) Former sec. 126 provided in effect that the statutes of limitations should not apply to dividends payable on money deposited. See now secs. 57 and 92.

Sec. 126. When company deemed insolvent.

(*e*) if it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay its creditors, or any of them;

(*f*) if, with such intent, it has procured its money, goods chattels, lands or property to be seized, levied on or taken, under or by any process or execution;

(*g*) if it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims; or,

(*h*) if it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure.

Sec. 4 of the same act also provides that a company is deemed to be unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor.

Charter to remain in force for calls and winding up.

127. The charter or Act of incorporation of the bank shall, in the case mentioned in the next preceding section, remain in force only for the purpose of enabling the directors, or other lawful authority, to make and enforce the calls mentioned in the next following section of this Act, and to wind up the business of the bank. 53 V., c. 31, s. 91. Am.

Prior to 1913, this section and the present sec. 126 constituted one section, numbered 127.

128. If any suspension of payment in full, in specie or Dominion notes, of all or any of the notes or other liabilities of the bank, continues for three months after the expiration of the time which, under the two last preceding sections would constitute the bank insolvent, and if no proceedings are taken under any Act for the winding-up of the bank, the directors shall make calls on the shareholders thereof, to the amount they deem necessary to pay all the debts and liabilities of the bank not exceeding the limit of liability of the shareholders hereinbefore specified, without waiting for the collection of any debts due to the bank or the sale of any of its assets or property. If no proceedings within 3 months thereafter, directors to make calls.

2. Such calls shall be payable at intervals of thirty days. Intervals.

3. Notice of such calls shall be given to the shareholders. Notice.

4. Any number of such calls may be made by one resolution. Number.

5. No such call shall exceed twenty per cent on each share. Amount.

6. Payment of such calls may be enforced in like manner as payment of calls on unpaid stock may be enforced. Payment.

7. The first of such calls may be made within ten days after the expiration of the said three months. First call.

8. In the event of proceedings being taken, under any Act, for the winding-up of the bank in consequence of the insolvency of the bank, the said calls shall be made in the manner prescribed for the making of such calls in such Act. Procedure.

9. Any failure on the part of any shareholder liable to any such call to pay the same when due, shall work a forfeiture by such shareholder of all claim in or to any part of the assets of the bank: Provided that such call, and any further call thereafter, shall nevertheless be recoverable from him as if no such forfeiture had been incurred. 53 V., c. 31, ss. 92, 93 and 94. Am. Forfeiture for non-payment. Proviso.

This section was divided into its present sub-sections in 1906. In 1913 it was amended by the inserting of the words "not exceeding the limit of liability of the shareholders herein-

Sec. 128.

before specified" in sub-sec. 1, and by verbal changes in sub-sec. 3.

Enforcement of double liability.

In other respects the section dates from 1890. In the last mentioned year the law was amended in several particulars. Formerly the first calls on the double liability were to be made if the suspension of payment in full continued for six months, now they are to be made as above provided. The words "and any number of such calls may be made by one resolution" were added in 1890. Cf. notes to sec. 38.

The principle that the double liability of shareholders should be enforced without waiting for the collection of debts or the sale of assets, was laid down by the act of 1871. The provision giving effect to this principle is designed to ensure the prompt and effectual enforcement of such liability, and to guard against the recurrence of such cases as have been the cause of loss to creditors in the past. In the case of the Bank of Upper Canada, for instance, the entire assets of the bank were not realized for many years and, partly as a result of the delay, the double liability was in fact never enforced.

Proceedings after bank becomes insolvent.

After a bank has become insolvent under sec. 126, proceedings may be taken under the Winding-up Act. If no such proceedings are taken, and the suspension of payment in full of all or any of the notes or other liabilities continues for three months after the bank has become insolvent under that section, the directors are obliged under sec. 128 to make calls on the shareholders to the amount the directors deem necessary to pay all the debts and liabilities of the bank, without waiting for the collection of any debts due to it or the sale of any of its assets or property.

If a winding-up order is made, the Winding-up Act provides that "the company from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up" (sec. 20). Cf. secs. 21 to 23 of the same act.

The settlement of the list of contributories, the making of calls upon shareholders, etc., are provided for by secs. 48 *et seq.* of the Winding-up Act.

Sec. 128. Proceedings after bank becomes insolvent.

By that act the winding-up is deemed to commence at the time of the service of the notice of presentation of the petition for winding-up (sec. 5). When a bank becomes insolvent a creditor for a sum not less than $1,000 may apply by petition to the court in the province where the head office or other chief place of business in Canada is situated. Before making the order the court shall direct a meeting of the shareholders and a meeting of the creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators. (Sec. 151; and cf. secs. 12 to 17 of general application to companies.)

Appointment of liquidator.

The appointment of a chairman and the voting at each meeting is provided for (secs. 152 to 155).

The chairman of each meeting shall report the result thereof to the court, and, if a winding-up order is made, the court shall appoint one or more liquidators not exceeding three to be selected, in its discretion, after such hearing of the parties as it deems expedient, from among the persons nominated by the majorities and minorities of the shareholders and creditors at their respective meetings (sec. 156).

If no one is so nominated, the liquidator or liquidators shall be chosen by the court (sec. 157).

In the case of the Bank of Liverpool, the judge appointed liquidators from the nominees of the creditors, one of them being the defendant bank. Held, affirming the judgment of the court below (22 N.S.R. 97), that there is nothing in the Winding-up Act that requires both creditors and shareholders to be represented on the board of liquidators, that a bank may be appointed liquidator, and that, f any appeal lies from the decision of the judge in exercising his judgment as to the appointment, his discretion was wisely exercised in this case. Forsythe v. Bank of Nova Scotia, 1890, 18 S.C.R. 707, S.C. Cas. 209.

If it appears that resort to the double liability of shareholders will be necessary to satisfy the claims of creditors, the creditors' choice of a liquidator should be adopted in preference to that of the shareholders. It is preferable that a liquidator should be appointed who is neither a creditor nor a shareholder. Re Central Bank, 1888, 15 O.R. 309.

While the court is confined to a selection between the persons nominated at the meetings of creditors and shareholders for the

Sec. 128. Appointment of liquidator.

office of liquidator, it is not bound to adopt the choice of the majority, but must exercise its own discretion. If the bank is solvent, the court ought to have particular regard to the wishes of the shareholders, but if it is not absolutely clear that the bank is solvent, the interests of creditors in the liquidation are entitled to greater consideration than those of the shareholders. In re Commercial Bank of Manitoba, 1893, 9 Man. R. 342.

Corporate powers.

Under the Winding-up Act a company in liquidation retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the court. The liquidator must sue in his own name or in that of the company, according to the nature of the action: in his own name, when he acts as representative of creditors and contributories; in that of the company, to recover either its debts or its property. Kent v. Communauté des Soeurs de Charité, [1903] A.C. 220.

A shareholder has no right to set off against his double liability a debt due to him by the bank: see notes to sec. 125. Under this section if he fails to pay a call, any claim of his against the bank becomes forfeited. Non-payment alone under this section appears to operate a forfeiture, whereas under sec. 40 the non-payment of calls upon unpaid stock of a solvent bank results in a forfeiture only when the directors declare the shares forfeited.

A director who refuses to make or to enforce, or to concur in making or in enforcing, any call under sec. 128 is criminally liable under sec. 154.

Liability of directors not diminished.

129. Nothing contained in the four sections last preceding shall be construed to alter or diminish the additional liabilities of the directors as herein mentioned and declared. 53 V., c. 31, s. 95.

Additional liabilities of directors.

See sec. 58 (impairing capital); sec. 139 (pledging or improperly issuing or taking bank notes); sec. 153 (false or deceptive statement); sec. 155 (giving undue preference).

Liability of shareholders who have transferred their stock.

130. (*a*) Persons who, having been shareholders of the bank, have only transferred their shares, or any of them, to others, as hereinbefore provided, within sixty days

before the commencement of the suspension of payment by the bank; and, Sec. 130.

(*b*) Persons whose subscriptions to the stock of the bank have been forfeited, in manner hereinbefore provided, within the said period of sixty days before the commencement of the suspension of payment by the bank; Or whose subscriptions have been cancelled.

shall be liable to all calls on the shares held or subscribed for by them, as if they held such shares at the time of such suspension of payment, saving their recourse against those by whom such shares were then actually held. 53 V., c. 31, s. 96.

In 1913 the words "as hereinbefore provided" were substituted for the words "or registered the transfer thereof" in sub-sec. 1, and the word "forfeited" was substituted for the word "cancelled" in sub-sec. 2. In other respects this section dates practically in its present form from 1890, when the corresponding section of the act of 1871 was amended by the change of the time limit from one month to 60 days and by the addition of the words "or persons whose subscriptions to the stock of the bank have been cancelled, etc."

Cf. sec. 52 of the Winding-up Act, which provides generally that if a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, he shall be liable to contribute independently of that act.

Under sec. 125 every holder of a share of bank stock assumes a liability to contribute to the assets of the bank, in the event of its insolvency, a sum equal to the par value of the share. In the case of forfeiture under sec. 40, this liability continues in force even after the registration upon the bank books of a transfer of the share to another person. It is extinguished only when the bank has continued for 60 days, after such registration, to carry on its business without any suspension of payment. Every transaction in bank shares must be taken to be made subject to the possibility that this well-known statutory liability will be enforced in case the insolvency of the bank occurs within the statutory period. The transferee or actual holder of a share at the time of the suspension is liable himself, and he is bound, as between himself Double liability of transferor and transferee of shares.

Sec. 130. Double liability of transferor and transferee of shares.

and the person from whom he purchased the share, to assume, and indemnify the latter against, the liability attached to the share. The obligation to indemnify arises not from the transfer but from the fact of purchase, and is based upon the principle that a person taking the advantage must take with it the burden. The liability of the purchaser of an equity of redemption to indemnify the mortgagor is based upon the same principle. Boultbee v. Gzowski, 1896, 28 O.R. at pp. 302-3, and cases there cited; S.C. reversed 24 O.A.R. 502, restored 29 S.C.R. 54.

The liquidator may, however, put upon the list of contributories both or all of the persons who have been holders of shares within 60 days prior to the suspension, until the full amount payable in respect of the shares has been paid. In re Central Bank, Baines' Case, 1889, 16 O.R. at p. 305, 16 O.A.R. at p. 245; Henderson's Case, 1889, 17 O.R. 110.

If shares are purchased with the bank's funds in contravention of sec. 76, and thereafter are transferred to a person who has agreed to become a shareholder and whose name is placed upon the register, the transferee is liable as a shareholder notwithstanding the previous illegal holding by the bank of its own shares. Re Ontario Bank, Barwick's Case, 1911, 24 O.L.R. 301; see also the notes to sec. 76 under "Shares of its own capital stock."

In Re Ontario Bank, Massey and Lee's Case, 1912, 27 O.L.R. 192, transfers were made by shareholders and registered in the transfer-books of the bank after winding-up proceedings had begun, but before a winding-up order was made. The names of the transferees, but not the names of the transferors, appeared in the first list of contributories prepared by the liquidator and settled by the referee in the winding-up. Afterwards, upon the application of the liquidator, the referee added the names of the transferors to the list. It was held that the transferors could not escape liability by reason of the delay, by virtue of a supposed election of the liquidator to look to the transferees, or by estoppel, or otherwise.

Where A. sells bank shares to B. within 60 days before the suspension of the bank, and B. sells to C., each of the three is liable upon the shares until the full amount payable in respect of them has been paid. C. is liable as the holder at the time. B. is liable notwithstanding that A. did not transfer the shares to him but executed a transfer in a form which was designed

Sec. 130. Double liability of transferor and transferee of shares.

to enable B. to pass them to C. without B.'s taking the transfer in his own name. A. is entitled to indemnity from B., and B. from C. If A. has to pay, and recover judgment against B., B. although he has not satisfied the judgment then has a cause of action against C. which he may assign to A. so as to enable A. to bring action directly against C. Boultbee v. Gzowski, *supra*.

Order of charges.

131. In the case of the insolvency of any bank,—

Notes.

(*a*) the payment of the notes issued or re-issued by such bank, intended for circulation, and then in circulation, together with any interest paid or payable thereon as hereinbefore provided, shall be the first charge upon the assets of the bank;

Dominion Government.

(*b*) the payment of any amount due to the Government of Canada, in trust or otherwise, shall be the second charge upon such assets;

Provincial governments.

(*c*) the payment of any amount due to the government of any of the provinces, in trust or otherwise, shall be the third charge upon such assets: and,

Penalties.

(*d*) the amount of any penalties for which the bank is liable shall not form a charge upon the assets of the bank, until all other liabilities are paid. 53 V., c. 31, s. 53.

The provision made by this section that the payment of notes in circulation shall be the first charge upon the bank's assets in case of its insolvency was an important feature of the banking legislation of 1880 (see chapter 2). The further security of the bank circulation redemption fund (see sec. 64) was created in 1890. See also secs. 71 and 72.

Priority of charges on assets of insolvent bank.

The clauses making the payment of any amount due to the government of Canada and to the government of any of the provinces the second and third charges respectively upon the assets, date from 1890. They are a re-enactment in modified form of the priority of the crown as a simple contract creditor which existed at common law, and which was held to be applicable to the crown as represented by the Dominion (Reg. v. Bank of Nova Scotia, 1885, 11 S.C.R. 1), or by a provincial

Sec. 131. Priority of charges on assets of insolvent bank.

government. Maritime Bank v. Receiver General of New Brunswick, [1892] A.C. 437. In the province of Quebec the crown has no general priority as a simple contract creditor (Exchange Bank v. The Queen, 1886, 11 App. Cas. 157), so that in that province a material change in the law has been effected by the passing of this section.

Money deposited with the government of Canada by a company under the Dominion Insurance Act is not the money of the crown, but is held by the finance minister in trust for the company, and is not subject to the prerogative of payment in priority to other creditors. Maritime Bank v. The Queen, 1889, 17 S.C.R. 657.

The claims of creditors are to be paid in priority to any penalties for which the bank is liable.

A depositor is simply an ordinary creditor and is entitled to be paid *pari passu* with other creditors.

A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit. Ontario Bank v. Chaplin, 1891, 20 S.C.R. 152.

In Re Central Bank, Wells & McMurchy's Case, 1888, 15 O.R. 611, a deposit had been made in a bank, and it was shewn that, at a director's meeting held on the previous day, the necessity of seeking outside assistance or of suspending payment had been considered and a resolution passed to suspend payment if such assistance was refused. The bank closed on the day upon which the deposit was made and did not again open its doors, and notice of suspension of payment was given on the following morning. It was held that the depositor was entitled to be repaid the amount of his deposit as having been obtained from him by fraud, and the liquidators were ordered to pay the same with interest from the date of the deposit.

A cheque certified at the instance of the holder at one of the branches of the drawee bank, after the decision of the board of directors to cease doing business, but without knowledge of this decision, discharges the drawer and constitutes payment as between him and the holder. Brunelle v. Ostiguy, 1911, Q.R. 21 K.B. 302; cf. notes to sec. 165 of the Bills of Exchange Act under "Certification of Cheque."

CHAPTER XXV.

Offences and Penalties.

Payments of Incorporation and Organization Expenses.

Offences.

131A. If prior to the time at which the certificate permitting the bank to issue notes and commence the business of banking has been obtained from the Treasury Board, any provisional director or director authorizes or is a party to the payment of, or receives, out of moneys paid in by subscribers or interest thereon, any sum for commission, salary or charges for services in connection with or arising out of the incorporation or organization of the bank, it shall be an offence against this Act.

Payments of expenses prior to obtaining Treasury Board certificate.

After certificate obtained.

2. If after the certificate has been obtained from the Treasury Board, any director authorizes payment of, or any general manager or other officer of the bank pays or causes to be paid any money for or on account of the incorporation or organization expenses of the bank, except and unless the sum so paid is mentioned or included in the statement submitted to the Treasury Board at the time at which the application is made under this Act to the Board for a certificate permitting the bank to issue notes and commence the business of banking, it shall be an offence against this Act.

When no certificate obtained.

3. If no certificate from the Treasury Board has been obtained within the time limited by this Act, it shall be an offence against this Act for any provisional director or director to authorize or be a party to the payment of, or to receive, out of moneys paid in by subscribers, any sum for commission, salary or charges for services in connection with or arising out of the incorporation or organization of the bank, unless provision has been made pursuant to section 16 of this Act for payment.

Sec. 131A.

This section was added to the act in 1913. See secs. 15 and 16.

The penalty for an offence against this act is prescribed by sec. 157.

Penalty for bank officers obtaining gifts or showing favour.

131B. Everyone is guilty of an offence and liable, upon conviction on indictment, to two years' imprisonment or to a fine not exceeding two thousand five hundred dollars, or to both, and, upon summary conviction, to imprisonment for six months, with or without hard labour, or to a fine not exceeding one hundred dollars, or both, who—

(*a*) being a director, general manager, manager, or other executive officer of a bank, corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having, after this Act comes into force, done or forborne to do, any act relating to the bank's business or affairs, or for showing or forbearing to show favour or disfavour to any person with relation to the bank's business or affairs; or,

Penalty for offering gifts or showing favour to bank officers

(*b*) corruptly gives or agrees to give or offers any gift or consideration to any director, general manager, manager, or other executive officer of a bank as an inducement or reward or consideration to such director, general manager, manager, or other executive officer of the bank, for doing or forbearing to do, or for having, after this Act comes into force, done or forborne to do any act relating to the bank's business or affairs, or for showing or forbearing to show favour or disfavour to any person with relation to the bank's business or affairs.

"Consideration" defined.

2. In this section "consideration" includes valuable consideration of any kind.

This section was added to the act in 1913.

Commencement of Business.

Commencing business without certificate.

132. Every director or provisional director of any bank and every other person who, before the obtaining of the certificate from the Treasury Board, by this Act required, permitting the bank to issue notes or commence business, issues or authorizes the issue of any note of such bank, or transacts or authorizes the transaction of any business in connection with such bank, except such as is by this Act authorized to be transacted before the obtaining of such certificate, is guilty of an offence against this Act. 53 V., c. 31, s. 14.

Offence.

See sec. 14 and notes thereto.

The penalty for an offence against this act is prescribed by sec. 157.

Sale and Transfer of Shares.

Sale and transfer of shares contrary to requirements.

133. Any person, whether principal, broker or agent, who wilfully sells or transfers or attempts to sell or transfer—

(*a*) any share or shares of the capital stock of any bank by a false number; or,

(*b*) any share or shares of which the person making such sale or transfer, or in whose name or on whose behalf the same is made, is not at the time of such sale, or attempted sale, the registered owner; or,

(*c*) any share or shares, without the assent to such sale of the registered owner thereof;

is guilty of an offence against this Act, 53 V., c. 31, s. 37.

Offence.

See sec. 45.

The penalty for an offence against this act is prescribed by sec. 157.

Cash Reserves.

Penalty for cash reserve not held in prescribed notes.

134. Every bank which at any time holds in Dominion notes less than forty per cent. of the cash reserves which it has in Canada shall incur a penalty of five hundred dollars for each such offence. 53 V., c. 31, s. 50. Am.

See sec. 60.

As to the procedure for enforcing the penalty, see sec. 158.

Issue and Circulation of Notes.

Excess of circulation.

135. If the total amount of the notes of the bank in circulation at any time exceeds the amount authorized by this Act the bank shall,—

(*a*) if the amount of such excess is not over one thousand dollars, incur a penalty equal to the amount of such excess; or,

(*b*) if the amount of such excess is over one thousand dollars, and not over twenty thousand dollars, incur a penalty of one thousand dollars; or,

(*c*) if the amount of such excess is over twenty thousand dollars, and not over one hundred thousand dollars, incur a penalty of ten thousand dollars; or,

(*d*) if the amount of such excess is over one hundred thousand dollars, and not over two hundred thousand dollars, incur a penalty of fifty thousand dollars; or,

(*e*) if the amount of such excess is over two hundred thousand dollars, incur a penalty of one hundred thousand dollars. 53 V., c. 31, s. 51.

See sec. 61.

As to procedure, see sec. 158.

Unauthorized issue of notes for circulation.

136. Every person, except a bank to which this Act applies, who issues or re-issues, makes, draws, or endorses any bill, bond, note, cheque or other instrument, intended to circulate as money, or to be used as a substitute for money, for any amount whatsoever, shall incur a penalty of four hundred dollars.

Penalty, recovery of.

2. Such penalty shall be recoverable with costs, in any court of competent jurisdiction, by any person who sues for the same.

Appropriation.

3. A moiety of such penalty shall belong to the person suing for the same, and the other moiety to His Majesty for the public uses of Canada.

Intention presumed.

4. If any such instrument is made for the payment of a less sum than twenty dollars, and is payable either in form

or in fact to the bearer thereof, or at sight, or on demand, or at less than thirty days thereafter, or is overdue or is in any way calculated or designed for circulation, or as a substitute for money, the intention to pass the same as money shall be presumed, unless such instrument is— Sec. 136.

(*a*) a cheque on some chartered bank paid by the maker directly to his immediate creditor; or, Exceptions.

(*b*) a promissory note, bill of exchange, bond or other undertaking for the payment of money made or delivered by the maker thereof to his immediate creditor; and,

(*c*) not designed to circulate as money or as a substitute for money. 53 V., c. 31, s. 60.

The section was divided into its present sub-sections in 1906, but in other respects it dates from 1890.

It is to be noted that under this section a moiety of any penalty recovered belongs to the person suing for the same. There is no similar provision in other sections which impose penalties upon individuals. Where the penalty is payable by the bank the amount recovered belongs under sec. 158 to the Dominion, but any portion thereof may be remitted to the bank or paid to any person.

The joint effect of this section and of the Dominion Notes Act is to reserve to the chartered banks and to the government of Canada the exclusive privilege of issuing notes intended to circulate as money. See chapter 29, *infra*, on Dominion Notes.

137. Every person who mutilates, cuts, tears, or perforates with holes any Dominion or bank note, or who in any way defaces a Dominion or bank note, whether by writing, printing, drawing or stamping thereon, or by attaching or affixing thereto anything in the nature or form of an advertisement shall, on summary conviction, be liable to a penalty not exceeding twenty dollars. Defacement of notes. Penalty.

2. Every officer, clerk and servant of a bank who, for the bank, re-issues to the public any bank notes or Dominion notes which have not been disinfected and sterilized in accord- Issue, by bank, of notes not disinfected or sterilized.

Sec. 137.

ance with the regulations made by the Treasury Board under the authority of this Act shall, on the information of any person, on summary conviction, be liable to a penalty not exceeding twenty dollars.

Penalty.

3. In the event of the conviction of any officer, clerk or servant of a bank under this section, the bank shall thereby incur a penalty of fifty dollars. 53 V., c. 31, s. 61. Am.

In 1913 this section was amended by the insertion of the words "who mutilates, cuts, tears, or perforates with holes" and the words "on summary conviction" in sub-sec. 1, and by the addition of sub-secs. 2 and 3.

As to the disinfection and sterilization of bank notes and dominion notes, see sec. 72.

Issuing notes during period of suspension.

138. (*a*) Every person who, being president, vice-president, director, general manager, manager, clerk or other officer of the bank, issues or re-issues, during any period of suspension of payment by the bank of its liabilities, any notes of the bank payable to bearer on demand, and intended for circulation, or authorizes or is concerned in any such issue or re-issue; and,

Or without authority of Treasury Board.

(*b*) if, after any such suspension, the bank resumes business without the consent in writing of the curator hereinbefore provided for, every person who being president, vice-president, director, general manager, manager, clerk or other officer of the bank issues or re-issues, or authorizes or is concerned in the issue or re-issue of any such notes before being thereunto authorized by the Treasury Board; and,

And accepting such notes.

(*c*) every person who accepts, receives or takes, or authorizes or is concerned in, the acceptance, receipt or taking of any such notes, knowing the same to have been so issued or re-issued, from the bank, or from such president, vice-president, director, general manager, manager, clerk or other officer of the bank, in payment or part payment,

or as security for the payment of any amount due or owing to such person by the bank; Sec. 138.

is guilty of an indictable offence, and liable to imprisonment for a term not exceeding seven years, or to a fine not exceeding two thousand dollars, or to both. 63-64 V., c. 26, s. 10. Penalty.

This section was added to the act in 1900. As first enacted it formed one section with the proviso to sec. 61. See notes to that section.

139. (*a*) Every person who, being the president, vice-president, director, general manager, manager, clerk or other officer of the bank, pledges, assigns, or hypothecates, or authorizes, or is concerned in the pledge, assignment or hypothecation of the notes of the bank; and, Pledging of notes by officers of bank.

(*b*) every person who accepts, receives or takes, or authorizes or is concerned in the acceptance or receipt or taking of such notes as a pledge, assignment or hypothecation; Accepting.

shall be liable to a fine of not less than four hundred dollars and not more than two thousand dollars, or to imprisonment for not more than two years, or to both. 53 V., c. 31, s. 52. Penalty.

See secs. 63 and 146A.

140. (*a*) Every person who, being the president, vice-president, director, general manager, manager, clerk or other officer of a bank, with intent to defraud, issues or delivers, or authorizes or is concerned in the issue or delivery of notes of the bank intended for circulation and not then in circulation; and, Issuing notes fraudulently.

(*b*) every person who, with knowledge of such intent, accepts, receives or takes, or authorizes or is concerned in the acceptance, receipt or taking of such notes; Knowingly accepting.

shall be guilty of an indictable offence, and liable to imprisonment for a term not exceeding seven years, or to a fine not exceeding two thousand dollars, or to both. 53 V., c. 31, s. 52. Penalty.

See sec. 63.

Annual Statement and Auditors' Report.

Issue of annual statement without auditors' report.

140A. If any copy of the statement or of the profit and loss account submitted under section 54 of this Act, which has not been signed as required by that section, is issued, circulated or published, or if any copy of such statement is issued, circulated or published without having a copy of the auditors' report attached thereto, the bank, and every director, general manager or other officer of the bank who is knowingly a party to the default, shall be liable to a fine not exceeding two hundred and fifty dollars.

Penalty.

This section was added to the act in 1913. See secs. 54 and 56.

Warehouse Receipts, Bills of Lading and other Securities.

Bank acquiring warehouse receipt or bill of lading

141. If any bank, to secure the payment of any bill, note, debt or liability, acquires or holds—

(*a*) any warehouse receipt or bill of lading; or,

(*b*) any instrument such as is by this Act authorized to be taken by the bank to secure money lent,—

(i) to any wholesale purchaser, or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live or dead stock, and the products thereof, upon the security of such products, or of such live or dead stock, or the products thereof;

(ii) to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise upon the security of the goods, wares and merdise manufactured by such person, or procured for such manufacture; or,

(iii) to any farmer upon the security of threshed grain;

such bank shall, unless—

Except in certain cases.

(*a*) such bill, note, debt or liability is negotiated or contracted at the time of the acquisition by the bank of

such warehouse receipt, bill of lading or security; or, Sec. 141.

(*b*) such bill, note, debt or liability is negotiated or contracted upon the written promise or agreement that such warehouse receipt, bill of lading or security would be given to the bank; or,

(*c*) the acquisition or holding by the bank of such warehouse receipt, bill of lading or security is otherwise authorized by this Act;

incur a penalty not exceeding five hundred dollars. 53 V., c. 31, s. 79. Penalty.

See secs. 86 to 90.

Secs. 141, 142, 143 and 144 were verbally amended in 1913 in accordance with the amendments made to secs. 88, 89 and 90 in that year. In other respects secs. 141, 142, 145 and 146 in their present form date from 1906. They have replaced sec. 79 of the act of 1890 which provides that "every bank which violates any provision contained in any of the sections numbered sixty-four to seventy-eight (both inclusive) shall incur for each violation thereof a penalty not exceeding five hundred dollars." Secs. 64 to 78 of the act of 1890 are now secs. 76 to 90 (omitting secs. 84 and 84A).

Sec. 76 forbids a bank to do certain things "except as authorized by this Act," and secs. 141, 142, 145 and 146 set out the prohibited acts subject to the exceptions created by the other provisions of the act. Prohibited transactions.

Although the bank may be liable to a penalty in respect of a transaction entered into in contravention of the Bank Act, the transaction itself is not necessarily a nullity. See notes to sec. 76, *supra*.

Clause (*c*) of sec. 141 protects a bank from liability to a penalty for doing an act which, although not authorized by secs. 86 to 90, is within the powers conferred by the enabling provisions of secs. 76 *et seq*.

142. If any debt or liability to the bank is secured by— Non-compliance with requirements for sale.

(*a*) any warehouse receipt or bill of lading; or,

(*b*) any other security such as is mentioned in the last preceding section;

and is not paid at maturity, such bank shall, if it sells the

Sec. 142.

products or stock, goods, wares and merchandise or grain covered by such warehouse receipt, bill of lading or security, under the power of sale conferred upon it by this Act, without complying with the provisions to which the exercise of such power of sale is, by this Act, made subject, incur a penalty not exceeding five hundred dollars. 53 V., c. 31, s. 79; 63-64 V., c. 26, s. 18.

Penalty.

See sec. 89, and cf. notes to sec. 141. As to procedure, see sec. 158.

Making false statements.

143. Every person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who wilfully makes any false statement—

In warehouse receipt or bill of lading.

(*a*) in any warehouse receipt or bill of lading given under the authority of this Act to any bank; or,

In security upon products.

(*b*) in any instrument given to any bank under the authority of this Act, as security for any loan of money made by the bank to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or of any wholesale purchaser, or shipper of or dealer in live or dead stock or the products thereof, whereby any such products or stock is assigned or transferred to the bank as security for the payment of such loan; or,

In security upon manufactures.

(*c*) in any instrument given to any bank under the authority of this Act, as security for any loan of money made by the bank to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, whereby any of the goods, wares and merchandise manufactured by him, or procured for such manufacture, are transferred or assigned to the bank as security for the payment of such loan; or,

In security upon grain.

(*d*) in any instrument given to any bank under the authority of this Act as security for any loan of money made by the bank to a farmer whereby any grain is

transferred or assigned to the bank as security for the payment of such loan. 53 V., c. 31, s. 75. Am. Sec. 143.

Prior to 1906, this section was part of the predecessor of the present sec. 90. The documents mentioned in clause (*a*) are those upon the security of which a bank may lend money under sec. 86. Clauses (*b*), (*c*) and (*d*) refer to documents which may be taken as security under sec. 88.

Cf. Criminal Code, secs. 425 and 427 (*a*).

Wilfully disposing of or withholding goods covered by security.

144. Every person who, having possession or control of any products or stock, goods, wares and merchandise, or grain covered by any warehouse receipt or bill of lading or by any such security as in the last preceding section mentioned, and having knowledge of such receipt, bill of lading or security, without the consent of the bank in writing, and before the advance, bill, note, debt or liability thereby secured has been fully paid,—

(*a*) wilfully alienates or parts with any such products or stock, goods, wares or merchandise, or grain; or,

(*b*) wilfully withholds from the bank possession of any such products or stock, goods, wares and merchandise, or grain, upon demand, after default in payment of such advance, bill, note, debt or liability;

is guilty of an indictable offence, and liable to imprisonment for a term not exceeding two years. 53 V., c. 31, s. 75; 63-64 V., c. 26, s. 18. Am. Penalty.

Prior to 1906 this section was part of the predecessor of the present sec. 90.

Cf. Criminal Code, secs. 426, 427 (*b*).

Bank not selling shares subject to privileged lien.

145. (*a*) If any bank having, by virtue of the provisions of this Act, a privileged lien for any debt or liability for any debt to the bank, on the shares of its own capital stock of the debtor or person liable, neglects to sell such shares within twelve months after such debt or liability has accrued and become payable; or,

(*b*) If any such bank sells any such shares without giving a

Sec. 145.
Or selling without notice.

notice to the holder thereof of the intention of the bank to sell the same, by mailing such notice in the post office, post paid, to the last known address of such holder, at least thirty days prior to such sale;

Penalty.

such bank shall incur, for each such offence, a penalty not exceeding five hundred dollars. 53 V., c. 31, s. 79.

See sec. 77, and cf. notes to sec. 141.
As to procedure, see sec. 158.

Prohibited Business.

Bank doing prohibited business.

146. If any bank, except as authorized by this Act, either directly or indirectly—

(*a*) deals in the buying or selling or bartering of goods, wares and merchandise, or engages or is engaged in any trade or business whatsoever; or,

(*b*) purchases, deals in, or lends money or makes advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or,

(*c*) lends money or makes advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise;

Penalty.

such bank shall incur a penalty not exceeding five hundred dollars. 53 V., c. 31, s. 79.

See sec. 76, and cf. notes to sec. 141.
As to procedure, see sec. 158.

Hypothecation of notes prohibited.

146A. It shall be an offence against this Act for any director, officer, clerk or servant of the bank to pledge, assign or hypothecate the notes of the bank on behalf of the bank.

This section was added to the act in 1913. See secs. 63 and 139.

The penalty for an offence against this act is prescribed by sec. 157.

Payment of liabilities of bank after suspension.

146B. If a bank suspends payment in specie or Dominion notes of any of its liabilities as they accrue, then, so long as such suspension continues, it shall be an offence against this Act for any director, officer, clerk or servant of the bank who has knowledge of such suspension to pay or cause to be paid to any person any debt or liability of the bank unless with the consent of a curator or liquidator duly appointed.

This section was added to the act in 1913. See secs. 117 ff. as to the curator.

The penalty for an offence against this act is prescribed by sec. 157.

Returns.

Bank not making monthly.

147. Every bank which neglects to make up and send to the Minister, within the first twenty days of any month, any monthly return by this Act required to be made up and sent in within the said twenty days, exhibiting the condition of the bank on the last juridical day of the month last preceding, and signed in the manner and by the persons by this Act required, shall incur a penalty of fifty dollars for each and every day, after the expiration of such time during which the bank neglects to make and send in such return. 53 V., c. 31, s. 85. Am.

Penalty.

See secs. 112 and 152.

As to procedure, see sec. 158.

Neglecting return of additional issue of notes.

147A. Every bank which neglects to make and send to the Minister, within the first thirty days after the last day of the month in which any amount of its notes in excess of the amount of the unimpaired paid-up capital of the bank has been issued or is outstanding, a return showing the amount of its notes in circulation for each juridical day during such month, and signed in the manner and by the persons by this Act required, shall incur a penalty of fifty dollars for each and every day, after the expiration of such time, during which the bank neglects to make and send in such return. 7-8 E. VII., c. 7, s. 2. Am.

Penalty.

Sec. 147A.

This section was added to the act in 1908 and amended in 1913. See secs. 61 and 152.

As to procedure, see sec. 158.

Neglecting return of value of property.

Penalty.

147B. Every bank which neglects to make and send to the Minister during the month of January in each year a return showing in detail the fair market value of its real and immovable property held under section 79 of this Act shall incur a penalty of fifty dollars for each and every day, after the expiration of such time, during which the bank neglects to make and send in such return.

This section was added to the act in 1913. See sec. 152.

As to procedure, see sec. 158.

Neglecting quarterly return.

Penalty.

147C. Every bank which neglects to make and send to the Minister a quarterly return as of the last juridical day of the months of March, June, September and December in each year, giving such particulars as may be prescribed by regulations made by the Treasury Board of the interest and discount rates charged by the bank, such returns to be made up and sent in within the first thirty days after the respective juridical days aforesaid, and signed by the persons by this Act required, shall incur a penalty of fifty dollars for each and every day, after the expiration of such time, during which the bank neglects to make and send in such return.

This section was added to the act in 1913. See secs. 91 and 152.

As to procedure, see sec. 158.

Not making returns required by Minister.

148. Every bank which neglects to make and send to the Minister, within thirty days from the date of the demand therefor by the Minister, or, if such time is extended by the Minister, within such extended time, not exceeding thirty days, as the Minister may allow, any special return, signed in the manner and by the persons by this Act required, which

under the provisions of this Act, the Minister may, for the purpose of affording a full and complete knowledge of the condition of the bank, call for, shall incur a penalty of five hundred dollars for each and every day during which such neglect continues. 53 V., c. 31, s. 86. Sec. 148. Penalty.

See secs. 113 and 152.
As to procedure, see sec. 158.

149. Every bank which neglects to transmit or deliver to the Minister, within twenty days after the close of any calendar year, a return, signed in the manner and by the persons and setting forth the particulars by this Act required in that behalf, of all certified cheques, drafts or bills of exchange issued by the bank to any person and remaining unpaid for more than five years prior to the date of such return, shall incur a penalty of fifty dollars for each and every day during which such neglect continues. 63-64 V., c. 26, s. 21. Bank not making annual returns of drafts and bills. Penalty.

See secs. 114 and 152.
As to procedure, see sec. 158.

150. Every bank which neglects to transmit or deliver to the Minister, within twenty days after the close of any calendar year, a certified list, as by this Act required, showing— Not returning annual list.

(*a*) the names of the shareholders of the bank on the last day of such calendar year, with their last known post office addresses and descriptions;

(*b*) the number of shares then held by such shareholders respectively; and,

(*c*) the amount paid thereon,

shall incur a penalty of fifty dollars for each and every day during which such neglect continues. 53 V., c. 31, s. 87. Am. Penalty.

See secs. 114 and 152.
As to procedure, see sec. 158.

Not making annual returns of dividends, balances, drafts and bills.

151. Every bank which neglects to transmit or deliver to the Minister, within twenty days after the close of any calendar year, a return, signed in the manner and by the persons by this Act required, of all dividends which have remained unpaid for more than five years, and also of all amounts or balances in respect of which no transactions have taken place, or upon which no interest has been paid, during the five years prior to the date of such return, and also of all certified cheques, drafts or bills of exchange issued by the bank and remaining unpaid for more than five years prior to the date of such return, as required by the provisions of this Act in the several cases respectively mentioned, shall incur a penalty of fifty dollars for each and every day during which such neglect continues.

Penalty.

Period of 5 years.

2. The said term of five years shall, in case of moneys deposited for a fixed period, be reckoned from the date of the termination of such fixed period. 53 V., c. 31, s. 88.

See secs. 114 and 152.
As to procedure, see sec. 158.

Date of posting return or list.

152. If any return or list, mentioned in either of the last eight preceding sections, is transmitted by post, the date appearing, by the post office stamp or mark upon the envelope or wrapper inclosing the return or list received by the Minister, as the date of deposit in the post office of the place at which the chief office of the bank was situated shall be taken prima facie, for the purpose of any of the said sections, to be the day upon which such return or list was transmitted to the Minister. 53 V., c. 31, ss. 85 and 86; 63-64 V., c. 26, ss. 22. Am.

Making false statement on account or return.

153. (*a*) The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank, or (*b*) the using of any false or deceptive statement in any account, statement, return, report or other document re-

specting the affairs of the bank with intent to deceive or mislead any person, Sec. 153. Using false statement.

is an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding five years. Penalty.

2. Every president, vice-president, director, auditor, general manager or other officer of the bank or trustee who negligently prepares, signs, approves or concurs in any account, statement, return, report or document respecting the affairs of the bank containing any false or deceptive statement shall be guilty of an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding three years. 53 V., c. 31, s. 99. Am. Liability of officers.

The section in its present form dates from 1913. In the revision of 1906 it was as follows:—

"153. The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank is an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding five years. False statement in any account, etc.

2. Every president, vice-president, director, auditor, manager, cashier or other officer of the bank, who,—

(*a*) prepares, signs, approves or concurs in any such account, statement, return, report or document containing such false or deceptive statement; or,

(*b*) uses the same with intent to deceive or mislead any person;

shall be held to have wilfully made such false or deceptive statement, and shall further be responsible for all damages sustained by any person in consequence thereof."

Sec. 153 of the act of 1906 was a revision of sec. 99 of the act of 1890 (which was practically a transcript of the corresponding section of the act of 1871), and was in the following words:—

"99. The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank is, unless it amounts to a higher offence, a misdemeanour punishable by imprison-

Sec. 153. False statement in any account, etc.

ment for a term not exceeding five years; and every president, vice-president, director, principal partner *en commandité*, auditor, manager, cashier or other officer of the bank, who prepares, signs, approves, or concurs in such statement, return, report or document, or uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by any person in consequence thereof."

The change made in 1906 in the wording of the first part of the section was consequential upon the abolition by the Criminal Code, 1892, of the distinction between felony and misdemeanor (R.S.C. 1906, c. 146, sec. 14). The changes in the wording of the second part were presumably intended to be declaratory of the meaning of the section (cf. Revised Statutes of Canada, 1906, Act, sec. 7).

It is to be noted that the word "statement" is used in two senses in the section: (1) the false allegation contained in the account, return, etc.; (2) the document in which the false allegation is contained. It will simplify the consideration of the section if the word "statement" is used exclusively in the first sense, and the word "account" or "return" is used to express the document in which the statement is contained.

Under the act prior to 1913 there appeared to be but one offence, namely, "the making of any wilfully false or deceptive statement in any account, . . . return, report, or other document respecting the affairs of the bank." This offence might be committed either by a bank officer or director, or by some other person. Any person, whether bank officer or director or not, who actually made a false or deceptive statement, etc., and did it wilfully, was liable under sub-sec. 1. The present section is wider in this respect, because under it the "using" of such false or deceptive statement by any person, whether bank officer or director or not, with intent to deceive or mislead, is as much a criminal offence as the "making" of it.

Sub-sec. 2 of the act of 1906 amplified the *primâ facie* meaning of "the *making* of any *wilfully* false or deceptive statement," and declared that a bank officer or director should be deemed to be guilty of the crime created by sub-sec. 1, *i.e.*, should be deemed to have *made* a false or deceptive statement, and to have made it *wilfully*, (*a*) if he prepared, signed, ap-

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proved or concurred in any account, return, report or other document respecting the affairs of the bank which in fact contained a wilfully false or deceptive statement, or (*b*) if he used such account, etc., with intent to deceive or mislead any person.

It had been held, however, in some cases decided under sec. 99 of the act of 1890, that knowledge of the falsity of the statement contained in the return was an essential element of the offence, and under the act of 1906 it was doubtful whether any court would hold that a person was guilty of *wilfully* making a false statement if he was ignorant of its falsity, notwithstanding the statutory declaration that he should be deemed to have made it wilfully.

It is to be noted, also, that the form of certificate (schedule D) to be signed by the president and general manager merely requires these officers to declare "that the foregoing return is made up from the books of the bank, and that *to the best of our knowledge and belief* it is correct, and shews truly and clearly the financial position of the bank."

Sub-sec. 2, as revised in 1913, is important in that it removes any doubt as to the liability of a person who *negligently* prepares, signs, approves or concurs in a return or account containing a false or deceptive statement, but very justly makes a distinction between a wilful and a merely negligent misstatement.

In a Quebec case it was held that it is not a duty cast on the president of a bank to watch the conduct of its cashier and inferior officers, nor to verify the exactness of the calculations of its auditors or of the entries in the books, nor to interfere with the employees who are put in a position of trust for the express purpose of attending to details of management. He is therefore not liable for loss arising from acts of gross mismanagement on their part of which he has no knowledge, and his signature of returns or statements required by the charter or the Bank Act, prepared and submitted by them, if he has no reason to suspect that they are inaccurate or false, does not amount to the making or approval of "wilfully false statements," etc., mentioned in sec. 99 of the Bank Act, 1890. Préfontaine v. Grenier, 1906, Q.R. 15 K.B. 143.

The judgment in favour of the defendant was affirmed by the Privy Council, [1907] A.C. 110. The first branch of the plaintiff's case was based upon alleged misrepresentations con-

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tained in an annual report. On this branch the members of the Judicial Committee found that there was no misrepresentation in fact by which the plaintiff was induced to act to his prejudice, and that it was therefore unnecessary to consider any of the questions of law which might otherwise have arisen. The second branch of the plantiff's case was based upon alleged negligence on the part of the defendant in the discharge of his functions as president of the bank, the main ground of negligence charged being that he had not exercised such a control over the details of the bank's business as to enable him to detect and put a stop to the irregular practices of the cashier in regard to allowing overdrafts. On this branch of the case the committee found that the charge of negligence had not been established in fact and referred especially to the principles expressed in Dovey v. Cory, [1901] A.C. 477; cf. notes to sec. 19.

Rex v. Lovitt, 1907, 41 N.S.R. 240, was a case reserved after the conviction of the president of the Yarmouth Bank for making a false and deceptive statement under sec. 99 of the act of 1890. The false statement alleged was that certain items which were classed in a monthly return to the government as "current loans" ought to have been included under the head of "overdue debts." The Supreme Court of Nova Scotia set aside the verdict. Weatherbe, C.J., reviewed the evidence and came to the conclusion that there was no evidence that the persons who actually prepared the return in question did so with a fraudulent design or that the classification was wilfully false, and that in any case the president, who had no knowledge of the fraud or falsity, was not liable. Another member of the court came to the same conclusion as the chief justice, and two other members concurred in setting aside the verdict for reasons which are not relevant to the subject under discussion.

In Rex v. Cockburn, a case tried before the police magistrate for the city of Toronto, judgment was delivered at the close of the case on the 4th of February, 1907. The magistrate found as a fact that the defendant, the president of the Ontario Bank, had no knowledge of the falsity of the returns he signed, and held, as a matter of law, that such knowledge was an essential element of the crime. The only authority cited by the magistrate was Longley, J.'s charge to the jury in Rex v. Lovitt, *supra*.

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Wilfully.

In Préfontaine v. Grenier, *supra*, the Court of King's Bench in Quebec adopted the dictum of Erle, J. in Reg. v. Badger, 1856, 6 E. & B. 136, at p. 158, that the word "wilfully" means knowingly and fraudulently.

The word "wilful" generally implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It means that the act is deliberate and intentional, not accidental or inadvertent. In re Young, 1885, 31 Ch. D. 168; Reg. v. Senior, [1899] 1 Q.B. 283, 291; Wilson v. Manes, 1899, 26 O.A.R. 398.

But as applied to a misstatement the word wilful means that the misstatement as distinguished from the statement is wilful. An unintentional error in a statement does not make the misstatement wilful, although the statement is made deliberately and therefore wilfully. A wilfully false or deceptive statement necessarily implies that the person making it does so deliberately with knowledge of its false or deceptive character. Cf. In re London & Tubbs' Contract, [1894] 2 Ch. 524, 536-538.

The offence of "wilfully making a false return" is not "fraud by a banker" in the list of offences which are extraditable between Canada and the United States, the kind of fraud falling within the extradition treaty being that indicated by secs. 412 ff. of the Criminal Code under the caption "Fraud and Fraudulent Dealing with Property." Where the crown, for the purpose of bringing the case within the treaty, charged that the false returns were fraudulently made substituting "fraudulently" for "wilfully"—it was held that the indictments should be quashed. Rex v. Nesbitt, 1913, 28 O.L.R. 91.

Mens rea.

Although *primâ facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. In such a case the statute is properly construed as imposing the penalty when the act is done, no matter

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how innocently, and the substance of the enactment is that a man shall take care that the statutory direction is obeyed and that if he fails to do so he does it at his peril. Whether any enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must depend upon the subject matter of the enactment, and the various circumstances that make the one construction or the other reasonable or unreasonable. Reg. v. Tolson, 1889, 23 Q.B.D. 168 at p. 172, and cases cited.

False statements and fraudulent intent.

Reports made and accounts rendered by the directors in the course of their duty, though made and issued to the shareholders only, as to the state of affairs of the company, are considered the representations of the company not only to the shareholders but also to the public, if they are published and circulated by the authority of the directors or a general meeting. Directors of a company are personally liable for injury caused to third parties by false representations contained in a report of the directors to the shareholders, but the injury must be the immediate and not the remote consequence of the representation, and it must appear that the false representation was made with the intent that it should be acted upon by such third persons. A shareholder cannot claim damages against directors for having been induced to purchase shares by misrepresentation, if he has continued to hold them long after he had knowledge, or full means of knowledge, of the untruth of the representations on which he bought them. Rhodes v. Starnes, 1878, 22 L.C.J. 113.

The nature of the fraud required to sustain a charge of false statements knowingly made with a fraudulent intent is considered and many authorities are reviewed in Parker v. McQuesten, 1872, 32 U.C.R. 273.

In Reg. v. Hincks, 1879, 24 L.C.J. 116, 2 L.N. 422, it was held that the instruction to the jury "that wilful intent to make a false return may be inferred by the jury from all the circumstances of the case proved to their satisfaction" was correct, and that such wilful intent might be inferred from an improper classification of items in a return. The conviction of the defendant (the president of the bank) was, however, quashed on

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the ground that the question whether certain items had been improperly classified was a question of fact for the jury and not one of law for the judge, namely, (1) whether sums borrowed by the bank from other banks, for which deposit receipts were given, were improperly classed as "other deposits payable after notice or at a fixed day," and (2) whether demand notes were improperly classed as "bills and notes discounted and current."

In an indictment charging the cashier of a bank with having unlawfully and wilfully made a wilful, false and deceptive statement in a return respecting the affairs of the bank, it is not necessary to allege that the return referred to was one required by law to be made by the accused, or that any use was made by him of such return, nor is it necessary to specify in what particulars the return was false or to allege that the false statement was made with intent to deceive or mislead. Reg. v. Cotté, 1877, 22 L.C.J. 141.

In an indictment under sec. 99 of the act of 1890 the allegation that the defendant unlawfully made and sent to the minister of finance and receiver general a monthly report of and concerning the affairs of the bank, adding by way of paraphrase, to characterize the term "monthly report," the words "a wilful, false and deceptive statement of and concerning the affairs of the said bank," and that such monthly report was made with intent to deceive and mislead, sufficiently sets forth the ingredients of the offence. Reg. v. Weir No. 1, 1899, Q.R. 8 Q.B. 521, 3 Can. Crim. Cas. 102.

An information under this section may be sworn by a non-shareholder and even by a debtor of the bank. Molleur v. Loupret, 1885, 8 L.N. 305.

A director or officer *de facto* cannot protect himself by shewing that he is not a director or officer *de jure*. Gibson v. Barton, 1875, L.R. 10 Q.B. 329.

Calls in the case of Suspension of Payment.

Director refusing to make calls on suspension of bank.

154. (*a*) If any suspension of payment in full, in specie or Dominion notes, of all or any of the notes or other liabilities of the bank continues for three months after the expiration of the time which, under the provisions of this Act, would constitute the bank insolvent; and,

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(*b*) if no proceedings are taken under any Act for the winding-up of the bank; and,

(*c*) if any director of the bank refuses to make or enforce, or to concur in the making or enforcing of any call on the shareholders of the bank, to any amount which the directors deem necessary to pay all the debts and liabilities of the bank;

such director shall be guilty of an indictable offence, and liable—

Penalty.

(*a*) to imprisonment for any term not exceeding two years; and,

(*b*) personally for any damages suffered by any such default. 53 V., c. 31, s. 92.

See sec. 128.

Undue Preference to the Bank's Creditors.

Officers giving undue preference to any creditor.

155. Every person who, being the president, vice-president, director, general manager, manager, or other officer of the bank, wilfully gives or concurs in giving to any creditor of the bank any fraudulent, undue or unfair preference over other creditors, by giving security to such creditor, or by changing the nature of his claim, or otherwise howsoever, is guilty of an indictable offence, and liable—

Penalty.

(*a*) to imprisonment for a term not exceeding two years; and,

Damages.

(*b*) for all damages sustained by any person in consequence of such preference. 53 V., c. 31, s. 97. Am.

A fraudulent issue of bank notes under sec. 140, if made to a creditor in order to give him a prior claim upon the assets of the bank in the event of insolvency, might also amount to an offence under this section.

Where a director of a bank, who was also a creditor for about $13,000, after a resolution to suspend payment had been passed, withdrew $10,000 from the bank with the concurrence of the president, it was held that he had conspired with the

president to obtain, and had thereby obtained, an undue preference over the other creditors. Reg. v. Buntin, 1884, 7 L.N. 228, 395. Sec. 155.

Use of the Title "Bank," etc.

156. Every person using the word "bank," or the words "savings bank," "banking company," "banking house," "banking association," or "banking institution," or any word or words of import equivalent thereto in any foreign language, in a sign or in an advertisement, or in a title to represent or describe his business or any part of his business without being authorised so to do by this Act, or by some other Act in force in that behalf, is guilty of an offence against this Act. Unauthorized use of title "bank" etc. Offence.

2. Every person who uses in a sign or in an advertisement or in a title to represent or describe his business words in a foreign language of import equivalent to the word "banker," or equivalent to the words "private banker," without being authorized so to do by this Act or by some other Act in force in that behalf, is guilty of an offence against this Act. 53 V., c. 31, s. 100. Am. Unauthorized use of words "banker," "private banker." Offence.

In 1913 sub-sec. 2 was added, and sub-sec. 1 was amplified by the insertion of the words "savings bank" and "or any word or words of import equivalent thereto in any foreign language, in a sign or in an advertisement, or in a title to represent or describe his business or any part of his business." The unauthorized use of the word "bank" was first forbidden in 1880. The prohibition of the other terms contained in this section dates from 1883, although until 1890 the use of these terms was permitted if the words "not incorporated" were added to the title.

The section is designed to prevent persons doing business under any name which might mislead the public into the belief that it is doing business with a chartered bank.

Sec. 157 prescribes a penalty for an offence against this act.

Sec. 156 does not prevent a foreign bank from suing in

Sec. 156.

Canada. Cf. Larocque v. Franklin Co. Bank, 1858, 8 L.C.R. 328, 15 R.J.R.Q. 164.

As to the meaning of "bank" in the act, see sec. 2.

Penalty for Offence against this Act.

Offence against this Act.

157. Every person committing an offence, declared to be an offence against this Act, shall be liable to a fine not exceeding one thousand dollars, or to imprisonment for a term nor exceeding five years, or to both, in the discretion

Penalty.

of the court before which the conviction is had. 53 V., c. 31, s. 101.

See secs. 131A, 132, 133, 146A, 146B and 156, each of which creates "an offence against this Act."

PROCEDURE.

Penalties enforceable at suit of Attorney General or Minister.

158. The amount of all penalties imposed upon a bank or person for any violation of this Act shall, unless otherwise provided by this Act, be recoverable and enforceable, with costs, at the suit of His Majesty instituted by the Attorney General of Canada, or by the Minister.

Appropriation.

2. Such penalties shall, unless otherwise provided by this Act, belong to the Crown for the public uses of Canada:

Proviso.

Provided that the Governor in Council, on the report of the Treasury Board, may direct that any portion of any penalty be remitted, or paid to any person, or applied in any manner deemed best adapted to attain the objects of this Act, and to secure the due administration thereof. 53 V., c. 31, s. 98. Am.

This section dates from 1890.

Secs. 134, 135, 141, 142, 145 to 151, impose penalties on the bank for violations of the act.

A bank compelled to pay a penalty under this section would have its recourse against the officer whose act or neglect caused the violation. Cf. Drake v. Bank of Toronto, 1862, 9 Gr. 116.

The section provides that suits for penalties imposed upon a bank may be brought by and for the benefit of the crown.

Sec. 158. Recovery of penalty.

It grants to the governor in council, on the report of the treasury board, discretionary powers to remit, or to pay to any person, any portion of a penalty. The power may be properly exercised so as to relieve a bank from the liability incurred by a technical, but not wilful, breach of the act, as for instance where a bank with a large number of branches temporarily and unintentionally issues notes in excess of the authorized amount. The power may also be exercised for the purpose of rewarding an informer.

Sec. 131 provides that the amount of penalties for which the bank is liable shall not form a charge upon the assets, in case of insolvency, until all other liabilities are paid.

REPEAL.

R.S., c. 29; 1912, c. 5, repealed.

159. Chapter 29 of the Revised Statutes, 1906, and chapter 5 of the statutes of 1912, are repealed.

COMMENCEMENT OF ACT.

Commencement of Act.

160. This Act shall come into force on the first day of July, one thousand nine hundred and thirteen.

CHAPTER XXVI.

Schedules to the Bank Act.

SCHEDULE A.

Name of Bank.	*Chief Office of Bank.*
1. The Bank of Montreal	Montreal.
2. The Quebec Bank	Quebec.
3. The Bank of Nova Scotia	Halifax.
4. The Bank of Toronto	Toronto.
5. The Molsons Bank	Montreal.
6. La Banque Nationale	Quebec.
7. The Merchants Bank of Canada	Montreal.
8. La Banque Provinciale du Canada	Montreal.
9. The Union Bank of Canada	Winnipeg.
10. The Canadian Bank of Commerce	Toronto.
11. The Royal Bank of Canada	Montreal.
12. The Dominion Bank	Toronto.
13. The Bank of Hamilton	Hamilton.
14. The Standard Bank of Canada	Toronto.
15. La Banque d'Hochelaga	Montreal.
16. The Bank of Ottawa	Ottawa.
17. The Imperial Bank of Canada	Toronto.
18. The Sovereign Bank	Toronto.
19. The Metropolitan Bank	Toronto.
20. The Home Bank of Canada	Toronto.
21. The Northern Crown Bank	Winnipeg.
22. The Sterling Bank of Canada	Toronto.
23. The Bank of Vancouver	Vancouver.
24. The Weyburn Security Bank	Weyburn.

See notes to secs. 3, 4 and 5.

SCHEDULE B.

An Act to incorporate the ———— Bank.

Whereas the persons hereinafter named have by their petition prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. [*Insert names of those applying for incorporation; the full name, address and description of each director must be given*], together with such persons as become shareholders in the corporation by this Act created, are incorporated under the name of [*insert name of bank*] hereinafter called "the Bank."

2. The persons named in section 1 of this Act shall be the provisional directors of the Bank.

3. The capital stock of the Bank shall be————dollars.

4. The chief office of the Bank shall be at————.

5. This Act shall, subject to the provisions of section 16 of The Bank Act, remain in force until the first day of July in the year one thousand nine hundred and twenty-three.

53 V., c. 31, Sch. B.; 63-64 V., c. 26, s. 45. Am.

See notes to sec. 9.

SCHEDULE C.

In consideration of an advance of ———— dollars made by the————Bank to A. B., for which the said Bank holds the following bills or notes: (*describe the bills or notes, if any*), [*or*, in consideration of the discounting of the following bills or notes by the————Bank for A. B.; (*describe the bills or notes*),] the products of agriculture, the forest, quarry and mine, [*or*, the sea, lakes and rivers, *or*, the live stock or dead stock, or, the products thereof, *or* the goods, wares and merchandise, *or*, the grain, (*as the case may be*),] mentioned below are hereby assigned to the said Bank as security for the payment on or before the ———— day of————of the said advance, together with interest thereon at the rate of————per cent. per annum from the————day of————[*or*, of the said bills or notes, or renewals thereof, or substitutions therefor, and interest thereon, *or as the case may be*].

This security is given under the provisions of section eighty-eight of The Bank Act, and is subject to the provisions of the said Act.

The said products of agriculture, the forest, quarry and mine, [*or*, the sea, lakes, and rivers, *or*, the live stock or dead stock, or the products thereof, *or*, the goods, wares and merchandise, *or*, the grain, (*as the case may be*),] are now owned by————, and are now in the possession of———— and are free from any mortgage, lien or charge thereon (*or as the case may be*), and are in (*place or places where the goods are*) and are the following (*description of property assigned*).

Dated, etc.

(*N.B.—The bills or notes and the property assigned may be set out in schedules annexed.*)

63-64 V., c. 26, s. 46 and Sch. C.

See notes to sec. 88.

SCHEDULE D.

Return of the liabilities and assets of the————Bank on the————day of————, 19—

Capital authorized.....$
Capital subscribed.....
Capital paid up.....
Amount of rest or reserve fund.....
Rate per cent. of last dividend declared.....—per cent.

Liabilities.

1. Notes in circulation.....$
2. Balance due to Dominion Government after deducting advances for credits, pay-lists, etc.....
3. Balances due to provincial governments.....
4. Deposits by the public, payable on demand in Canada.....
5. Deposits by the public, payable after notice or on a fixed day, in Canada.....
6. Deposits elsewhere than in Canada.....
7. Loans from other banks in Canada, secured, including bills rediscounted.....
8. Deposits made by and balances due to other banks in Canada.....
9. Due to banks and banking correspondents in the United Kingdom.....
10. Due to banks and banking correspondents elsewhere than in Canada and the United Kingdom.....
11. [illegible] payable.....
12. Acceptances under letters of credit.....
13. Liabilities not included under foregoing heads.

$

Schedule D.

Assets.

1. Current gold and subsidiary coin..... { In Canada $ / Elsewhere $ } $
2. Dominion notes..... { In Canada $ / Elsewhere $ } $
3. Deposit with the Minister of Finance for the security of note circulation.....
4. Deposit in the central gold reserves .....
5. Notes of other banks.....
6. Cheques on other banks.....
7. Loans to other banks in Canada, secured, including bills re-discounted.....
8. Deposits made with and balances due from other banks in Canada.....
9. Due from banks and banking correspondents in the United Kingdom.....
10. Due from banks and banking correspondents, elsewhere than in Canada and the United Kingdom.....
11. Dominion government and provincial government securities.....
12. Canadian municipal securities, and British, foreign and colonial public securities other than Canadian.....
13. Railway and other bonds, debentures, and stocks.....
14. Call and short (not exceeding thirty days) loans in Canada on stocks, debentures and bonds.....
15. Call and short (not exceeding thirty days) loans elsewhere than in Canada.....
16. Other current loans and discounts in Canada.
17. Other current loans and discounts elsewhere than in Canada.....
18. Loans to the Government of Canada.....

Schedule D.

19. Loans to provincial governments.....
20. Loans to cities, towns, municipalities and school districts.....
21. Overdue debts .....
22. Real estate other than bank premises.....
23. Mortgages on real estate sold by the bank....
24. Bank premises, at not more than cost, less amounts (if any) written off.....
25. Liabilities of customers under letters of credit as per contra.....
26. Other assets not included under the foregoing heads.....

$

Aggregate amount of loans to directors, and firms of which they are partners, $———

Average amount of current gold and subsidiary coin held, during the month, $———

Average amount of Dominion notes held during the month, $———

Greatest amount of notes in circulation at any time during the month, $———

Branch and agency returns included in the foregoing and antedating the last juridical day of the month aforesaid are as follows:—

Branch or Agency.	*Date of such return.*

I declare that the above return has been prepared under my directions and is correct according to the books of the bank.

E. F.,
Chief Accountant, (*or* Acting Chief Accountant, *as the case may be*).

Schedule D.

We declare that the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct, and shows truly and clearly the financial position of the bank; and we further declare that the bank has never, at any time during the period to which the said return relates, held in Dominion notes less than forty per cent. of the cash reserves which it has in Canada.

(*Place*)————this——day of————, 19—.

A. B.,
President, (Vice-President, *or* Director acting as President, *as the case may be*).

C. D.,
General Manager, (*or other principal officer as the case may be*).

63-64 V., c. 26, s. 47 and Sch. D. Am.

See notes to sec. 112.

SCHEDULE E.

Return of the————————Bank————showing the amount of its notes in circulation for each juridical day during the month of————————, 19—.

Day of the Month.	*Paid-up Capital.*	**Reserve Fund*	*Deposit Gold Coin and Dominion Notes.*	*Circulation.*	*Excess (if any).*

**N.B.—Returns for the months of March to August, inclusive, need not have the Reserve Fund column.*

I declare that the above return has been prepared under my directions and is correct according to the books of the bank.

E. F.,

Chief Accountant, (*or* Acting Chief Accountant, *as the case may be*).

We declare that the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct.

(*Place*)————————this————day of————, 19—.

A. B.,

President (Vice-President, *or* Director acting as President, *as the case may be*).

C. D.,

General Manager (*or other principal officer, as the case may be*).

This schedule was added to the act in 1913. See sec. 61.

SCHEDULE F.

Return of unpaid dividends, balances and amounts, certified cheques, drafts and bills of exchange of the———— Bank at the close of the calendar year 19—, made in accordance with the provisions of subsections 1 to 5, inclusive, of section 114 of The Bank Act.

.....

.....

.....

I declare that the above return has been prepared under my directions and is correct according to the books of the bank.

E. F.,
Chief Accountant, (*or* Acting Chief Accountant, *as the case may be*).

We declare that the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct.

(*Place*)————this———day of————, 19——.

A. B.
President, (Vice-President, *or* Director acting as President, *as the case may be*).

C. D.,
General Manager, (*or other principal officer, as the case may be*).

This schedule was added to the act in 1913. See sec. 114.

CHAPTER XXVII.

The Clearing House(a).

Power to establish and regulate clearing houses.

In Canada clearing houses for banks are governed by the act of incorporation of the Canadian Bankers' Association (see chapter 23, *supra*). By that act the association may from time to time establish in any place in Canada a clearing house for banks, and make rules and regulations for its operations: provided always, that no bank shall be or become a member of such clearing house except with its own consent, and a bank may after becoming such member at any time withdraw therefrom (sec. 7). It is further provided that all banks whether members of the association or not, shall have an equal voice in making from time to time the rules and regulations for the clearing house, but no such rule or regulation shall have any force or effect until approved by the treasury board (sec. 7). The powers of the association are to be exercised by its executive council, which is specifically authorized to pass by-laws, resolutions, rules and regulations not contrary to law, or to the provisions of the act, respecting clearing houses for banks, but no such by-law, etc., and no repeal, amendment, or variation of or other dealing with, any such by-law, etc., is to have any force or effect until approved of by the treasury board (sec. 16).

In pursuance of the powers contained in the act the association has adopted the rules and regulations contained in by-law no. 16, set out below, being part of the by-laws passed at a general meeting of the association held in Toronto on the 15th of November, 1900, and amended at a general meeting

(a) The following authorities may be usefully consulted as to the history and operation of clearing houses: Jevons, Money and the Mechanism of Exchange, Cannon's History of Clearing Houses (reviewed by J. T. P. Knight in an article in 10 J.C.B.A. 40 on the history and operation of the Montreal Clearing House), Watson's Law of the Clearing House (where the American cases are exhaustively collected). See also Boddington v. Schlencker, 1833, 4 B. & Ad. 752, and the special verdict in Warwick v. Rogers, 1843, 5 M. & G. at p. 348, as to the early practice in the London clearing house, and Hart, pp. 324, 327, where the rules of the London clearing house are set out; cf. Grant, pp. 66 ff. In Banque Nationale v. Merchants Bank, 1891, M.L.R. 7 S.C. 336, the beginning of the Montreal Clearing House is described.

held in Montreal on the 15th of April, 1901, and approved by the treasury board on the 10th of May, 1901.

Voluntary association.

A clearing house is a voluntary association. The association has not exercised its power to "establish in any place in Canada a clearing house for banks" except by authorizing the chartered banks doing business in any city or town or such of them as may desire to do so to form themselves into a clearing house (rule 1). Other banks may be admitted subsequently (rule 1), and any member may withdraw upon giving the proper notice (sec. 7 and rule 9).

Any clearing house may enact by-laws, rules and regulations for the government of its members, not inconsistent with the rules contained in by-law no. 16 (rule 17).

To facilitate daily exchanges.

A clearing house is established for the purpose of facilitating daily exchanges and settlements between banks (rule 2).

It may be defined as a place or institution where the settlement of mutual claims of banks is effected by the payment of differences, called "balances."

Its operation in a simple case may be illustrated as follows:

Operation of clearing house.

A clerk from each bank attends the clearing house at a stated hour with bank notes, cheques, drafts, bills, and other items, usually called "exchanges," on the other banks belonging to the clearing house. These exchanges are distributed at the clearing house by messengers among the clerks of the banks that are to pay them. The exchanges which a bank sends to the clearing house are called creditor exchanges; those which it receives from the other banks are called debtor exchanges. If the creditor exchanges of a bank exceed its debtor exchanges, it is a "creditor bank." If the reverse is the case, it is a "debtor bank."

By arrangement with the board of management of the clearing house, one bank acts as clearing bank for the receipt and disbursement of balances due by and to the various banks, and some bank officer acts as manager of the clearing house (rule 10).

On completion of the exchanges, the balance due to or by each bank is settled and declared by the clearing house manager, and the balances due by debtor banks must be paid into the clearing bank at or during stated hours. Subsequently the credit balances are paid by the clearing bank to the creditor banks (rule 11).

The hours for making the exchanges at the clearing house,

for payment of the debit balances to the clearing bank, and for payment out of the balances due to the creditor banks, are fixed by by-law of the clearing house passed under rule 17, provided that no credit balance, or portion thereof, shall be paid until all debit balances have been received by the clearing bank (rule 11). Operation of clearing house.

In the case of a large clearing house two or more representatives may be sent from each bank. Where two are sent the procedure may be as follows. A messenger delivers his parcels of credit exchanges and receives in return parcels of debit exchanges, and then returns to his own bank with his delivery statement initialed by the clerks who have received the parcels he has delivered. A clerk from each bank remains to transcribe the amounts received, as shewn by tickets removed from the parcels delivered to his messenger, to a settling sheet, and proceeds to calculate the difference between the amounts delivered and the amounts received—the difference constituting the credit or debit balance for which the manager of the clearing house signs vouchers to be used later at the clearing bank. If the calculations of all the clerks are accurately made, the amount due to the clearing bank will of course be the same as the amount due by it.

A clearing house substitutes a settlement made at a fixed time and place each day by representatives of all the members, for a separate settlement over the counter by each bank with every other bank. No other object is contemplated or provided for. The clearing house does not provide for any united action for any business purpose. It does not contemplate the employment of capital or credit in any entreprise. It contemplates and provides for co-operation to expedite and simplify the transaction by each member of its own proper business in one particular, namely, the settlement of daily balances with the other banks doing business in the same city or town. Incidentally, co-operation in this particular will tend to bring the banks belonging to the clearing house into closer relations, enable them to become more familiar with the volume of business and the actual conditions of each other, and open the way to make them mutually helpful in times of financial stringency; but these results are incidental only. Purpose of clearing house.

The importance of these so-called incidental results of the clearing house, however, should not be overlooked. For instance, in times of extreme stringency, bankers in the United

Purpose of clearing house.

States have sometimes resorted to clearing house certificates as a method of giving each other assistance. The object is accomplished by the deposit by banks with the clearing house of bills receivable and other securities, and the issue to such banks of loan certificates which may be used in settling balances at the clearing house. The result is simply to give to the depositing banks the benefit of re-discount, and to shift the burden of the lender from day to day to the banks best able to carry it. This expedient was first resorted to by the New York bankers in 1873, and has since been used at several different periods. 2 J.C.B.A. 208; cf. Watson, *op. cit.*, p. 6.

The necessity for the issue of clearing house certificates in the United States has been due, in the main, to the lack of elasticity in the American currency. Since the Canadian system of bank note issue obviates this defect to some extent, there has hitherto been no occasion for the issue of such certificates. Although efforts have sometimes been made to widen the scope and extend the functions of the clearing house, it remains in Canada simply a time-saving and labour-saving device, and is not, what it has been claimed to be in the United States, "a medium for united action upon all questions affecting the mutual welfare and prosperity of its members." 10 J.C.B. A. at pp. 41, 49.

The exchanges sent to the clearing house by a bank are usually enclosed in sealed envelopes, which are not opened in the clearing house room. Only the aggregate amount of the exchanges contained in each package is noted upon the cover.

Objections to items.

Each bank upon receipt at its own office of the packages containing its debtor exchanges verifies the cash and bank notes, examines the cheques and other items with regard to the genuineness of its customers' signatures, the state of their accounts, regularity of endorsements, etc. If the bank objects to any item delivered to it or charge made against it in the exchanges of the day, it should first make application direct to the bank interested for repayment of the amount or charge objected to, but in default of obtaining payment from such bank, the objecting bank may, under rule 12, notify the clearing house manager of the objection and non-payment.

Although the last mentioned rule provides that the objecting bank shall make such application for repayment and give notice of such objection within certain limited times, the omission to comply with the rule does not deprive the objecting

bank of any rights it would have had if the exchanges had been made directly between the banks concerned instead of through the clearing house. Rule 12 is expressly made subject to the important rule 2, which guards against the use of the clearing house as a means of obtaining payment of any item, charge or claim disputed or objected to.

Payment provisional only.

By virtue of rule 2, payment through the clearing house is provisional only. If an item or charge is, for good cause, objected to on the day of its receipt from the clearing house and within the hours allowed by the rules, the objecting bank is entitled to repayment or to a reversal of the charge against it in respect of such item.

In Warwick v. Rogers, 1843, 5 M. &. G. 340, a banker received through the clearing house a bill payable at his banking house accepted by a customer, and after examination of the bill and having funds in his hands, cancelled the acceptance by drawing lines across the customer's name, without rendering the acceptance illegible. In the course of the day, the customer, finding himself to be insolvent, ordered the banker not to pay the bill, whereupon the latter wrote thereon "cancelled by mistake—orders not to pay." The banker then returned the bill in this state to the clearing house before the settling hour in accordance with the custom of the trade in London (a custom which appears to have continued in its essential particulars down to the present time: Hart, p. 326). Held, that the banker was not under any legal liability. Cf. Prince v. Oriental Bank, 1878, 3 App. Cas. 325; Wilkinson v. Johnson, 1824, 3 B. & C. 428, and sec. 144 of the Bills of Exchange Act.

Bank not prejudiced by payment through clearing house.

If the objection is not made within the time allowed by the clearing house rules, the fact of the payment through the clearing house, as has been stated, does not affect the bank's rights. Its rights will be subject to the ordinary rules of law governing recovery by the payer of money paid by mistake to a person who is not entitled to receive payment, and who cannot give a discharge. See notes to sec. 50 of the Bills of Exchange Act. Recent examples are to be found in the cases of Imperial Bank v. Bank of Hamilton, [1903] A.C. 49, and Rex v. Bank of Montreal, 1906, 11 O.L.R. 595, affirmed by the Supreme Court of Canada *sub nom.* Bank of Montreal v. The King, 1907, 38 S.C.R. 258. In the former case the paying bank was held entitled to recover, notwithstanding payment through

the clearing house and the fact that in accordance with a custom of the clearing house applicable to certified cheques, the cheque there in question was not objected to until the day following its receipt, the receiving bank not having been prejudiced by the delay. See clearing house rules referred to in 31 O.R. at p. 102. In the latter case it was held that the paying bank was estopped from claiming repayment of the cheque by its delay in objecting to it.

A custom of trade or banking in derogation of the common law must be strictly proved. In Banque Nationale v. Merchants Bank, 1891, M.L.R. 7 S.C. 336, a cheque was returned on the afternoon of the day of its receipt, and therefore with sufficient diligence according to the common law standard, but too late according to a temporary rule adopted by the then newly-formed Montreal clearing house. It appeared in evidence that this rule was not generally observed by the banks belonging to the clearing house, and it was held that the objecting bank had the right to return the cheque.

In the United States the decisions are conflicting. In some cases absolute effect has been given to a clearing house rule requiring items to which objection is taken to be returned by a certain hour, whether the presenting bank has altered its position prior to the return of the item or not. In other cases it has been considered necessary, in order to make such a rule effective, to shew that the presenting bank has been induced by the delay in returning the item to alter its position, as, for instance, by abandoning securities in its hands in the belief that the conditional acceptance of the item in the morning clearing had been meanwhile verified and made absolute. Banque Nationale v. Merchants Bank, *supra;* Watson, pp. 35 ff.

Presentment through clearing house.

If a bill is accepted payable at a particular bank, presentment for payment through the clearing house is sufficient presentment to such bank. Reynolds v. Chettle, 1811, 2 Camp. 595; Harris v. Parker, 1833, 3 Tyr. 370. But the arrangements between banks in a clearing house do not affect the public unless it can be assumed or proved that the person sought to be charged has dealt with a bank subject to the rules of the clearing house. Sterling Bank v. Laughlin, 1912, 3 O.W.N. 643, 21 O.W.R. 221, 1 D.L.R. 383.

The delivery of items to a bank through the clearing house is provisional and such items are held by the receiving bank as

trustee until such bank pays to the clearing bank at the proper time the balance, if any, found against it as a result of the clearings of the day. See rules 13, 14 and 15 which provide for the case of a bank's making default in payment of its debit balance.

The following is the text of

BY-LAW NO. 16.

By-law respecting clearing houses.

The rules and regulations contained in this by-law are made in pursuance of the powers contained in the act to incorporate the Canadian Bankers' Association, 63 and 64 V., c. 93 (1900), and shall be adopted by, and shall be the rules and regulations governing all clearing houses now existing and established, or that may be hereafter established.

Rule 1. The chartered banks doing business in any city or town, or such of them as may desire to do so, may form themselves into a clearing house. Chartered banks thereafter establishing offices in such city or town may be admitted to the clearing house by a vote of the members.

Rule 2. The clearing house is established for the purpose of facilitating daily exchanges and settlements between banks. It shall not either directly or indirectly be used as a means of obtaining payment of any item, charge or claim disputed, or objected to. It is expressly agreed that any bank receiving exchanges through the clearing house shall have the same rights to return any item, and to refuse to credit any sum which it would have had were the changes made directly between the banks concerned, instead of through the clearing house; and nothing in these or any future rules, and nothing done, or omitted to be done thereunder, and no failure to comply therewith shall deprive a bank of any rights it might have possessed had such rules not been made, to return any item or refuse to credit any sum; and payment through the clearing house of any item, charge or claim shall not deprive a bank of any right to recover back the amount so paid.

Rule 3. The annual meeting of the members shall be held on such day in each year, and at such time and place as the members may fix by by-law. Special meetings may be called by the chairman or vice-chairman whenever it may be deemed necessary, and the chairman shall call a special meeting whenever requested to do so in writing by three or more members.

By-law respecting clearing houses.

Rule 4. At any meeting each member may be represented by one or more of its officers, but each bank shall have one vote only.

Rule 5. At every annual meeting there shall be elected by ballot a board of management who shall hold office until the next annual meeting, and thereafter until their successors are appointed. They shall have the general oversight and management of the clearing house. They shall also deal with the expenses of the clearing house, and the assessments made therefor. In the absence of any member of the board of management he may be represented by another officer of the bank of which he is an officer.

Rule 6. The board of management shall at their first meeting after their appointment elect out of their own number a chairman, a vice-chairman, and a secretary-treasurer, who shall perform the duties customarily appertaining to these offices.

The officers so selected shall be respectively the chairman, vice-chairman and secretary-treasurer of the clearing house.

Should the bank of which the chairman is an officer be interested in any matter, his powers and duties shall, with respect to such matter, be exercised by the vice-chairman, who shall also exercise the chairman's duties and powers in his absence.

Rule 7. Meetings of the board may be held at such times as the members of the same may determine. A special meeting shall be called by the secretary-treasurer on the written requisition of any member of the clearing house for the consideration of any matter submitted by it, of which meeting 24 hours' notice shall be given, but if such meeting is for action under rules 15 or 16, it shall be called immediately.

Rule 8. The expenses of the clearing house shall be met by an equal assessment upon the members, to be made by the board of management.

Rule 9. Any bank may withdraw from the clearing house by giving notice in writing to the chairman or secretary-treasurer, between the hours of 1 and 3 o'clock p.m., and paying its due proportion of expenses and obligations then due. Said retirement to take effect from the close of business of the day on which such notice is given. The other banks shall be promptly notified of such withdrawal.

Rule 10. The board of management shall arrange with a bank to act as clearing bank for the receipt and disbursement

of balances due by and to the various banks, but such bank shall be responsible only for the moneys actually received by it from the debtor banks, and for the distribution of such moneys amongst the creditor banks, on the presentation of the clearing house certificates properly discharged. The clearing bank shall give receipts for balances received from the debtor banks. The board of management shall also arrange for an officer to act as manager of the clearing house from time to time, but not necessarily the same officer each day.

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Rule 11. The hours for making the exchanges at the clearing house, for payment of the debit balances to the clearing bank, and for payment out of the balances due the creditor banks, shall be fixed by by-law under clause 17. On completion of the exchanges, the balance due to or by each bank shall be settled and declared by the clearing house manager, and if the clearing statements are readjusted under the provisions of these rules, the balances must then be similarly declared settled, and the balances due by debtor banks must be paid into the clearing bank, at or during the hours fixed by by-law as aforesaid, provided that no credit balance, or portion thereof, shall be paid until all debit balances have been received by the clearing bank. At clearing houses where balances are payable in money they shall be paid in legal tender notes of large denominations.

At clearing houses where balances are payable by draft, should any settlement draft given to the clearing bank not be paid on presentation, the clearing bank shall at once notify in writing all the other banks of such default; and the amount of the unpaid draft shall be repaid to the clearing bank by the banks whose clearances were against the defaulting bank on the day the unpaid draft was drawn, in proportion to such balances. The clearing bank shall collect the unpaid draft, and pay the same to the other banks in the above proportion. It is understood that the clearing bank is to be the agent of the associated banks, and to be liable only for moneys actually received by it.

Should any bank make default in paying to the clearing bank its debit balance, within the time fixed by this rule, such debit balance and interest thereon shall then be paid by the bank so in default to the chairman of the clearing house for the time being, and such chairman and his successor in office from time to time shall be a creditor of and entitled to recover

By-law respecting clearing houses.

the said debit balance, and interest thereon from the defaulting bank. Such balances, when received by the said chairman or his successor in office, shall be paid by him to the clearing bank for the benefit of the banks entitled thereto.

Rule 12. In order that the clearing statements may not be unnecessarily interfered with, it is agreed that a bank objecting to any item delivered to it through the clearing house, or to any charge against it in the exchanges of the day, shall, before notifying the clearing house manager of the objection, apply to the bank interested for payment of the amount of the item or charge objected to, and such amount shall thereupon be immediately paid to the objecting bank. Should such payment not be made, the objecting bank may notify the clearing house manager of such objection and non-payment, and he shall thereupon deduct the said amount from the settling sheets of the banks concerned and readjust the clearing statements and declare the correct balances in conformity with the changes so made, provided that such notice shall be given at least half an hour before the earliest hour fixed by by-law, as provided in clause 11, for payment of the balances due to the creditor banks. But notwithstanding that the objecting bank may not have so notified the clearing house manager, it shall be the duty under these rules of the bank interested to make such payment on demand therefor being made at any time up to 3 o'clock; provided, however, that if the objection is based on the absence from the deposit of any parcel or of any cheque or other item entered on the deposit slip, notice of such absence shall have been given to the bank interested before 12 o'clock noon, the whole, however, subject to the provisions of rule no. 2.

Rule 13. All bank notes, cheques, drafts, bills and other items (hereafter referred to as "items") delivered through the clearing house to a bank in the exchanges of the day, shall be received by such bank as a trustee only, and not as its own property, to be held upon the following trust, namely upon payment by such bank at the proper hour to the clearing bank of the balance (if any) against it, to retain such items freed from said trust; and in default of payment of such balance to return immediately and before 12.30 o'clock p.m., the said items unmarked and unmutilated through the clearing house to the respective banks, and the fact that any item cannot be so returned shall not relieve the bank from the obligation to return the remaining items, including the amount of the bank's own notes so delivered in trust.

By-law respecting clearing houses.

Upon such default and return of said items, each of the other banks shall immediately return all items which may have been received from the bank so in default, or pay the amount thereof to the defaulting bank through the clearing house, The items returned by the bank in default shall remain the property of the respective banks from which they were received, and the clearing house manager shall adjust the settlement of balances anew.

A bank receiving through the clearing house such items as aforesaid, shall be responsible for the proper carrying out of the trust upon which the same are received as aforesaid, and shall make good to the other banks respectively all loss and damage which may be suffered by the default in carrying out such trust.

Rule 14. In the event of any bank receiving exchanges through the clearing house making default in payment of its debit balance (if any), then in lieu of its returning the items received by it as provided by rule 13, the board of management may require the banks to which the defaulting bank, on an account being taken of the exchanges of the day between it and the other banks, would be a debtor, in proportion to the amounts which, on such accounting, would be respectively due to them, to furnish the chairman of the clearing house for the time being with the amount of the balance due by the defaulting bank, and such amount shall be furnished accordingly and shall be paid by the chairman to the clearing bank, which shall then pay over to the creditor banks the balances due to them in accordance with rule 11. The said funds for the chairman shall be furnished by being deposited in the clearing bank for the purpose aforesaid. The defaulting bank shall repay to the chairman for the time being, or to his successor in office, the amount of such debit balance and interest thereon, and the said chairman, and his successor in office, shall be entitled to recover the same from the defaulting bank. Any moneys so recovered shall be held in trust for and deposited in the clearing bank for the benefit of the banks entitled thereto.(*b*)

(*b*) This rule is intended to cover a case where for any reason the banks which have balances against a defaulting bank prefer, instead of having their items returned, to obtain the benefit of the balances due to the defaulting bank by other banks, a benefit which under some circumstances might be very important. The wording of the rule is rendered complicated

By-law respecting clearing houses.

Rule 15. If a bank neglects or refuses to pay its debit balance to the clearing bank, and if such default be made not because of inability to pay, the board of management may direct that the exchanges for the day between the defaulting bank and each of the other banks be eliminated from the clearing house statements, and that the settlements upon such exchanges be made directly between the banks interested and not through the clearing house. Upon such direction being given the clearing house manager shall comply therewith and adjust the settlement of balances anew, and the settlements of the exchanges so eliminated shall thereupon be made directly between the banks interested.

Rule 16. Should any case arise to which, in the opinion of the board of management, the foregoing rules are inapplicable, or in which their operation would be inequitable, the board shall have power at any time to suspend the clearings and settlements of the day; but immediately upon such suspension the board shall call a meeting of the members of the clearing house to take such measures as may be necessary.

Rule 17. Every clearing house now existing, or that may hereafter be established, may enact by-laws, rules and regulations for the government of its members, not inconsistent with these rules, and may fix therein among other things:—

1. The name of the clearing house;
2. The number of members of the board of management and the quorum thereof;
3. The date, time and place for the annual meeting;
4. The mode of providing for the expenses of the clearing house;
5. The hours for making exchanges, and for payment of the balances to or by the clearing bank;
6. The mode or medium in which balances are to be paid.

Any by-law, rule, or regulation passed or adopted under this clause may be amended at any meeting of the members, provided that not less than two weeks' notice of such meeting and of the proposed amendments, has been given.

by the fact that the defaulting bank is not the debtor of the several banks in the clearing house, but owes its debtor balance to the chairman of the clearing house (rule 11).

CHAPTER XXVIII.

Currency and Legal Tender.

Earlier legislation.

The foundation of the present dominion legislation on the subject of the currency was laid by the statute 34 V., c. 4, passed in 1871. This statute, after reciting that "it is expedient to establish one uniform currency for the whole Dominion of Canada," enacted that on and after the first day of July, 1871, the currency of the province of Nova Scotia should be the same as that of the provinces of Quebec, Ontario and New Brunswick, in all of which one currency, of the uniform value thereinafter mentioned, had been and was then used. The system of currency in use prior to confederation in the provinces other than Nova Scotia was a decimal system,(*a*) in which the pound sterling was the equivalent of $4.86 2-3. The statute of 1871 extended this decimal system to the Dominion and provided for the conversion of Nova Scotia currency into Canadian currency at the ratio of 73 to 75. The statute also made provision as to legal tender.

The foregoing provisions were substantially re-enacted by R.S.C. 1886, c. 30, and again by R.S.C. 1906, c. 25. On the 14th of May, 1910, the last mentioned statute was repealed and the Currency Act, 1910 (9-10 E. 7, c. 14), came into force. The new act re-enacts with some verbal alteration most of the provisions of the repealed act, but also contains a number of new provisions which were rendered necessary by the establishment in Canada of a branch of the royal mint under the authority of the imperial Coinage Act, 1870. See also the Ottawa Mint Act, R.S.C. 1906, c. 26.

Ottawa Mint Proclamation, 1907.

The following is the text of the proclamation, approved by his late majesty in council on the 2nd day of November, 1907, directing the establishment of a branch mint at Ottawa.

(*a*) For an account of the introduction of the decimal system in the province of Canada in 1858, see article by Adam Shortt, 11 J.C.B.A. 13 (Oct., 1903).

A PROCLAMATION.

Ottawa Mint Proclamation, 1907.

Whereas under *The Coinage Act, 1870*, it is lawful for His Majesty, with the advice of His Privy Council, from time to time, by proclamation to direct the establishment of any branch of His Majesty's Royal Mint in England in any British possession, and to impose a charge for the coinage of gold thereat, and determine the application of such charge, and determine the extent to which such branch is to be deemed part of the said mint, and to which coins issued therefrom are to be current and be a legal tender, and to be deemed to be issued from the said mint:

And whereas the Government of the Dominion of Canada has applied for the establishment of a branch of the Mint at Ottawa, the capital of the Dominion, and provision has been made by the Parliament of the Dominion for an annual expenditure of seventy-five thousand dollars for the expenses of the branch mint:

We, therefore, in pursuance of the said Act and of all other powers enabling Us in that behalf, do hereby, by and with the advice of Our Privy Council, proclaim, direct, and ordain as follows:—

1. A branch of Our Mint (in this Proclamation referred to as the Ottawa Branch Mint) shall be established at or near Ottawa in Our Dominion of Canada, on such site as the Governor General of the Dominion in Council may approve.

2. Gold coins of the same denominations, designs, weights, and fineness as gold coins coined at Our Mint in England, may be coined at the Ottawa Branch Mint, and any gold coins so coined (in this Proclamation referred to as sterling gold coins) shall be subject to the allowance of the same remedy as gold coins coined at Our Mint in England.

3. The master of Our Mint shall prepare and transmit such dies as may be required for the sterling gold coins to be coined at the Ottawa Branch Mint.

4. The sterling gold coins coined in pursuance of this Proclamation at the Ottawa Branch Mint shall be deemed to have been issued from Our Mint, and shall be current and a legal tender in like manner and to the like extent as if they had been coined and issued in England. Ottawa Mint Proclamation, 1907.

5. (i) If any person brings to the Ottawa Branch Mint any gold bullion and requires the deputy master of that branch to assay, coin into sterling gold coins and deliver out the same to him, the deputy master shall comply with the requisition upon payment for every ounce troy of gold of standard fineness of a charge of three cents where the amount brought at one time does not exceed five hundred ounces, and of two cents in any other case: Provided that—

(*a*) Where the gold bullion so brought is such that it cannot be brought to the standard fineness of the coin to be coined thereout without refining the whole or some portion of it, the deputy master shall demand for assaying and refining the same such additional charge as the Governor General in Council may from time to time fix, and until such charge is paid to him may refuse to receive, assay or coin such bullion; and

(*b*) Where the bullion brought to the branch mint for coinage is finer than the standard fineness of the coin to be coined thereout, there shall be delivered to the person bringing the same such additional amount of coin as is proportionate to such superior fineness;

(*c*) No undue preference shall be shewn to any person as respects the bullion brought to the branch mint, and every person shall have priority according to the time at which he brought it;

(*d*) The Governor General in Council may make regulations for carrying into effect the provisions of this article with respect to gold bullion and the bringing, coining and delivery out thereof, and in particular for regulating the time and conditions at and under which it is to be so brought, assayed,

Ottawa Mint Proclamation, 1907.

coined and delivered out, and the minimum amount which may be so brought.

(ii) The charges under this article for coining, assaying, and refining shall be collected by the deputy master in accordance with the said regulations, either as a payment in advance, or as a deduction from the coin delivered out, or otherwise, and shall be accounted for and paid over in such manner as the Governor General in Council directs to the Minister of Finance and Receiver General of Canada, to be by him paid into the Consolidated Revenue Fund of Canada.

6. Subject to the provisions of this Proclamation the Ottawa Branch Mint shall be deemed to be part of Our Mint, and accordingly—

(*a*) The deputy master shall comply with all directions he may receive from the master of Our Mint, whether as regards the returns to be made or the transmission of specimen sterling gold coins to England or otherwise; and

(*b*) The said specimen sterling gold coins shall be subject to the trial of the pyx under section twelve of *The Coinage Act, 1870*, so, however, that they shall be examined separately from the coins coined in England or at any branch mint other than the one regulated by this Proclamation; and

(*c*) The deputy master and other officers and persons for the purpose of carrying on the business of the branch mint may be appointed, promoted, suspended, and removed, and their duties assigned and salaries awarded under section fifteen of *The Coinage Act, 1870*.

7. Subject to any regulations and conditions which may be made by the master of Our Mint, the deputy master of the Ottawa Branch Mint shall coin at that branch mint any gold, silver, bronze, or other coin which the Governor General of the Dominion requires to be so coined, and which is for the time being a coin of the Dominion and current and legal tender in the Dominion, but coins coined under this article shall not for the purposes of *The Coinage Act, 1870*, be deemed to be coins made at, or issued from, Our Mint.

Ottawa Mint Proclamation, 1907.

8. The Governor General in Council shall cause the store of bullion and coin at the Ottawa Branch Mint to be inspected half-yearly and cause the persons inspecting the same to report thereon to the deputy master of the branch mint, stating the exact amount of bullion and coin inspected by them; and copies of such report shall be transmitted by the deputy master to the Governor General and to the master of Our Mint in London.

9. The master of Our Mint shall, in the execution of this Proclamation, act in accordance with any regulations made or directions given by the Lords Commissioners of Our Treasury.

10. In this Proclamation—

The expression "Mint" means Our Royal Mint in England;

The expression "Governor General" includes the officer for the time being administering the Government of the Dominion;

The expression "deputy master of the branch mint" includes any person who lawfully exercises at such branch mint the authority of deputy master.

11. This Proclamation may be cited as the Ottawa Mint Proclamation, 1907.

12. This Proclamation shall come into force on the first day of January, nineteen hundred and eight.

Given at Our Court at Buckingham Palace, this second day of November, in the year of our Lord nineteen hundred and seven, and in the seventh year of Our reign.

God save the King.

Vide Canada Gazette, vol. xli, p. 1510; *Statutes of Canada*, 1908, p. xlviii.

The foregoing proclamation makes provision for the coinage of sterling gold coins, but it is contemplated under article 7 that in addition gold, silver, bronze or other coins in the currency of the Dominion shall be coined at the branch mint. Further provision is made in regard to this dominion currency by the Currency Act, 1910, the text of which is printed below.

9-10 EDWARD VII., CHAPTER 14.

AN ACT RESPECTING THE CURRENCY.

[*Assented to 4th May*, 1910.]

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

SHORT TITLE.

Short title.

1. This Act may be cited as The Currency Act, 1910.

DENOMINATIONS AND STANDARDS.

Denominations in currency.

2. The denominations of money in the currency of Canada, shall be dollars, cents and mills,—the cent being one hundredth part of a dollar, and the mill one-tenth part of a cent. [R.S.C. 1906, c. 25, s. 3.]

As to the introduction of the decimal system, see notes at the beginning of this chapter.

Standard for gold and silver coins.

3. The standard for gold coins of the currency of Canada shall be such that of one thousand parts by weight, nine hundred shall be of fine gold and one hundred of alloy; and the standard for silver coins of such currency shall be such that of one thousand parts by weight nine hundred and twenty-five shall be of fine silver and seventy-five of alloy.

The standard of fineness prescribed by this section for gold coins is the same as that in force in the United States (cf. sec. 10), but differs from the standard for sterling gold coins.

Standard for sterling gold coins.

Any individual is entitled to take gold bullion to the English mint and have it coined into sovereigns at the rate of £3 17s. 10½d. an ounce, free of charge for coining, although the common practice is to sell bullion to the Bank of England at 1½d. less than the mint price. English sovereigns are made of standard gold, which is an alloy or mixture of eleven parts pure gold and one part composed chiefly of copper. Standard gold is therefore said to be "eleven-twelfths" fine or twenty-

two carats fine, a carat being a goldsmith's term for a twenty-fourth part of an ounce. Sec. 3.

As to coining sterling gold coins in Canada, see the Ottawa Mint Proclamation, 1907.

At the mint price a sovereign should weigh 123.27447 grains troy, or 7.98805 grams, and should contain 113.00160 grains, or 7.32238 grams, of pure gold, but since absolute accuracy is a matter of difficulty (and was especially so in former times when the machinery for coining was somewhat primitive), the mint is allowed a slight deviation called a "remedy," amounting to two-tenths of a grain in each sovereign. There is also a remedy in the fineness of the gold of two parts in a thousand. Remedy allowance.

As to standard weight and fineness of Canadian coins and the remedy allowed, see also sec. 4 and the schedule to the act. Canadian coins.

COINS.

4. Gold, silver and bronze coins, struck by the authority of the Crown for circulation in Canada, of the respective denominations mentioned in the Schedule to this Act, and of the standard weight and fineness therein set out, shall be equal to and pass current for the respective sums in the currency of Canada following, to wit: for twenty dollars, ten dollars, five dollars, two and one-half dollars, one dollar, fifty cents, twenty-five cents, ten cents, five cents and one cent. Value and currency of standard gold, silver and bronze coins.

2. In the making of such coins a remedy (or variation from the standard weight and fineness specified in the Schedule hereto) shall be allowed of an amount not exceeding the amount specified in that schedule. Remedy allowance.

3. If any coin of gold, silver, or bronze, but of any other denomination than that of the coins mentioned in the Schedule hereto, is hereafter coined under the provisions of this Act, such coin shall be of the same fineness as is fixed for coins of like material by that schedule, and shall be of a weight bearing the same proportion to the weight specified in that schedule as the denomination of such coin bears to the denominations or denomination of coin of like material mentioned in that schedule; and in the making of such coin a remedy shall be allowed Standard fineness and weight of coins of other denominations. Remedy allowance.

Sec. 4.

Gold coin.

of such amount as, having regard to the remedy assigned in that schedule to coins of like material, may be fixed and determined by proclamation under this Act; and such coin, if of gold, shall be subject to such provision as to least current weight as may be fixed and determined by proclamation under this Act, regard being had to the least current weight assigned in that schedule to the respective gold coins mentioned therein.

As to standard fineness for gold coins, cf. sec. 3.

As to legal tender, see secs. 8 ff.

Canadian silver and copper or bronze coins are tokens, *i.e.*, coins the exchange value of which is greater than the value of the metal contained in them. They are, however, coined only in sufficient quantities to provide the country with coin for small payments, and are legal tender only to limited amounts. No other silver, copper or bronze coins than those which the crown has heretofore caused to be struck or may hereafter cause to be struck for circulation in Canada, or in some province thereof, are legal tender in Canada (sec. 12).

Coins to be made at Ottawa Branch.

5. All coins of the currency of Canada which may be made pursuant to the provisions of this Act shall, subject to any regulations and conditions which may be made by the Master of His Majesty's Royal Mint in England, be coined at the Ottawa Branch of the Royal Mint; but if for any reason such coins cannot be made at the said branch mint as required, the Governor in Council may authorize the making of such coins at His Majesty's Royal Mint or at any other branch thereof.

Proviso.

See the Ottawa Mint Proclamation, 1907, article 7, *supra*.

Purchase of bullion.

6. The Minister of Finance may from time to time issue out of the Consolidated Revenue Fund such sums as may be necessary for the purchase of bullion in order to provide supplies of coin for the public service.

Application of sums received.

7. The sums received in payment for coin produced from bullion purchased under the next preceding section shall be paid into the Consolidated Revenue Fund.

LEGAL TENDER.

8. A tender of payment of money, if made in coins which have been made in accordance with the provisions of this Act, and have not been called in under any proclamation made in pursuance of this Act, and have not become diminished in weight, by abrasion through ordinary and legitimate use, so as to be of less weight than the current weight, that is to say, than the weight (if any) specified as the least current weight in the Schedule hereto, or less than such weight as may be declared by any proclamation made in pursuance of this Act, shall be a legal tender,— Tender of payment in coin of standard weight to be legal tender.

(*a*) In the case of gold coins, for a payment of any amount; Gold.

(*b*) In the case of silver coins, for a payment of an amount not exceeding ten dollars, but for no greater amount; Silver.

(*c*) In the case of bronze coins, for a payment of an amount not exceeding twenty-five cents, but for no greater amount. Bronze.

2. The holder of the notes of any person to the amount of more than ten dollars shall not be bound to receive more than that amount in such silver coins in payment of such notes, if presented for payment at one time, although any of such notes is for a less sum. Payment of notes in silver.

3. Nothing in this Act shall prevent any paper currency which under any Act or otherwise is a legal tender from being a legal tender. [Cf. R.S.C. 1906, c. 25, ss. 9, 10.] Paper currency.

Dominion notes are also legal tender; see sec. 3 of the Dominion Notes Act, next chapter. Bank notes are not legal tender, but a bank must always receive in payment its own notes at par at any of its branches, agencies or offices (see. 71 of the Bank Act).

9. The British sovereign of the weight and fineness prescribed by the laws of the United Kingdom at the date of the passing of this Act, and which is not of less weight than the current weight specified as the least current weight at which it is a legal tender in the United Kingdom, shall pass current and be a legal tender in Canada for four dollars and eighty-six British sovereigns and gold coins to be legal tender.

Sec. 9.

cents and two-thirds of a cent of the currency of Canada; and any other gold coins made at His Majesty's Royal Mint or at any branch thereof, and current in the United Kingdom, being a multiple or division of the sovereign shall, subject to corresponding current weight specifications, pass current and be a legal tender in Canada for proportionate sums in the currency of Canada. [Cf. R.S.C. 1906, c. 25, s. 9.]

As to the weight and fineness of the British sovereign, see notes to sec. 3.

Foreign gold coins.

10. The Governor in Council may, by proclamation, from time to time, fix the rates at which any foreign gold coins of the description, date, weight and fineness mentioned in such proclamation shall pass current and be a legal tender in Canada;

Proviso as to gold coins of United States.

Provided that until it is otherwise ordered by any such proclamation the gold coins of the United States of America hereinafter mentioned, that is to say the half eagle or five dollar piece, the eagle or ten dollar piece and the double eagle or twenty dollar piece, coined after the eighteenth day of January, one thousand eight hundred and thirty seven, and while the standard of fineness for gold coins then fixed by the laws of the said United States remains unchanged, and weighing respectively one hundred and twenty-nine grains, two hundred and fifty-eight grains, and five hundred and sixteen grains, subject to the provisions of the laws of the said United States with respect to such coins as to tolerance or remedy and as to the reduction in weight by abrasion through ordinary and legitimate use below the said respective weights, in so far as such provisions prescribe the conditions under which the said coins shall be a legal tender in the said United States, and so long as such coins shall be receivable at their nominal value by the Treasury of the said United States and its offices, shall pass current and be a legal tender in Canada for five dollars, ten dollars and twenty dollars, respectively, in the currency of Canada. [Cf. R.S.C. 1906, c. 25, s. 12.]

The standard of fineness for the gold coins of the United States mentioned in this section is nine-tenths. Cf. notes to sec. 3. Sec. 10.

11. The silver, copper or bronze coins heretofore struck by authority of the Crown for circulation in the provinces of Ontario, Quebec and New Brunswick under the Acts at the time in force in the said provinces respectively, and such silver, copper or bronze coins as, before the passing of this Act, have been struck by the same authority for circulation in Canada under the Acts at the time in force in Canada, shall be current and a legal tender throughout Canada at the rates in the said currency of Canada assigned to them respectively by the said Acts, and under the like conditions and provisions. [R.S.C. 1906, c. 25, s. 10.] Certain coins of certain provinces, and of Canada prior to this Act to be legal tender.

12. No other silver, copper or bronze coins than those which the Crown has heretofore caused to be struck or may hereafter cause to be struck for circulation in Canada, or in some province thereof, shall be a legal tender in Canada. [R.S.C. 1906, c. 25, s. 11.] No other coins to be legal tender.

13. The stamp of the year on any foreign coin made current by this Act, or any proclamation issued under it, shall establish *primâ facie* the fact of its having been coined in that year; and the stamp of the country on any foreign coin shall establish *primâ facie* the fact of its being of the coinage of such country. [R.S.C. 1906, c. 25, s. 13.] Proof of date and country of coins.

14. No coin which has been bent or mutilated, or has been defaced by the stamping or engraving thereon of any name, word, or mark, whether such coin is or is not thereby diminished or lightened, and no coin which has in any way been reduced in weight, except by abrasion through ordinary and legitimate use, shall pass current or be a legal tender. [Cf. R.S.C. 1906, c. 25, s. 14.] Mutilated or defaced coin not legal tender.

ACCOUNTS, DEBTS AND OBLIGATIONS.

15. All public accounts throughout Canada shall be kept in the currency of Canada; and in any statement as to money Public accounts and statements to be in currency.

Sec. 15.

or money value, in any indictment or legal proceeding, the same shall be stated in such currency.

Accounts, contracts, etc., from July 1st, 1871.

2. Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter and thing relating to money, or involving the liability to pay any money, which was made, executed or entered into, done or had on or subsequent to the first day of July, one thousand eight hundred and seventy-one, and before the coming into force of this Act, shall be deemed to have been and be, so far as anything remains to be or may be executed, done or had thereunder, as if the same was originally made, executed, done or had according to the coins made for circulation in Canada and which are legal tender in Canada in pursuance of this Act, unless the same was made, entered into, done or had according to the currency of Great Britain or of some British possession or of some foreign state.

Proviso.

All accounts, contracts, etc., to be in currency.

3. Every contract, sale, payment, bill, note, instrument and security for money, and every transaction, dealing, matter and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed or entered into, done or had, shall be made, executed, entered into, done and had according to the coins made for circulation in Canada and which are current and legal tender in pursuance of this Act, unless the same be made, executed, entered into, done or had, according to the currency of Great Britain or of some British possession or some foreign state. [Cf. R.S.C. 1906, c. 25, s. 4.]

Proviso.

Sums mentioned in Acts to be deemed currency.

16. All sums mentioned in dollars and cents in *The British North America Act, 1867*, and in all Acts of the Parliament of Canada shall, unless it is otherwise expressed, be understood to be sums in the currency of Canada. [R.S.C. 1906, c. 25, s. 5.]

17. All sums of money payable on and after the first day of July, one thousand eight hundred and seventy-one, to

the Crown, or to any person, under any Act, or law in force in Nova Scotia, passed before the said day, or under any bill, note, contract, agreement or other document or instrument, made before the said day in and with reference to that province, or made after the said day out of Nova Scotia and with reference thereto, and which were intended to be, and but for such alteration would have been payable in the currency of Nova Scotia, as fixed by law previous to the fourteenth day of April, one thousand eight hundred and seventy-one, shall hereafter be represented and payable, respectively, by equivalent sums in the currency of Canada, that is to say, for every seventy-five cents of Nova Scotia currency, by seventy-three cents of the currency of Canada, and so in proportion for any greater or less sum; and if in any such sum there is a fraction of a cent in the equivalent in the currency of Canada, the nearest whole cent shall be taken. [R.S.C. 1906, c. 25, s. 6.]

Sec. 17. Payments in Nova Scotia from July 1st, 1871, to be in currency.

The ratio of 73 to 75 represents the relation between the currency of Nova Scotia prior to Confederation, of which it required $5 to make a pound sterling, and the currency of the other provinces, in which a pound sterling was the equivalent of $4.86 2-3. By sec. 2, the latter currency is established as the currency of Canada.

A discussion of the old currencies of Nova Scotia is contained in an article by J. W. H. Rowley in 2 J.C.B.A. 413, (June, 1895).

18. Any debt or obligation contracted before the first day of July, in the year one thousand eight hundred and eighty one, in the currency then lawfully used in the province of British Columbia, or in the province of Prince Edward Island, shall, if payable thereafter, be payable by an equivalent sum in the currency of Canada. [R.S.C. 1906, c. 25, s. 7.]

Payment of debts in B.C. and P.E.I. to be in currency.

DOMINION AND BANK NOTES.

19. No Dominion note or bank note payable in any other currency than the currency of Canada shall be issued or re-issued by the Government of Canada, or by any bank (except

Dominion and bank notes to be issued in currency only.

Sec. 19.

as otherwise provided by The Bank Act), and all such notes issued before the first day of July one thousand eight hundred and seventy-one which are outstanding and legal obligations shall be redeemed, or notes payable in the currency of Canada shall be substituted or exchanged for them.

Face value of notes to be deemed currency.

2. The respective sums which Dominion notes and bank notes, now in circulation issued on or after the first day of July, one thousand eight hundred and seventy-one, and before the coming into force of this Act, purport to be obligations to pay, shall be deemed to be sums in the currency of Canada as by this Act established. [Cf. R.S.C. 1906, c. 25, s. 8.]

Dominion notes are governed by the Dominion Notes Act; see chapter 29, *infra*. Bank notes are governed by secs. 61 *et seq.*, of the Bank Act, *supra*. Section 62 of the Bank Act permits in certain cases the issue and reissue, at any office of a bank in any British colony or possession other than Canada, notes of the bank payable in the currency in use in such colony or possession.

POWERS OF THE GOVERNOR IN COUNCIL.

Powers of Governor in Council to deal with dimensions, designs, denominations, remedy, weight, redemption and calling in of coins.

20. The Governor in Council may from time to time by proclamation do all or any of the following things:—

(*a*) Determine the dimensions of and designs for any coin;

(*b*) In addition to the denominations of coins mentioned in the Schedule hereto, determine the denominations of other coins to be coined and, subject to the provisions of this Act, the remedy and least current weight therefor;

(*c*) Diminish the amount of remedy allowed by the Schedule hereto in the case of any coin;

(*d*) Determine the weight not being less than the weight (if any) specified in the Schedule hereto, below which a coin, when diminished in weight by abrasion through ordinary and legitimate use, is not to be deemed a current or legal tender;

(*e*) Make regulations under which the Minister of Finance may redeem silver, copper or bronze coins issued for circulation

in Canada which by reason of abrasion through ordinary and legitimate use are no longer fit for circulation; Sec. 20.

(*f*) Call in coins of any date or denomination;

(*g*) Revoke or alter any proclamation previously made.

2. Every such proclamation shall be published in *The Canada Gazette* and shall thereupon come into operation on the date of such publication, and shall have effect as if it were enacted in this Act. Publication in *Canada Gazette*.

The designs for ten-dollar and five-dollar gold coins respectively were determined under this section by proclamation dated the 15th November, 1911, and those for silver and bronze coins respectively by proclamation dated the 29th December, 1911. See Canada Gazette, vol. 45, pp. 1909, 2595; Statutes of Canada, 1912, p. cxxiii.

EXAMINATION AND TEST OF COINS.

21. For the purpose of ascertaining that coins of the currency of Canada issued from the Ottawa Branch of the Royal Mint have been coined in accordance with the provisions of this Act, the Governor in Council shall nominate and appoint competent persons, not less than three, who shall meet at least once in each year, as assay commissioners, to examine and test, in the presence of the proper officers of the Ottawa Branch of the Royal Mint and of the officers attending pursuant to any regulations made hereunder, the fineness and weight of the coins reserved for this purpose. Appointment of assay commissioners.

2. The Governor in Council may, from time to time, make regulations respecting the proceedings at and the conduct of such examination and test, and all matters incidental thereto, and in particular respecting the following matters, namely,— Regulations for examination and test.

(*a*) the time and place of examination and test:

(*b*) the setting apart out of the coins issued by the said branch mint of certain coins for examination and test; and the custody and production of the coins so set apart, and the production of the standard weights and trial plates hereinafter mentioned;

Sec. 21.

(*c*) the attendance of one or more officers of the Department of Finance and of one or more officers of the Department of Inland Revenue thereat;

(*d*) the recording and publication of the findings of the commissioners as the result of such examination and test, and the proceedings (if any) to be taken in consequence thereof.

Effect of regulations.

3. Every such regulation shall come into operation on the date therein in that behalf mentioned, and shall have effect as if it were enacted in this Act, but may be revoked or altered by any subsequent regulation under this section.

Dominion standard troy ounce to be standard of weight.

22. The Dominion standard troy ounce, made of platinum-iridium now in the custody of the Minister of Inland Revenue, shall be the standard for regulating the weight of such currency, and the Minister of Inland Revenue shall cause weights of each denomination of coin made under this Act to be made and duly verified, and these weights, when approved by the Governor in Council, shall be the standard weights for determining the justness of the weight of and for weighing such coin.

Weights to be verified.

Standard weights and multiples to be procured.

2. The Minister of Inland Revenue shall, for the purpose of such examination and test, procure such standard weights, multiples and divisions in weight of such standard troy ounce, and such balances as may be necessary for the purpose of such examination and test.

Trial plates to be made.

3. The Minister of Inland Revenue shall from time to time, when necessary, cause trial plates of pure gold and of pure silver to be made and duly verified, and such trial plates shall be used for determining the justness of the gold and silver coins examined and tested under the provisions hereof.

Custody of weights and plates.

4. Such standard weights and trial plates shall, except as may be provided by any regulations made hereunder, be in the custody of the Minister of Inland Revenue, to be kept in such place and in such manner as the Minister of Inland Revenue may direct.

EXPENSES INCIDENT TO ADMINISTRATION.

23. The costs, charges and expenses incident to the carrying out of the provisions of this Act, including the examination and test, procuring standard weights, trial plates and balances, shall be payable out of the Consolidated Revenue Fund. Payment of expenses.

WHEN COUNTERFEIT OR DIMINISHED COIN TO BE BROKEN.

24. Every officer employed in the collection of the revenue in Canada shall cut, break or deface, or cause to be cut, broken or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which is tendered to him in payment of any part of the revenue of Canada. [Cf. R.S.C. 1906, c. 25, s. 16.] Revenue officers to destroy counterfeit and diminished coin.

This section was formerly part of an Act respecting Offences relating to the Coin, most of the other provisions of which are now incorporated in the Criminal Code (R.S.C. 1906, c. 146, part ix).

REPEAL.

25. The Currency Act, chapter 25 of the Revised Statutes, 1906, is repealed. R.S., c. 25 repealed.

SCHEDULE.

Denomination of coin.	Standard weight.	Least current weight.	Standard fineness.	Remedy allowance.	
				Weight per piece.	Millesimal fineness.
	Grains.	Grains.		Grains.	
Gold—					
Twenty dollar	516	513.42	Nine-tenths fine gold, one-tenth alloy; or millesimal fineness, 900	.50	1
Ten dollar	258	256.71		.40	1
Five dollar	129	128.355		.25	1
Two and one-half dollar	64.5	64.178		.20	1
Silver—					
One dollar	360	.....	Thirty-seven fortieths fine silver, three fortieths alloy; or millesimal fineness, 925.	1.50	4
Fifty cent	180	.....		1.00	4
Twenty-five cent	90	.....		.60	4
Ten cent	36	.....		*2.50	4
Five cent	18	.....		†3.00	4
Bronze—					
Cent	87.5	.....	Mixed metal, copper, tin and zinc	‡140.00	.....

* This remedy is on a group of one dollar's worth, ten pieces.
† This remedy is on a group of one dollar's worth, twenty pieces.
‡ This remedy is on a group of eighty pieces weighed against a weight of one pound avoirdupois.

CHAPTER XXIX.

Dominion Notes.

Earlier legislation.

As pointed out in chapter 2, *supra*, the statute 31 V., c. 46, passed in 1868, in effect extended to the whole Dominion the operation of the Provincial Notes Act, 1866.(*a*) The $8,000,000 of provincial notes prepared in 1866, and the $5,000,000 thereof in circulation in 1868 were declared to be dominion notes, redeemable in specie on presentation at offices established or to be established at Montreal, Toronto, Halifax and St. John, N.B., and at that one of the said places at which they might be respectively made payable, the notes payable at Halifax to be redeemable in Nova Scotia currency, *i.e.*, at the rate of $5 per pound sterling. The governor was authorized to establish branches of the receiver general's department in Montreal, Toronto, Halifax and St. John, respectively, for the issue and redemption of provincial or dominion notes, or to make arrangements with any chartered bank or banks for this purpose. The government was also authorized either to re-issue any of such provincial notes or to issue dominion notes to an amount not exceeding that of the provincial notes redeemed.

From an early date bank charters granted in Upper and Lower Canada had permitted banks to issue notes as small as one dollar or five shillings. Notwithstanding the criticism and remonstrance of the colonial office, the officials of which urged that "a currency founded in a sound and metallic basis" be substituted for this small note circulation, the privilege was enjoyed by the banks until 1870. In that year the right to issue notes under $4 was voluntarily surrendered by the banks in return for valuable concessions, namely the abolition of the tax of 1% per annum upon their note circulation and the repeal of the statute requiring them to hold one-tenth of their capital in dominion securities. At the same time the banks were required to hold, as nearly as might be, one-half of their

(*a*) See articles by Adam Shortt in 10 J.C.B.A., pp. 18 ff. (provincial act of 1866 and dominion act of 1868), pp. 279 ff. (act of 1870); 14 J.C.B.A. pp. 13 ff. (acts of 1872, 1875 and 1880).

cash reserves in dominion notes, the proportion of such reserves held in dominion notes never to be less than one-third thereof. Earlier legislation.

These provisions were subsequently modified so as to require a bank to hold not less than 40% of its cash reserves in dominion notes (Bank Act, sec. 60), and to prohibit a bank's issuing any note for a sum less than $5 or for any sum which is not a multiple of $5 (*ibid.*, sec. 61).

In 1876 the laws respecting dominion notes were extended to the provinces of Prince Edward Island, British Columbia and Manitoba, and the government was authorized to establish branch offices of the receiver general's department at Charlottetown, Victoria, and Winnipeg.

By statutes passed in 1870, 1872, 1875 and 1880 the dominion note circulation was enlarged from time to time, and changes were made in the proportions of dominion securities and specie respectively required to be held against outstanding notes. These acts and that of 1868, were all consolidated by R.S.C., 1886, c. 31. An act of 1895 (59 V., c. 16), repealing an act of 1894, removed the limitation of $20,000,000 which had existed immediately prior to 1894, and provided that the minister of finance, in addition to any amount required to be held by him in gold under the revised statute, should hold an amount in gold equal to the amount of dominion notes issued and outstanding in excess of $20,000,000.

In 1903, R.S.C. 1886, c. 31 and amending acts were repealed and a new act was passed, the provisions of which are reproduced in the present statute.

R.S.C., 1906, Chapter 27.

An Act respecting Dominion Notes.

SHORT TITLE.

1. This Act may be cited as the Dominion Notes Act. Short title.

INTERPRETATION.

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

(*a*) 'specie' means coin current by law in Canada, at the rates and subject to the provisions of the law in that behalf, or bullion of equal value according to its weight and fineness.

Sec. 2.

(*b*) 'Dominion notes' means notes of the Dominion of Canada issued and outstanding under the authority of this Act. 3 E. VII., c. 43, ss. 1 and 2.

As to "coin current by law in Canada," see the Currency Act, 1910, chapter 28, *supra*.

ISSUE AND REDEMPTION.

Issue of Dominion notes.

3. Dominion notes may be issued and outstanding at any time to any amount; and such notes shall be a legal tender in every part of Canada except at the offices at which they are redeemable. 3 E. VII., c. 43, s. 2.

Legal tender is also provided for by secs. 8 to 14 of the Currency Act, chapter 28, *supra*.

As to the offices at which dominion notes are redeemable, see secs. 5 and 9, *infra*.

Denomination and form.

4. Dominion notes shall be of such denominational values as the Governor in Council determines, and shall be in such form, and signed by such persons and in such manner, by lithograph, printing or otherwise, as the Minister of Finance from time to time directs.

Redemption in specie.

2. Such notes shall be redeemable in specie on presentation at branch offices established or at banks with which arrangements are made for the redemption thereof as hereinafter provided. 3 E. VII., c. 43, s. 3.

As to agencies for redemption of notes, see sec. 9.

SECURITY.

Amount held as security for redemption.

5. The Minister of Finance shall always hold as security for the redemption of Dominion notes up to and including thirty million dollars, issued and outstanding at any time an amount equal to not less than twenty-five per centum of the amount of such notes in gold, or in gold and securities of Canada, the principal and interest of which are guaranteed by the Government of the United Kingdom.

Sec. 5. Amount held in gold.

2. The amount so held in gold shall be not less than fifteen per centum of the amount of such notes so issued and outstanding.

Notes in excess of $30,000,000.

3. As security for the redemption of Dominion notes issued in excess of thirty million dollars the Minister shall hold an amount in gold equal to such excess. 3 E. VII., c. 43, s. 4.

By sec. 3, dominion notes may be issued and outstanding at any time to any amount. As to the security required to be held, cf. 7-8 E. 7, c. 23, confirming an issue of notes in excess of the security held.

Loan may be raised if amount of security is insufficient.

6. In case the amount held in accordance with the provisions of this Act as security for the redemption of Dominion notes is not sufficient to pay the Dominion notes presented for redemption, or in case the amount so held is reduced below the amount required by this Act to be held, the Governor in Council may raise, by way of loan, temporary or otherwise, such sums of money as are necessary to pay such notes or to provide the amount required to be held as security for the redemption of Dominion notes issued and outstanding. 3 E. VII., c. 43, s. 5.

PROCEEDS AND EXPENSES.

Proceeds of notes; expenses incurred.

7. The proceeds of Dominion notes so issued shall form part of the Consolidated Revenue Fund of Canada, and all expenses incurred or required to be paid in connection with the engraving, printing or preparation of such notes, or the signing, issue or redemption thereof, shall be paid out of the said fund. 3 E. VII., c. 43, s. 5.

MONTHLY STATEMENT.

Monthly statement by Minister in *Canada Gazette*.

8. The Minister of Finance shall publish monthly in the *Canada Gazette* a statement of the amount of Dominion notes outstanding on the last day of the preceding month, and of the gold and guaranteed debentures then held by him for securing the redemption thereof. 3 E. VII., c. 43, s. 6.

AGENCIES FOR REDEMPTION.

Offices and agencies for redemption.

9. The Governor in Council may establish branch offices of the Department of Finance at Toronto, Montreal, Halifax, St. John, Winnipeg, Victoria and Charlottetown, for the redemption of Dominion notes, or may make arrangements with a chartered bank at any of the said places for the redemption thereof.

Assistant receiver general.

2. Every assistant receiver general appointed at any of the said places under Part II. of the Savings Banks Act shall be an agent for the issue and redemption of such notes. 3 E. VII., c. 43, s. 7.

By sec. 60 of the Bank Act the minister of finance is required to make such arrangements as are necessary for ensuring the delivery of dominion notes to any bank, in exchange for an equivalent amount of specie, at the several offices of the department of finance at which dominion notes are redeemable, in the cities mentioned in that section, respectively: such notes are redeemable at any of such offices.

NOTES OF LATE PROVINCE OF CANADA.

Redemption of notes of old province of Canada.

10. Provincial notes under the Act of the late province of Canada, passed in the session held in the twenty-ninth and thirtieth years of Her late Majesty Queen Victoria's reign, chapter ten, intituled *An Act to provide for the issue of Provincial Notes*, shall be held to be notes of the Dominion of Canada, and shall be redeemable in specie on presentation at Toronto, Montreal, Halifax, or St. John, according as the same are respectively made payable, and shall be legal tender except at the offices at which they so are respectively made payable. 3 E. VII., c. 43, s. 8.

See historical note at the beginning of this chapter.

BOOK II.

NEGOTIABLE INSTRUMENTS AND THE BILLS OF EXCHANGE.

CHAPTER XXX.

Negotiable Instruments.

In Crouch v. Crédit Foncier, 1873, L.R. 8 Q.B. at p. 381, Blackburn, J., quoting the editors of Smith's Leading Cases, states the tests of negotiability thus:

Tests of negotiability.

"It may be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it pro tempore, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt."(*a*)

Blackburn, J., in the same case at p. 382, continues: "Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine in-

(*a*) Chalmers (Bills of Exchange, 7th ed., p. 346) remarks that Blackburn, J.'s statement "appears to require modification in two respects, for first, an instrument, not otherwise negotiable, may be made negotiable by statute; and secondly, foreign government bonds to bearer may undoubtedly be negotiable, yet the holder cannot sue the foreign government upon them in the courts of this country; but the explanation may be that the exemption of a foreign government from suit in this country is a personal exemption, and does not arise out of any defect of title on the part of the holder."

dorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bonâ fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."

Tests of negotiability.

Yet, when the two characteristics just mentioned as belonging to bills and notes are considered, it is evident that they do not afford satisfactory tests to distinguish so-called negotiable instruments from other choses in action.(*b*)

(1) All choses in action might formerly be sued on in equity, and by the effect of statute may now be sued on in law, in the name of the transferee. The characteristic which has been spoken of as one peculiar to bills and notes is really but a matter of practice upon which different courts took different views. This characteristic, as a peculiar one, either never existed or, if it did, has been abolished.

(2) As to the second characteristic, a bill or note does not cease to be a "negotiable instrument" when it becomes overdue, yet in that case "it can be negotiated only subject to any defect of title affecting it at its maturity" (Bills of Exchange Act, sec. 70). Even before maturity, honest acquisition of a bill or note does not always confer title (*e.g.*, if a simple signature not delivered in order that it may be converted into a bill has been fraudulently filled up as a complete bill.) See the notes to sec. 74 of the same act as to the rights of a holder).

Nor on the other hand is the characteristic in question one which attaches only to bills and notes or other so-called negotiable instruments. "Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by, such equities." In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation, 1867, L.R. 2 Ch. at p. 397.(*c*)

(*b*) As to the frequent confusion of thought in the use of the term negotiable, see article by J. S. Ewart in 16 L.Q.R. 135 (April, 1900), especially pp. 140-142, and his book on Estoppel by Misrepresentation, at pp. 376 ff. The statements contained on this and the next following three pages are based upon his discussion.

(*c*) As to this case, cf. notes to sec. 36 of the Bills of Exchange Act, under "Promise to Accept."

Tests of negotiability.

Thus when bills and notes are distinguished from other choses in action by being described as negotiable, they are so distinguished by a peculiarity of which they not only have no exclusive possession but which frequently they have not themselves.

Original and acquired meanings.

Some of the difficulties of defining the word negotiable disappear when it is noted that it has an original and an acquired meaning. Originally it meant (1) transferable; but afterwards it was used to indicate the effects of transfer, namely, that the transferee (2) could sue in his own name, and (3) took free from the equities.

The primary meaning truly indicated at one time a real distinction among choses in action. Now any chose in action arising out of contract may be transferred, and it is not essential to the validity of a bill that it shall be transferable from one person to another, except under the ordinary rules governing the assignment of choses in action, as for instance a "non-negotiable" bill.

Real distinction.

Nevertheless there does exist a real distinction among choses in action, namely between those intended to be assignable free from equities, and those not so intended. All contracts are now transferable by the obligee, but some are made with the intention that they shall be payable to persons other than the immediate promisee, that is, are intended to be ambulatory.(*d*)

Ambulatory intent.

Ambulatory intent is perhaps more truly the distinguishing characteristic of "negotiable" instruments than the characteristics usually assigned. This characteristic is not confined to bills and notes, although the non-recognition of the true distinguishing characteristic made the admission of other instruments to the class called negotiable unnecessarily difficult.(*e*) Other instruments are equally negotiable instruments "when it appears from the nature or terms of the contract that it must have been intended to be assignable free from, and un-

(*d*) But the intention must be gathered from the language of the instrument. Cf. notes to sec. 95 of the Bank Act, *supra*, under "Deposit Receipts."

(*e*) Street (Foundations of Legal Liability, vol. 2, p. 425, note), remarks of the arguments used to support the view that the characteristics of ambulatory contracts are founded on estoppel: "Historically they appear to be defective, but as an interpretation of the past in the light of maturing knowledge the suggestions of Mr. Ewart are well worthy of attention."

affected by, such equities." In re Agra and Masterman's Bank, *supra*.

Negotiability as it affects rights of holder.

"Negotiability" may affect the rights of holders of instruments (1) in regard to the equities of the person liable as against the transferee in good faith, and (2) in regard to the equities of the real owner as against some holder who claims through a finder, a thief, or a fraudulent trustee.(*f*)

1. *As to the equities of persons liable.* The reason why the person liable may not set up his equities may be either (*a*) that the contract is an original promise by the person liable to pay the transferee, that is, not a promise to the original payee but an original and direct promise moving from the person liable to the transferee, by virtue of the ambulatory nature of the contract (cf. Bullard v. Bell, 1817, Mason 243), or more probably, (*b*) that the person liable is estopped, by making a contract that he will pay to the order of the original payee, from setting up his equities as against third parties who have acted upon the faith of his promise. Cf. In re General Estates Co., 1868, L.R. 3 Ch. 758; McKenzie v. Montreal, etc., Ry. Co., 1878, 29 U.C.C.P. at pp. 338-339.

2. *As to the title of a transferee from a finder, a thief, or a fraudulent trustee.* Such transferee of a bill or note is said to obtain a good title by reason of the "negotiability" of the instrument. "The law merchant validates in the interest of commerce a transaction which the common law would declare void for want of title or authority." Swan v. North British, 1862, 7 H. & N. 634. Cf. Bills of Exchange Act, sec. 40.

Negotiability by estoppel.

The negotiable character of bonds and scrip payable to bearer was not readily admitted by the courts but it was nevertheless held that the persons dealing with such documents were estopped from denying it. This doctrine of "negotiability by estoppel," (so named by Bowen, L.J., in Easton v. London, etc., Bank, 1886, 34 Ch. D. at p. 113), was formulated by Lord Cairns in Goodwin v. Robarts, 1876, 1 App. Cas. at p. 490, 5 R. C. at p. 212, where he says: "Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign government; still the appellant is in the position of a person who has made a represent-

(*f*) Ewart on Estoppel, pp. 390 ff.

ation on the face of his scrip, that it would pass with a good title to anyone on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made."

Ostensible ownership or agency.

Ewart(*g*) suggests that the true foundation for the decision of cases where a man apparently may give a better title than he has is to be found, not in negotiability real or by estoppel, but in estoppel by ostensible ownership or ostensible agency. The maxim *nemo dat quod non habet* is, he says, universally true; but its truth in no way prevents an owner of property from being estopped by his conduct from setting up his good title as against a transferee who has none. In the case of an ambulatory instrument, mere possession constitutes apparent ownership. Therefore if the true owner of such an instrument gives possession of it to another he gives such other person the apparent ownership, and is estopped as against a transferee in good faith from such person from denying that the apparent is the real ownership. Sometimes the validity of a transferee's title must be attributed to ostensible agency rather than to ostensible ownership. Bills are entrusted to a bill-broker. As against a transferee in good aith, the owner is estopped from setting up that the agent by private instructions had no authority to sell. An owner of ambulatory instruments is aware that possession is apparent ownership. He may protect himself against loss by restricting their transferability by appropriate endorsement. If he leaves them payable to bearer, and they are lost or stolen, he ought to bear the loss rather than an innocent transferee from the finder or thief. Cf. Young v. MacNider, 1895, 25 S.C.R. at p. 279.

Definition of negotiable instrument.

The following definition expresses clearly the distinction between the original and the acquired meaning of the word negotiable.

Negotiable instrument defined.

A negotiable instrument is one which, when transferred by delivery or by endorsement and delivery, as the case may be, passes to the transferee a good title to payment according to its tenor, and irrespective of the title of the transferor, provided, in the case of a bill of exchange, note, or cheque, that the trans-

(*g*) *Op. cit.*, p. 393.

feree is a holder in due course [Bills of Exchange Act, sec. 56], and in the case of other instruments, that he is a holder for value in good faith without notice of any defect attaching to the instrument or the title of the transferor. Negotiability in the above sense must be carefully distinguished from the mere quality of being subject to negotiation. Negotiation is the appropriate transfer of a bill, note, or cheque, by delivery or by endorsement and delivery [Bills of Exchange Act, sec. 60], and may take place where the instrument, by reason of being overdue or otherwise, has lost the quality of negotiability in the first-mentioned sense. Hart, p. 816. Cf. chapter 40, *infra*.

What documents are negotiable.

What documents are negotiable.

The negotiability of bills, notes and cheques, in both senses of the term negotiability, will be discussed in connection with the Bills of Exchange Act, which is the subject of commentary in the following chapters. In this chapter an attempt will be made to state the principal classes of documents other than bills, notes and cheques which are now entitled to be called negotiable, *i.e.*, negotiable in the sense firstly mentioned in Hart's definition.

The meaning of "a holder for value in good faith without notice of any defect attaching to the instrument or to the title of the transferor" need not be further discussed here, as the elements of the expression are discussed in connection with the appropriate sections of the Bills of Exchange Act: see notes to sec. 56.

The title of a bank which takes negotiable instruments from a broker or other agent is discussed in chapter 15, *supra*.

A person taking the bonds or other obligations of a corporation as security must assure himself either that the issue of such obligations is within the ordinary scope of the power of the corporation or that the issue has been duly authorized in pursuance of special powers in that behalf contained in the charter of the corporation or in any statutes applicable to it, but the corporation may be estopped from denying the validity of the obligations.

In Webb v. Herne Bay Commissioners, 1870, L.R. 5 Q.B. 642, the commissioners had power under a local act to levy certain rates and to mortgage such rates to secure money bor-

What documents are negotiable.

rowed from time to time. In payment of goods supplied to them by one of their own members, they issued to the vendor, in alleged contravention of the act, mortgages in the form prescribed by the act, which purported upon the face of them to be mortgages given for money advanced to them. The mortgages were duly transferred to the plaintiff in the form prescribed by the act. It was held that inasmuch as there was power to issue mortgages for the purposes stated on their face, the commissioners were estopped from saying that the mortgages were not good and valid in the hands of an innocent holder.

The principle of Webb v. Herne Bay Commissioners is not applicable, however, to instruments which on their face do not purport to be duly executed and issued in pursuance of the power given to the corporation and for an authorized purpose. If a municipal debenture purports to be issued in pursuance of a by-law, and the by-law on its face purports to be passed for a purpose for which the corporation has no power to pass such a by-law, the debenture is void even in the hands of an innocent holder for value. Confederation Life v. Howard, 1894, 25 O.R. 197.

Usage of the place of transfer.

The quality of negotiability is an incident annexed by the usages of the money market where the instruments are transferred, and is not determined by the law of the place of issue. Picker v. London and County Banking Co., 1887, 18 Q.B.D. 515; approved in Williams v. Colonial Bank, 1888, 38 Ch. D. 404.

Law may change to conform to usage.

The law, as thus governed by usage, is of a progressive character; cf. chapter 1, *supra*. Instruments which at one time are not negotiable, may, by the usage of the money market, afterwards become so. Goodwin v. Robarts, 1875, L.R. 10 Ex. 337, 1 App. Cas. 476: see judgment of the Exchequer Chamber, where the history of the doctrine of negotiability to that date is traced. "As we find points at which common law doctrine has modified the pure law merchant as applicable to bills and notes, so we find points at which the law merchant has modified the common-law principles applicable to contracts, analogous to bills and notes, but not within their accepted description"; see Street, *op. cit.*, vol. 2, p. 419, chapter entitled "Transferable Securities," in which the the gradual recognition of the negotiable character of transferable

bonds, etc., is traced in some of the leading English decisions of the last century.

Bonds payable to bearer or order.

Bonds payable to bearer.

"In my opinion," says Bigham, J., in Edelstein v. Schuler, [1902] 2 K.B. 144, at p. 155, "the time has passed when the negotiability of bearer bonds, whether government bonds or trading bonds, foreign or English, can be called in question in our courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law; the very expression bearer bond connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities."

The bonds in question in Edelstein v. Schuler were debenture bonds, some issued by an English company in England, others by foreign corporations abroad, in the ordinary form of such securities. Both classes of bonds were held to be negotiable so as to give a holder in good faith and for value a perfect title; following Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q.B. 658.

The case of Crouch v. Crédit Foncier, 1873, L.R. 8 Q.B. 374, so far as it is inconsistent with the doctrine just laid down, can no longer be considered law in view of the doubt expressed in Goodwin v. Robarts, and the disapproval expressed in Bechuanaland v. London. Cf. the explanation of Crouch v. Crédit Foncier in London and County Banking Co. v. London and River Plate Bank, 1887, 20 Q.B.D. 232 at p. 240, where, however, a different kind of document was in question, namely share certificates.

Bonds payable to order.

In the case of In re General Estate Co., 1868, L.R. 3 Ch. 758, the doctrine of negotiability was held to extend to bonds payable to the order of a named person and by him endorsed, distinguishing In re Natal Company's Case, 1868, L.R. 3 Ch. 355, on the ground of the peculiar wording, in the latter case, of the bond which was payable to a named person "his executors, administrators, or transferees or to the holder for the time being of this debenture bond." See also Bank of Toronto v. Cobourg Ry. Co., 1884, 7 O.R. 1, where the nature of debentures is discussed, and the particular debentures in question (payable to order and expressed to be made in pursuance of a

statute which made them a charge on the property of the company, with a right of foreclosure and sale) are characterized as "strictly, on the face of them, negotiable instruments."

In Venables v. Baring, [1892] 3 Ch. 527, the bonds of an American railroad company were in question. On the face of each bond it was stated that it and the other bonds of the series were secured by a mortgage of even date made by the company to trustees upon the company's property. It was held that the bonds were negotiable, without deciding whether or not any of the limitations or provisions expressed in the mortgage passed with the bond.

Foreign government bonds.

The negotiability of foreign government bonds payable to bearer has been established since the cas of Gorgier v. Mievell, 1824, 3 B. & C. 45, 5 R.C. 198. Cf. Goodwin v. Robarts, 1875 L.R. 10 Ex. 337, 1 App. Cas. 476, 5 R.C. 199.

In Goodwin v. Robarts the principle of negotiability was held to extend to the scrip issued by a foreign government, on negotiating a loan. The scrip contained a promise to give to the bearer, after all instalments of the loan were made, a bond for the amount paid.

The question of the negotiability of such bonds and scrip is independent of the fact that the holder cannot sue the foreign government or its agents within the jurisdiction. Goodwin v. Robarts; Twycross v. Dreyfus, 1877, 5 Ch. D. 206.

It has been said that the mere fact that bonds are overdue will not prevent a transferee in good faith and for value from acquiring a good title by estoppel. Young v. MacNider, 1895, 25 S.C.R. 272, 278.

Interest coupons are independent negotiable instruments. McKenzie v. Montreal, etc., Ry. Co., 1878, 29 U.C.C.P. 333; DesRosiers v. Montreal, etc., 1883, 6 L.N. 388.

Other negotiable instruments.

Circular notes.

Circular notes issued by a bank are negotiable instruments. The law and practice respecting them is discussed in Conflans Stone Quarry Co. v. Parker, 1867, L.R. 3 C.P. 1, 11-12. Cf. Hart, p. 583. As to bank notes, see chapter 14, *supra*.

Exchequer bills.

Exchequer bills are negotiable instruments. Brandao v. Barnett, 1846, 12 Cl. & F. 787, at p. 805. Cf. Grant, 6 ed. 143.

Dividend warrants.

As to dividend warrants, see notes to Bills of Exchange Act, sec. 7, *infra*.

Deposit receipts.

Deposit receipts may or may not, according to their form be negotiable. See notes to Bank Act, sec. 95, *supra*.

Instruments not negotiable.

Post office orders.

Post office orders have been held in England not to be negotiable although the Post Office regulations provide in effect that a banker's stamp will be accepted in place of the payee's receipt. Fine Art Society v. Union Bank, 1886, 17 Q.B.D. 705; cf. McEntire v. Potter, 1889, 22 Q.B.D. at pp. 442-3.

Bills of lading.

Bills of lading are not negotiable instruments: see notes to sec. 2 of the Bank Act, *supra*. They are, however, by the custom of merchants, transferable by endorsement.

Letters of credit.

A letter of credit signed by the provincial secretary with the assent of his colleagues, but not being authorized by order in council, constitutes no contract with the government and is not a negotiable instrument within the Bills of Exchange Act or the Bank Act so as to enable a bank to lend money upon it. Banque Jacques-Cartier v. The Queen, 1895, 25 S.C.R. 84.

A letter of credit is an instrument, in common use among bankers for the transmission of money. It is an open letter of credit, whereby one person requests some other person to advance money, to a third person named therein, for a certain amount, and promises to repay the same to the person making the advance or to accept bills for the amount advanced.

A letter of credit is not a negotiable instrument. If it is stolen, or lost, and the banker to whom it is addressed honours drafts or pays money upon a forged signature, he is not thereby discharged. In such case the banker granting the letter of credit must account to the owner of the letter for any money received by him to be applied under it. As the person presenting a letter of credit is not necessarily the person entitled to draw under it, bankers to whom a letter of credit is addressed ought to satisfy themselves that the signature to the draft is genuine, because otherwise the payment will be at their risk. Grant, pp. 147-8, citing Orr v. Union Bank of Scotland, 1854, 1 Macq. H. L. Cas. 513; British Linen Co. v. Caledonian Ins. Co., 1861, 4 Macq. H.L. Cas. 107; cf. Hart, pp. 570 ff.

A person who, in reliance upon, and in accordance with the terms of, a letter of credit, has given credit to the holder, is entitled to resort to the banker who has signed the letter, and is not affected by the state of accounts between him and his

customer. In re Agra and Masterman's Bank, Ex parte Asiatic Banking Co., 1867, L.R. 2 Ch. 391; see the notes to sec. 36 of the Bills of Exchange Act under "Promise to Accept." Letters of credit.

In Dominion Express Co. v. Krigbaum, 1909, 18 O.L.R. 533, an "express money order" was held not to be a negotiable instrument. According to the form of the document there in question, the company agreed "to transmit and pay to the order" of a person to be named in the document a sum to be named. At the foot of the document were the words "name of remitter" (with a space for the name of the purchaser), and at the upper left hand corner were the words "when countersigned by agent at point of issue," intended to qualify the words of agreement. The document was stolen from the agent, filled in and presented by the thief, and paid by the company. It was held that the company was not entitled to recover the amount from the agent, because the company itself would not have been liable upon the document to a payee or an endorsee, there being no privity of contract between him and the company, even assuming that the document had been regularly issued. Express money orders.

Share certificates and transfers are not negotiable instruments. In Rumball v. Metropolitan Bank, 1877, 1 Q.B.D. 194, scrip certificates to bearer for shares in an English joint stock company were held to be negotiable, but in London and County Banking Co. v. London and River Plate Bank, 1887, 20 Q.B.D. 232, S.C. 21 Q.B.D. 535, share certificates of the Pennsylvania Railroad with blank transfer forms endorsed on the back were held not to be negotiable instruments notwithstanding evidence that these shares were treated as negotiable by delivery on the English market. See also Smith v. Walkerville, 1896, 23 O.A.R. 95, and an article by Z. A. Lash in 7 J.C.B.A. 117. Share certificates.

A person taking share certificates for value without notice of any infirmity in the title would not have a right to hold them as against a prior owner who had never intended to part with the property in them. If there has been no intent on the part of the owner to transfer them, a good title can be obtained against him only if he has so acted as to preclude himself from setting up a claim to them. Colonial Bank v. Cady, 1890, 15 App. Cas. 267, 283, and see Société Générale v. Walker, 1885, 11 App. Cas. 20, and cases cited. In Smith v. Rogers, 1899, 30 O.R. 256, (where many of the cases are collected), it was held that the registered owner, by endorsing

Share certificates.

a certificate of shares with a transfer and power of attorney in blank and delivering it to a broker, had so acted as to estop himself from setting up his title as against a bank with which the certificate was improperly deposited by the broker as security, in view of the evidence given that according to the usages of the stock exchanges of Ontario and Quebec such a share certificate so endorsed passes from hand to hand and is recognized as entitling the holder to deal with the shares as owner and pass the property in them by delivery, or to fill in the blank with his own name and have the shares so registered on the books of the company. It was held in that case that the bank was entitled to hold the shares as against the owner. There was no question of the rights of a subsequent transfer by the registered owner, and the case does not decide that the bank was not obliged, as against another transferee, to complete its title by procuring itself to be registered on the books of the company.

A note upon a share certificate that "without the production of this certificate no transfer of the shares mentioned therein can be registered" does not amount to a representation to or contract with the holder of the certificate that the shares will not be transferred without production of the certificate, but is only a warning to the owner of the shares to take care of the certificate because he cannot compel the company to register a transfer without its production. Rainford v. Keith, [1905] 1 Ch. 296; S.C. reversed on the ground that the company had notice in fact of the claim of a third party, [1905] 2 Ch. 147.

The effect of a certificate is to preclude the company issuing it from denying that at the time it was issued the person named therein as the owner was entitled to the shares. The certificate will not give to a transferee from the person so named a good title as against an innocent, though subsequent, transferee, whose transfer is duly registered without production of the certificate. Smith v. Walkerville, 1896, 23 O.A.R. 95. See the notes to sec. 43 of the Bank Act, *supra*, as to transfer of shares.

CHAPTER XXXI.

Introduction to the Bills of Exchange Act.

The Bills of Exchange Act, 1890, being 53 V., c. 33, intituled "An Act relating to Bills of Exchange, Cheques and Promissory Notes," was a re-enactment with little modification of the English Bills of Exchange Act, 1882. The draftsman of the English act was M. D. Chalmers(*a*) author of "A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities," the first edition of which appeared in 1878.

In the introduction to the third edition of that work (published in 1883) the author said:—

Illustrations must be tested by the language of the act.

"Soon after the publication of the Second Edition of this Digest the law relating to bills, notes, and cheques was codified by the Bills of Exchange Act, 1882. For the most part the propositions of the Act were taken word for word from the propositions of the Digest. In the Introduction to the Second Edition it was pointed out that the general propositions of the Digest could only be considered as law, in so far as they were correct and logical inductions from the decided cases which were cited as illustrations. Now the position is reversed. The cases decided before the Act are only law in so far as they can be shewn to be correct and logical deductions from the general propositions of the Act. The illustrations, therefore, must always be tested by the language of the Act itself."

The Bills of Exchange Act, 1882, was the first enactment codifying any branch of the common law. The conditions under which the experiment was successfully carried out are described by Chalmers in the following language:—

Codification of the law of exchange in England.

"The success of the Bills of Exchange Bill depended on the wise lines laid down by Lord Herschell. He insisted that the Bill should be introduced in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament. A bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy. Of course codification pure and simple is an impossibility. The draftsman

(*a*) Now Sir Mackenzie Dalziel Chalmers, K.C.B., C.S.I.

Codification of the law of exchange in England.

comes across doubtful points of law which he must decide one way or the other. Again, voluminous though our case law is, there are occasional gaps which a codifying Bill must bridge over if it aims at anything like completeness. Still, in drafting the Bills of Exchange Bill, my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effects. The idea of codifying the law of negotiable instruments was first suggested to me by Sir Fitz-James Stephen's Digest of the Law of Evidence, and Sir F. Pollock's Digest of the Law of Partnership. Bills, notes, and cheques seemed to form a well isolated subject, and I therefore set to work to prepare a Digest of the law relating to them. I found that the law was contained in some 2,500 cases, and 17 statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1603. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield. The general principles of the law were then settled, and subsequent decisions though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid down. On some points there was a curious dearth of authority. As regards such points I had recourse to American decisions, and to inquiry as to the usages among bankers and merchants. As the result, a good many propositions in the Digest, even on points of frequent occurrence, had to be stated with a (probably) or a (perhaps). Some two years after the publication of my Digest, I read a paper on the question of codifying the law of negotiable instruments before the Institute of Bankers. Mr. John Hollams, the well-known commercial lawyer, who was present, pointed out the advantages of a code to the mercantile community; and, mainly I think on his advice, I received instructions from the Institute of Bankers and the Associated Chambers of Commerce to prepare a Bill on the subject. The draft of the Bill was first submitted to a sub-committee of the Council of the Institute of Bankers, who carefully tested such portions of it as dealt with matters of usage uncovered by authority. The bill was then introduced by Sir John Lubbock, the President of the Institute. After it had been read a second time in the Commons, it was referred to a strong Select Committee of merchants, bankers, and lawyers, with Sir Farrer Herschell as chairman. As the Scotch law of negotiable instruments differed in certain par-

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ticulars from English law, the Bill was originally drafted to apply to England and Ireland only. The first work of the Select Committee was to take the evidence of Sheriff Dove-Wilson of Aberdeen, a well-known authority on Scotch Commercial Law. He pointed out the particulars in which the Bill, as applied to Scotland, would alter the law there. With three exceptions the points of difference were insignificant. The Committee thereupon resolved to apply the Bill to Scotland, and Sheriff Dove-Wilson undertook the drafting of the necessary amendments. Eventually the Scotch rules were in three cases preserved as to Scotland, while on other points the Scotch rule was either adopted for England, or the English rule applied to Scotland. A few amendments in the law were made when the Committee was unanimous in their favour, but very wisely no amendments were pressed on which there was a difference of opinion. Sir Farrer Herschell reported the Bill to the House, and it was read a third time and sent up to the Lords without alteration. In the House of Lords it was again referred to a Select Committee with Lord Bramwell for chairman. A few amendments were then inserted, mainly at Lord Bramwell's suggestion. These were agreed to by the Commons, and the Bill passed without opposition. Merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the laws of bills, notes, and cheques contained in a single Act of 100 sections. As regards particular cases which arise, it is seldom necessary to go beyond the Act itself. It must also be an advantage to foreigners who have English bill transactions to have an authoritative statement of the English law on the subject in an accessible form. If I could do the work over again, I certainly could do it better and should profit by past experience. But as it is, the Act, as yet, has given rise to very little litigation."

Bills of Exchange Act in Canada.

In Canada, early in the parliamentary session of 1889, a bill to enact the English Bills of Exchange Act with the necessary modifications was introduced into the House of Commons by Sir John S. D. Thompson, the minister of justice, and considered to some extent in committee.(*b*) Before its introduc-

(*b*) Debates H. of C., 1889, col. 14, 775, 778, 788, 1629. The bill was introduced shortly after, if not in consequence of, the publication in the *Toronto Daily Mail* of a series of letters from Benjamin Russell (now Mr. Justice Russell of the Supreme Court of Nova Scotia). See preface to Russell on Bills (1909).

Bills of Exchange Act in Canada.

tion the bill had been distributed throughout the Dominion among the banks, chambers of commerce and boards of trade, and among individuals who manifested interest in the subject. This distribution resulted in a number of suggestions being made, some of which were incorporated in the bill in committee. Subsequently, in view of the importance of the subject, and the desire of the House to have an opportunity to consider the bill more carefully, the bill was withdrawn, upon the understanding that it should be introduced again at the next sess on. In the interval it was again widely distributed, and copies were furnished to members of both houses of parliament.

On the 20th of January, 1890, the minister of justice re-introduced the bill. It was discussed in committee and some amendments were made both in the Commons and in the Senate.(c) The bill received the royal assent on the 16th of May, 1890, and came into force on the 1st of September, 1890.

Differences between the English and Canadian acts.

In the following chapters of this book attention will be drawn to the respects in which the English act changed the existing law of England, and no good purpose would be served by enumerating them here. The changes made in the Canadian bill in the course of its passage through Parliament were chiefly in the direction of sanctioning some usage or law already in force in some one or more of the provinces of Canada. In its ultimate form the act presented the following chief points of difference from the English act.

1. Whenever the last day of grace falls on a legal holiday or non-juridical day in the province where any such bill 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 (sec. 42). For the English law, see notes to that section.

2. The legal holidays or non-juridical days in Canada are not in every case the days which are non-business days in England (notes to sec. 43). Some days are legal holidays in Quebec which are not holidays in the other provinces.

3. A sight draft in England is a demand bill and is not entitled to days of grace. In Canada a sight draft is a bill payable at a determinable future time and is entitled to days of grace (secs. 24 and 42).

4. Under the Canadian act (sec. 38), an acceptance

(c) Debates H. of C., 1890, vol. 1, col. 26, 105, 343, 1077, 1403, 1519, 1582, vol. 2, col. 426, 4404, 4411, 4413. Debates Sen. Can., 1890, col. 328-9, 349, 355, 362, 387, 462, 572, 707, 904.

payable only at a particular specified place is not on that account conditional or qualified. In England it is a qualified acceptance. Differences between the English and Canadian acts.

5. The section of the English act which protects a banker who, in good faith and in the ordinary course of business, pays a cheque upon a forged or unauthorized endorsement has not been re-enacted in Canada. See secs. 49 and 50, and notes.

6. In Canada a notice of dishonour must be given not later than the juridical or business day next following the dishonour of the bill (sec. 97). As to the English law, see notes to that section.

7. The propriety of the practice of protesting inland bills upon dishonour is recognized by the Canadian act (sec. 113). In Quebec protest of such bills is necessary to preserve the liability of drawer or endorsers (sec. 114).

8. Sec. 131 of the Canadian act has established a different rule from the English rule in regard to the liability of a stranger to an instrument who signs his name on the back before the payee has endorsed.

9. The Canadian act, as originally passed in 1890, also differed from the English act in omitting the important section 97, sub-sec. 2, of the latter act, which provides that "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques." In the following session, (1891), this omission was rectified by the addition of the provision contained in sec. 10 of the present act. Rules of common law applicable.

Since 1882 only one amendment has been made to the English act (see notes to sec. 175). The Canadian act has been amended in various particulars. When the Canadian bill was altered by taking sight drafts out of the class of demand bills, the incidental effect of this change upon other parts of the act was overlooked, and several of the subsequent amendments were intended merely to render the various parts of the act consistent with each other. Amendments.

The act has had the effect of creating one uniform law relating to bills, notes and cheques for all the provinces, except that (1) it preserved the necessity of protesting inland bills in the province of Quebec, (2) it left untouched the tariffs of fees for notarial services existing in the several provinces, and (3) it retained in the province of Quebec certain holidays not Effect of the act in Canada.

observed in the other provinces. See, however, notes to sec. 10 of the act, as to the extent to which reference must still be had to provincial law in transactions connected with bills, notes and cheques.

Inasmuch as recourse in unprovided cases must be had to the common law of England relating to bills, notes and cheques, and not to the provincial law on these subjects, there does not seem to be any practical advantage in discussing in detail the matters in respect of which the law of the different provinces may have differed from the law of England prior to the act. In the English-speaking provinces the differences were few, and, excepting in so far as they have been incorporated into the act, unimportant. The statutes which were repealed by the act were not numerous and did not purport to deal comprehensively with the general subject of bills of exchange.

Law of exchange in Quebec.

In the province of Quebec, however, the law of exchange had been made the subject of legislation to a larger extent.

As noted in chapter 1, *supra*, it is still a matter of controversy whether the celebrated commercial ordinance of 1673, which codified the law of France relating to bills of exchange, was ever in force in what is now the province of Quebec. Whatever may be the correct view, the courts of Quebec were frequently uncertain and divided as to the sources of law to which they should have recourse. Their guide in some instances was the old French law, as it existed at the time of the Treaty of 1763, and as modified by competent authority in the province. Owing to the doubts which existed in regard to the ordinance of 1673, old text books had to be consulted to ascertain to what extent it had altered the law, and modern commentators consulted in so far as they were deemed to be the exponents of the old law.

In 1849 the legislature of the united province of Canada passed the statute 12 V., c. 22, which, although not expressly confined in its operation to Lower Canada, was afterwards held not to apply to Upper Canada. Ridout v. Manning, 1850, 7 U.C.R. 35. This statute was the most comprehensive enactment relating to bills and notes which was passed in any part of Canada prior to the Civil Code. In effect it introduced into Lower Canada many of the rules of English law and some of the statutes of Upper Canada, and provided that in all matters relating to bills and notes, in regard to which no provision was made in the act, recourse should be had to the laws

Law of exchange in Quebec.

then in force in Lower Canada, and, in cases not provided for by such laws, then to the laws of England as at the time of the passing of the act, *i.e.*, the 30th day of May, 1849.

The statute just mentioned did not remedy the uncertainty of the law in Lower Canada, inasmuch as resort was to be had to the laws of England only when the existing laws of Lower Canada were silent.(*d*)

The seventh report of the commissioners appointed to codify the laws of Lower Canada in civil matters contains the following remarks in regard to bills, notes and cheques:—

"The works of Savary, a writer of great experience and industry, are based chiefly upon the Ordinance of 1673, which, according to the prevailing opinion, is not received as law with us. The same observation is true of the *Traité du Change* of Pothier, and thus the guidance of that admirable jurist, which in almost all instances is so complete and unerring, cannot be implicitly followed in this.

"Looking from these authors, to the usages among our merchants, and to the adjudged cases in the courts, more or less sanctioned by special statutory provisions, it would seem that our law in relation to bills of exchange has gradually been formed, less from the ancient French law, which is its legitimate source, than from the commercial usages and jurisprudence of England, aided by the legislation and learning of modern France. It can scarcely, however, for that reason, be regarded as new law; for the observation of Heineccius, as cited by Story, shews the breadth of the basis of all municipal laws on the subject of bills of exchange. The laws of all nations on this subject, he justly says, entirely agree in most things; there are certain principles common to all nations which constitute the proper foundations upon which the whole law of exchange rests as a part of the municipal jurisprudence of each country. These principles, having their origin in the customs and practice of exchange, are considered so proper in themselves that all the just conclusions deducible from them are deemed of universal obligation."

Articles 2279 to 2354 of the Civil Code of Lower Canada, 1866, related to the subject of bills, notes and cheques. Article 2340, which was also applicable to notes and cheques, provided

(*d*) See the whole subject learnedly discussed in Girouard's *Essai sur les Lettres de change et les Billets promissoires*, Montreal, 1860.

Law of exchange in Quebec.

that "in all matters relating to bills of exchange not provided for in this code recourse must be had to the laws of England in force on the thirtieth day of May, one thousand eight hundred and forty-nine." These articles were all repealed by the Bills of Exchange Act, 1890, "except in so far as such articles, or any of them, relate to evidence in regard to bills of exchange, cheques and promissory notes."

Except in India, whence an act drawn on somewhat different lines is in force, the English Bills of Exchange Act has been adopted with little change in all the principal British dominions beyond the seas.

Codification of the law of exchange in the United States.

But when that has been said the field of direct influence of the English codification has not been covered. The fact that the law of negotiable instruments falls within the legislative jurisdiction of the separate states precluded the Congress of the United States from adopting any law on the subject of general application and to the Conference of Commissioners on Uniform State Laws is due the adoption in many parts of the United States of a law of exchange substantially the same as that which prevails in the British dominions.(*e*)

The state commissioners who compose this conference at their annual meeting in August 1895, by resolution requested its committee on commercial law "to procure as soon as possible a draft of a bill relating to commercial paper, based on the English statute on that subject, and on such other sources of information as may be deemed proper to consult."(*f*) The committee delegated the carrying out of these instructions to a sub-committee of three members. They, in September 1895, employed John J. Crawford of the New York bar, who had made a special study of the law relating to commercial paper, to prepare a draft of a bill in accordance with the resolution. Upon the completion of the draft it was carefully

(*e*) In an article in 29 C.L.T., pp. 130-145 (Feb., 1909), the present writer essayed to give to Canadian readers a brief account of the work which has been done by this body of American lawyers. A uniform negotiable instruments law is the best known and most important achievement of the conference, but it is only one of many uniform statutes prepared by it.

(*f*) The chief sources of information for this sketch are an article in 2 Mich. L.R. 260-297 (Jan., 1904), entitled "The Negotiable Instruments Law: Its History and Its Practical Operation," by the Hon. Amasa M. Eaton, who for some years was president of the Conference of Commissioners on Uniform State Laws, and an article by Charles L. McKeehan in 41 Am. Law Reg. N.S. 437, 499, 561, reprinted with some additions and corrections in Brannan, Negotiable Instruments Law, 2nd ed., pp. 220 ff.

Codification of the law of exchange in the United States.

revised by the sub-committee. Annotated copies were sent to all the commissioners and comments were invited. Copies were also widely distributed throughout the country, in order to make the proposed act as well known as possible.

At the annual conference of commissioners held in August 1896 the committee on commercial law presented a draft and reported further that in addition to the examination and criticism of the commissioners the committee had sought the opinions of experts and professors in this branch of the law and had been aided by their suggestions in the final revision of the act as now presented for the consideration of the conference. Mr. Crawford was present during the three days of the session at which the conference examined the act, section by section. A few amendments were made, chiefly changes in the existing law which the draftsman had not felt at liberty to make on his own authority.(*g*) As thus amended the draft was approved by the conference and recommended for adoption by the state legislatures.

In the following year the committee on uniform laws of the American Bankers' Association, having been directed by the executive council to prepare a uniform law of commercial paper reported in favour of adopting the act as drafted by the conference. Accordingly the bankers' association republished the act with an account of its preparation and distributed it throughout the country, and this association has since then co-operated with the commissioners on uniform state laws in endeavouring to secure the enactment of the act.

The Negotiable Instruments Law.

The state of New York led the way by enacting the Negotiable Instruments Law in 1897, and the act is now in force in 40 states, as well as in Hawaii, the Philippine Islands and the district of Columbia.(*h*) The numbering of the sections referred to hereinafter is that of the commissioners' draft, although it differs from that of the statute as enacted in New York and some other states.

(*g*) Crawford, Preface to the first edition of his Annotated Negotiable Instruments Law.

(*h*) The following states have adopted the Negotiable Instruments Law: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

The Negotiable Instruments Law.

The act is undoubtedly "a very important and ably framed code."(*i*) Crawford benefited by the labours of Chalmers and it has been said that the American act is simpler, less technical, and more easily intelligible than its English precursor. See Street, Foundations of Legal Liability, vol. 2, p. 497.

The act has been subjected to some searching extrajudicial discussion, which has substantially enriched the literature in regard to the law of exchange. Criticism was started by the late James Barr Ames, dean of the Harvard Law School, who in a paper published in 1900 pointed out what he conceived to be certain defects in the act. To this paper the Hon. Lyman D. Brewster, president of the conference, wrote an answer. Dean Ames replied and Judge Brewster rejoined, and others wrote papers on the subject.(*j*)

(*i*) Arthur Cohen, in Brannan, p. 215.

(*j*) The articles by Ames and Brewster, originally published in 14 Harv. L.R. 241, 10 Yale L.J. 84, 14 Harv. L.R. 442, 15 Harv. L.R. 26, 16 Harv. L.R. 255, are reprinted, along with a summary of the controversy contained in the paper by C. L. McKeehan already referred to, in Brannan, 2nd ed., 162 ff.

CHAPTER XXXII.

The Bills of Exchange Act: Short Title and Interpretation.

THE REVISED STATUTES OF CANADA, 1906,
CHAPTER 119.

AN ACT RELATING TO BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES.

SHORT TITLE.

Short title.

1. This Act may be cited as the Bills of Exchange Act. 53 V., c. 33, s. 1. [Eng. s. 1. N.I.L. s. 190.]

The original of this act was passed in 1890 (see next preceding chapter) by virtue of the exclusive jurisdiction conferred upon the dominion parliament by the 91st section of the British North America Act, 1867, to make laws with regard to bills of exchange and promissory notes. Its short title was "The Bills of Exchange Act, 1890."

The act of 1890 both in arrangement and wording, was a copy of the English Bills of Exchange Act, 1882, except in a few particulars. In the revision of the dominion statutes in 1906, however, many alterations were made in the arrangement and constitution of the sections. Many of the sections of the new act consist of sub-sections and parts of different sections of the old act, and even more frequently sections of the old act have been divided into parts and sub-sections and now appear in separate sections of the new act.

Corresponding sections of English act noted.

At the end of each section of the act, a note is made of the corresponding section or parts of sections of the English act of 1882. The number of the section of the English act is preceded by the abbreviation "Eng." in order to distinguish this reference from the official reference at the end of each section to the Canadian act of 1890 and amending acts. It is in no case to be taken for granted that the corresponding English section is in exactly the same words as the Canadian statute.

Owing to the re-arrangement of sections effected by the revision of 1906, there is very often some verbal difference between the English and Canadian statutes. Whenever the difference is significant, a special note will be made of the fact.

Corresponding sections of Negotiable Instruments Law noted.

A reference distinguished by the abbreviation "N.I.L." is also given at the end of each section to the corresponding provision (if any) of the American Negotiable Instruments Law, of which some account has been given in the next preceding chapter. The section-numbering of the act as drafted has been adopted as the basis of reference.

It is to be observed that the language of the Negotiable Instruments Law differs in many respects from that of the Bills of Exchange Act. The former act, however, sets forth a law of exchange which is substantially similar to that prevailing in England and in Canada. The substantial differences will be noted in the course of the book.

The English act is entitled "An Act to codify the Law relating to Bills of Exchange, Cheques, and Promissory Notes." Chalmers, p. 1, states that the bill as originally drafted was intended to reproduce the then existing law as exactly as possible, but certain amendments of the law were introduced in committee.

Rule of construction of codifying act.

In the case of Bank of England v. Vagliano, [1891] A.C. 107, the construction of sub-sec. 5 of sec. 21 was in question. See notes to that sub-section. The Court of Appeal imported into the sub-section a qualification derived from the law as it existed prior to the passing of the act, but the decision of that court was reversed by the House of Lords. Lord Halsbury, L.C., says at p. 120: "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed." Cf. Earl of Selborne, at pp. 129-130.

In the same case, Lord Herschell, at p. 144, after pointing out that the decision of the Court of Appeal was founded upon an examination of the state of the law at the time the act was passed, continues as follows: "My Lords, with sincere respect

for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived fron the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

Rule of construction of codifying act.

"If a statute, intended to embody in a code a particular branch of law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute, critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence, I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to early decisions can only be justified on some special ground.

"One further remark I have to make before I proceed to consider the language of the statute." The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects. And I do not

Rule of construction of codifying act.

think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment."

The rule of construction expressed by Lord Herschell, *supra*, was approved by Lord Watson in Robinson v. Canadian Pacific Ry. Co., [1892] A.C. at p. 487. See also Abbott v. Fraser, 1874, L.R. 6 P.C. at pp. 116-117, where the Judicial Committee says of the Civil Code of Lower Canada, "When this code contains rules on any given subject complete in themselves, they alone are binding, and cannot be controlled by the pre-existing laws on the subject, which can then be properly referred to only to elucidate, in cases of doubtful construction, the language of the code," and compare Bank of Toronto v. St. Lawrence Fire Ins. Co., [1893] A.C. at p. 66, and Hinton v. Bank of Montreal, 1903, 9 B.C.R. 545, 548-550.

In Russell on Bills, p. 2, it is pointed out, as being significant, that the title of the Canadian act contains no words indicating that the act is intended to be a codification of the existing law; but it is submitted, that there is no good reason for applying a different rule of construction to our act from that which is applied to the English act. The fact that the English act is a codifying act did not prevent the learned lords in the Vagliano case from deciding that it had made an alteration in the law. It is doubtless true, that the laws of the different provinces varied considerably before the passing of the act, and therefore the statute cannot here be so generally accepted as declaratory of the old law as it could be in England. That is however irrelevant to the present question. The effect of sec. 10 is to make applicable to negotiable instruments the rules of the common law of England, save in so far as they are inconsistent with the express provisions of the act, and therefore in construing the act the law which must be considered as underlying it, is the common law and not the varying laws of the different provinces. See notes to sec. 10 for a discussion of the question how far recourse is to be had to the law of a particular province in regard to transactions concerning bills.

Definitions.

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

'Acceptance'

(*a*) 'acceptance' means an acceptance completed by delivery or notification;

'Action.'

(*b*) 'action' includes counter-claim and set-off;

(*c*) 'bank' means an incorporated bank or savings bank carrying on bus ness in Canada; 'Bank.'

(*d*) 'bearer' means the person in possession of a bill or note which is payable to bearer; 'Bearer.'

(*e*) 'bill' means bill of exchange, and 'note' means promissory note; 'Bill,' 'note.'

(*f*) 'delivery' means transfer of possession, actual or constructive, from one person to another; 'Delivery.'

(*g*) 'holder' means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof; 'Holder.'

(*h*) 'endorsement' means an endorsement completed by delivery; 'Endorsement.'

(*i*) 'issue' means the first delivery of a bill or note, complete in form, to a person who takes it as a holder; 'Issue.'

(*j*) 'value' means valuable consideration; 'Value.'

(*k*) 'defence' includes counter-claim; 'Defence.'

(*l*) 'non-business days' means days directed by this Act to be observed as legal holidays or non-juridical days. 'Non-business days.'

2. Any day other than as aforesaid is a business day. 53 V., c. 33, ss. 2 and 91. [Eng. ss. 2 and 92. Cf. N.I.L. s. 191.] Business days.

An interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain. Reg. v. Pearce, 1880, 5 Q.B.D. 389. Such a clause is not intended to exclude the rule, alike of good sense and of grammar and law, that general words are to be restrained to the subject matter dealt with. Chorlton v. Lings, 1868, L.R. 4 C.P. 387.

The definitions in sec. 2 are verbal, that is, they define the sense in which the particular terms are used in the act. The substantial or operative definitions are referred to below, and appear in their appropriate places in the act. Chalmers, p. 7.

(*a*) *Acceptance.*

As to the operative definition and requisites of an acceptance, see secs. 35 *et seq.*

As to delivery or notification to complete a contract on a bill, see secs. 39, 40 and 41. Delivery is defined by clause (*f*).

Sec. 2. Definition of terms.

As Russell, p. 6, points out, clause (*a*) merely sets out one of the requisites of a valid acceptance, and one which itself is not essential, for where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable (sec. 39).

(*b*) *Action.*

The word "action" is used in secs. 11, 49, 58, 93, 157 and 183. By clause (*k*) defence includes counterclaim.

Set-off is of a different nature from counterclaim. A set-off consists of a defence to the original claim of the plaintiff. A counterclaim is an assertion of a separate and independent demand which does not answer or destroy the original claim of the plaintiff. The right to set up a counterclaim was first given by the Judicature Acts. The right to rely on a set-off has long existed. Stoke v. Taylor, 1880, 5 Q.B.D. at p. 577. Set-off corresponds approximately to compensation under the Civil Code of Lower Canada, counterclaim is analogous to a cross-demand under the Quebec Code of Civil Procedure. Cf. Maclaren, 4 ed. p. 22. For a discussion of the nature of set-off and counterclaim respectively, see Gates v. Seagram, 1909, 19 O.L.R. 216; Thompson v. Big Cities Realty Co., 1910, 21 O.L.R. 394; Grills v. Farah, 1910, 21 O.L.R. 457.

(*c*) *Bank.*

Cf. the Bank Act, sec. 2(*a*), *supra.*

The corresponding clause of the English act is as follows:—"Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking. Banking in Canada is carried on by the banks chartered under the Bank Act, certain savings banks, and private bankers. Savings banks are governed by R.S.C. 1906, chapter 30 (Savings Banks Act) and the Quebec Savings Banks Act, 1913, and must of course be distinguished from the savings departments of the banks governed by the Bank Act.

A private banker is not a bank under the Bills of Exchange Act: see notes to sec. 165.

The Negotiable Instruments Law defines "bank" as including any person or association of persons carrying on the business of banking, whether incorporated or not.

Sec. 2. Definition of terms.

(*d*) *Bearer.*

As to when a bill or note is payable to bearer, see sec. 21. A bill payable to bearer is negotiated by delivery (sec. 60). The possessor of a bill or note payable to order is not technically the "bearer" of it.

Russell, p. 8, suggests that if the payee of a bill endorses it in blank, he thereby becomes the bearer, as the bill is then transferable by delivery, differing from Paget, who thinks that the payee does not become the bearer until the endorsement is made complete by delivery. Clearly the payee could strike out his endorsement at any time before delivery.

(*e*) *Bill and note.*

The operative definitions of these words are contained in secs. 17 and 176. A cheque is defined by sec. 165.

The Negotiable Instruments Law differs in that it defines "note" to mean "negotiable promissory note." It also defines "instrument" to mean negotiable instrument.

(*f*) *Delivery.*

A person is said to have constructive possession of a thing when it is in the actual possession of his servant or agent on his behalf; therefore delivery may be effected without change of actual possession in three cases, namely: (1) A bill is held by C. on his own account; he subsequently holds it as agent for D; (2) A bill is held by C.'s agent, who subsequently attorns to D. and holds it as his agent; (3) A bill is held by D. as agent for C.; he subsequently holds it on his own account. Chalmers, p. 4.

Every contract on a bill is incomplete and revocable until delivery of the instrument in order to give effect thereto (sec. 39). Some of the difficult questions which arise as to delivery are discussed in the notes to secs. 39 to 41; cf. notes to secs. 31 and 32.

(*g*) *Holder.*

Chalmers, p. 5, states that holder as here defined includes classes of persons who are holders in different senses:—

(1) The lawful holder or holder in due course (sec. 56).

Sec. 2 Definition of terms.

In this sense holder includes a person to whom a bill is by its terms payable and whose title is good against all the world; also a person to whom a bill is by its terms payable, and who, as against third parties, is entitled to enforce payment thereof, though, as between himself and his transferor, he is a mere agent or bailee with a defeasible title, *e.g.*, an endorsee for collection.

(2) An unlawful holder, that is, a person to whom a bill is by its terms payable, whose possession is unlawful (*e.g.*, the finder of a bill endorsed in blank), but who nevertheless can give a valid discharge to a person paying it in good faith, or a good title to a person who takes it before maturity in good faith and for value (sec. 74). An unlawful holder must be distinguished from a mere wrongful possessor, *e.g.*, a person holding under a forged endorsement (sec. 49), or a person who has stolen a bill payable to the order of another. A wrongful possessor has no title and can give none.

Possession is an essential part of the definition. Bearer is defined by clause(*d*).

As to holder for value, see sec. 54. As to holder in due course, and the question whether the original payee can be a holder in due course, see sec. 56.

As to the rights and powers of the holder, see sec. 74.

As to a holder for collection, see discussion in chapter 15, *supra*, of a bank as collecting agent.

(*h*) *Endorsement.*

As to delivery, see clause(*f*).

As to the other requisites of an endorsement to operate as a negotiation, see secs. 62 ff.

The word endorser primarily denotes the holder of a bill who endorses it, but it is also used to denote any person who signs a bill otherwise than as drawer or acceptor and thereby incurs the liabilities of an endorser to a holder in due course (sec. 131). A person who signs a bill although not the holder of it is called under the foreign codes the giver of an "aval." The term endorsee is used to denote not only the person to whom a bill is specially endorsed, but also any person who makes title through an endorsement, *e.g.*, the bearer of a bill

endorsed in blank. Chalmers, p. 6. Cf. also notes to clause (*g*), *supra*, as to a holder for collection.

(*i*) *Issue.*

The term issue is used in secs. 28, 30 and 160. The "re-issue" of a bill is provided for by sec. 73. As to a "complete" bill, cf. secs. 31 and 56.

(*j*) *Value.*

The operative definition of valuable consideration is contained in sec. 53. See also secs. 54 to 58.

(*k*) *Defence.*

There is no corresponding clause in the English act.

The word "defence" is used in secs. 15 and 74. See notes to secs. 70 and 74 as to the distinction between real defences and merely personal defences. There is, it is submitted, no significance in the omission from this clause of "set-off." Set-off is by its nature a defence; see notes to clause (*b*) *supra*.

(*l*) *Non-business days.*

Sec. 43 provides that in all matters relating to bills, certain days and no others shall be observed as legal holidays or non-juridical days.

See secs. 6, 42, and notes to sec. 43.

Person—written—writing—bankrupt.

The English act also contains definitions of the words *bankrupt, person, written and writing.*

By the Interpretation Act (R.S.C. 1906, c. 1, sec. 34), "person" includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends, and "writing," "written," or any term of like import, includes words printed, painted, engraved, lithographed or otherwise traced or copied.

As to "bankrupt," see notes to sec. 78.

By the Negotiable Instruments Law "person" includes a body of persons, whether incorporated or not, and "written" includes printed and "writing" includes print. The act does not define "bankrupt."

CHAPTER XXXIII.

Bills of Exchange Act: General Provisions.

In the present statute, "Part I." comprises secs. 3 to 16, under the heading "General," these being, for the most part, the sections which, in the act of 1890, are contained in "Part V.," entitled "Supplementary." The short title and the interpretation clauses (secs. 1 and 2) compose "Part I." in the act of 1890. In both statutes the second, third and fourth "Parts" contain substantially the same provisions and are entitled respectively:

II. Bills of Exchange;

III. Cheques on a Bank;

IV. Promissory Notes.

PART I.

GENERAL.

Thing done in good faith.

3. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not. 53 V., c. 33, s. 89. [Eng. s. 90.]

This section is obviously founded upon the distinction pointed out by Lord Blackburn, in Jones v. Gordon, 1877, 2 App. Cas. 616 at p. 629, 4 R.C. 415 at p. 427, between honest blundering or carelessness and a dishonest refraining from enquiry. Tatam v. Haslar, 1889, 23 Q.B.D. at p. 348. A holder may have taken in good faith although he acted negligently. Ross v. Chandler, 1909, 19 O.L.R. 584, at p. 598.

The expression "in good faith" is used in secs. 56, 139, 172 and 175. There is no provision in the Negotiable Instruments Law similar to sec. 3. The question of the good faith of the holder is usually involved in the question as to the existence of notice on his part of a defect in title to a bill, which is discussed in the notes to sec. 56. Note sec. 56 of the Negotiable Instruments Law there quoted.

See also Chalmers, pp. 304-6, where it is pointed out that the test of good faith in bill transactions has varied in the past. Cf. Russell, pp. 206-9. Sec. 3.

Negligence on the part of the holder of a bill is not of itself sufficient to deprive him of his remedies for procuring its payment. But negligence, when considered in connection with the surrounding circumstances, may be evidence of *mala fides*. Good faith or bad faith is a question of fact depending on the circumstances of the individual case. It is for the tribunal, whether judge or jury, that has to decide questions of fact, to determine whether a particular holder took a bill in good faith or not. The tribunal must make use of its general knowledge of business and of the moving motives of mankind in order to appreciate the evidence which is before it. In re Gomersall, 1875, 1 Ch.D. 137, 146, S.C. *sub nom.* Jones v. Gordon, *supra*. In this case the subject of good faith is fully discussed. Negligence and good faith.

It is to be noted that while on the one hand the existence of negligence on the part of the holder does not in itself disentitle him from recovering, however gross the negligence, provided it is compatible with good faith, on the other hand the absence of negligence on the part of the person liable according to the tenor of a bill lost by him or stolen from him does not prevent him from being liable to the holder (see sec. 40). Cf. Swan v. North British Australasian Co.,1863, 2 H. & C. 184. But by negligence a person may become liable upon a forged signature if the circumstances are such as to constitute an estoppel (sec. 49).

4. Where by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority. 53 V., c. 33, s. 90. [Eng. s. 91. Cf. N.I.L. s. 19.] Signature.

Sec. 131 provides that no person is liable as drawer, endorser, or acceptor of a bill who has not signed it as such. Secs. 17, 36, 62, 63, 132, 151 and 176 require the signature of a party.

A signature may be defined as the writing of a person's name on a bill in order to authenticate and give effect to some contract thereon. Chalmers, p. 308. A pencil signature

Sec. 4. What is sufficient signature.

(Geary v. Physic, 1826, 5 B. & C. 234), or a lithographed or stamped signature (Ex parte Birmingham Bank, 1868, L.R. 3 Ch. at pp. 653-4) is sufficient: see definition of "writing" in the Interpretation Act, noted under sec. 2, *supra*.

A signature made by another person but attested by mark is sufficient. George v. Surrey, 1830, Moo. & M. 516.

Signature does not necessarily mean subscription or writing the full name at the foot of the document. It is sufficient if the signature is contained in the body of the document, thus: "I, John Stiles, promise to pay," "I, John Stiles, instruct you to pay," or even "Mr. Stiles instructs Messrs. Holdfast to pay." Taylor v. Dobbins, 1719, 1 Stra. 399; Saunderson v. Jackson, 1800, 2 B. & P. 238; Ruff v. Webb, 1794, 1 Esp. 129; Grant, p. 25; see also Russell, pp. 45 ff., (discussing Caton v. Caton, 1867, L.R. 2 H.L. 142, and other cases under the Statute of Frauds, which like the Bills of Exchange Act, requires signature not subscription); but, as Chalmers, p. 308, points out, legal analogies must be applied with caution to bills which are the creation of custom, and where it is of the utmost importance that a clear title should appear on the face of the instrument.

Misrepresentation as to character of document.

"It seems plain, on principle and on authority, that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended." Byles, J., in Foster v. Mackinnon, 1869, L.R. 4 C.P. 704, 1 Ames 540; cf. Banque Jacques Cartier v. Lescard, 1886, 13 Q.L.R. 39 (signature given for purpose of a receipt); Banque Jacques Cartier v. Lalonde, 1901, Q.R. 20 S.C. 43. The English cases as to the plea of *non est factum* are reviewed in Howatson v. Webb, [1907] 1 Ch. 537, [1908] 1 Ch. 1, C.A. It is there pointed out that to make a contract absolutely

void, it is necessary to shew that the character of the contract was misrepresented so that the signer intended to sign something of an entirely different nature; it is not sufficient to shew merely that the effect of the contract was misrepresented in material respects. It is also suggested as being an open question whether the old cases were not based on the fact that an illiterate man was treated as being in the same position as a blind man, and whether at the present time an educated person, who is not blind, is not estopped from availing himself of the plea of *non est factum* against an innocent third party. Sec. 4. Misrepresentation as to character of document.

By or under his authority.

As to the signature of a corporation, see notes to sec. 5.

Subject to the provisions of he act a forged or unauthorized signature is wholly inoperative, unless the party against whom it is sought to retain or enforce payment is precluded from setting up the forgery or want of authority (sec. 49). An unauthorized signature may become binding by ratification (see notes to sec. 49).

The Negotiable Instruments Law, sec. 19, provides: "The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency." This, as Russell, p. 15, points out, is a fair statement of the law as to such signatures by an agent and the proof of the authority of the agent. Cf. Byles, 52. Signature by agent.

The case of one partner signing the firm name on behalf of all the partners is based on express or implied agency. See notes to sec. 132.

As to the liability of an agent who signs without authority, see notes to sec. 51.

A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signatures only if the agent in so signing was acting within the actual limits of his authority (sec. 51, and see cases there cited).

A signature by an agent must be the principal's signature, or the agent's signature for or on his behalf; if the agent merely adds words to his own signature describing himself as agent, he will be liable and not the principal: cf. sec. 52.

Sec. 4. Signature by agent.

Where a bill is payable to order, the delivery of the bill by the payee to another person with the intention of transferring the property, does not itself constitute an authority to the latter person to endorse the bill in the name of the former. Harrop v. Fisher, 1861, 4 R.C. 338, 10 C.B.N.S. 196. There is nothing in the act explicitly to point out this rule, but the rule is consistent with the general principle stated in sec. 4. By sec. 61 where the holder of a bill payable to his order transfers it for value without endorsing it, the transferee acquires the right to have the endorsement of the transferor.

A general power to sign bills, notes, etc., and to superintend, manage, and direct all the affairs of the principal, gives the agent power to endorse notes (Auldjo v. McDougall, 1833, 3 U.C.O.S. 199), but a power of attorney to administer the affairs of the principal does not authorize the endorsement of a note. Banque Molson v. Cooke, 1905, Q.R. 27 S.C. 130.

Bill payable to C.'s order and endorsed in h's name. It is proved that C.'s wife had authority to endorse bills for him and that in this case C. s endorsement was written by his daughter in the presence and by the direction of his wife. Held, sufficient. Lord v. Hall, 1849, 8 C.B. 627; cf. Lindus v. Bradwell, 1848, 5 C.B. at p. 591; Chalmers, pp. 307-8.

Chalmers, p. 307, gives the following additional illustrations:—

Bill addressed to B. and accepted in his name. It is shewn that C., who wrote the acceptance, is in the habit of accepting bills in B.'s name, and that B. is aware of it and duly honours such bills. This is evidence from which an authority to C. to accept bills for B. may be implied. Cf. Morris v. Bethell, 1869, L.R. 5 C.P. at p. 51. This case might, however, be put on the ground that B. is precluded by his conduct from setting up that the acceptance is unauthorized. See notes to sec. 49.

It is shewn that C. has express authority to draw bills in A.'s name. This of itself is not sufficient to shew that he has authority to endorse bills for A. Cf. Prescott v. Flinn, 1832, 9 Bing. at p. 22.

An express authority to an agent to receive payment from B., by drawing on him, does not authorize an agent to draw a bill payable to his own order. Hogarth v. Wherley, 1875, L.R. 10 C.P. 630.

5. In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal. 53 V., c. 33, s. 90. [Eng. s. 91.] What required of corporation

The word "duly" in this section does not occur in the corresponding section of the English act. It was inserted by the Senate in amendment to the House of Commons bill.

The section deals only with the form of signature. It does not touch the question of capacity to contract; see secs. 47 and 48.

By the law merchant an instrument under seal was formerly (*a*) not negotiable, but this section makes an exception in the case of bills and notes sealed with the corporate seal of a company. The Negotiable Instruments Law, sec. 6, provides that the validity and negotiable character of an instrument are not effected by the fact that it bears a seal.

A corporation, otherwise competent to contract, could always be bound by a bill or note duly signed on its behalf. This was one of the recognized exceptions to the rule that corporations can contract only under seal. Crouch v. Crédit Foncier, 1873, L.R. 8 Q.B. at pp. 382, 383. Liability of corporation on a bill.

In order to determine whether a company is liable on a bill, three questions must be asked:—

(1) Has the company the requisite capacity to bind itself by a bill?

(2) Is the signature on the bill sufficient in form to bind the company?

(3) Was the signature placed there by a person who had authority to sign bills for the company? If, however, the person signing is acting within the apparent scope of his authority, it is immaterial that he exceeds or contravenes private instructions. In re Land Credit Co., Ex parte Overend, Gurney & Co., 1869, L.R. 4 Ch. 460. Chalmers, p. 311. Cf. notes to sec. 51.

Sec. 77 of the English Companies (Consolidation) Act, 1908 (replacing sec. 47 of the Companies Act, 1862), provides

(*a*) But as to negotiability of bonds payable to bearer and other instruments, see chapter 30, *supra*.

Sec. 5. Liability of corporation on a bill.

as follows: "A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a company if made, or accepted, or endorsed in the name of, or by or on behalf or on account of the company by any person acting under its authority." The section does not confer on all companies under the Companies Acts capacity to issue bills and notes. It merely prescribes the mode in which such companies as have the requisite capacity may exercise it. Peruvian Railways Co. v. Thames, &c., Co., 1867, L.R. 2 Ch. 617. Chalmers, p. 376.

A person "acting under the authority" of the company means a person who has actual authority to accept or endorse bills, although he need not be specially authorized to accept or endorse the particular bills in question. Premier Industrial Bank v. Carlton Manufacturing Co., [1909] 1 K.B. 106. Cf. Grant, pp. 573-5.

The Dominion Companies Act (R.S.C. 1906, c. 79, sec. 32) provides that every bill of exchange drawn, accepted or endorsed, and every promissory note and cheque made, drawn or endorsed on behalf of the company, by any agent, officer or servant of the company, in general accordance with his powers as such under the by-laws of the company, shall be binding upon the company, and that in no case shall it be necessary to have the seal of the company affixed to any such bill, note or cheque, or to prove that the same was made, drawn, accepted or endorsed, as the case may be, in pursuance of any by-law or special note or order. The same section also provides that no person so acting as such agent, officer or servant of the company shall be thereby subjected individually to any liability whatever to any person. But by sec. 115 of the same act every director, manager or officer of the company, and every person on its behalf, who signs or authorizes to be signed on behalf of the company, any bill of exchange, promissory note, endorsement, cheque, etc., wherein the name of the company,(*b*) with the word "limited" after it, is not mentioned in legible characters, as required by sec. 33 of the act, shall incur a penalty of two hundred dollars, and shall also be personally liable to the holder of any such bill, note, cheque, etc., for the amount thereof, unless the same is duly paid by the company. (Cf.

(*b*) The company's liability is not affected by the use of an abbreviated form of its name, as, *e.g.*, "Co.," instead of "Company." Thompson v. Big Cities Realty Co., 1910, 21 O.L.R. 394, 404.

the English Companies (Consolidation) Act, 1908, s. 63, replacing the Companies Act, 1862, s. 42: see Chalmers, p. 375.) Sec. 5. Liability of corporation on a bill.

The provisions just recited apply to companies incorporated under the act by letters patent and to companies incorporated under R.S.C. 1886, c. 119, or to which that act applied before its repeal by 2 Edw. VII., c. 15, excepting loan companies. Sec. 160 contains provisions similar to those of sec. 32 applicable to companies incorporated by special acts of parliament. Similar provisions are also contained in several of the provincial companies acts. In every case of a bill or note signed by or on behalf of a company, it is necessary to consider the statute which is applicable in the particular instance.

In the case of a bank, see secs. 73 and 74 of the Bank Act, *supra*.

See also notes to sec. 35, as to acceptance by or on behalf of a company.

As to the question whether the form of the signature is such as to render the principal and not the agent liable, see sec. 52. As to the liability of an agent who signs without authority, see notes to sec. 51.

6. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. 53 V., c. 33, s. 91. [Eng. s. 92.] Computation of time.

There is no corresponding section in the Negotiable Instruments Law, but compare secs. 85 and 194 of that act quoted in the notes to sec. 42.

Non-business days, as defined by sec. 2 (*l*), are the days directed by the act to be observed as legal holidays or non-juridical days. See sec. 43.

This section will be applicable to sec. 80 (acceptance), and sec. 94 (presentment to acceptor for honour). Cf. also secs. 97 and 103 (notice of dishonour).

In the English act a distinction is made between bank holidays and other non-business days; see chapter 37, *infra*.

7. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend. 53 V., c. 33, s. 94. [Eng. s. 95.] Crossing dividend warrants.

Sec. 7.

The provisions as to crossed cheques are contained in secs. 168 to 175.

The negotiability of dividend warrants was formerly doubtful: see Partridge v. Bank of England, 1846, 9 Q.B. 396; Goodwin v. Robarts, 1875, L.R. 10 Ex. at p. 354. Now by sec. 22 instruments within the act are negotiable unless they contain words prohibiting transfer, etc. Apart from any peculiarity in the form of the particular instrument, a dividend warrant is practically an ordinary cheque.

The English act (sec. 97) further provides that nothing in the act shall affect the validity of any usage relating to dividend warrants, or the endorsement thereof. This provision, which is not in the Canadian act, was probably intended to protect the usage of paying dividend warrants on the endorsement of one of several payees, but otherwise it seems to contemplate them as falling within the act, where their form satisfies its requirements. Cf. Chalmers, p. 357.

The Bank Act not affected.

8. Nothing in this Act shall affect the provisions of the Bank Act. 53 V., c. 33, s. 95. [Cf. Eng. s. 97 (3) (*b*).]

See the Bank Act, especially secs. 61 to 75 relating to the issue and circulation of notes.

The corresponding section of the English act is differently worded, and applies to a number of statutes besides those directly relating to banks.

Imperial Acts 15 Geo. III., c. 51 and 17 Geo. III., c. 30.

9. The Act of the Parliament of Great Britain passed in the fifteenth year of the reign of His late Majesty George III., intituled *An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England,* and the Act of the said Parliament passed in the seventeenth year of His said Majesty's reign, intituled *An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England,* shall not extend to or be in force in any province of Canada, nor shall the said Acts make void any bills, notes, drafts or orders made or uttered therein. 53 V., c. 33, s. 95.

The act of 1890 repealed certain dominion and provincial statutes then in force, but contained no provision, other than this section, expressly affecting any imperial statute. The statutes mentioned in this section are no longer in force in England. Chalmers, p. 294, says: "A promissory note for less than £5 payable to bearer on demand is, it seems, void in England. The legislation on the subject is confused, but this seems to be the effect of it." Sec. 9.

10. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to bills of exchange, promissory notes and cheques. 54-55 V., c. 17, s. 8. [Eng. s. 97. Cf. N.I.L. s. 196.] Common law of England.

This section was added to the act by the amending act of 1891, which provided that the section should be taken and held to have applied to bills of exchange, promissory notes and cheques from the date when the original act of 1890 came into force. The importance of the amendment in the unification of the law for the whole Dominion has been already pointed out in chapter 31, *supra*. The "law merchant," as explained in chapter 1, *supra*, consisted formerly of a distinct set of legal rules based on the customs of merchants, but it is now incorporated in the common law.

Sec. 10 has been added to meet cases not exhaustively dealt with by other sections. In re Gillespie, Ex parte Robarts, 1886, 18 Q.B.D. at p. 292; and see notes to sec. 134.

Examples of the application of the section may be found in Union Investment Co. v. Wells, 1908, 39 S.C.R. 625, 648, (see notes to sec. 70 under the heading "When overdue"), and in Lloyd's Bank v. Cooke, [1907] 1 K.B. 794, (see notes to sec. 32).

The rules of the common law of England, save in so far as they are inconsistent with the provisions of the act, must be applied, and, in order to determine what is the common law of England, resort must be had primarily to English decisions. Canadian cases decided prior to the passing of the act are authority only in so far as they correctly declare the common law of England. See the judgment of the Privy Council in Macdonald v. Whitefield, 1883, 8 App. Cas. at p. 749, 4 R.C. at p. 545, where the somewhat similar provision of the Civil Common law, to what extent applicable.

Sec. 10. Common law, to what extent applicable.

Code of Lower Canada (now repealed in this respect) was in question. In that case, Lord Watson, delivering the judgment of the Judicial Committee, refers to the fact that the case of Ianson v. Paxton, 1873, 28 U.C.C.P. 439, decided by the Court of Error and Appeal in Upper Canada, and three other decisions of Canadian courts, as well as a New York decision, were relied on by the respondent's counsel, as supporting the doctrine for which they were contending. Without entering into a "minute criticism of these cases," Lord Watson disposes of them in the following language: "If they are to be regarded as authorities to that effect, their Lordships cannot accept these cases as conclusive of the law of England, or as precedents which ought to govern the decision of this appeal. The Civil Code of Lower Canada (article 2340) enacts that in all matters relating to bills of exchange not provided for in the Code, recourse must be had to the laws of England in force on the 30th day of May, 1849, and seeing that the Code makes no provision regarding the question raised between the appellant and the respondent, that question must, in the opinion of their Lordships, be decided according to the law of England, as laid down by the Court of Common Pleas in Reynolds v. Wheeler, 10 C.B.N.S. 561; 30 L.J.C.P. 350."

As to the general rule of construction of the provisions of the act itself as a statute intended to embody in a code a particular branch of the law, see notes to sec. 1, *supra*.

Chalmers points out that any case decided before the act in regard to a matter for which provision is made by the act, is law only in so far as it can be shewn to be a correct and logical deduction from the general propositions of the act. See chapter 31, *supra*.

The question of the applicability of the section is complicated in Canada by the fact that the act is in force in a number of separate provinces in which, as the result of legislation or otherwise, different rules of law may prevail in regard to property and civil rights. Reference must still be had, in many instances, to provincial law in matters connected with bills of exchange, etc. See Marson v. Taylor, 1908, 9 Q.P.R. 363, and an article by Walter S. Johnson, 28 C.L.T. 812 (Oct. 1908).

The act governs the form, issue, negotiation and discharge of bills, the manner in which persons become liable as parties

thereto, etc., but neither the act itself, nor the common law of England made applicable by sec. 10, regulates all matters of civil obligation resulting from the substance of the contracts entered into by parties to bills or determines all the consequences of such contracts. These, as a general rule, are governed by provincial law, and, where the places of drawing, accepting and payment are in different provinces, recourse must be had to the provisions of secs. 160 to 164, or to the general rules applicable to cases of conflict of laws, in order to determine what particular local law is applicable.

Sec. 10. Common law, to what extent applicable.

For instance, the act declares what persons are liable as endorsers, but the appropriate provincial law decides whether an endorser, as being in the nature of a surety, is discharged by dealings between the creditor and the principal debtor. Guy v. Paré, 1892, Q.R. 1 S.C. 443, a case decided under article 2340 of the Civil Code, referred to above.

So, the act and the common law declare whether a note in a particular form is a joint note or a joint and several note (Noble v. Forgrave, 1899, Q.R. 17 S.C. 234), but the provincial law regulates the consequences of joint or joint and several liability. Thus, where the common law rule as to joint contracts has been altered by provincial statute, the statute governs. Cook v. Dodds, 1903, 6 O.L.R. 608.

So, the act contains provisions as to the discharge of a bill by payment, or the avoiding of a bill by reason of fraud, duress, illegality of consideration, etc. What is payment, fraud, duress or illegality must be determined by provincial law. The act provides only as to the extent to which fraud, etc., will affect parties other than the immediate parties to the fraud, etc.

Questions of limitations or prescription, set-off or compensation, and evidence are to be governed by provincial law. As to compensation, see, *e.g.* Inkiel v. Laforest, 1897, Q.R. 7 K.B. 456. The question of capacity is expressly referred by the act to the general law governing capacity. (Sec. 47.) See also sec. 53, as to what constitutes consideration.

The transmission and transfer of bills, otherwise than by negotiation under the act, are regulated by provincial law. In McCorkill v. Barrabé, 1885, M.L.R. 1 S.C. 319, decided prior to the act, it was held that a non-negotiable note specially endorsed by the payee and transferred to a third party might

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be sued on by the latter in his own name, after signification of the transfer had been duly served upon the maker in accordance with Quebec law.

The causes which discharge a bill must be determined by the law merchant, but the causes which discharge the liabilities of parties *inter se* may have to be decided by provincial law. Cf. secs. 139 ff.

Protest *primâ facie* evidence.

11. A protest of any bill or note within Canada, and any copy thereof as copied by the notary or justice of the peace, shall, in any action be *primâ facie* evidence of presentation and dishonour, and also of service of notice of such presentation and dishonour as stated in such protest or copy. 53 V., c. 33, s. 93.

There is no corresponding section in the English act.

Production of a note and proof of the signature of the defendant as endorser and production of the protest setting out the facts of presentment and notice of dishonour make out a *primâ facie* case within the jurisdiction of the division court. Slater v. Laberee, 1905, 9 O.L.R. 545.

Evidence of protest in Canada.

Independently of this section it would be necessary to prove, by evidence given *viva voce* in court, the facts of presentment of an inland bill or note, and of giving of notice of dishonour. Codd v. Lewis, 1851, 8 U.C.R. 242.

The *primâ facie* evidence afforded by the production of the protest or copy may be rebutted. But, inasmuch as by sec. 104, if a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice notwithstanding any miscarriage by the post office, it would seem that the mere denial of the receipt of the notice alleged to have been given by post is not a sufficient answer. Cf. Merchants Bank v. Macdougall, 1879, 30 U.C.C.P. 236; Southam v. Ranton, 1883, 9 O.A.R. 530; but see Ontario Bank v. Burke, 1885, 10 O.P.R. 561.

The next section makes provision in regard to proof of a foreign protest and notice of dishonour.

Copy of protest *primâ facie* evidence.

12. If a bill or note, presented for acceptance, or payable out of Canada, is protested for non-acceptance or non-payment, a notarial copy of the protest and of the notice of dishonour,

and a notarial certificate of the service of such notice, shall be received in all courts, as *primâ facie* evidence of such protest, notice and service. 53 V., c. 33, s. 71. Sec. 12.

This section was added by the Senate in amendment of the House of Commons bill, 1890. There is no corresponding section in the English act.

Prior to this act it was held in Upper Canada that the production of a protest of a notary in a foreign country was no evidence of the facts therein stated. Griffin v. Judson, 1862, 12 U.C.C.P. 430; cf., however, Ross v. McKindsay, 1845, 1 U.C.R. 507, and Byles, 263. The giving of notice of dishonour is not necessarily part of a notary's duties, and the protest could be evidence only of the non-acceptance or non-payment. Ewing v. Cameron, 1843, 6 U.C.O.S. 541. Evidence of protest in foreign country.

Under this section a notarial copy of the protest alone is not made *primâ facie* evidence of the giving of notice. A notarial copy of the notice and a notarial certificate of the service must be produced.

As to the protest of an inland bill, see sec. 11.

13. No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed. 53 V., c. 33, s. 61. Officer of bank not to act as notary.

This section is a re-enactment of R.S.C. 1886, c. 123, sec. 11, and has been law in Ontario and Quebec since 1850. There is no corresponding section in the English Act.

It is submitted that a protest made by a clerk, teller or agent of the bank would have no evidential value under sec. 11. There would of course be no objection to such person giving notice of dishonour and proving the fact by his own evidence in cases where protest is not essential. It is questionable, however, whether any court in Canada could properly admit evidence of a protest made by a person who is forbidden by the statute to act as notary.

14. Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a Consideration, purchase money of a patent.

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patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words *Given for a patent right.*

Absence of necessary words.

2. Without such words thereon, such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration. 53 V., c. 33, s. 30. [Cf. N.Y. s. 330.]

Sub-sec. 2 was added to the act by the Senate in amendment to the House of Commons bill in 1890. Sub-sec. 1 of this section, and also secs. 15 and 16, are a re-enactment of R.S.C. 1886, c. 123, secs. 12, 13 and 14. The original act, passed in 1884, was entitled "An Act for the better prevention of fraud in connection with the sale of patent rights."

Even under the act as it stood before the enactment of sub-sec. 2, it was held that a note, the consideration of which consisted of the purchase money of a patent right, was void in the hands of an endorsee for value with notice of the consideration, by reason of the absence of the words "given for a patent right." Johnson v. Martin, 1892, 19 O.A.R. 592, overruling Girvin v. Burke, 1890, 19 O.R. 204.

Note given for patent right.

A joint and several note made by two persons in partnership is invalid under this section, although one of the makers was already indebted to the payee on a personal account to more than the amount of the note, and the consideration for the note was the purchase of a patent right only as regards the other maker. C. & F. were partners in the manufacture of certain articles under a patent owned by F. F. assigned to C. a part interest in the patent in consideration of C.'s authorizing F. to sign the firm name to a note in favour of F's. creditor. It was held that the note was void because it had not "given for a patent right" written or printed across its face. Craig v. Benjamin, 1894, 24 S.C.R. 278. "The endeavour in this case was to render legal by indirect means that which it was the aim and very object of the statute to prevent. The cases demonstrating the futility of such attempts are collected in Johnson v. Martin, 19 O.A.R. at pp. 595, 597." Samuel v. Fairgrieve, 1893, 24 O.R. at p. 490.

See notes to sec. 56, as to what constitutes notice of illegality.

15. The endorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties. 53 V., c. 33, s. 30. [Cf. N.Y. s. 330.] Transferee to take with equities.

It is evident from these sections, that the object of this legislation is to protect persons who give bills or notes for patent rights, and to enable them to defend themselves against transferees to the same extent as they could against the original payee. In order to secure this object more effectually, the legislature by the next following section, makes it an indictable offence knowingly to issue, sell or transfer such notes, without having the prescribed words written or printed thereon. Johnson v. Martin, 1892, 19 O.A.R. at p. 600. Note given for patent right.

By sec. 2, clause (*b*) set-off is included in action, and by clause (*k*) defence includes counterclaim.

The New York and Ohio acts contain provisions somewhat similar to sec. 15 and sub-sec. 1 of sec. 14. The Negotiable Instruments Law as enacted in the other states contains no corresponding provision. Crawford, p. 182.

16. Every one who issues, sells or transfers, by endorsement or delivery, any such instrument not having the words *Given for a patent right* printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of an indictable offence and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit. 53 V., c. 33, s. 30. Transferring defective note. Indictable offence. Penalty.

See notes to secs. 14 and 15.

CHAPTER XXXIV.

Bills of Exchange: Form of Bill and Interpretation.

Part II. of the act, entitled "Bills of Exchange," extends from sec. 17 to sec. 164. These sections are contained in chapters 34 to 50 of this book. The subsequent "parts" of the act are:

III. Cheques on a Bank: secs. 165 to 175.

IV. Promissory Notes: secs. 176 to 187.

Cheques.

By sec. 165, except as otherwise provided in part III., the provisions of this act applicable to a bill of exchange payable on demand apply to a cheque. Part III. contains special provisions with regard to a cheque which is not presented for payment within a reasonable time, and the termination of a bank's duty and authority to pay a cheque, and with regard to crossed cheques.

Promissory notes.

By sec. 186, subject to the provisions of part IV. and except as provided by sec. 186, the provisions of the act relating to bills of exchange apply, with the necessary modifications, to promissory notes. In the application of such provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. The following provisions as to bills do not apply to notes, namely: those relating to (*a*) presentment for acceptance; (*b*) acceptance; (*c*) acceptance *supra* protest; (*d*) bills in a set.

Arrangement of act.

Notwithstanding the changes made in the sequence of the sections of the Canadian act in 1906, the general arrangement remains substantially the same as that of the English act. Both acts deal primarily with bills of exchange. The provisions relating to negotiable instruments generally are grouped under the heading of bills of exchange, and, with few exceptions, are phrased exclusively with reference to bills of exchange. Then follow a few sections relating only to cheques and notes respectively, and, subject to these sections, the provisions relating to bills are applied, so far as they are in their nature applicable, to cheques and notes respectively.

The arrangement of the Negotiable Instruments Law is essentially different. The general provisions are grouped together and are phrased so as to be equally applicable to bills, cheques and notes. Then follow the provisions specially applicable to bills, cheques and notes respectively. The arrangement of the American act seems preferable to that of the English act. Sec. 16.

PART II.

BILLS OF EXCHANGE.

Form of Bill and Interpretation.

17. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money or to the order of a specified person, or to bearer. Bill of exchange defined.

2. An instrument which does not comply with the requisites aforesaid, or which orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange. Non-compliance with perquisites.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section: Provided that an unqualified order to pay, coupled with,— Unconditional order.

(*a*) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount; or,

(*b*) a statement of the transaction which gives rise to the bill;

is unconditional. 53 V., c. 33, s. 3. [Eng. s. 3. Cf. N.I.L. ss. 126, 1, 3 and 5.]

Bill of exchange.

A bill is sometimes called a draft and an accepted bill an acceptance. The person who gives the order is called the drawer. The person to whom it is addressed is called the drawee, and if he signifies his assent to the order in due form

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(sec. 35), he is then called the acceptor. The person to whom the money is payable is called the payee or bearer (sec. 2), as the case may be. If he transfers the bill by endorsement (sec. 2) he is called the endorser (sec. 131); if by delivery only, he is called the transferor by delivery (sec. 137). The holder is defined by sec. 2. Cf. Chalmers, p. 8.

Form of bill of exchange.

A bill may be drawn in any language. See, *e.g.*, In re Marseilles Co., 1885, 30 Ch. D. 598. Under the act no special form of words is essential to the validity of a bill. Thus an order, sufficient in other respects, running "Credit C. or order in cash," instead of "Pay," is a valid bill; Ellison v. Collingridge, 1850, 9 C.B. 670, 1 Ames, 42; cf. Lovell v. Hill, 1838, 6 C. & P. 238. Chalmers, p. 9. As to form of promissory notes, see notes to sec. 176. The Negotiable Instruments Law, sec. 10, provides that an instrument need not follow the language of the act, but that any terms are sufficient which clearly indicate an intention to conform to the requirements thereof. As to instruments so ambiguously worded that it is doubtful whether they were intended to be bills or notes, see notes to sec. 26.

Unconditional.

An instrument must not be payable on a contingency: see sec. 18.

Neither a bill nor a note may be drawn conditionally, but a bill may be accepted conditionally (sec. 38). The condition in an endorsement may be disregarded (sec. 66). As between the immediate parties, and as regards a remote party other than a holder in due course, the delivery of a bill may be shewn to have been conditional (sec. 40).

Bill must be unconditional.

A bill or note must be payable absolutely, *i.e.* it must be subject to no conditions (except the implied conditions of presentment, protest, and notice of dishonour in so far as these conditions attach to negotiable paper as such. Cf. 2 Ames, p. 827.

As to an order to pay out of a particular fund, see sub-sec. 3 and notes, *infra*. A statement of the transaction which gives rise to the instrument may be inserted, *e.g.* "on policy 33,386" (Taylor v. Currie, 1871, 109 Mass. 36), but there must be no addition which qualifies the promise or order to pay. Cf. Kirkwood v. Carroll, [1903] 1 K.B. 531: see notes to

sec. 176, as to words providing that the property in property shall not pass till note paid, and as to pledge of collateral security. Sec. 17. Bill must be unconditional.

As to a note "as per agreement," see Jury v. Barker, 1858, E.B. & E. 459. A bill drawn in the common form "as per advice" is not conditional. The expression of an executory consideration on the face of a bill may perhaps make it conditional: Drury v Macaulay, 1846, 16 M. & W. 146; but see sub-sec. 3. Chalmers, p. 12.

If the document requires a particular form of receipt to be given *as a condition of payment*, it will not be a cheque. Bavins v. London and South Western Bank, [1900] 1 Q.B. 270; London City and Midland Bank v. Gordon, [1903] A.C. 240, 252. But where a cheque bore at the foot the words "The receipt at back hereof must be signed, which signature will be taken as an indorsement of this cheque," it was held to be a negotiable instrument, as the words were not addressed to the bankers and did not affect the nature of the order to them. Nathan v. Ogdens, Limited, 1905, 93 L.T. 553; 94 L.T. 126. It seems also that documents which contain a notice that they will be paid only if presented within a named time are not cheques, as this limitation would be a condition. But the point has not yet been decided. Grant, p. 32.

A conditional instrument does not become a bill or note upon the fulfilment of the condition. It must be a bill or note when executed, if ever. 2 Ames, p. 828, citing Kingston v. Long, K.B., Michaelmas Term, 1751, reported in 1 Ames 31 and in Bayley on Bills, 6 ed., 16; and Colehan v. Cooke, 1742, Willes, 393 at 399, 4 R.C. 184, at 190.

Order.

A bill is an "order"; therefore it must in its terms be imperative and not precative, but the insertion of mere terms of courtesy will not make it precative. Chalmers, p. 11. In illustration of the last clause Chalmers states that the common form of a French bill runs "il vous plaira payer."

But, as Russell, p. 26, points out it is not easy to apply this rule and it is perhaps impossible to reconcile the cases. An instrument running "Please let the bearer have seven pounds and place it to my account and you will much oblige your humble servant" was held not to be a bill. Little v. Bill must be an order.

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Slackford, 1828, Moo. & M. 171; cf. Reg. v. Ellor, 1784, 1 Leach, C.C. 323; but see Reg. v. Tuke, 1858, 17 U.C.R. 296, in which a document in substantially the same form was held to be a good order and not a mere request. In Ruff v. Webb, 1794, 1 Esp. 129, it was held that a document running "Mr. N. will much oblige Mr. W. by paying R. on order twenty guineas on his account" was a good bill.

A document running "we authorize you to pay" is not a bill. Hamilton v. Spottiswoode, 1849, 4 Ex. 200. As to the earlier case of Russell v. Powell, 1845, 14 M. & W. 418 ("we do hereby authorize and require you to pay"), see Russell, p 30.

In writing.

See notes to sec. 2, *supra.*

Addressed by one person to another.

An instrument not addressed to anyone is not a bill: see notes to sec. 20.

Where drawer and drawee are the same person or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note (sec. 26).

As to the meaning of "person," see notes to sec. 2, *supra.*

Signed by the person giving it.

See sec. 4 and notes, as to the signature.

A bill may be accepted before it is signed (sec. 37), but until a bill is signed it is inchoate and of no effect; see notes to that section.

See sec. 31 as to the effect of delivery of a simple signature on a blank paper, or of a bill wanting in material particulars.

The person to whom it is addressed.

The drawee must be named or otherwise indicated in a bill with reasonable certainty (sec. 20). A bill may be addressed to two or more drawees but not to two drawees in the alternative or to two or more drawees in succession (sec. 18).

On demand or at a fixed or determinable future time.

As to when a bill is payable on demand, see sec. 23.

As to when a bill is payable at a determinable future time,

see sec. 24. A bill must not be expressed to be payable on a contingency (sec. 18). Sec. 17.

A sum certain.

As to the meaning of a sum certain, see also sec. 28 (sum required to be paid with interest, by instalments, or according to an indicated or ascertainable rate of exchange). Bill must be for a sum certain.

The following are invalid as not being for a sum certain:

1. An order for "the amount of my account furnished" which the drawee wrote "correct for, say, $75," and signed his initials. Kennedy v. Adams, 1874, 15 N.B.R. (2 Pugs.) 162.

2. A promise to pay C. £65 "and also all other sums which may be due to him." Smith v. Nightingale, 1818, 2 Stark. 375.

3. An order to pay the proceeds of a shipment of goods, "value about £2,000." Jones v. Simpson, 1823, 2 B. & C. 318.

4. An order to pay "the balance due to me for building the Baptist College Chapel." Crowfoot v. Gurney, 1832, 9 Bing. 372.

5. A promise to pay £100 and "the demands of the Sick Club." Bolton v. Dugdale, 1833, 4 B. & Ad. 619.

6. A promise to pay £13 "and all fines according to rule." Ayrey v. Fearnsides, 1838, 4 M. & W. 168.

In money.

A bill must be payable in money, *i.e.*, in what is a legal tender in payment of debts at the place of payment. 2 Ames, p. 828. As to legal tender generally, see chapter 28, *supra*. Bill must be payable in money.

The amount of a bill may be expressed in money of a foreign denomination (cf. sec. 163) if the bill is not expressed to be payable in foreign currency, *e.g.*, an English bill for £100 payable in the United States, but a note payable in the United States "in Canada money" is not negotiable. Thompson v. Sloan, 1840, 23 Wend. 71, 1 Ames 51, 2 Ames 829. But see Grant, p. 12, where the opinion is stated that a cheque must not be expressed in foreign money because it is no part of a banker's implied contract with his customer to pay the debt in any but the known and current money of the country.

The decision in Gray v. Worden, 1870, 29 U.C.R. 535, that an instrument payable in "Canada bills" was not a promissory note, although such bills were legal tender at the place of payment, seems indefensible. Ames remarks that the opinion

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expressed in this case that legal tender notes are not money, however sound in political economy, is not sound in law. 2 Ames, p. 829. See Russell, p. 54.

In Ex parte Imeson, 1815, 2 Rose, 225, it was held that an order to pay "in cash or Bank of England notes" was not a bill, but Chalmers, p. 10, points out that in 1833 such notes were made legal tender except by the bank itself.

A note made in Canada payable in Chicago in "American currency" is good. Third National Bank v. Cosby, 1877, 41 U.C.R. 402, 43 U.C.R. 58; cf. St. Stephen Ry. Co. v. Black, 1870, 13 N.B.R. (2 Han.) 139. If a note is payable in the United States "in currency," currency means American currency. Wallace v. Souther, 1888, 16 S.C.R. 717.

A note payable in "legal tender money" (North-Western v. Jarvis, 1883, 2 Man. R. 53) or in "bankable currency" (Dunn v. Allen, 1884, 24 N.B.R. 1) is good.

Act . . . in addition to the payment of money.

A promise to pay money and to deliver goods is not negotiable and an endorsee cannot sue upon it. Travis v. Forbes, 1907, 41 N.S.R. 226.

Bill must not require anything but payment of money.

An order requiring the drawee to pay money and to deliver up a wharf to the payee is not a bill. Martin v. Chauntry, 1747, 2 Stra. 1271, 1 Ames 53; cf. In re Boyse, 1886, 33 Ch.D. at p. 621; Chalmers, p. 10; 2 Ames, p. 829.

The Negotiable Instruments Law, sec. 5, provides that the negotiable character of an instrument otherwise negotiable is not affected by a provision which gives the holder an election to require something to be done in lieu of payment of money.

The following are invalid bills or notes, namely orders or promises to pay a sum.

1. "in cash or mortgage upon real estate," although the maker elects to pay in cash (Going v. Barwick, 1858, 16 U.C.R. 45), "half in cash and half in goods." Gillin v. Cutler, 1857, 1 L.C.J. 277; Burnham v. Watts, 1844, 4 N.B.R. (2 Kerr) 377; Melville v. Bedell, 1832, 1 N.B.R. (Chipman) 349; Turner v. Crane, 1833, *ibid.* 370.

2. a note running "I will pay A. $90 for B. or otherwise settle the sum of $90 for him on a note that he says he gave A. for $100." Cochrane v. Caie, 1875, 16 N.B.R. (3 Pugs.) 224.

s. "in merchantable timber, etc. If not so paid within the time, then the same is to be paid in cash." Boulton v. Jones, 1860, 19 U.C.R. 517. "This note is to be paid by a lawful mortgage." Newhorn v. Lawrence, 1848, 5 U.C.R. 359. Sec. 17.

To or to the order of a specified person.

Various persons to whom or to whose order a bill may be made payable are stated in sec. 19. Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty (sec. 21 and notes).

As to the manner in which a bill may be made payable to order, see sec. 22.

Under the Negotiable Instruments Law (secs. 1, 126), a negotiable instrument must be payable "to order or to bearer." See also notes to sec. 22, *infra*.

Or to bearer.

As to bearer, see sec. 2 (*d*), and as to bills payable to bearer, see sec. 21.

Except as hereinafter provided.

These words are not in the English act. They were added to the Canadian bill of 1889 in committee in view of the provisions of sec. 28, sub-sec. 1, clause (*d*), but seem to be unnecessary for this purpose inasmuch as a sum payable as therein provided is still a "sum certain" within sec. 17.

The definition of a bill contemplates three parties to the instrument. Any two of them may, however, be the same person (secs. 19 and 26). The drawee or payee may be fictitious (secs. 21 and 26). Words may be added prohibiting transfer (sec. 21). No time for payment need be expressed (sec. 23). Blanks in material particulars may be filled up (sec. 31) including the date (sec. 31).

Particular fund.

An order to pay out of a particular fund is not a bill of exchange but may be an equitable assignment: see notes to sec. 127. As to inserting a statement of the transaction which gives rise to the bill, cf. notes under "unconditional," *supra*. Bill must not be payable out of a particular fund.

The following are not bills or notes, being orders or promises to pay out of a particular fund, namely, orders or promises to pay money:

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Bill must not be payable out of a particular fund.

1. out of the money in your hands belonging to A. Jenney v. Herle, 1724, 2 Ld. Raym. 1361; 1 Ames 28.

2. out of the money due to me from Horace Walpole out of the Exchequer and what will be due at Michaelmas. Rowe v. Dawson, 1749, 1 Ves. 331, 1 W. & T.L.C. 8 ed. 95.

3. out of the money arising from my reversion when sold. Carlos v. Fancourt, 1794, 5 T.R. 482, 4 R.C. 180.

4. out of S.'s money. Ockerman v. Blacklock, 1862, 12 U.C.C.P. 362.

5. out of the first moneys received by you on my account. Fullerton v. Chapman, 1871, 2 N.S.D. 470.

6. out of certificate of money due me on 1st June for materials furnished to above church. Bank of B.N.A. v. Gibson, 1892, 21 O.R. 613.

The following are valid bills or notes, namely, orders or promises to pay money.

1. as my quarterly half-pay to be due from 24th of June to 27th of September next, by advance. Macleod v. Snee, 1728, 2 Stra. 762; 1 Ames 30; cf. Russell, p. 64.

2. on account of moneys advanced by me to the S. & F. Co. Griffin v. Weatherby, 1868, L.R. 3 Q.B. 753.

3. and deduct same from moneys coming due to me on account of Mrs. W.'s residence. Peacocke v. Williams, 1909, 28 N.Z.L.R. 355; following Griffin v. Weatherby, *supra.* (Mere indication of fund from which drawee is to reimburse himself, the order itself being unqualified.)

4. against credit No. 20, and place it to account, as advised by G. P. & Co. Cf. Banner v. Johnston, 1871, L.R. 5 H.L. 157, 159.

5. which you will please charge to my account, and credit according to a registered letter I have addressed to you. In re Boyse, 1886, 33 Ch.D. 612.

6. for flooring supplied to your buildings on D road, and charge to my account. Hall v. Prittie, 1890, 17 O.A.R. 306; see also notes to sec. 127.

Instrument payable on contingency.

18. An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

Addressed to two or more drawees.

2. A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is

not a bill of exchange. 53 V., c. 33, ss. 6 and 11. [Eng. ss. 6 and 11. Cf. N.I.L. ss. 4 and 128.] Sec. 18.

Payable on a contingency.

Cf. notes to sec. 17 under the heading "Unconditional."

A bill may be payable on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain: see sec. 24 which prior to 1906 constituted one section with sub-sec. 1 of this section.

As to an instrument payable in instalments, and containing a provision for acceleration in case of default, see sec. 28.

An instrument creating a liability to payment upon a contingency, *e.g.*, one payable 90 days after sight, or when realized, cannot be a negotiable bill or note. Carlos v. Fancourt, 1794, 4 R.C. 180, 5 T.R. 482, 2 R.R. 647, affirmed on a writ of error 2 Str. 1271; Alexander v. Thomas, 1851, 16 Q.B. 333.

The following are invalid bills or notes namely instruments payable, Bill must not be payable on a contingency.

1. "three days after the sailing" of a vessel. Dooley v. Ryarson, 1873, 1 Q.L.R. 219, 28 R.J.R.Q. 243; cf. Palmer v. Pratt, 1824, 2 Bing. 185; Duchaine v. Maguire, 1882, 8 Q.L.R. 295.

2. at the sale, or delivery, of the timber marked "P.A" in Quebec or elsewhere. Russell v. Wells, 1848, 5 U.C.O.S. 725.

3. on account of the plaintiff's claim in this suit. Perth v. McGregor, 1862, 21 U.C.R. 459.

4. when I marry B. Pearson v. Garret, 1689, 4 Mod. 242; Beardsley v. Baldwin, 1741, 2 Stra. 1151, 1 Ames 30.

5. when I am in good circumstances. Ex parte Tootell, 1798, 4 Ves. 372.

6. out of my salary during such time as I am indebted to A. for money or otherwise. Amount due him now is $292. Angers v. Dillon, 1898, Q.R. 15 S.C. 435.

7. on completion of building now in course of erection. Thomson v. Huggins, 1896, 23 O.A.R. 191; Garner v. Hayes, 1884, 10 O.A.R. 24.

Two or more drawees.

Prior to 1906, sub-sec. 2 and sec. 20 formed one section.

The Negotiable Instruments Law, sec. 128, more concisely

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and clearly provides that a bill may be addressed to two or more drawees *jointly*, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

The acceptance of some one or more of the drawees but not of all is a qualified acceptance (sec. 38).

Two or more drawees.

A bill may not be addressed to two drawees in succession, or in the alternative, but it may name a drawee in case of need (sec. 33). A bill may be made payable in the alternative (sec. 19).

The acceptors of a bill can be liable only jointly, whereas the makers of a note may be liable jointly or jointly and severally according to its tenor (sec. 179).

Payee, drawer or drawee.

19. A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

Two or more payees.

2. A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

Holder of office payee.

3. A bill may be made payable to the holder of an office for the time being. 53 V., c. 33, ss. 5 and 7. [Eng. ss. 5 and 7.]

The Negotiable Instruments Law, sec. 8, provides that an instrument may be drawn payable to the order of—1. a payee who is not maker, drawer or drawee; or 2. the drawer or maker; or 3. the drawee; or 4. two or more payees jointly; or 5. one or some of several payees; or 6. the holder of an office for the time being.

Payable to or to the order of.

Cf. secs. 21 and 22 as to bill payable to order.

Prior to 1906, sub-sec. 1 and sec. 26 formed one section. The latter section provides for the case in which the drawer and drawee are the same person or where the drawee is a fictitious person or a person not having capacity to contract.

Payable to drawer's order.

A bill payable to "....order," which is endorsed by the drawer, is deemed to be payable to drawer's order. Chamberlain v. Young, [1893] 2 Q.B. 206, C.A.; *sed quaere*, per Bowen L. J., if the instrument ran, "Pay to——or order." Chalmers, p. 17. Cf. Russell, p. 84, and notes to sec. 21, sub-sec. 4, *infra*.

A bill is sometimes drawn in the form "pay to your own order" when the drawee acts in two different capacities, *e.g.*, if he be in business on his own account, and also agent for some other person interested in the bill; see Holdsworth v. Hunter, 1830, 10 B. & C. 449. In such a case the instrument is not a bill which can be enforced until the drawee has endorsed it away. Cf. Reg. v. Bartlett, 1841, 2 Moo. & R. 362. Chalmers, p. 17. Sec. 19. Payable to drawee's order.

The payee.

The provisions of the act relating to a payee apply, with the necessary modifications, to an endorsee under a special endorsement (sec. 67).

Payable to two or more payees, etc.

Prior to 1906, sub-secs. 2 and 3 of this section and sub-secs. 4 and 5 of sec. 21 formed one section.

The act makes a material alteration in the law in allowing a bill to be made payable to persons in the alternative, unless there is apparent community of interest. Blanckenhagen v. Blundell, 1819, 2 B. & Ald. 417, 1 Ames 116; cf. Holmes v. Jacques, 1866, L.R. 1 Q.B. 376, 1 Ames 126; and Watson v. Evans, 1863, 1 H. & C. 622, 1 Ames 124; Chalmers, p. 22. Alternative payees.

An instrument payable to the "order of J.B.G. for W.M." is a note, and negotiable, but the endorser must see that the proceeds are applied for M. Munro v. Cox, 1870, 30 U.C.R. 363.

A note payable to A. "or to his wife and to no other person" is the same as if payable to A. alone. Moodie v. Rowatt, 1856, 14 U.C.R. 273.

A note in the alternative is payable to, and may be sued on by, either one of the payees. Spaulding v. Evans, 1840, 2 McLean 139.

Payable to the holder of an office.

Prior to the act a bill drawn payable to the "treasurer for the time being" of a society was void for uncertainty. Cowie v. Sterling, 1856, 6 E. & B. 333, 1 Ames 119. But an instrument payable to A.B., treasurer of, etc., or to his successor in office, or order was held to be a note, the words "or to his successors in office" being void. McGregor v. Daly,

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1855, 5 U.C.C.P. 126; cf. Patton v. Melville, 1861, 21 U.C. R. 263 (where the words following the payee's name were held to be descriptive only, and Rex v. Box, 1815, 6 Taunt, 325, 1 Ames 114.

A note payable to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being was held to be valid. Holmes v. Jacques, L.R. 1 Q.B. 376, 1 Ames 126. Cf. Byles, 95.

Payable to estate of deceased person.

Ames states that whatever doubt may exist as to the negotiability of an instrument payable to the order of administrators or trustees who are not named therein, it is clear that an instrument payable "to the estate of A" is not a bill. 1 Ames 122, note (*a*).

But it has been held that an instrument payable to the trustees of an insolvent firm, without naming them, is sufficiently certain, and that extrinsic evidence might be given to identify the payees described. Auldo v. McDougall, 1833, 3 U.C.O.S. 199.

As to an instrument payable to the estate of A., Ames subsequently changed his opinion, for he states, "In Shaw v. Smith, 1889, 150 Mass. 166; Peltier v. Babillion, 1881, 45 Mich. 384, such a note was properly interpreted as a note payable to the legal representative of A." Brannan, p. 195, note 3. Shaw v. Smith is quoted from with approval by Russell, p. 83, and commends itself as being in accordance with reason and common sense.

Drawee to be named.

20. The drawee must be named or otherwise indicated in a bill with reasonable certainty. 53 V., c. 33, s. 6. [Eng. s. 6 (1). N.I.L. s. 1 (5).]

As to a fictitious drawee, see sec. 26.

An order not directed to any person is not a bill. Forward v. Thompson, 1854, 12 U.C.R. 103; McPherson v. Johnston, 1894, 3 B.C.R. 465.

As to filling up blanks, see sec. 31.

But an instrument in the form of a bill, except that the word "at" is substituted for "to" before the name of the drawee, is a bill. Shuttleworth v. Stephens, 1808, 1 Camp. 407, 1 Ames, 104; Allan v. Mawson, 1814, 4 Camp. 115.

If an order to pay contains no indication of the drawee, semble it is not a bill even though an acceptance is written

across it. Peto v. Reynolds, 1854-5, 9 Ex. 410, 11 Ex. 418, 1 Ames 106. But the holder may recover on it as a promissory note. Fielder v. Marshall, 1861, 9 C.B. N.S. 606. Sec. 20. Drawee to be named.

Where however an order although addressed to no one was made payable at a particular street address and was in fact accepted by the person who resided at such address, it was held that he was liable as acceptor of a bill, the acceptance being an acknowledgment by him that he was the person to whom the bill was directed. Gray v. Milner, 1819, 8 Taunt. 739; 1 Ames 104; cf. Peto v. Reynolds, 9 Ex. at p. 414; Davis v. Clarke, 1844, 6 Q.B. 16, 1 Ames 202. See also Russell, pp. 79-80, discussing the cases and citing 2 Ames 832, for the opinion that the defendant in Gray v. Milner should have been charged as the maker of a note. Chalmers, p. 19, cites Gray v. Milner, without disapproval, as an illustration of the section. Byles, p. 204, remarks that the decision goes to the verge of the law, and, p. 110, points out that a bill cannot be addressed to one man and accepted by another (see sec. 35).

21. When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable. Transfer words.

2. A negotiable bill may be payable either to order or to bearer. Negotiable bill.

3. A bill is payable to bearer which is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank. When payable to bearer.

4. Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. Certainty of payee.

5. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer. 53 V., c. 33, ss. 7 and 8. [Eng. ss. 7 and 8. Cf. N.I.L. ss. 1, 8, 9, 40.] Fictitious payee.

Prior to 1906 the first three sub-sections of this section and sec. 22 formed one section, and sub-secs. 4 and 5 formed one section with sec. 19.

Prohibiting transfer.

There is no provision in the Negotiable Instruments Law corresponding to sub-sec. 1. Under that act an instrument

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to be negotiable must be payable either to order or to bearer. See notes to sec. 22.

A bill expressed to be payable to a particular person is payable to order, if it does not contain words prohibiting transfer or indicating an intention that it shall not be transferable (sec. 22).

A bill negotiable in its origin continues to be negotiable until it has been (*a*) restrictively endorsed or (*b*) discharged by payment or otherwise (sec. 69).

Words prohibiting transfer.

A bill is drawn payable "to order L.D.F." (the drawer). The drawees stamp a printed acceptance across the bill and sign it and above the acceptance write "In favour of L.D.F. only. No. 28." Held that the negotiability of the bill is not affected. Decroix v. Meyer, 1890, 25 Q.B.D. 343, affirmed *sub nom.* Meyer v. Decroix, [1891] A.C. 520, 4 R.C. 249. Apparently if the acceptance had run "accepted in favour of L.D.F. only" the result would have been different. Cf. Chalmers, p. 26. If a person writes across a bill that which unqualified would, in ordinary course, import a clean acceptance of a bill, and intends to qualify its operation, he must do so by plain and intelligible language, and make that qualification sufficiently part of the acceptance itself to be intelligible in the ordinary course of business. Decroix v. Meyer, *supra.* Cf. Grant, p. 21.

Where a cheque payable to C.'s order was crossed "account of C., National Bank, Dublin," it was held that these words did not prohibit further transfer, and that the bank, having credited C. with the amount, could sue the drawer. National Bank v. Silke, [1891] 1 Q.B. 435. But a note drawn in the form "I promise to pay C. only" is not negotiable. Chalmers, p. 26.

A person who puts his name on the back of a non-negotiable note payable to another cannot be sued as endorser. West v. Bown, 1847, 3 U.C.R. 290; a case of a note payable to a particular person, but not expressed to be payable to his order. Such a note is now payable to order if it does not contain words prohibiting transfer or indicating an intention that it shall not be transferable (sec. 22). As to the other objection to the liability of the defendant in the case cited, namely, that when he put his name on the back the note had not been endorsed by the payee, see now notes to sec. 131.

As to the assignment of a non-negotiable bill as a chose in action, see notes at the beginning of chapter 40, *infra*. Sec. 21.

Payable to bearer—the only or last endorsement.

The Negotiable Instruments Law, sec. 9, contains words similar to sub-sec. 3, and expressly provides as well that an instrument is payable to bearer "when it is payable to a person named therein or bearer,"—the result doubtless being the same as under the Canadian act. Cf. Grant v. Vaughan, 1764, 3 Burr. 1516, 1 Ames 299 (bill payable "to ship Fortune or bearer").

Sub-sec. 3 alters the law. It was intended to bring the law into accordance with the mercantile understanding by making a special endorsement control a previous endorsement in blank. Chalmers, p. 26. Before the act it was held that where a bill was endorsed in blank, its negotiability to bearer was not affected by a subsequent special endorsement (Walker v. Macdonald, 1848, 2 Ex. 527), though the special endorser was liable on his endorsement only to such parties as made title through it (Smith v. Clarke, 1794, Peake, 225); Story sec. 207. Cf. Sovereign Bank v. Gordon, 1905, 9 O.L.R. at p. 150.

Conversion of blank endorsement into special endorsement.

A blank endorsement may be converted by any holder of the bill into a special endorsement (sec. 67). But a bill *originally* expressed to be payable to bearer continues to be payable to bearer notwithstanding that it is specially endorsed. This follows from the wording of sub-sec. 3. The Negotiable Instruments Law, sec. 40, explicitly provides that where an instrument payable to bearer is endorsed specially, it may nevertheless be further negotiated by delivery; but re-enacts the common law rule above mentioned that the person endorsing specially is liable as endorser only to such holders as make title through his endorsement. Cf. Ames' criticism of the first part of the section, in Brannan, p. 46.

Payee must be named or otherwise indicated with reasonable certainty.

A bill may be made payable to the holder of an office for the time being or to two or more payees jointly or in the alternative to one of two or one or some of several payees (sec. 19).

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As to a bill payable to the estate of A.B., or to trustees of an estate (without naming them), see notes to sec. 19.

Extrinsic evidence is admissible to identify the payee when misnamed, or when designated by description only, but not to explain away an uncertainty patent on the bill. Soares v. Glyn, 1845, 8 Q.B. 24; Chalmers, p. 21.

If a bill is payable to John Souther & Son, evidence may be given that John Souther & Co. were intended to be named. Wallace v. Souther, 1889, 16 S.C.R. 717; cf. Willis v. Barrett, 1816, 2 Stark. 29.

Payee must be named.

But if a bill be drawn in the form "pay —— or order" evidence is not admissible to shew that C. was intended to be the payee (Rex v. Randall, 1811, R. & R. 195), and the bill cannot be recovered on by the person to whom it was given, either as payee or bearer, unless he inserts his name in the blank. Mutual Safety v. Porter, 1851, 7 N.B.R. (2 Allen) 230. The person in possession of a bill has *primâ facie* authority to fill up the blank in any way he thinks fit (secs. 31 and 32).

As to a bill payable to "—— order" and endorsed by the drawer, see notes to sec. 19.

If the payee is wrongly designated or his name is misspelt, he may endorse the bill as therein described, adding his proper signature; or he may endorse by his own proper signature (sec. 64).

Payee a fictitious or non-existing person.

Chalmers states that sub-section 5 was inserted in committee in place of a clause working out in detail the effect of the cases in the following words:—"When the payee is a fictitious or non-existing person, no person shall be capable of making title to or enforcing payment of the instrument, provided that when a bill has knowingly been drawn payable to a fictitious or non-existing person and purports to bear his endorsement, it shall be valid for all purposes in the hands of a holder in due course, and a holder with notice may enforce it against the drawers or any indorser thereof, or against the acceptor if when he accepted he was aware of the facts." See 7 L.Q.R. at p. 220 (July, 1891).

The acceptor of a bill by accepting it is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority

to draw the bill, or the existence of the payee and his capacity to endorse (sec. 129). This was the law before the act, the law in this respect being based on the principle of estoppel. The genuineness of the endorsement of the payee was, however, a matter as to which, except in one special instance, no estoppel prevailed. This exception was that a bill drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer, but the estoppel applied only against parties who at the time they became liable on the bill were cognizant of the fictitious character or of the non-existence of the supposed payee.(*a*) After the passing of the act, the Court of Appeal in England in the leading case of Vagliano v. Bank of England, held that the act did not extend the exception, and that "fictitious" meant fictitious to the knowledge of the party sought to be charged upon a bill (23 Q.B.D. 243; see the judgment of Bowen, L.J., especially at pp. 257 *et seq.*, where the cases are reviewed). It was held, however, by the House of Lords (Bank of England v. Vagliano, [1891] A.C. 107) that such a qualification of the express words of the statute could not be properly implied from the earlier cases.(*b*) If the payee is in fact(*c*) fictitious or non-existing the bill may, as regards all persons, be treated as payable to bearer.

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If payee fictitious or non-existing, bill payable to bearer.

"Fictitious" as distinguished from "non-existing."

Chalmers, p. 23, states that the words "or non-existing" seem superfluous, but that they were probably intended to cover a case such as the following:—By arrangement between the endorsee and the acceptor a bill is drawn and endorsed in the name of a deceased person. The endorsee can recover from the acceptor. Ashpitel v. Bryan, 1863, 32 L.J.Q.B. 91; affirmed by Ex. Ch., 33 L.J.Q.B. 328; cf. Vagliano v. Bank of England, 1889, 23 Q.B.D., at p. 260, C.A.

The words in question have, however, been made the basis

"Fictitious" distinguished from "non-existing."

(*a*) As to the estoppels which bind a drawer or an endorser as such, see sec. 130. As to estoppel by negligence and the liability where the endorsement of a real payee is forged, see sec. 49.

(*b*) It was in this connection that Lord Herschell stated the rule for the construction of the act which is quoted in the notes to sec. 1.

(*c*) The knowledge or intention of the acceptor is irrelevant to this question of fact. The knowledge or intention of the drawer is material in determining whether the payee is fictitious, but of course is irrelevant to the question whether the payee is non-existing. See further discussion below.

Sec. 21. "Fictitious" distinguished from "non-existing."

of a distinction in the English cases. Two different states of fact are, it is said, contemplated by the sub-section—the one is that the payee is fictitious, the other that he is non-existent. Existence or non-existence is a question of fact, not relevant to anybody's mind or intention. "Fictitious" is different. A thing can be fictitious only relatively to some one. There can be no action without an actor, no pretence without a pretender, and no fiction without a feigner. Fiction is necessarily relative. Macbeth v. North and South Wales Bank, [1908] 1 K.B. 13, C.A., Buckley, L.J., at p. 22; S.C. affirmed *sub nom.* N. & S.W. Bank v. Macbeth, [1908] A.C. 137.

The plaintiff drew a cheque payable to a non-existing person, his clerk having falsely pretended that the drawer was indebted to such person. The clerk then endorsed the cheque in the fictitious name to the defendant, a purchaser for value without notice, and the latter received payment from the drawee bank. Held that the plaintiff could not recover the amount from the defendant. Clutton v. Attenborough, [1897] A.C. 90; cf. Vinden v. Hughes, [1905] 1 K.B. at p. 800; Macbeth v. N. & S.W. Bank, [1908] 1 K.B. at p. 23, [1908] A.C. at p. 140; shewing that the decision in Clutton v. Attenborough is irrelevant to the meaning of "fictitious," and is based solely on the ground that the payee was a "non-existing" person whom no one either could or did mean to be the recipient of the proceeds of the cheque.(*d*)

Whereas the English courts, by a strict construction, consider the drawer's intention immaterial if the named payee is in fact non-existing, in the United States the intention or knowledge of the drawer is decisive of the fictitiousness of the named payee, irrespective of the actual existence of a person of such name. 21 Harv. L.R. 214 (Jan., 1908); cf. 10 Harv. L.R. 449 (Feb., 1897). The Negotiable Instruments Law, sec. 9, provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." It has been suggested that to avoid litigation there might have been inserted in the Negotiable Instruments Law the words "or to a living person not intended to have any interest in it." 22 Harv. L.R. 141-2 (Dec., 1908); cf. Brannan, p. 13.

(*d*) Cf. Canadian Bank of Commerce v. Rogers, 1911, 23 O.L.R. 109, 120 (note payable to an unorganized or non-existent company).

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In the United States as in England the knowledge of the person (other than the drawer) sought to be charged is irrelevant to this question whether the payee is fictitious, unless as Street(e) suggests the acceptor is to be regarded as the person who makes the bill payable to a fictitious person.

Real person as fictitious payee.

Real person is fictitious payee if he is named by pretence of the drawer.

It has been held that the word "fictitious" is applicable not only to a creature of the imagination having no real existence, but also to a real person named as payee who has not, and never was intended by the drawer to have any right upon or arising out of the bill. The section applies, although the bill (so-called) is not in reality a bill, but is in fact a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the documents for payment, both the named drawer and the named payee being entirely ignorant of the circumstances. A bill purporting to be drawn by A. to the order of C. & Co., and to be endorsed by them, is accepted by the drawee payable at his bankers. The bankers pay it at maturity. A. is a correspondent of the acceptor's, who often draws bills in favour of C. & Co. It turns out afterwards that the names and signatures of the drawer and payees were forged by the acceptor's clerk, who obtained the money. Under these circumstances C. & Co. are fictitious payees and the bankers can debit the acceptor's account with the sum so paid. Bank of England v. Vagliano, [1891] A.C. 107; discussed by Chalmers, 7 L.Q.R. 216 (July, 1891); cf. note, *ibid.*, p. 295; Chalmers on Bills, p. 23.

Both the Vagliano Case and Clutton v. Attenborough were distinguished in Vinden v. Hughes, [1905] 1 K.B. 795. In the last-mentioned case the plaintiffs' confidential clerk made out a number of cheques to the order of various customers of the plaintiffs for sums not actually owing to the respective customers at the time the cheques were signed, obtained the plaintiffs' signature thereto, misappropriated the cheques, forged the payees' endorsements and negotiated the cheques to the defendant, who gave full value for them in good faith and obtained payment of them from the plaintiffs' bankers. Held,

(e) Foundations of Legal Liability, vol. 2, pp. 512-3.

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that the payees were not "fictitious" persons, and the plaintiffs were entitled to judgment for the amounts of the cheques. Warrington, J., who tried the case, distinguished Clutton v. Attenborough because there the payee was non-existing rather than a fictitious person, and therefore the fact that the drawer believed and intended the cheques to be payable to the order of a real person was immaterial. He also distinguished the Vagliano Case because in that case there was no drawer in fact and the use of a name as payee was a mere fiction, whereas in the case before him the drawer intended to issue the document and intended to issue it with the name of the particular payee upon it, that payee being a real person. Warrington, J., refers especially to the judgment of Lord Herschell, [1891] A.C., at p. 152, as summing up the meaning of "fictitious" as applied to a real person, namely that the payee is named (*i.e.*, by the drawer), "by way of pretence only, without the intention that he shall be the person to receive payment."

Vinden v. Hughes was approved and followed by Bray, J. in Macbeth v. North and South Wales Bank, [1906] 2 K.B. 718; affirmed by C.A., [1908] 1 K.B. 13, and by H. L., [1908] A.C. 137, *sub nom.* N. & S. Wales Bank v. Macbeth. W. by falsely representing to the plaintiff that he had agreed to purchase from K. certain shares then held by K. in a company, and that he had arranged to resell the shares at a profit, induced the plaintiff to agree to assist him in financing the transaction. For this purpose the plaintiff drew a cheque on the C. Bank payable to K. or order for the amount of the purchase-money, which cheque was delivered to W. in order that he might hand it to K. in payment for the shares. W. forged K.'s endorsement to the cheque and paid it into his own account with the defendant bank, which credited him with the amount, and collected the money from the C. Bank. W. had not agreed to buy any shares from K., and K. had at the time no shares in the company. Held, that the payee was not a "fictitious person" and that the defendant bank was liable to pay to the plaintiff the amount of the cheque as damages for conversion of the cheque.

The judgment of Buckley, L.J., in the Court of Appeal, [1908] 1 K.B. 13, contains an interesting analysis of the meaning of "fictitious," which, he says at p. 22, means fictitious by the pretence of some person who is a party to the instrument.

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By "a party to the instrument" he means the drawer (plaintiff), for, as he points out at p. 23, "fictitious" involves an investigation into the mind of the drawer of the bill. "Was the drawee [*sic*—payee] a fiction to the drawer? If he was, then he is a fictitious person." As Lord Macnaghten said in Bank of England v. Vagliano, [1891] A.C. 107, at p. 161, the bills when they came before Vagliano for acceptance were wholly fictitious. The drawer, the payee, and the person indicated as agent for presentation were fictitious. One and all they were feigned or counterfeit persons put forward as real persons, each in a several and distinct capacity, whereas, in truth, they were mere make-believes for the persons whose names appeared on the instrument. They were not the less fictitious because there were in existence real persons for whom these names were intended to pass muster. When Vagliano accepted, he made himself liable on an instrument which, by the operation of the act, was necessarily to be treated as being payable to bearer, and according to Buckley, L.J., this is the true meaning of Vagliano's case.

If, however, a real drawer designates an existing person as payee and intends him to be the payee, the payee is not a "fictitious person" within the terms of the sub-section. See Lord Loreburn, L.C., [1908] A.C. at p. 139, adopting the language of Bray, J., to this effect in [1906] 2 K.B. at pp. 725-7. Lord Robertson, at p. 140, says: "Now I hope I shall not be thought too crude if I say that the present question seems to me to be decided, once we know that T. A. Kerr, so far from being a 'feigned or imaginary' person, was a living man, in business, known to the drawer of the cheque, and intended by him to receive the proceeds." Both learned lords point out that to give effect to the argument on the other side would be to bring within the sub-section all bills the drawing of which is induced by fraud.

Another case arising under circumstances in part the same as in the Macbeth case was argued at the same time before the House of Lords. Irvine, the plaintiff, was induced by the fraud of W. to sign a cheque for £2,300 payable to D. or order. The plaintiff intended that D., who was a real person well known to all concerned, should receive the money. W. forged D.'s name and procured his own bank, the defendant, to present it and obtain payment from the plaintiff's bankers. W. had

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advanced to the plaintiff £2,180 to enable the plaintiff to meet the cheque, so that the plaintiff had lost only the difference, namely £120. Held, that the payee was not a fictitious person, and that the defendant was liable for £2,300, although the plaintiff might have to account to W.'s trustees for £2,180. North and South Wales Bank *v.* Irvine, [1908] A.C. 139.

Two reported cases have been decided in Ontario involving the question of a fictitious payee. The first was decided before the passing of the Bills of Exchange Act. H. made an application in the names of the owners of land to the plaintiff company which accepted the loan upon H.'s valuation and issued cheques payable to the owners in consideration of mortgages to which H. forged the owner's names. H. got possession of the cheques, forged the owner's endorsements and obtained payment from the defendant, the drawee bank. The owners were entirely ignorant of these transactions until some time afterwards, when they discovered and repudiated the mortgages. Held, that the bank was liable. Agricultural Savings and Loan Association v. Federal Bank, 1881, 6 O.A.R. 192. Osler, J.A., who alone in the Court of Appeal discusses the question whether the cheques were payable to fictitious persons, anticipates exactly the rule now laid down in the recent English cases, when he says at p. 201: "That would be so if it had been the intention of the plaintiffs to use the name of a fictitious payee. But on the contrary, the payees were existing persons with whom the plaintiffs believed they were dealing, and whose endorsement they relied upon having before the cheques were paid."

The correctness of the decision next to be referred to is more open to doubt. N. was the assistant superintendent of the plaintiff, a life insurance company, and the local agent at one of its branches. He sent in a number of fictitious applications for insurance in the names of existing persons. Subsequently he represented to the company that the persons insured under the policies issued in pursuance of these fictitious applications, (as well as persons insured under five policies issued in pursuance of genuine applications, which five policies had lapsed but were represented by N. to be in force), were dead and that the claims were payable, and sent in to the head office claim papers with forged signatures. Thereupon the company sent to N. cheques drawn by the

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company in favour of the alleged claimants(*f*) and payable at a branch of the defendant bank. N. forged the payee's names, and the cheques were presented to and paid by the bank in good faith (to whom or how did not appear) and the amounts were charged to the company's account. Held that under the circumstances the cheques must be regarded as payable to fictitious or non-existing persons and therefore payable to bearer, and that the bank was justified in paying and charging the company with the amounts. London Life Ins. Co. v. Molsons Bank, [1904] 8 O.L.R. 238, C.A.

It is submitted that London Life Ins. Co. v. Molsons Bank cannot be reconciled with Vinden v. Hughes and N. & S. Wales Bank v. Macbeth. If the judges in the two latter cases have not misread the judgments in Bank of England v. Vagliano, the last mentioned case decides that a named payee, being a real person intended by the drawer to be the payee, is not "fictitious or non-existing" within the section, notwithstanding that there is no real transaction between the drawer and the payee upon which the bill might be based and which would justify the payee in endorsing the bill. If, however, this proposition is applied to the facts in the London Life Case, one seems to be driven to a conclusion contrary to that at which the Court of Appeal for Ontario arrived. If the local insurance agent in that case had invented names instead of using the names of actual persons who lived in his district, cheques made out in favour of such invented names would have been payable to "non-existing" persons within the principle of Clutton v. Attenborough. The agent, for his own purposes and doubtless in order to lessen the risk of the company's discovering that the insurance had no real existence, used the names of real persons. Such persons were intended by the drawer to receive payment.(*g*) "It matters not in my opinion," says Bray, J., [1906] 2 K.B. at p. 727, "how much the drawer of the cheque may have been deceived if he honestly intends that the cheque shall be paid to the person designated by him." The principle of the statutory provision is that the

(*f*) It is stated by Meredith, C.J., in the court below, 5 O.L.R. at p. 409, that all the supposed claimants lived or were represented to live at or near Ottawa and the cheques were all payable at any branch of the defendant bank and were all paid through its Ottawa branch. The adverse criticism of the decision in this case is valid, if at all, only so far as the payees were real persons.

(*g*) Maclennan, J.A., 8 O.L.R. at p. 241, puts the case in such a way as to bring it precisely within the later English cases.

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drawer, who for some purpose of his own has inserted the name of a fictitious or non-existing person, necessarily could not have intended that the cheque should be payable to such person only, and therefore he must be deemed to have made it payable to bearer.

The Court of Appeal in London Life Ins. Co. v. Molsons Bank held, that the case was governed by Bank of England v. Vagliano. In the London Life Case there was a real drawer. In the Vagliano Case the name of the pretended drawer was forged, but the acceptor was estopped from denying the genuineness of the drawer's signature. In neither case was there any genuine transaction on which the bills could be based. A real difference between the two cases is that in the London Life Case the drawer really intended its cheques to be paid to the named payees while in the Vagliano Case the drawer had no intention to pay any one, his name having been forged.

Mr. Justice Russell admits that the present writer is probably right in thinking that the London Life Case is irreconcileable with the recent English cases, but expresses the opinion that the London Life Case is well founded on the decision in the Vagliano Case. He is thus driven to suggest, albeit in a very timorous manner, that the decision in the Vagliano Case is wrong, at least in part. Russell, p. 93. He questions the reasonableness of the distinction between the case where the drawee (Vagliano) accepts a bill upon which the drawer's name has been forged and the name of a real person has been inserted as payee and the case where the drawer (Vinden or Macbeth) signs a bill in which the name of a real person has been inserted as payee. *Ibid.*, p. 92. The answer seems to be that the statute has done away with the qualification which formerly existed, namely, that in order to render a bill payable to bearer the fact that the payee is fictitious must have been known to the acceptor, but that as there must, nevertheless, be some test of fictitiousness, the knowledge of the drawer is still a necessary element. Fictitiousness is a matter of fact, but as Buckley, L.J., points out, *supra*, it is necessarily relative to someone. The only person whose intention or knowledge is relevant to this fact is the person who has inserted the name of the payee, *i.e.*, the drawer. For this purpose it is of course immaterial whether the drawer inserts the payee's name with his own hand or signs as drawer a bill which has been prepared

by some one else. It is the drawer in either case, who by his signature and the delivery of the document brings a bill into existence with a payee fictitious or otherwise.

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In the Australian case of City Bank v. Rowan, 1893, 14 N.S.W.R. (Law) 127, the facts were very similar to those in Vinden v. Hughes. It was falsely represented to the defendants that certain goods had been sold to them by James Shackell & Co. and were ready to be delivered, and the defendants were induced to become makers of a note in favour of the alleged vendors for the purchase price of the goods. In fact the business of James Shackell & Co. had ceased to exist, although James Shackell, who formerly carried on business in that name, was living in Melbourne, where the firm formerly carried on business. The payees' name was forged and the note negotiated to the plaintiff who took it in good faith. It would seem that the case might have been disposed of in the plaintiff's favour on the ground that the note was payable to a non-existing person. The court reached the same conclusion but based its decision upon the ground that the case fell "precisely within the law laid down in Bank of England v. Vagliano, which is to the effect that wherever the name inserted as that of payee in a bill or note is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act and that such bill or note may be treated by a legal holder as payable to bearer." It is not easy to see the application of this doctrine to the facts before the court as the makers of the note did in fact intend that the named payees should receive payment in conformity with the terms of the note. The judgment then proceeds as follows, laying down a similar doctrine to that upon which the Court of Appeal relied in the London Life Case: "Here James Shackell & Co. the supposed payees, even if an existing firm, had no interest in the note, no right to endorse it or be paid upon it, and as they had not, then no person as payee had any such right. The payees were accordingly fictitious persons, and the plaintiffs are therefore holders of this note as if it were payable to bearer, and may as such holders sue the defendants as makers." This doctrine is not correct according to the English cases. The maker of a note like the drawer of a bill is the creator of the instrument, and his intention alone

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is relevant to the fictitiousness or reality of the payee. Cf. article by A.R. Butterworth, 10 L.Q.R. 40 (Jan. 1894.)

Endorsement of bill payable to the order of a fictitious person.

Endorsement in name of fictitious payee.

Chalmers, p. 24, says: "When a bill is payable to the order of a fictitious person it is obvious that a genuine endorsement can never be obtained, and in accordance with the language of the old cases and text-books the Act puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person, but in the hands of another, is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bonâ fide* holder would be justified in indorsing it in the payee's name. It might have been better if the Act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of anyone who should indorse it, or, in other words, as indorsable by the bearer. Though the bill may be payable to bearer, it is clear that a holder who is party or privy to any fraud acquires no title. What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person shall not affect the rights of a person who has received or paid it in good faith."

The question whether endorsement is necessary under the English act is perhaps open. The language of the foregoing extract from Chalmers suggests that the failure of the act to require endorsement of such a bill in the name of the fictitious payee was the result of mere oversight. The Negotiable Instruments Law, on the other hand, provides that such an instrument "is payable to bearer," and it seems to be agreed that the effect is to dispense with endorsement and theoretically thus to create an anomalous exception to the general rule that a bill payable to order cannot be negotiated by delivery without endorsement. Practically, of course, a bill payable to a fictitious person and unendorsed will be as negotiable as a bank note marked "counterfeit." Cf. C. L. McKeehan's review of the Ames-Brewster controversy in Brannan, pp. 107 ff.; Street. Foundations of Legal Liability, vol. 2, p. 513.

The signature of a fictitious person must be distinguished from (*a*) the forged signature of a real person, and (*b*) the signature of a real person using a fictitious name—for instance, John Smith may trade as "The Birmingham Hardware Company," and sign accordingly. Chalmers, p. 25; citing Schultz

v. Astley, 1836, 2 Bing, N.C. 544, where Thomas Wilson Richardson drew a bill as Thomas Wilson; see sec. 132. Sec. 21. Endorsement in name of fictitious payee.

It has been suggested that bills payable to the order of unincorporated associations or to the estates of deceased persons are payable to bearer by reason of the sub-section in question. But, as Ames says, it is a perversion of language to call the payee in such a bill a fictitious or non-existing person. See Brannan, pp. 195, 231. Cf. notes to sec. 19.

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

2. Where a bill, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option. 53 V., c. 33, s. 8. [Eng. s. 8 (4) (5). Cf. N.I.L. s. 8.] When payable to person or order.

Prior to 1906, this section and the first three sub-sections of sec. 21 formed one section.

Sub-sec. 1 alters the law and adopts the Scotch rule. Chalmers, p. 27. Before the act it was held that a bill or note drawn payable to a particular person, without the addition of "or order" or other words authorizing transfer, was not negotiable. Plimley v. Westley, 1835, 2 Bing, N.C. at p. 251; Harvey v. Bank of Hamilton, 1888, 16 S.C.R. 714, S.C. Cas. 129; otherwise as to an endorsement; see notes to sec. 67. Bill payable to a particular person is payable to order.

By reason of sec. 165 the provision is equally applicable to a cheque. Bank of B.N.A. v. Warren, 1909, 19 O.L.R. 257, at p. 262.

The change in the law effected by sub-sec. 1 has not been adopted by the Negotiable Instruments Law. That act provides that an instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. The consequence is that if words of negotiability are omitted the act does not apply and rights of the parties are governed by principles of the law merchant applicable to them at common law. Street, Foundations of Legal Liability, vol. 2, pp. 501 ff.

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If a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties, but it is not negotiable (sec. 21). Cf. secs. 68 and 69.

Sub-sec. 2 is declaratory. Smith v. McClure, 1804, 5 East, 476. It provides that a bill payable "to the order of C." is in legal effect payable "to C. or order," *i.e.*, that C. can demand payment without giving a responsible endorsement. C. of course is bound to give a receipt to the same extent as any person who receives payment of money. See an endorsement by way of receipt distinguished by Byles, J., from an ordinary endorsement which is in the nature of a guarantee. Keane v. Beard, 1860, 8 C.B.N.S. at p. 382, 2 Ames, at p. 732. Chalmers, p. 28. As to the obligation to give a receipt, see Lockridge v. Lacey, 1870, 30 U.C.R. 494.

Payable on demand when.

23. A bill is payable on demand,—

(*a*) which is expressed to be payable on demand, or on presentation; or,

(*b*) in which no time for payment is expressed.

Endorsed when overdue.

2. Where a bill is accepted or endorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any endorser who so endorses it, be deemed a bill payable on demand. 53 V., c. 33, s. 10. [Cf. Eng. s. 10. Cf. N.I.L. s. 7.]

The corresponding section of the English act has in sub-sec. 1, clause (*a*), the words "or at sight" after the words "on demand." These words were in the Canadian bill as introduced into the House of Commons in 1890, but were struck out in committee.

Sight drafts.

If a bill is not payable on demand, three days of grace are, in every case, where the bill itself does not otherwise provide, added to the time of payment (sec. 42). The effect of the act is that bills payable on presentation are demand drafts and are not entitled to days of grace, but that sight drafts, in accordance with the custom prevailing in this country prior to the act, are entitled to days of grace. In England bills payable at sight as well as those payable on presentation are demand drafts and not entitled to days of grace under the act. The English act in this respect reproduces the effect of the statute 34 & 35 V., c. 74. Prior to that statute it was doubtful whether

or no days of grace attached to such bills. Chalmers, p. 32. Sec. 23.

Under the Negotiable Instruments Law, as under the English act, instruments payable at sight are payable on demand.

Clause (*b*) of sub-sec. 1 is declaratory. Before the act a bill payable generally was payable on demand. Whitlock v. Underwood, 1823, 2 B. & C. 157.

A bill payable on demand is deemed to be overdue for the purposes of negotiation, when it appears on the face of it to have been in circulation for an unreasonable length of time (sec. 70) but the statute of limitations begins to run from the date of the bill. See notes to sec. 95. A demand bill must be presented for payment within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the endorser liable (sec. 86). The provisions of the act applicable to a bill payable on demand apply to a cheque except as otherwise provided in part III. (sec. 165). As to presentment for payment of a note payable on demand, see secs. 180 and 181. As to presentment for acceptance, see sec. 75. Demand bill, when overdue.

A bill payable otherwise than on demand is overdue after the expiration of the last day of grace. See sec. 42. As to the negotiation of an overdue bill, see sec. 70. A bill may be accepted when it is overdue (sec. 37).

The rule of sub-sec. 2 was law before the act so far as the acceptor was concerned. Mutford v. Walcot, 1698, 1 Lord Raym. 574, 4 R.C. 216. The sub-section extends the same rule to an endorsement after maturity.

24. A bill is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable,— Determinable future time.

(*a*) at sight or at a fixed period after date or sight; Sight.

(*b*) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain. 53 V., c. 33, s. 11; 54-55 V., c. 17, s. 1. [Cf. Eng. s. 11. Cf. N.I.L. s. 4.] Specified event.

The corresponding sections of the English act and the Negotiable Instruments Law omit the words "at sight or" at the beginning of clause (*a*). These words were added to the Canadian act by amendment in 1891.

Sec. 24. Sight bill.

When similar words were struck out of the section in the bill of 1890 which corresponds to the present sec. 23 (see notes to that section) the effect was to declare that a sight draft was not payable on demand. Hence the necessity of inserting the words in sec. 24, so as to include sight drafts in the category of bills payable at a determinable future time.

Subject to the provisions of the act, when a bill payable at sight or after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time (sec. 77). Presentment of such a bill for acceptance is necessary in order to fix the maturity of the instrument (sec. 75).

As to the due date of bills payable as described in this section, see secs. 44, 45 and 46. See also sec. 150 (acceptance for honour).

When a bill is not payable on demand, it is duly presented for payment if presented on the day it falls due (sec. 86). Three days of grace, where the bill itself does not otherwise provide, are added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (sec. 42).

Event which is certain to happen.

An instrument payable on a contingency is not a bill and the happening of the event does not cure the defect (sec. 18).

On or after specified event.

It was held in Colehan v. Cooke, 1743, Willes, 393, 4 R.C. 184, 1 Ames 83, that a note payable "ten days after the death of my father" was negotiable, the event being certain to happen, unlike a number of cases cited in which payment was made to depend upon an event which might never happen. See cases cited in the notes to sec. 18. Ames disapproves of Colehan v. Cooke and thinks that an instrument like the one there held to be valid is wholly foreign to the custom of merchants. 2 Ames 831. Such an instrument, however, seems to be authorized by the words of sec. 24, which declares the law as established in various cases. See full discussion in Russell, pp. 97 ff. A note payable with interest twelve months after notice is not payable on a contingency and is valid. Clayton v. Gosling, 1826, 5 B. & C. 360. See other illustrations given by Chalmers, pp. 33-4; cf. Byles, p. 116.

A note payable at a specified date, with a proviso that "if the defendant should sooner dispose of or sell certain lands, etc., then the note shall be payable on demand at said bank,"

was held valid. Elliott v. Beech, 1886, 3 Man. R. 213; cf. Massey v. Perrin, 1892, 8 Man. R. 457. So in the case of a note reading "seventeen months after date I promise to pay to A. or order £50 without interest, or three years and five months after date with two years' interest." Hogg v. Marsh, 1849, 5 U.C.R. 319. Sec. 24. On or after specified event.

The Negotiable Instruments Law, sec. 4, further provides that an instrument is payable at a determinable future time which is expressed to be payable "on or before a fixed or determinable future time specified therein." In such case the instrument is due at a time fixed and it is not due before. The exercise of the option would be a payment in advance of the legal liability to pay and nothing more. Crawford, p. 14. Ames considers such an instrument unobjectionable at common law. 2 Ames 831.

25. An inland bill is a bill which is, or on the face of it purports to be,— Inland bill defined.

(*a*) both drawn and payable within Canada; or,

(*b*) drawn within Canada upon some person resident therein.

2. Any other bill is a foreign bill. Other bills.

3. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. 53 V., c. 33, s. 4. [Eng. s. 4. Cf. N.I.L. s. 129.] Presumption

A foreign bill if dishonoured must be duly protested (sec. 112) whereas, except in the province of Quebec, it is not necessary to note or protest an inland bill (sec. 113), notice of dishonour alone being sufficient.

Where a foreign note is dishonoured, protest thereof is unnecessary, except for the preservation of the liabilities of endorsers (sec. 187). See sec. 177 as to when a note is a foreign or an inland note.

Sub-sec. 3 is new. The result appears to be that though a bill purports to be a foreign bill, the holder may nevertheless shew that it is in fact an inland bill for the purpose of excusing protest; while if it purports to be an inland bill though really a foreign bill, he may treat it, at his option, as either. Chalmers, p. 17. Cf. Russell, p. 104. Inland or foreign bill.

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Inland or foreign bill.

"Unless the contrary appears on the face of the bill," *i.e.*, unless something on the face of the bill indicates that it is a foreign bill, the holder may treat it as an inland bill, although it does not purport to be (*a*) both drawn and payable within Canada, or (*b*) drawn within Canada upon some person resident therein.

As to place of payment for purposes of presentment, if no place of payment is specified in the bill, see sec. 88. As to measure of damages when a bill is dishonoured abroad, see sec. 136.

In order to determine whether a bill is inland or foreign, Canada is considered as one country just as the British Islands are in the English act treated as one country for this purpose, but for the purposes of private international law or conflict of laws, the various provinces are to be treated as separate countries, and the consequence of the contracts entered into by the various parties to a bill may be governed by provincial law. See secs. 160, *et seq.*, *infra*, and notes to sec. 10, *supra*.

The following examples of inland bills are adapted from Chalmers, p. 16:—

1. A bill is drawn in Toronto on a merchant in Montreal. It is accepted payable in Montreal, but is endorsed in New York. Cf. sec. 161 and Lebel v. Tucker, 1867, L.R. 3 Q.B. 77.

2. A bill is drawn in Toronto on B. who resides in Montreal. B. accepts it payable in New York.

3. A bill is drawn in Toronto upon a merchant in New York, payable in Toronto, and is accepted. Cf. Amner v. Clark, 1835, 2 C.N. & R. 468, and sec. 162; if the bill were not drawn payable in Toronto, it would in its origin be a foreign bill, and would, presumably, continue so, though subsequently accepted payable in Toronto.

Bill or note.
Option.

26. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note. 53 V., c. 33, s. 5. [Eng. s. 5. N.I.L. s. 130.

As to incapacity to contract, see sec. 47, which provides that capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Sec. 26.

In view of the full discussion of the word "fictitious" in the notes to sec. 21, sub-sec. 5 (payee a fictitious or non-existing person), it is sufficient here to say that a fictitious person means a person who is fictitious by the pretence of the creator of the instrument, *i.e.*, the drawer of a bill or cheque or the maker of a note.

A. draws a bill on B. and negotiates it away; B. is a fictitious person. The holder may treat the bill as a note made by A. He need not prove presentment or give notice of dishonour. Smith v. Bellamy, 1817, 2 Stark 223. Bill or note.

Presentment for acceptance is excused where the drawee is a fictitious person or a person not having capacity to contract by bill (sec. 79). Presentment for payment is dispensed with where the drawee is a fictitious person (sec. 92).

Notice of dishonour is dispensed with as regards the drawer where (*a*) the drawer and drawee are the same person; (*b*) the drawee is a fictitious person or a person not having capacity to contract (sec. 107). Notice of dishonour is dispensed with as regards the endorser, where the drawee is a fictitious person or a person not having capacity to contract, and the endorser was aware of the fact at the time he endorsed the bill (sec. 108).

If both drawer and drawee are fictitious persons, the bill might perhaps be treated as a note made by the first endorser. Chalmers, p. 19.

The directors of a joint stock company draw a bill in the name of the company, addressed "To the Cashier." The holder may treat it as a note by the company. Allen v. Sea, 1850, 9 C.B. 574; cf. Ellison v. Collingridge, 1850, 9 C.B. 570, 1 Ames 42.

A document in the form of a banker's draft drawn by a branch bank upon its head office cannot be treated by the bank as a bill of exchange, although a holder may sue the bank upon it and treat it as either a bill or a note. London City, etc., Bank v. Gordon, [1903] A.C. at p. 250. Although the holder of such an instrument has the option of treating it as a bill, it is in effect nothing but a note, one of the essentials of a bill being lacking, namely, a drawee distinct from the drawer. Miller v. Thomson, 1841, 3 M. & G. 576, 1 Ames 138. Cf.

Sec. 26. Bill or note.

Willans v. Ayers, 1877, 3 App. Cas. 133, 142; Charlebois v. Montreal, 1898, Q.R. 15 S.C. 96 (warrant issued by a city police committee to the city treasurer).

Ambiguous instruments.

The Negotiable Instruments Law, sec. 17 (5), provides that where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election. A similar doctrine is stated in Edis v. Bury, 1827, 6 B. & C. 433, 1 Ames 136; Lloyd v. Oliver, 1852, 18 Q.B. 471, 1 Ames 141; but Ames thinks the reasoning of the court in the latter case to be far from convincing, inasmuch as the words "I promise" were wholly ignored: 2 Ames 834; Golding v. Waterhouse, 1876, 16 N.B.R. (3 Pugs.) 313.

Valid bill.

27. A bill is not invalid by reason only,—

Not dated.

(*a*) that it is not dated;

Statement of value.

(*b*) that it does not specify the value given, or that any value has been given therefor;

Statement of place.

(*c*) that it does not specify the place where it is drawn or the place where it is payable;

Irregular date.

(*d*) that it is antedated or postdated, or that it bears date on a Sunday or other non-juridical day. 53 V., c. 33, ss. 3 and 13. [Eng. ss. 3 (4) and 13 (2). Cf. N.I.L. ss. 6 and 12.]

Prior to 1906, clauses (*a*), (*b*) and (*c*) were part of the present sec. 17, and clause (*d*) was part of the present sec. 29.

Date.

Although an undated bill may be valid, the issue of an undated bill is irregular and may be attended with some practical inconvenience. As to inserting the date of issue or acceptance, see sec. 30; cf. sec. 31. If the date is omitted, the bill is considered as dated on the day on which it was drawn (Giles v. Bourne, 1817, 6 M. & S. 73), and such date may be shewn by parol evidence. Davis v. Jones, 1856, 17 C.B. 625. The Negotiable Instruments Law, sec. 17 (3), provides that where an instrument is not dated, it will be considered to be dated as of the time it was issued.

If a date is given, it is presumed to be the true date (sec. 29). Any alteration of the date is a material alteration (sec. 146). Sec. 27.

As to conflict of laws, see secs. 160 and 164.

A note dated 7 Nov., 1905, payable "21st November next," is payable 21st November, 1906. Drapeau v. Pominville, 1897, Q.R. 11 S.C. 326.

Value.

The law raises a *primâ facie* presumption of consideration, and therefore it is not necessary to express on the face of the bill that value has been given. Hatch v. Trayes, 1840, 11 A. & E. 702. An exception is, however, made by sec. 14 in the case of bills given for a patent right.

Every party whose signature appears upon a bill is *primâ facie* deemed to have become a party thereto for value (sec. 58). But the value may be impeached; see notes to that section and to sec. 74.

Place.

It seems that a bill may state an alternative place of payment. Beeching v. Gower, 1816, Holt, N.P.C. 313; cf. Pollard v. Herries, 1803, 3 B. & P. 335; Speyer v. Inland Revenue, [1907] 1 K.B. 247. A bill which is made payable elsewhere than at the residence or place of business of the drawee, is said to be "domiciled" where payable. Chalmers, p. 15.

As to presentment for payment of a bill in which no place of payment is specified, see sec. 88.

Remise de place en place.

Under some of the foreign codes, it is necessary that a bill should be payable in a place different from that in which it was made. This rule prevailed under the old French law and, for a long time, in the province of Quebec. Long ago, however, the merchants of Quebec had adopted the English custom, which was sanctioned by the Civil Code of 1866, *la remise de place en place* not being mentioned in that code as an essential of a bill of exchange. Girouard, Bills of Exchange, p. 16.

An acceptance to pay at a particular specified place is not on that account conditional or qualified (sec. 38).

Any alteration of the place of payment, or the alteration of a bill by the addition of a place of payment without the acceptor's assent where the bill has been accepted generally, is a material alteration (sec. 146).

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Antedating and postdating.

For many purposes a postdated cheque is equivalent to a bill payable after date. Forster v. Mackreth, 1867, L.R. 2 Ex. 163, 4 R.C. 210. For instance, if the cheque is presented to the bank, on or after the date, the bank paying it is entitled to charge the customer in the same way as any other drawee of a bill payable on demand, and any other person taking the cheque for value (within a reasonable time after the date) would doubtless be entitled to treat it as a bill of exchange payable on demand. In any case, the person liable upon the instrument would be bound to make his arrangements to meet it as if it were a bill payable on demand on or after the day of its date. 4 R.C. at p. 214. A bank ought not to pay a postdated cheque on its being presented before its ostensible date, but ought to pay it if presented on or after its ostensible date, even if it has already been presented before its date and payment has been refused. Halsbury, vol. 1, p. 602.

Antedating and postdating.

A bill bearing date the 1st May, is endorsed by the payee to D. It appears that the payee died in the previous April. D. may shew that the bill was postdated, and he can then recover on the bill. Pasmore v. North, 1811, 13 East 517; Usher v. Dauncey, 1814, 4 Camp. 97; Chalmers, p. 36.

A postdated cheque given and received with the intention that it should be held over and not presented for payment until the day of its date, is a bill of exchange, and therefore, in the absence of express authority, one partner of a firm of solicitors cannot bind his co-partners by drawing a postdated cheque in the name of the firm. Forster v. Mackreth, *supra*.

The fact that a cheque is postdated does not make it irregular within the meaning of sec. 56, so as to charge the holder with equities of which he had no notice. Hitchcock v. Edwards, 1889, 60 L.T.N.S. 636; Royal Bank v. Tottenham, [1894] 2 Q.B. 715; Chalmers, p. 37; Russell, p. 210; Brannan, p. 17. The editor of the notes in 4 R.C. 214 says "it could hardly be maintained that a person taking a cheque before the apparent date would not be put upon enquiry, or would have a better title than the person from whom he received it," but the decision in Hitchcock v. Edwards, *supra*, is to the contrary.

To antedate a deed in order to defraud a third party is a forgery (Reg. v. Ritson, 1869, L.R. 1 C.C.R. 200), and the same principle would doubtless apply to bills and notes. As to

bills which were antedated to defraud creditors, see Re Gomersall, 1875, 1 Ch. D. 137; Jones v. Gordon, 1877, 2 App. Cas. 625. Chalmers, p. 37. Sec. 27. Antedating and post-dating.

The Negotiable Instruments Law, sec. 12, in place of clause (*d*) *supra*, provides: "The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery." If for the purpose of evading the law, a false date is inserted in the instrument, it will be void as to all persons having notice. Crawford, p. 23, citing Serle v. Norton, 9 M. & W. 309.

Sunday or other non-juridical day.

The words "or other non-juridical day" are not in the English act. They were added by the Senate. Their utility is not obvious, as no days except Sundays are *dies nefasti* in Canada.

Legislation having for its object the compulsory observance of Sunday, or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is within the jurisdiction of the dominion parliament. In re Legislation respecting Abstention from Labour on Sunday, 1905, 35 S.C.R. 581, 592, following Attorney-General for Ontario v. Hamilton Street Railway, [1903] A.C. 524. In the latter case the Judicial Committee held that the Ontario act "to prevent the Profanation of the Lord's Day" is *ultra vires* of the Ontario legislature, as being within the exclusive power given to parliament to legislate with regard to criminal law.

It is possible that the decisions just referred to would not affect a provincial act declaring a contract made on Sunday to be invalid.

R.S.C. 1906, c. 153, sec. 5, provides that it shall not be lawful for any person on the Lord's Day, except as provided in the act, or in any provincial act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour. Sec. 16 of the same act provides that nothing in the act shall be construed to repeal or in any way affect any provisions of any act or law relating

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in any way to the observance of the Lord's Day in force in any province of Canada when the act comes into force.

Bill made or dated on Sunday.

So far as bills are concerned, sec. 27 declares that a bill is not invalid by reason only that it bears date on a Sunday. The act does not say that a bill made on Sunday shall be valid. Such a bill would seem to be affected with illegality, except as against a holder in due course (sec. 58), if the consideration is a contract forbidden by statute to be made on Sunday and in fact made on that day. Cf. Bailey v. Dawson, 1912, 25 O.L.R. 387, 400.

In Quebec, before the passing of the act, it was held that a note made or dated on Sunday for a trade transaction closed the same day was void between the immediate parties. Cote v. Lemieux, 1859, 9. L.C.R. 221; cf. Kearney v. Kerich, 1863, 7 L.C.J. 31, where the plaintiff, apparently a holder in due course, was held entitled to recover on a note made on Sunday. The decision was based on the ground that the Quebec statute merely imposed a penalty, but was silent as to the effect upon contracts. It was there said "The court does not know of any law, either in Canada or in England, which declares that a note made on a Sunday, is a nullity or void."

Under the Ontario Lord's Day Act a note made on Sunday in payment of goods sold on that day is void, as between the original parties, but not as against an endorsee for value and without notice. Houliston v. Parsons, 1852, 9 U.C.R. 681; Crombie v. Overholtzer, 1853, 11 U.C.R. 55. In the latter case it was said "The statute makes void all contracts of sale made on a Sunday; but that affects merely the consideration. The plea relies on the bare fact that the transaction out of which this note arose was illegal as between the parties, without averring anything that might make such a defence available against this plaintiff, an innocent holder, for all that appears, for value."

In Begbie v. Levi, 1830, 1 Cr. & J. 180, the court seemed to think that a bill issued on a Sunday would be void in the hands of a holder with notice, but they suggested qualifications. Chalmers, p. 37.

Sum certain.

28. The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid,—

Interest.

(*a*) with interest;

(*b*) by stated instalments; Instalments.

(*c*) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; Default.

(*d*) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill. Exchange.

Figures and words.

2. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

With interest.

3. Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof. 53 V., c. 33, s. 9. [Eng. s. 9. Cf. N.I.L. ss. 2 and 17.]

A bill or a note must be for the payment of a "sum certain" (secs. 17 and 176). See notes to sec. 17.

An alteration of the sum payable is a material alteration (sec. 146).

With interest.

Where a bill is dishonoured, the measure of damages, which are deemed to be liquidated damages, include interest on the amount of the bill from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case (sec. 134).

In case of conflict of laws, see notes to sec. 161.

Interest expressly made payable by a bill is part of the debt, and not merely damages for detaining the debt. Crouse v. Park, 1847, 3 U.C.R. 458.

Interest before and after maturity.

A bill does not bear interest before maturity unless it is expressed to be payable with interest. If it is so expressed, interest runs from the date of the bill, or if the bill is undated, from its issue. As to the date, see notes to sec. 27. Issue is defined by sec. 2. If no rate of interest is fixed by the instrument, the rate payable is 5%: R.S.C. 1906, c. 120, s. 3. If a rate is fixed by the instrument, such rate is payable only until maturity, in the absence of an express stipulation for the

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payment of such rate after maturity. See cases cited in the notes to sec. 91 of the Bank Act, *supra*.

Russell (pp. 50, 108, 467) is of opinion that a bill payable "with bank interest" is not for a sum certain and therefore not negotiable. At p. 109 he refers to the editorial opinion expressed in 6 J.C.B.A. 308 that a bill payable "with bank charges" is not negotiable.

By stated instalments.

A bill payable by two instalments due 1st January and 1st July is valid (Carlon v. Kenealy, 1843, 12 M. & W. 139; 1 Ames 74; Gaskin v. Davis, 1860, 2 F. & F. 294); but a bill payable "by instalments," not specifying dates or amounts (Moffatt v. Edwards, 1841, Car. & M. 16), or "by ten equal instalments, payable, etc., all instalments to cease on the death of A." (Worley v. Harrison, 1835, 3 A. & E. 669) is invalid. Days of grace must be added to the instalment due-dates. Oridge v. Sherborne, 1843, 11 M. & W. 374; Chalmers, pp. 28, 29.

A promise to pay $100 "to be paid in yearly proportions" is a note payable in two years, and parol evidence to shew that it was intended to give four years for payment is not admissible. McQueen v. McQueen, 1852, 9 U.C.R. 536.

Bill payable by stated instalments.

An illustration of clause (*c*) is afforded by Carlon v. Kenealy, *supra*. In the absence of an acceleration clause, only the overdue instalment can be sued for. Clearahue v. Morris, 1820, 2 Rev. de Leg. 30.

Each instalment of principal is to be treated as a separate bill for purposes of presentment and notice of dishonour. As to an instrument providing for payment of interest in instalments during the currency of the instrument, see Union Investment Co. v. Wells, 1908, 39 S.C.R. 625, cited in the notes to sec. 70.

On principle the negotiability of an instrument payable in instalments with a provision for acceleration in case of default in payment of any instalment is doubtful. 2 Ames 830. But clause (*c*) of the statute is declaratory of the law as decided by the courts. Carlon v. Kenealy, *supra;* Miller v. Biddle, 1865, 13 L.T. 334, 1 Ames 76.

Rate of exchange. Sec. 28.

A bill payable "at exchange as per last endorsement," or "payable in Paris or London, at the choice of the holder, according to the course of exchange upon Paris" (Pollard v. Herries, 1803, 3 B. & P. 335) is valid. Chalmers, p. 29.

Where a bill drawn in a foreign country is made payable in Canada but not in the currency of Canada, the amount, in the absence of express stipulation, is to be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (sec. 163). Rate of exchange.

The general rule is that a sum payable in a currency other than that of the place of payment is to be calculated upon the value of such currency at the time of payment. Cf. Hirschfield v. Smith, 1866, L.R. 1 C.P. 340, 353, and Chalmers, p. 29, disapproving of Da Costa v. Cole, 1688, Skinner, 272; cf. sec. 164.

Prior to the act it had been held in a number of cases in this country that a bill payable according to an indicated rate of exchange was invalid as not being for a sum certain.

Discrepancy between words and figures.

A bill is drawn "Pay to the order of C. two hundred pounds." In the margin is superscribed £250. This is a bill for £200 only, and evidence to the contrary is inadmissible. Saunderson v. Piper, 1839, 5 Bing. N.C. 425, 2 R.C. 707, 712.

Parol evidence is inadmissible to explain a patent ambiguity (Saunderson v. Piper, *supra*). If the sum payable is omitted, evidence could not be given to shew the sum for which the bill was intended to be drawn, but the holder would have *primâ facie* authority to fill up the omission (sec. 31).

A bill is drawn "Pay to the order of C. one hundred," with £100 in the margin. This is a bill for £100. Rex v. Elliott, 1777, 1 Leach, C.C. 175. A bill in the form "Pay to my order, twenty-five, ten shillings," is sufficient as a bill for £25 10s. Phipps v. Tanner, 1833, 5 C. & P. 488. Chalmers, pp. 30, 31. Sum expressed in words and in figures.

A bill in which the sum payable is expressed in figures only is valid, although there are grave practical objections to drawing a bill in that form.

B. signs as acceptor a bill with the amount left blank. In the margin is £14 (in figures). This is fraudulently altered to £164 and the bill is filled up for one hundred and sixty-four

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pounds. A holder in due course can recover the larger amount from B., the giving of the acceptance in blank constituting authority to fill up the bill for any amount the stamp will cover. Garrard v. Lewis, 1882, 10 Q.B.D. 30; see secs. 31 and 32. See explanation in Bowen, L.J.'s judgment of the meaning and effect of the marginal figures. Cf. Byles, p. 108, note (*k*).

The Negotiable Instruments Law, sec. 17, provides that where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

With costs of collection or an attorney's fee.

The Negotiable Instruments Law, sec. 2, provides in addition that the sum payable is a sum certain within the act although it is to be paid "with costs of collection or an attorney's fee, in case payment shall not be made at maturity." This is in accordance with the weight of authority in the United States before the act. Crawford, p. 9. Cf. Brannan, p. 164, and 2 Ames 829, 830.

As to the addition of a provision authorizing a confession of judgment, if the instrument is not paid at maturity, see Brannan, pp. 9, 164.

True date presumption.

29. Where a bill or an acceptance, or any endorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance or endorsement, as the case may be. 53 V., c. 33, s. 13. [Eng. s. 13 (1). N.I.L. s. 11.]

This section is declaratory of the common law. Roberts v. Bethel, 1852, 12 C.B. at p. 778; Hays v. David, 1852, 3 L.C.R. 112, 115. The *primâ facie* presumption arising from the date may be rebutted and the true date shewn, *e.g.*, for the purpose of ousting the Statute of Limitations. Montague v. Perkins, 1853, 22 L.J.C.P. 187; 1 Ames 522. B. gives a blank acceptance in 1857. The drawer, by inadvertence, fills it up as a bill dated 1856. The holder can recover from the acceptor. Armfield v. Allport, 1857, 27 L.J. Ex. 42; cf.

Pasmore v. North, cited, *supra*, in the notes to sec. 27 (post-dated bill). Chalmers, p. 36. Sec. 29.

30. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at sight or at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly: Provided that,— Undated bill payable after date.

(*a*) where the holder in good faith and by mistake inserts a wrong date; and, Inserting wrong date.

(*b*) in every other case where a wrong date is inserted; Liability of holder.

if the bill subsequently comes into the hands of a holder in due course the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date. 53 V., c. 33, s. 12; 54-55 V., c. 17, s. 2. [Eng. s. 12. Cf. N.I.L. s. 13.]

This section is supplementary to sec. 31.

The English act and the Negotiable Instruments Law omit the words "at sight or." These words were added to the Canadian act in 1891; cf. notes to sec. 24.

The section was added to the English bill in committee. Before its enactment the English law on the subject was very obscure. When a bill comes from a foreign country undated, the holder frequently cannot know the exact date intended. He knows when the mail left, but does not know on what previous day the bill was issued. The present section throws any possible inconvenience that may arise upon the negligent party who omitted to date the bill or acceptance. Chalmers, p. 35. Presumption as to true date.

As to "issue" and "holder," see sec. 2. "Good faith" is defined by sec. 3, and "holder in due course" by sec. 56.

A bill is not invalid by reason only that it is not dated (sec. 27), but the omission, being a material one (cf. sec. 146), may be filled up by the person in possession of the bill (sec. 31).

It is pointed out in Russell, p. 113, that in the revision of the act in 1906 the punctuation of the proviso was changed (semicolons being substituted for commas at the end of clauses (*a*) and (*b*) as they now stand, and the comma which in the act of 1890 followed the phrase "if the bill subsequently comes into the hands of a holder in due course" being omitted). Holder in due course not prejudiced by insertion of wrong date.

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The omission of the comma makes it quite clear that the qualification expressed in the words within the quotation marks apply to clause (*a*) as well as to clause (*b*). In this respect the punctuation of the present act agrees with that of the English act, and, while the proviso as it stood in the act of 1890 is patient of the construction placed upon it by Russell, namely, that the qualifying words apply only to clause (*b*), it hardly seems likely that that is the true construction. It is worth noting that the corresponding provision of the Negotiable Instruments Law makes no distinction between the cases covered by clauses (*a*) and (*b*). It runs, "The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date."

Prior to the act it was vainly contended in Cruchley v. Clarance, 1813, 2 M. & S. 90, 1 Ames 128, and Schulz v. Astley, 1836, 2 Bing. N.C. 544, that a bill could be filled up only by one of the original parties. Byles, p. 106, note (*u*). Cf. other cases cited in 2 Ames 798.

Perfecting bill.

31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer, or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. 55 V., c. 33, s. 20. [Eng. s. 20 (1). N.I.L. s. 14.]

Authority.

Prior to 1906 this section and sec. 32 constituted one section. The two sections must be read together, for the completed instrument cannot be enforced against any person who becomes a party to it prior to its completion, unless it is filled up within a reasonable time and strictly in accordance with the authority given or unless, after completion, it is negotiated to a holder in due course (sec. 32).

Filling up incomplete bill.

The English act provides that where a simple signature on a blank *stamped* paper is delivered, etc., it operates as a *primâ facie* authority to fill it up as a complete bill for any

amount the stamp will cover, etc. The Negotiable Instruments Law agrees in this respect with the Canadian act. Sec. 31.

Sec. 30 provides for the special case where a bill payable after date is issued undated or an acceptance payable at sight or after sight is undated.

Where a note is signed and endorsed with a blank space for the rate of interest in an existing clause providing for interest, any person in possession of the note has *primâ facie* authority to fill in any rate of interest, but if the note when signed and endorsed had no clause providing for interest the addition of such a clause is an alteration not contemplated when the note was made and endorsed and avoids the note. British Columbia v. Ellis, 1897, 6 B.C.R. 82; cf. Burton v. Goffin, 1897, 5 B.C.R. 454. Filling up incomplete bill.

A bill is drawn payable to——or order. Any holder for value may write his own name in the blank and sue on the bill. Crutchly v. Mann, 1814, 5 Taunt. 529; Mutual Safety Ins. Co. v. Porter, 1851, 7 N.B.R. 230; cf. Chamberlain v. Young, [1893] 2 Q.B. 206, in which it was held that a bill made payable to "——order," and issued by the drawer endorsed by him without filling up the blank, was complete, "——order" being construed to mean "my order," *i.e.*, to the order of the drawer.

32. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given. When to be completed.

2. Reasonable time within the meaning of this section is a question of fact. 53 V., c. 33, s. 20. [Eng. sec. 20 (2). N.I.L. s. 14.] Reasonable time.

This section is supplementary to sec. 31. "Such instrument" in sec. 32 refers to an instrument which has been delivered in an incomplete state, *i.e.*, a simple signature on a

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blank paper delivered by the signer in order that it may be converted into a bill, or a bill delivered as a bill but wanting in a material particular (sec. 31).

It is proposed, firstly, to discuss the cases where a signature or incomplete document has been so delivered (these being the only cases to which secs. 31 and 32 apply), and secondly, to discuss the cases where there has come into the hands of an innocent holder a document in the form of a bill but which left the hands of the signer in an incomplete state without any effective delivery by him.

I. *Strictly in accordance with the authority given.*

Bill delivered in incomplete state and afterwards filled up.

If a bill is signed and delivered in blank and it is afterwards filled up within a reasonable time and strictly in accordance with the authority given, the holder need not shew that he comes within the proviso, and the signer is estopped from saying that the bill is other than, in its complete state, it purports to be. The latter cannot, *e.g.*, shew that his name as endorser was put on a bill payable to the order of a third person before the payee had endorsed.(*h*) The delivery of the incomplete instrument authorises the various blanks to be filled up in any order, and the bill may be enforced by a holder who knew all the circumstances of the case, and even though he became a party to the document while it was still incomplete. Glenie v. Smith, [1908] 1 K.B. 263, C.A., at pp. 267 ff.

A person who signs and delivers a blank paper in order that it may be converted into a bill upon the promise of the person accommodated, not a party to the instrument, that the latter will provide funds to meet the bill, is liable for the amount of the bill into which the paper is converted (in accordance with the authority given) to the holder in whose presence the conversion or filling in takes place, and *a fortiori* to a subsequent holder in due course. Bacon v. Décarie, 1908, Q.R. 34 S.C. 103.

Negotiated after completion to a holder in due course.

There seem to be cases which would arise fairly often in practice which would not be within the proviso, and where the first part of sec. 32 would take effect. The proviso can

(*h*) The defendant sought to bring himself within the case of Jenkins v. Coomber, [1898] 2 Q.B. 168. See the notes to sec. 131.

never operate in favour of a person who knows the acceptance of the bill to have been in blank. So where the plaintiff has inserted his own name as payee he will probably have to shew that this was done within the authority given by the defendant. See Herdman v. Wheeler, [1902] 1 K.B. at p. 37, where it is said that the rule just stated is in accordance with the cases decided before the passing of the act, with one possible, but not clear, exception. In the United States, however, the adoption of the Negotiable Instruments Law, sec. 14, has effected a change in the law. Street, Foundations of Legal Liability, vol. 2, p. 516. Sec. 32.

A "holder in due course" is a holder (sec. 2) who has taken a bill, complete and regular on the face of it, under the conditions mentioned in sec. 56. If the bill is not complete and regular on its face, the holder has notice of the imperfection and can be in no better position than the person who first took the bill in blank. See notes to sec. 56.

If, however, the signature or incomplete instrument which has been delivered within the meaning of sec. 31 is negotiated *after completion* to a holder in due course, it is valid and effectual for all purposes in his hands although it was not filled up within a reasonable time or in accordance with the authority given. When completed instrument may be enforced.

As to "reasonable time," cf. secs. 77, 86, 166, 181 and 182, where the same expression is used.

"Negotiated" in the proviso to the section means transferred by one holder to another (cf. sec. 60). A delivery of a bill to a payee for value is the issue of the bill (cf. sec. 2) and not its negotiation. B., intending to borrow £15 from A., signs a blank stamped paper, and authorises A. to fill it up as a note for £15 payable to A. A., instead of so doing, fills up the document as a note for £30 payable to C., and then hands it to C., who takes it in good faith and for value. Held, that, even if C. is a holder in due course,(*i*) the delivery of the note to him is not a negotiation of the instrument, and therefore he cannot recover, the note not having been filled up by A. in accordance with B's. authority. Herdman v. Wheeler, [1902] 1 K.B. 361.

"Completion" in the section refers to completing the form of the bill or supplying the wanting "material par-

(*i*) Although it was not decided in this case that the original payee may be a holder in due course, it has been so decided in other cases. See, *e.g.*, McDonough v. Cook, 1909, 19 O.L.R. 267, 271, 273, and notes to sec. 56.

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ticular." It does not include delivery, as in secs. 39 and 178, where a bill or note is said to be inchoate and incomplete until delivery (*ibid.*, p. 371).

Herdman v. Wheeler was decided solely with reference to the provisions of the statute and was distinguished on this ground by the English Court of Appeal in Lloyd's Bank v. Cooke, [1907] 1 K.B. 794. A. (the defendant) signed his name on a blank stamped piece of paper and entrusted the paper to X. with authority to fill it up as a note for £250 payable to B. (the plaintiff) and deliver it to B. as security for an advance to be made by B. X. fraudulently filled up the paper as a note for £1000 and obtained by means of it an advance of that amount from B., who had no notice of the fraud. The proviso to sec. 32 was inapplicable for the reasons stated in Herdman v. Wheeler, *supra*, but(*j*) it was held in Lloyd's Bank v. Cooke that the principle of Brocklesby v. Temperance Permanent Building Society,(*k*) is applicable also to negotiable instruments, and the common law doctrine of estoppel is not made inapplicable by the Bills of Exchange Act, and therefore A. was estopped from denying the validity of the note as between himself and B. and was liable for the full amount.

In other words, if a person signs an incomplete document and authorises another person to complete it as a negotiable instrument and use it, no matter to what limitation the authority may be subject, the signer is liable on the completed instrument to a holder in due course and cannot as against such holder set up the fraud or abuse of authority.

Examples of application of proviso.

The defendant signed, as maker, a printed form of promissory note, and handed it to A. by whom it was filled up for $55. The plaintiffs became endorsees for value without notice. Defendant held liable though the note may have been fraudulently or improperly filled up or endorsed. McInnes v. Milton, 1870, 30 U.C.R. 489; cf. Garrard v. Lewis, 1882, 10 Q.B.D. 30, cited in the notes to sec. 28.

(*j*) If B. had negotiated the note after completion to C., a holder in due course, then C. could have recovered by virtue of the proviso.

(*k*) [1895] A.C. 173: a case of securities fraudulently pledged by an agent for an amount larger than the principal had authorized.

Where the payee of a note endorsed it in November for the accommodation of the maker, leaving the date and sum blank, and the blanks were filled up in February by the maker, the date inserted being a day in January, it was held that the endorsee could recover against the payee. Sanford v. Ross, 1841, 6 U.C.O.S. 104. Sec. 32. When completed instrument may be enforced.

An endorser placed his name upon a note without maker's name or sum or payee's name, and the maker's name was afterwards signed by another person without authority, and the note negotiated. The endorsee must shew that he is a *bonâ fide* holder for value. Hanscombe v. Cotton, 1857, 15 U.C.R. 42; cf. Rossin v. McCarty, 1850, 7 U.C.R. 100.

Revocation of authority by death.

An instrument which is wanting in some one or more of the requisites of a complete bill is in effect a transferable authority to create a bill, and while incomplete is subject to the ordinary rules of law relating to authorities, *e.g.*, an authority coupled with an interest is not revoked by the death of donor or donee, while an authority not coupled with an interest is revoked by the donor's death. See Chalmers, pp. 54-56, citing the following illustrations:

1. B., who is indebted to C., gives him a blank acceptance for £100. C. dies. If C.'s administrator fills up the paper as a bill payable to drawer's order, and inserts his own name as drawer, he can enforce payment thereof against the acceptor. Scard v. Jackson, 1875, 34 L.T.N.S. 65. Death of acceptor before instrument filled up.

2. B., who is indebted to C., gives him a blank acceptance for £100, and then dies. C. may fill in his own name as drawer and payee after B.'s death, and recover the amount from B.'s estate. Carter v. White, 1882, 20 Ch. D. 225, affirmed, 1883, 25 Ch. D. 666, C. A., where it was held that a surety for the acceptor, not party to the bill, was not discharged.

3. B., having authority to do so, gives a blank acceptance for £100 in the name of the firm. It is filled up after B.'s death. The surviving partners are liable. Usher v. Dauncey, 1814, 4 Camp. 97.

4. B. gives C. a blank acceptance to accommodate him, and without receiving value. After B.'s death it is filled up and discounted with D., who sees it filled up. D. cannot re-

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cover the amount from B.'s estate. Hatch v. Searles, 1854, 2 Sm. & G. 147, approved in France v. Clark, 1884, 26 Ch.D. at p. 262.

Nature of holder's right to complete bill.

The editor of the Ruling Cases suggests that the expression in the section "*primâ facie* authority" hardly expresses the extent of the power of the holder of an incomplete instrument. The power to complete the bill, according to Cotton, L.J., in Carter v. White, *supra*, is not merely that of an agent, but arises from a contract that the person to whom the bill is given or any one authorised by him shall be at liberty to fill it up. That contract is not put an end to by the death of the acceptor. 4 R.C. at p. 645.

But, as Ewart points out, in the cases where the signer is held liable on an instrument completed without authority or in excess of authority, *ex hypothesi* the contract is not that of the signer, and it is not made by any one having authority to make it for him. Upon what principle then can he be liable? In one way only as Ewart sees it and that is by estoppel—by estopping him from denying that the contract is his. Estoppel by Misrepresentation, pp. 444-5.

II. *Instrument with blank but not delivered.*

The provisions of secs. 31 and 32 in favour of the holder are operative only upon the hypothesis that the incomplete document has been delivered by the signer in order that it may be converted into a bill.

No estoppel if incomplete instrument not delivered.

Although therefore a person who issues a bill leaving a blank in a material part of it is estopped, as between himself and a *bonâ fide* holder for value to whom it has passed with the blank filled up, from disputing the authority so to fill it up, there is no estoppel or presumption of authority in the case of a bill which has not been issued—that is to say delivered with the intention that it should operate as a bill—by the person charged upon it. Baxendale v. Bennett, 1878, 3 Q.B.D. 525, 4 R.C. 637.(*l*)

(*l*) Ewart apparently does not admit this exception to the application of the principle of estoppel, although the exception appears to be clearly established by the cases to be referred to. See Estoppel by Misrepresentation, pp. 438-449. At p. 440 he disposes somewhat summarily of a significant quotation from Baxendale v. Bennett, in which Brett, L.J., states the principle applicable to the signing of a blank acceptance.

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Delivery is defined by sec. 2 as transfer of possession, actual or constructive, from one person to another. By sec. 39 every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto.

The doctrine of sec. 40 (by which, when a bill is in the hands of a holder in due course, a valid delivery by all parties prior to him, so as to make them liable to him, is conclusively presumed), is inapplicable to a document which, when it leaves the possession of the signer, is wanting in material particulars. The doctrine which in England and in Canada has been applied in the decided cases to such incomplete document is expressly provided for in sec. 15 of the Negotiable Instruments Law as follows: "Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." By this section even the innocent holder is not protected if it is shewn that the incomplete instrument was never in fact delivered. The instrument is then treated, in effect, as a forgery. Street, Foundations of Legal Liability, vol. 2, p. 517; cf. Caulkins v. Whisler, 1870, 29 Iowa 495, 1 Ames 580, 2 *ibid.*, 865. The defence of want of delivery in such case is a real defence available against the whole world, not merely a personal defence which cannot be set up against a holder in due course.

A. wrote his name as acceptor across a document in the form of a bill of exchange addressed to himself and payable to drawer's order but with a blank for the name of the drawer. The document was stolen from an unlocked drawer of A.'s desk and came into the possession of B. who, without authority from A., filled in his own name as drawer and endorsed it. In its complete state the document was negotiated to D., who took in good faith and for value. Held, that D. was not entitled to recover against A. Baxendale v. Bennett, 1878, 3 Q.B.D. 525, 4 R.C. 637.

The sufficient unassailable ground for the last mentioned decision mainly relied upon by Brett, L.J., in the Court of Appeal was the fact that A. never issued the acceptance and never authorized the bill to be filled up with a drawer's name, so that he could not be sued thereon. He was under no legal

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duty, so that it was unnecessary to enquire whether he would have been negligent if there had been a duty. Bramwell, L.J., assumed that A. had been negligent, but considered his negligence not to be the proximate or effective cause of the fraud; he laid stress on a distinction between the cases cited and that before the court; in them the instrument had been parted with voluntarily, but in the case before the court the bill had been obtained by the commission of a crime. See T. Beven in 23 L.Q.R. at p. 396 (Oct., 1907). This distinction is clearly not the true ground of the decision in view of the case of Smith v. Prosser, *infra*.

A. (the defendant) being about to leave South Africa for England, signed two lithographed forms of promissory note with blanks for the date, sum payable, payee, etc., and handed them to his agent X., telling him to keep them for him and, if he (A.) should send instructions by telegram or letter, then to fill up the documents and raise money upon them for the purpose of making certain payments which A. might have to meet in South Africa while he was away. No instructions to use the documents were ever given, but, in A.'s absence, X. fraudulently filled up the documents as promissory notes payable to B. (the plaintiff). B. discounted them in good faith and X. misappropriated the proceeds. In an action on the notes in England (the notes being stamped as foreign bills for the purpose of suit) it was held that, as A. had entrusted the blank signed forms to X. as custodian only and not with the intention that X. should issue them as negotiable instruments, A. was not estopped from denying that he was liable. Smith v. Prosser, [1907] 2 K.B. 735 C.A.

B. being the payee of the notes, there was no negotiation to him after completion, and the case, therefore, was not within the proviso to sec. 32. Moreover, B. had notice that X. was acting under a power of attorney and ought, perhaps, to have made enquiries. There was also some question as to the validity of the notes because they had not been stamped at the time of signature. All the members of the Court of Appeal who heard the case put their decision, however, on the broad ground that the documents had never been delivered by the signer with the intention that they might be converted into complete notes, and that delivery with that intention was essential to estoppel whether under the act or at common law.

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Smith v. Prosser shews that the distinction made by Bramwell, L.J., in Baxendale v. Bennett is not valid in this connection. The fact that the signer voluntarily parted with possession of the documents does not preclude him from setting up the want of delivery.

Smith v. Prosser was applied in Ontario under the following circumstances. A. (the plaintiff) signed a lithographed form of note partially filled up in handwriting. The document was payable to A.'s order and was endorsed by him, but it was incomplete at least to the extent that no sum payable was mentioned in the body of the note, although the amount may have been written in figures in the corner of the form. No place of payment was mentioned, although the form contained a space for this purpose. This document and a signed application for insurance on A.'s life were left by A. in the possession of B., an agent for soliciting life insurance, upon the understanding that if and when A. passed the insurance company's medical examination the note was to be good or was to be paid by A. Soon afterwards A. decided not to proceed with the application, and he notified the company and B. of his decision but omitted to get from B. the form of note which he had signed. B. fraudulently filled it up as a note, inserted as the place of payment A.'s own bank (the defendant), and discounted the completed document with C., a holder in due course. C. presented the note at maturity to the defendant bank, which, without instructions from A., paid the amount out of A.'s funds on deposit. Held, that A. was entitled to recover notwithstanding that the defendant bank was the transferee of the note from a holder in due course. Hubbert v. Home Bank, 1910, 20 O.L.R. 531 (judgment affirmed by divisional court. Leave to appeal refused by the Court of Appeal).

It is to be noted that in Hubbert v. Home Bank not only did the signer voluntarily part with possession of the document as in Smith v. Prosser. At the time he parted with the possession he gave instructions which would have justified his agent in completing and using the document in a certain event, which, however, never happened, whereas in Smith v. Prosser the agent had no right in any event at all to complete and use the documents until and unless he should receive new and independent instructions to that effect from the signer.

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The case of Ray v. Willson, 1911, 45 S.C.R. 401, affirming 24 O.L.R. 122, was decided on grounds similar to those which prevailed in Smith v. Prosser and Hubbert v. Home Bank, but the court found as a fact that the plaintiffs were not holders in good faith.

Smith v. Prosser was also followed in McKenty v. Vanhorenback, 1911, 21 Man. R. 360, a case of a cheque payable to bearer stolen from the drawer's desk and cashed by the plaintiff in good faith. In the latter case, however, so far as appears from the report, the document was complete when it left the signer's hands, and, therefore, it is submitted that under sec. 40, sub-sec. 2, delivery should have been conclusively presumed in favour of the plaintiff (a holder in due course), and that the defendant should have been held liable.(*m*)

Referee in case of need.

33. The drawer of a bill and any endorser may insert therein the name of a person, who shall be called the referee in case of need, to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment.

Option.

2. It is in the option of the holder to resort to the referee in case of need or not, as he thinks fit. 53 V., c. 33, s. 15. [Eng. s. 15. N.I.L. s. 131.]

In the province of Quebec presentment to the referee in case of need (*besoin* or *recommandataire*) was, prior to the act, obligatory, as it is under some of the foreign codes. In England the question was a doubtful one.

It may possibly be necessary in some cases to present to the case of need in Canada, in order to charge a foreign drawer or endorser in his own country, for a Canadian statute is only binding in Canadian courts. However in most countries the duties of the holder would be held to be regulated by the *lex loci solutionis*. Cf. Chalmers, p. 42.

The referee in case of need is sometimes called the drawee in case of need (cf. the French version, *tiré au besoin*), or simply the "case of need,"—the usual form being "In case of need apply to D.E. at F."

A bill must be protested or noted for protest before it can be presented to the case of need (secs. 117 and 147, *et seq.*).

(*m*) See 19 J.C.B.A. 151 (Jan. 1912).

34. The drawer of a bill, and any endorser, may insert therein an express stipulation,— Stipulations.

(*a*) negativing or limiting his own liability to the holder; Limiting.

(*b*) waiving, as regards himself, some or all of the holder's duties. 53 V., c. 33, s. 16. [Eng. s. 16. Cf. N.I.L. ss. 38, 61 and 5.] Waiving rights.

Negativing or limiting, etc.

An endorsement negativing or limiting the endorser's liability is sometimes called a qualified endorsement.

The Negotiable Instruments Law, sec. 38, provides that a qualified endorsement constitutes the endorser a mere assignor of the title to the instrument and that it may be made by adding to the endorser's signature the words "without recourse," or any words of a similar import. Such an endorsement does not impair the negotiable character of the instrument. Cf. sec. 65 of the Negotiable Instruments Law, quoted in the notes to sec. 138, as to the effect of a qualified endorsement.

Such an endorsement must be distinguished from a conditional endorsement (sec. 66) or a restrictive endorsement (sec. 68).

The holder of a bill endorses it to D. thus: "Pay D. or order without recourse to me," or "Pay D. or order *sans recours*" (Goupy v. Harden, 1816, 7 Taunt. at p. 163), "or Pay D. or order at his own risk" (Rice v. Stearns, 1807, 3 Mass. 224) or "Pay D. or order without recourse, unless presented within 30 days." The endorser thereby passes his interest to D., but negatives or limits his liability as an endorser. Cf. Castrique v. Buttigieg, 1855, 10 Moo. P.C., pp. 110-2, 117; Chalmers, p. 42. Negativing or limiting liability.

In order to escape personal liability the person signing must do more than merely add words to his signature describing himself as an agent or as filling a representative character (sec. 52).

As to the ordinary liabilities of parties to a bill, see secs. 127, *et seq.*

An acceptance may be qualified (sec. 38).

Waiving as regards himself, etc.

As to waiver of presentment or notice of dishonour before or after the time for either of these acts, see secs. 92, 106.

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The drawer or any endorser may under clause (*b*) waive his right to presentment, notice or dishonour, etc. Such an endorsement is sometimes spoken of as a facultative endorsement. It does not affect the negotiation of the bill. C. adds the words "notice of dishonour waived" to his endorsement. This relieves any subsequent party from the necessity of giving notice of dishonour to C.

Waiving performance of holder's duties.

If it is intended that a person should, at the time he becomes a party to a bill, dispense with performance of any of the holder's duties, the dispensation or waiver should appear on the instrument itself, otherwise it would not be admissible in evidence under the rule that a contract in writing cannot be varied by extrinsic evidence. Free v. Hawkins, 1816, Holt, N.P. 550, 8 Taunt. 92, 2 Ames 132, 814; cf. notes to sec. 41 (Oral evidence).

Chalmers, p. 43, states that it has been held in the United States that an endorsement in the above form dispenses with the necessity of notice to all subsequent endorsers; and that in France a similar construction has been put on the phrases, *Retour sans frais*, *Retour sans protêt*, and *Sans compte de retour*, but that it is doubtful whether the English act would bear such an interpretation. The express authority of the section extends only to the waiver by a party "as regards himself" of some or all of the holder's duties, and it has been held in the Quebec case of Banque de St. Jean, v. Desmarais, 1910, 17 R. de J. 304, that an endorsement "waiving protest" does not relieve the holder from protesting as against another endorser.

The Negotiable Instruments Law provides (sec. 5) that the negotiable character of an instrument otherwise negotiable is not affected by a provision which waives the benefit of any law intended for the advantage or protection of the obligor, and (sec. 110) that where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an endorser, it binds him only.

CHAPTER XXXV.

ACCEPTANCE.

Acceptance is defined by secs. 35 and 36.

It may be general or qualified (sec. 38).

The time of acceptance is provided for by sec. 37.

As to acceptance *supra* protest, see sec. 147, and as to acceptance of bills in a set, see secs. 158 and 159.

Acceptance and Interpretation.

Acceptance defined.

35. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

Drawee's name wrong.

2. Where in a bill the drawee is wrongly designated or his name is misspelt, he may accept the bill as therein described, adding, if he thinks fit, his proper signature, or he may accept by his proper signature. 53 V., c. 33, s. 17. [Cf. Eng. s. 17. Cf. N.I.L. s. 132.]

Prior to 1906 this section and sec. 36 constituted one section.

Unless the context otherwise requires, "acceptance" means an acceptance completed by delivery or notification, (sec. 2), for until delivery or notification the contract of acceptance is incomplete and revocable (sec. 39). After the drawee has accepted a bill he is termed the "acceptor."

The liability of an acceptor is defined by secs. 128 and 129.

Acceptance must be by drawee.

There cannot be an acceptor of a bill other than the drawee or one who accepts as his agent (see notes to sec. 51) or for his honour (sec. 147, *et seq.*). Steele v. McKinley, 1880, 5 App. Cas. 754, at p. 782, 4 R.C. 218, at p. 235.

The same principle is not applicable to a note. Any number of persons may become bound as promisors along with the original maker (*ibid.*).

Acceptance must be by drawee.

In Steele v. McKinley, *supra*, W. addressed a bill to W.M. and T M. The drawees accepted. Their father, J.M., then

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wrote his own signature across the back of the bill, and handed it to W. who remitted its amount, less discount, to the drawees. In an action by the representative of the drawer against the representative of J. M., it was held that what was done could not be effectual as a guarantee for want of a writing sufficient to satisfy the Statute of Frauds, or as an acceptance because the bill was not addressed to J.M. It was urged that J.M.'s signature was operative as an endorsement to W., but the court held that W., being the drawer, was by virtue of that fact liable to an endorser, and could not at the same time be entitled to sue on the endorsement. It is true that there may be an endorsement by a person who puts his name on the bill to facilitate its negotiation to a holder. Such an endorsement is known as the giving of an aval. But an aval for the honour of the acceptor is not effectual in English law. The endorsement by a stranger to a bill to one who is about to take it has the effect of making the endorser responsible to subsequent holders, but creates no obligation to those who were parties previously. See notes to sec. 131.

In Steele v. McKinley the question was discussed with reference to some Scotch authorities which seemed to indicate that the defendant was liable. The English authorities were already clear upon the point. See Davis v. Clarke, 1844, 6 Q.B. 16, 1 Ames 202; and Jackson v. Hudson, 1810, 2 Camp. 447, 1 Ames 201.

A bill is addressed to the "Directors of the B. Co., Ltd." The acceptance is signed by two directors and the manager. The manager is not liable as acceptor. Bult v. Morrell, 1840, 12 A. & E. 745.

A bill is addressed to William B. His wife accepts it, signing the acceptance "Mary B." If he authorizes her so to accept, or afterwards promises to pay the bill, he is liable as acceptor. (Lindus v. Bradwell, 1849, 5 C.B. 583, on the ground that the drawee may accept in any name he chooses to adopt, and that in this case William B., chose to adopt *pro hac vice* the name of his wife to accept in: *sed quaere* now. Chalmers, pp. 44, 46; cf. Byles, p. 52, note (*b*).)

Firm and partners.

When a bill is addressed to two or more persons, whether partners or not, any one of them may accept so as to bind him-

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self. Owen v. Von Uster, 1850, 10 C.B. 318, 1 Ames 204. If all do not accept, the acceptance is a qualified acceptance (sec. 38).

Acceptance by a partner.

The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm (sec. 132). If a bill is addressed to B. & Co., and D., a partner in the firm, accepts it in his own name, he is liable as acceptor. Owen v. Von Uster, *supra*. But the firm is not liable; Mason v. Ramsay, 1808, 1 Camp. 384, to the contrary, is presumably no longer law since the act requiring the acceptance to be signed by the drawee (sec. 36): Chalmers, p. 46.

A bill is addressed to B. & Co. B., a partner in the firm, accepts it in the firm name, adding also his own name. This is the acceptance of the firm, and not of B. personally. In re Barnard, Edwards v. Barnard, 1886, 32 Ch. D. 447.

A bill is addressed to D., who is a partner in the firm of B. & Co. D., accepts in the firm name. He is liable personally as acceptor. Nicholls v. Diamond, 1853, 9 Ex. 154.

A firm of "Cormack Bros." dissolved partnership, and Carter, an agent, was appointed to wind it up. M. Cormack had been a partner in the firm. Carter accepted, for his own purposes, a bill drawn on Cormack Bros., signing the acceptance "M. Cormack and R. Carter." M. Cormack is not liable on this acceptance. Odell v. Cormack, 1887, 19 Q.B.D. 223.

Incorporated company.

The acceptance of a company is sufficiently signed if it is duly sealed with the corporate seal (sec. 5). A company may however, be bound by an acceptance duly signed on its behalf by an agent: see notes to sec. 5.

A bill is addressed to the B. Co., Ltd. Two of the directors accept it, signing thus: "J.S. and H.T., directors of the B. Co., Ltd." This is an acceptance by the company. Okell v. Charles, 1876, 34 L.T.N.S. 822. Chalmers, p. 46, remarks that this decision may have depended upon sec. 47 of the English Companies Act, 1862; see notes to sec. 5.

A bill is addressed to the S.S.P. Co., the proper name of the company being the S.S.P. Co., *Limited*. It is accepted by "J.M., secretary of the company." This is not the acceptance of the company; but J. M. was held personally liable under the predecessor of sec. 63 of the English Companies

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(Consolidation) Act, 1908, cited in the notes to sec. 5.(*a*) Penrose v. Martyr, 1858, E.B. & E. 499; cf. Atkins v. Wardle, 1889, 58 L.J.Q.B. 377, affirmed on appeal 5 T.L.R. 734: Byles 93; Brown v. Howland, 1885, 9 O.R. 48, affirmed, 15 O.A.R. 750; Chalmers, p. 375.

Acceptance by officer of a company.

If a bill is addressed to an officer of a company either by name or by the title of his office, the company cannot be liable as acceptor because it is not the drawee; before the act the officer would have been liable personally if he accepted either as officer of the company or "for the company," but not if he accepted in the company's name, *per* himself. Madden v. Cox, 1880, 5 O.A.R. 473, where the previous cases in Upper Canada are discussed. But in view of the terms of sec. 52, a person signing "for the company" would not now, it seems, be held personally liable. See Smith v. Mason, 1911, Q.R. 40 S.C. 75, cited in the notes to sec. 52.

Drawee wrongly designated or his name misspelt.

There is no provision in the English act or in the Negotiable Instruments Law corresponding to sub-sec. 2. Sec. 64 contains a similar provision in regard to the payee or endorsee of a bill payable to order, except that the words "if he thinks fit" are omitted.

A bill is addressed to D. & Co. The proper style of the firm is C. D. & Co., and the bill is accepted in that name. Held a valid acceptance. Lloyd v. Ashby, 1831, 2 B. & Ad. 23. The contrary was held in Quebec Bank v. Miller, 1885, 3 Man. R. 17. Under the act the acceptance would be valid.

Acceptance.

36. An acceptance is invalid unless it complies with the following conditions, namely:—

On the bill.

(*a*) It must be written on the bill and be signed by the drawee;

For money.

(*b*) It must not express that the drawee will perform his promise by any other means than the payment of money.

(*a*) Except under the statute, a person who purports to accept personally or as an officer a bill addressed to a company, is not liable personally because he is not the drawee. But a person desiring to sign a note on behalf of a company may easily render himself personally liable if he does not indicate clearly by the form of the signature that he is signing for or on behalf of a principal. See notes to sec. 52.

2. The mere signature of the drawee written on the bill without additional words is a sufficient acceptance. 53 V., c. 33, s. 17. [Eng. s. 17. Cf. N.I.L. ss. 132 and 133.]

Sec. 36 Mere signature.

Written on the bill and signed.

At common law not only might an acceptance be by a separate letter, but it might be oral. The requirement that the acceptance be in writing on the bill itself and signed, was introduced into the law of England by the Mercantile Law Amendment Act of 1856. In Hindhaugh v. Blakey, 1878, 3 C.P.D. 136, it was held that the signature of the acceptor without words of acceptance did not satisfy the statute. This decision was a surprise to the mercantile community. An act of 1878 provided that the signature of the drawee without additional words should be sufficient, the act being "equivalent to a declaration that the case of Hindhaugh v. Blakey was wrongly decided." (Steele v. McKinley, 1880, 5 App. Cas. at p. 782, 4 R.C. at p. 235.) The effect of these enactments is reproduced by the Bills of Exchange Act.

Requisites of acceptance.

The Negotiable Instruments Law, sec. 132, does not require the acceptance to be on the bill, but provides that it must be in writing and signed by the drawer. Cf. sec. 133: "The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored;" and sec. 134: "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, upon the faith thereof, receives the bill for value." Crawford, p. 153, suggests that the provision of the Bills of Exchange Act that the acceptance must be written on the bill may sometimes work inconvenience as it would, *e.g.*, preclude a drawee from accepting by telegram.

The usual mode of accepting is for the drawee to write "accepted" across the face of the bill, and then to sign his name underneath; but any words which indicate that the drawee means to pay is a sufficient acceptance. The simple meaning of an acceptance is, "I will pay." (Smith v. Vertue, 1860, 30 L.J.C.P. at p. 60, 4 R.C. at p. 248.)

As to the signature, see sec. 4; as to what the word "written" includes, see note at end of chapter 32, *supra*.

An acceptance written on the back of a bill is sufficient.

Sec. 36. Requisites of acceptance.

Young v. Glover, 1857, 3 Jur. N.S. 637; 1 Ames 227; Russell, p. 121.

As to cancellation of acceptance, and as to the effect of destruction or retention of bill by drawee, see notes to sec. 80. As to dishonour by non-acceptance and its consequences, see secs. 81 and 82.

Other means than the payment of money.

An acceptance "payable in bills" or "payable in goods" is invalid. Russell v. Phillips, 1850, 14 Q.B. 891. When the time of payment comes, the holder may of course accept goods or bills in satisfaction of the debt due to him. An acceptance may be an acceptance to pay part only of the amount for which the bill is drawn (sec. 38).

Promise to accept.

Since Johnson v. Collings, 1800, 1 East 98, 1 Ames 171, the English courts have not countenanced the idea that a man can be made liable on a bill when he refuses to accept it, merely because he may have promised, before the bill was drawn, to accept it, although it had been earlier held by Lord Mansfield in Pierson v. Dunlop, 1777, 2 Cowp. 571, that a promise to accept a bill not yet drawn was an acceptance of it if the promise was accompanied with circumstances which induced a third person to take the bill by endorsement.(*b*)

Promise to accept.

In the United States, however, the doctrine of virtual acceptance, as it is called, has been extensively applied, and is expressed in the Negotiable Instruments Law, sec. 136: "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." The doctrine results from a confusion of the common law liability for breach of contract to accept and the liability of an acceptor upon the bill under the law merchant. In England the modern cases have kept the two sorts of liability distinct and the trouble there experienced in working out a satisfactory theory by which to protect those who advance money on the bill is illustrated in In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation, 1867, L.R. 2 Ch. 391,

(*b*) Thus qualifying the doctrine of the earlier case (also before Lord Mansfield) of Pillans v. Van Mierop, 1765, 3 Burr. 1663.

where a bill was negotiated on the faith of a letter of credit given by the Agra Bank to the drawer authorizing him to draw bills and promising to honour them up to a named amount. In order to protect the person who had acted upon this promise by taking a bill drawn in accordance with the letter, the court was compelled to treat the contract as being negotiable to the extent of excluding all equities existing between the Agra Bank and its customer (the drawer). Under the American doctrine no difficulty is experienced in reaching this end at once. Street, Foundations of Legal Liability, vol. 2, pp. 399-403; cf. Crawford, p. 154.

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Russell, p. 123, refers to Bank of Montreal v. Thomas, 1888, 16 O.R. 503, as a case similar to In re Agra and Masterman's Bank, *supra*; cf. Torrance v. Bank of British North America, 1873, L.R. 5 P.C. 246; Byles, p. 207, as to promise to accept.

37. A bill may be accepted,— Acceptance.

(*a*) before it has been signed by the drawer, or while otherwise incomplete; Before completion.

(*b*) when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment. Overdue.

2. When a bill payable at sight or after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance. 53 V., c. 33, s. 18; 54-55 V., c. 17, s. 3. [Eng. s. 18. N.I.L. s. 138.] Acceptance after dishonour.

The words "at sight or" in sub-sec. 2 are not in the English act. They were added to the Canadian act in 1891. See notes to sec. 24.

Incomplete instruments.

The drawer's signature may be added at any time, but until the drawer has signed, the instrument is inchoate and without effect. A. addresses a bill to B. but does not sign it. B. accepts and the instrument is transferred for value to C. The instrument is neither a bill nor a note. McCall v. Taylor, 1865, 34 L.J.C.P. 356, 1 Ames 101. The blank may be

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filled up by the holder (see secs. 31 and 32), but until he completes the instrument it is not a valid bill. Ex parte Hayward 1871, L.R. 6 Ch. 546. Cf. Reg. v. Harper, 1881, 7 Q.B.D. 78; Reg. v. Bowerman, [1891] 1 Q.B. 112.

Overdue.

See sec. 23 which provides that where a bill is accepted when it is overdue, it shall, as regards the acceptor who so accepts, be deemed a bill payable on demand, and contains a similar provision in regard to endorsement of an overdue bill. See notes to the same section as to when a bill is overdue.

After dishonour.

An acceptance after a previous refusal to accept, after the due date of the bill and after protest for non-payment, is good. Wynne v. Raikes, 1804, 5 East 514, 1 Ames 174. The acceptance in this case was by separate letter which was at that time a good acceptance.

In case a bill is dishonoured by non-acceptance, it may be presented to the referee in case of need, if there be one named in the bill (sec. 33). As to acceptance for honour, see sec. 147.

As of the date of first presentment.

Sub-sec. 3 was added to the English act in committee. It accords with mercantile practice, and was intended to put the holder as far as possible in the same position as if the bill had not been dishonoured. Chalmers, p. 49.

Date of acceptance.

The ordinary rule under the Canadian act is that the holder is entitled to have the acceptance of a bill which is payable at or after sight dated as of the day of presentment or of either of the two next following days, but in any case not later than the day of the drawee's actual acceptance (sec. 80). As Russell, p. 126, points out, if the statute is read strictly, the indulgence granted to the drawee by sec. 80 is not available in the exceptional case to which sec. 37, sub-sec. 3 applies, although a reasonable construction of the last mentioned provision would be to allow a drawee who accepts a bill payable at or after sight to accept as of the second day after the first presentment.

Presumption as to time. Sec. 37.

Unless the contrary appears by its terms, a bill is *primâ facie* deemed to have been accepted before maturity and within a reasonable time after its issue, but there is no presumption as to the exact time of acceptance. For example, B. accepts, without dating, a bill drawn payable three months after date. He attains his majority the day before the bill matures. This is *primâ facie* evidence that B. accepted it while an infant. Roberts v. Bethell, 1852, 12 C.B. 778. Chalmers, p. 49.

38. An acceptance is either,— Kinds.

(*a*) general; or, General.

(*b*) qualified.

2. A general acceptance assents without qualification to the order of the drawer.

3. A qualified acceptance in express terms varies the effect of the bill as drawn and in particular, an acceptance is qualified which is,— Qualified.

(*a*) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated; Conditional

(*b*) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; Partial.

(*c*) qualified as to time; Time.

(*d*) the acceptance of some one or more of the drawees, but not of all. Drawees.

4. An acceptance to pay at a particular specified place is not on that account conditional or qualified. 53 V., c. 33, s. 19. [Cf. Eng. s. 19. Cf. N.I.L. ss. 139, 140 and 141.] Specified place.

General acceptance.

See definition of acceptance in secs. 35 and 36.

Qualified acceptance.

The holder may refuse to take a qualified acceptance (sec. 83). If a qualified acceptance is taken, the drawer or the endorser will be discharged from his liability upon the bill unless he

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has authorized the taking of such an acceptance, or subsequently assented thereto, or unless after he has received notice of a qualified acceptance, he does not within a reasonable time express his dissent (secs. 83 and 84).

The view has been expressed that there may be qualified acceptances other than those specifically mentioned in the section. Byles, p. 210, citing Decroix v. Meyer, 1890, 25 Q.B.D. at p. 347.

Conditional.

Although a bill may not be drawn in terms importing a condition, it may be accepted conditionally. Cf. notes to sec. 17.

Words importing a conditional or otherwise qualified acceptance will be construed most strongly against the restriction of the acceptor's liability, and, to have effect, must shew in clear and unequivocal terms on the face of the bill that the acceptance is so qualified. Thus it was held that an acceptance worded "accepted payable, on giving up bill of lading for 76 bags clover-seed, at the London and Westminster Bank" merely postponed the liability to pay until the delivery up of the bill of lading, but that the acceptor was not discharged by the failure to present the bill for payment and deliver up the bill of lading on the very day of maturity. Smith v. Vertue, 1860, 30 L.J.C.P. 59, 4 R.C. 246; cf. Decroix v. Meyer, cited in notes to sec. 22; see also sec. 93.

Conditional acceptance.

An acceptance worded "accepted — payable when in funds" is conditional. Julian v. Shobrooke, 1753, 2 Wils. 9; as to the meaning of such a condition, see Smith v. Vertue, *supra*.

Examples of conditional acceptances are "When in funds as a first preference out of the estate" (Potters v. Taylor, 1888, 20 N.S.R. 362) or "Provided they have done sufficient to earn that sum." McLean v. Shields, 1884, 1 Man. R. 278. Upon the performance of the condition before action brought, the acceptance becomes absolute. Ontario Bank v. McArthur, 1889, 5 Man. R. 381; Potters v. Taylor, *supra*.

Partial.

"I do accept this bill to be paid half in money and half in bills." This is valid as a qualified acceptance for half the

amount. Petit v. Benson, 1697, Comberb, 452, 1 Ames 146. As to the balance of the amount it is not a valid acceptance (sec. 36). Sec. 38.

The drawer or endorser is not discharged by the taking of a partial acceptance, whereof due notice has been given (sec. 84).

Qualified as to time.

A bill drawn 28 Nov., 1836, payable 42 months after date was accepted "on condition of its being renewed until the 28th Nov., 1844." The endorsee is at liberty to treat the acceptance as an extension of the time of payment specified in the bill, and to declare on it accordingly. Russell v. Phillips, 1850, 14 Q.B. 891.

Words introduced into the memorandum of acceptance which are contrary to the tenor of the bill, will, unless the intention is clear, be rejected as not forming part of the acceptance. Thus a bill dated 8th Sept., 1856, drawn payable four months after date was accepted. Between the words of acceptance and the signature of the acceptor was the memorandum "due 11th December, 1856." The memorandum of the due date was rejected. Fanshawe v. Peat, 1857, 2 H. & N. 1, 4 R.C. 243.

At a particular specified place.

The English act provides that a qualified acceptance may be "(c) local, that is to say, an acceptance to pay only at a particular specified place: an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere." The Negotiable Instruments Law is to the same effect.

Acceptance payable at a particular place.

The House of Lords had held that an acceptance "payable at the house of P. & Co.," bankers, was a qualified acceptance. Rowe v. Young, 1820, 2 Bro. & B. 165, 2 Bligh, 391, 2 Ames, 22. The statute 1 and 2 G. 4, c. 78, altered the law as thus declared, and enacted the provisions which have been re-enacted in the clauses of the English act above quoted.

The bill as originally introduced into the Canadian House of Commons in 1889 followed the English act. This was in accordance with the law already prevailing by statute in Ontario and Prince Edward Island. (R.S.C. 1886, c. 123, secs. 9 and 16.)

Sec. 38. Acceptance payable at a particular place.

In 1890 the clause referring to an acceptance payable at a particular specified place was omitted from the bill, owing to the strong opinion expressed at the previous session against the proposal to make the Ontario provisions applicable to the whole Dominion. Under the Ontario statute, a convenient practice had grown up of persons accepting their bills at particular banks, not with the intention of restricting their liability upon the bills, but with the intention that the banks at which they kept their accounts should pay the bills when they matured without cheque and without further instructions. In other provinces the same practice had been followed to some extent, but except in Prince Edward Island without the sanction of statute. The practice was especially convenient in cases where an acceptance had to be procured by a bank at a considerable distance. By stamping upon the bill "accepted payable at the A. Bank," and procuring the drawee's signature to the acceptance in that form, a bank avoided the necessity of having to present it to the drawee, as presentment at the place specified in the acceptance, *i.e.*, at the bank itself, was sufficient (sec. 88).

The omission of the clause would have had the effect of making an acceptance to pay at a particular specified place a qualified acceptance, which a bank would take at the risk of discharging the other parties to the bill (secs. 83 and 84). Under the English and Ontario statutes, the bank might take an acceptance payable at a particular specified place, provided the acceptor did not expressly provide that the bill should be paid there only and not elsewhere.

The English clauses were restored in committee. In the Senate, however, the clause relating to a local acceptance was struck out and the present clause inserted, providing generally that the acceptance to pay at a particular specified place is not on that account conditional or qualified.

The difference between the English and the Canadian acts may be illustrated as follows:—

1. The drawee of a bill accepts "payable at Smith & Co." his bankers. This is a general acceptance in England (cf. Halstead v. Skelton, 1843, 5 Q.B. 86; Chalmers p. 51) and in Canada.

2. The drawee of a bill accepts it "payable at the Union Bank and not elsewhere," or "payable only at the Union

Bank." This is a qualified acceptance in England (*ibid.*), but a general acceptance in Canada. Russell, pp. 130, 131, considers, however, that it is an open question whether such an acceptance is not a qualified one in Canada. Sec. 38. Acceptance payable at a particular place.

Under the Canadian act the drawee may even make the acceptance payable in a different part of the country from that in which he resides or carries on business. Such an acceptance might be very inconvenient to the holder if the acceptance were made payable at a distant place. Russell, p. 131, thinks it is better to consider the right of the drawee to accept in this way an open question, but it is not clear upon what ground he bases this opinion in view of the terms of the act. It is submitted that under the act, even where the drawer has inserted a place of payment, an acceptance payable at another place is a not qualified acceptance.

A bill is presented at the proper place if a place of payment is specified in the bill and the bill is there presented (sec. 88).

As to presentment as regards drawer and endorsers, see sec. 85, and as regards acceptor, see sec. 93.

39. Every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto: Provided, that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable. 53 V., c. 33, s. 21. [Eng. s. 21. Cf. N.I.L. s. 16.] When acceptance complete. Proviso.

Prior to 1906 this section and secs. 40 and 41 constituted one section. The sections must be read together. The Negotiable Instruments Law omits the proviso to sec. 39.

The following sections contain provisions relating to the different "contracts on a bill":—

Secs. 130 to 133: drawer or endorser;

Secs. 35, 38 and 128: acceptor.

Sec. 2, sub-sec. 1, contains the following definitions:—

(*a*) "Acceptance" means an acceptance completed by delivery or notification;

(*b*) "Endorsement" means an endorsement completed by delivery;

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(*f*) "Delivery" means transfer of possession, actual or constructive, from one person to another.

Bill incomplete and revocable until delivery.

"To constitute a contract there must be a delivery over of the instrument by the drawer or endorser for a good consideration, and as soon as such delivery takes place the contract is complete and it becomes a contract in writing." Abrey v. Crux, 1869, L.R. 5 C.P. 37, at p. 42, 4 R.C. 195, at p. 199; cf. Denton v. Peters, 1870, L.R. 5 Q.B. 475; Ex parte Cote, 1873, L.R. 9 Ch. 27. Chalmers, p. 59.

As to the admission of oral evidence to contradict or vary the contract in writing, see notes to sec. 40.

"It is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor; for the making the communication is a pledge by him to the party, and enables the holder to act upon it." (Cox v. Troy, 1822, 5 B. & Ald. at p. 478.)

The drawee, unlike the drawer or endorser, has no property in the bill; therefore less is required to make him attorn to the holder. Chalmers, p. 57.

The following illustrations of this section are given by Chalmers, pp. 57-59:—

1. B., who owes C. £100, makes a note for the amount payable to C. B. dies, and the note is afterwards found among his papers. C. has no right to this note, and if it be given to him he cannot enforce it. Cf. Bromage v. Lloyd, 1847, 1 Ex. 32.

2. B. makes a note in favour of his servant and hands it to his solicitor, telling the solicitor to retain the note till his death and then hand it to the servant, if still in his service. B. dies, and the solicitor hands the note to the servant. The servant can (perhaps) prove for the amount in the administration of B.'s estate. In re Richards, 1887, 36 Ch. D. 541; criticized, In re Whitaker, 1889, 42 Ch.D. 119, at p. 125, C.A.

3. B. makes a note in favour of C. and delivers it to a stakeholder (*e.g.*, trustee under composition deed). C. thereby acquires no property in the note. Cf. Latter v. White, 1872, L.R. 5 H.L. 578.

4. C., the holder of a bill, specially endorses it to D., and transmits it by post to X., his own agent. X. informs D. that he has received the bill, but does not give it to him or undertake to hold it on his account. C. (probably) can revoke

Sec. 39. Bill incomplete and revocable until delivery.

the transaction and cancel his endorsement to D. Brind v. Hampshire, 1836, 1 M. & W. 365; Muller v. Pondir, 1873, 55 N.Y. 325. *Quaere*, since the Judicature Acts?

5. C., the holder of a bill, specially endorses it to D., and encloses it in a letter addressed to D. The letter, which is put in the office letter box, is stolen by a clerk of C.'s, who forges D.'s endorsement and negotiates the bill. The property in the bill remains in C. Cf. Arnold v. Cheque Bank, 1876, 1 C.P.D. at p. 684.

6. By the regulations of the English Post Office,(*c*) a letter once posted cannot be reclaimed. If, then, the endorsee of a bill authorize the endorser to transmit it to him by post, the property in the bill passes to the endorsee, and the endorsement becomes complete as soon as the letter is posted. In re Deveze, Ex parte Cote, 1873, L.R. 9 Ch. 27; Sichel v. Borch, 1864, 2 H. & C. 954; but if there be no authority to send by post, the instrument is so sent at sender's risk. Pennington v Crossley, 1897, 13 Times L.R. 513.

7. The holder of a note payable to bearer wishes to remit money to D. For safety of transmission he cuts the note in two and posts one-half to D. Before he posts the second half he changes his mind, and writes to D. demanding back the half he has sent. He is entitled to do so, for a partial delivery is ineffectual. Smith v. Mundy, 1860, 29 L.J.Q.B. 172; cf. Redmayne v. Burton, 1860, 2 L.T.N.S. 324.

8. A bill is left with the drawee for acceptance. The drawee writes an acceptance on it. The next day the holder calls for the bill; he is merely informed that it is mislaid, and is requested to call the next day. In the meantime the drawee hears that the drawer has failed. He accordingly cancels his acceptance, and the next day delivers the dishonoured bill back to the holder. This is no acceptance; the drawee is entitled to cancel it. Bank of Van Dieman's Land v. Bank of Victoria, 1871, L.R. 3 P.C. 526.

9. A firm is indebted to D. B., who is a member of the firm, and also agent for D., writes the firm's endorsement on a bill held by the firm, and puts the bill with some other papers of D.'s of which he has the custody. This is a valid endorsement by the firm, and the property in the bill passes to D. Lysaght v. Bryant, 1850, 9 C.B. 46.

(*c*) It is otherwise where, as is the case in France, a letter once posted can, under certain conditions, be reclaimed. Byles, p. 172.

CHAPTER XXXVI.

Delivery and Oral Evidence.

Sec. 39, subject to a proviso specially applicable to acceptance, provides that "Every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto."

The other sections relating to delivery of a bill are secs. 40 and 41. Prior to 1906 all three sections formed one section. Section 39 is now placed in the act under the heading "Acceptance and Interpretation," and has therefore been included in chapter 35. The section and the illustrations cited in connection with it must, however, be read along with the next following sections.

Delivery.

Requisites.

40. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery,—

Authority.

(*a*) in order to be effectual must be made either by or under the authority of the party drawing, accepting or endorsing, as the case may be;

Conditional.

(*b*) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

Presumption

2. If the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed. 53 V., c. 33, s. 21. [Eng. s. 21. N.I.L. s. 16.]

Parting with possession.

41. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved. 53 V., c. 33, s. 21. [Eng. s. 21. N.I.L. s. 16.]

Conditional delivery, etc. Sec. 40.

It has long been settled law that the delivery of a bill may be conditional and that effect will be given to the condition. Chalmers (p. 61), after observing that a deed delivered conditionally is called an "escrow" and by analogy the term is sometimes applied to bills, states that there is, however, this distinction; a deed cannot be delivered conditionally to the obligee, the delivery must be to a third party. In Bell v. Lord Ingestre, 1848, 12 Q.B. 317, 4 R.C. 203, A. sent his acceptances to the holders of some overdue bills for the express purpose of retiring such bills and on the express condition that the old bills should be returned to him by the next post; which condition was never complied with. Held that no interest in the acceptances passed. "It is singular sort of escrow:" says Lord Denman, C.J., "for the bills were delivered to the parties who, in the event of their performing a certain act, were to be benefited by them. But still I think they were delivered to them as mere trustees, and that the same principle applies." Cf. 2 Ames, p. 833, for the contrary view, namely that a bill or note, like a bond, cannot be delivered to the payee as an escrow. See Russell, p. 139 for a discussion of this point. Conditional delivery.

A note was signed by defendant and delivered to his joint maker S., upon condition that S., before delivering it to the agent of the plaintiff, should obtain the additional signature of H. This condition was known to the plaintiff's agent and was never fulfilled. Held, that the plaintiff could not succeed. Commercial Bank v. Morrison, 1902, 32 S.C.R. 98.

Chalmers, pp. 60-61 gives the following illustrations of conditional delivery:—

B. makes a note payable to C., who sues him on it. B. can defend by shewing that the note was delivered to C. on condition that it was to operate only if he should procure B. to be restored to a certain office, and that B. was not so restored. Jefferies v. Austin, 1725, 1 Stra. 674.

C., the holder of a bill, endorses it in blank and hands it to D. on the express condition that he shall forthwith retire certain other bills therewith. D. does not do so. He cannot sue C., and if he sues the acceptor, the latter can set up the *jus tertii*. Bell v. Lord Ingestre, *supra;* cf. Seligman v. Huth, 1877, 37 L.T.N.S. 488; see also Wismer v. Wismer, 1863, 22 U.C.R. 446.

C., the payee of a bill, endorses it to D. D. sues C. as

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endorser. C. may shew that he and D. were jointly interested in the bill, and that he endorsed to the latter to collect on joint account. Denton v. Peters, 1870, L.R. 5 Q.B. 475.

B. makes a note for £100 payable to C. or order. C. sues B. Evidence is admissible to shew that the note was given as collateral security for a running account, and what the state of that account is. Cf. Ex parte Twogood, 1812, 19 Ves. 227; Re Boys, 1870, L.R. 10 Eq. 467.

In the hands of a holder in due course.

A holder in due course is defined by sec. 56.

A contract on a bill is incomplete without a delivery *animo contrahendi*. But a person who has signed a bill will not always be permitted to rely on the absence of such delivery in order to defeat the title of a holder in due course.

The case of a document with blanks in material particulars delivered by the signer in order that it may be converted into a bill is specially provided for by secs. 31 and 32. If the signer parts with the possession of an incomplete document he may, even as against a holder in due course, shew that it was never delivered in order that it might be converted into a bill. See notes to sec. 32.

Conclusive presumption of delivery in favour of holder in due course.

The doctrine last mentioned has, however, no application to a bill which is complete in form when it leaves the signer's possession. By sec. 40 a valid delivery of such bill is conclusively presumed in favour of a holder in due course. *E.g.*, the title of such a holder is unimpeachable although the paper was delivered to a third person as an escrow and afterwards wrongfully delivered by him to a payee before condition performed; or although the paper was deposited with the payee, not as an obligation, but as a receipt or memorandum for safe keeping, and by the payee wrongfully transferred; or even, according to some authorities, although the paper was never delivered to any one, but was wrongfully taken from the possession of the party who signed it. 2 Ames 865.(*a*) As

(*a*) As Ames justly points out, the *ratio decidendi* in these instances would seem to be equally applicable although the instrument signed was not wholly filled out, if at the time of signing it appeared to be an inchoate bill or note, as in the case of a printed blank form of bill or note; cf. Ewart, Estoppel by Misrepresentation, pp. 456 ff. But a mere signature on a blank paper stands in a different position from a signature to a complete form of bill.

Sec. 41. Conclusive presumption of delivery in favour of holder in due course.

to the last and most extreme instance, see also Street, Foundations of Legal Liability, II., 517: "By virtue of this section, one who has signed but not delivered a completed instrument is liable on it to an innocent purchaser though it should be lost or stolen from him." Cf. Brannan, p. 21. To the same effect, before the Bills of Exchange Act, see Ingham v. Primrose, 1859, 7 C.B.N.S. 82, at p. 85, 1 Ames 530, at p. 531; *non obstante* the disapproval—directed rather to another point—expressed by Brett, L.J., in Baxendale v. Bennett, 1878, 3 Q.B.D. 525, at p. 532, 4 R.C. 637, at p. 644; cf. Swan v. North British Australasian Co., 1863, 2 H. & C. 175, at p. 184.

A. makes a note and leaves it with B. to be used by him in procuring an advance from the payee. In an action by the payee, the maker alleges that he made and delivered the note to B. for a purpose other than that for which B. deposited it with the plaintiff, but does not state that the plaintiff had notice. Held no defence. Ontario Bank v. Young, 1901, 2 O.L.R. 761.

B., by means of a false pretence, or a promise on a condition which he does not fulfil, induces A. to draw a cheque in favour of C. B. delivers it to C., who receives it in good faith and for value. C. acquires a good title, and can sue the drawer. Watson v. Russell, 1862, 3 B. & S. 34, 5 B. & S. 968; cf. Clutton v. Attenborough, [1897] A.C. 90; as to the doubt expressed in Herdman v. Wheeler, [1902] 1 K.B. 361, whether the original payee can be a holder in due course, see notes to sec. 56.

C., the holder of a bill, endorses it specially to D. in order that he may get it discounted for him. D., in breach of trust, negotiates the bill to E. If E. takes the bill in good faith and for value, he acquires a good title, and can sue all the parties thereto. If he do not so take it, he cannot sue C.; and if he sue the acceptor, the latter can set up that the bill is C.'s (Lloyd v. Howard, 1850, 15 Q.B. 995; cf. Barber v. Richards, 1851, 6 Exch. 63); further C. can bring an action against E. to recover the bill or the proceeds. Goggerley v. Cuthbert, 1806, 2 B. & P. N.R. 170 ; cf. Alsager v. Close, 1842, 10 M. & W. 576; Muttyloll v. Dent, 1853, 8 Moo. P.C. 319. Chalmers, p. 61.

Oral evidence.

A bill or note must be in writing, and so too must the supervening contracts thereon, such as acceptance or endorsement. The contracts of the various parties, as interpreted by this act

Sec. 41.

and by the law merchant, are subject to the ordinary rule as to written contracts. Oral evidence is inadmissible in any way to contradict or vary their effect. Chalmers, p. 62. Cf. Byles, p. 121; Grant, p. 105, note (38).

Oral evidence, when admissible.

Oral evidence is not admissible to shew an agreement that the liability of a party as it appears on the face of the bill is contingent on the happening of some event (Foster v. Jolly, 1835, 1 C.M. & R. 703; Abrey v. Crux, 1869, L.R. 5 C.P. 37, 4 R.C. 194; McNeil v. Cullen, 1904, 37 N.S.R. 13); or that such party shall not be liable on the bill in any event (Emerson v. Erwin, 1903, 10 B.C.R. 101); or unless he choose (Adams v. Thomas, 1850, 7 U.C.R. 249); or that interest shall be payable, although the bill is not expressed to be payable with interest (Dombroski v. Laliberté, 1905, Q.R. 27 S.C. 57); or that the bill shall be renewed at maturity (Porteous v. Muir, 1885, 8 O.R. 127; Letellier v. Cantin, 1897, Q.R. 11 S.C. 64; New London Credit Syndicate v. Neale, [1898] 2 Q.B. 487; Vidal v. Ford, 1859, 19 U.C.R. 88); or that it shall be payable in instalments, or that part only shall be paid (Besant v. Cross, 1851, 10 C.B. 895; Hill v. Wilson, 1873, L.R. 8 Ch. 888, at p. 898); or that it shall be payable out of a particular fund which is no longer available (Campbell v. Hodgson, 1819, Gow 74; cf. Richards v. Richards, 1831, 2 B. & Ad. at pp. 454, 455; Vidal v. Ford, *supra*); or that it shall be payable at a different time from that mentioned on the face. (Cf. Drain v. Harvey, 1855, 17 C.B. 257.)

It has indeed been held that in an action by the endorsee against the drawer of a bill the defendant might set up that at the time of the endorsement to the plaintiff it was verbally agreed that the plaintiff should sue the acceptor and not the defendant, the endorser. Pike v. Street, 1828, 1 M. & M. 226, 2 Ames 135. This case has been explained on the ground that the evidence really negatived the consideration and so was admissible, per Parke, B., Foster v. Jolly, *ubi supra*, at p. 708. In the later case of Abrey v. Crux, *ubi supra*, in practically identical circumstances, such evidence was not admitted (*dubitante*, however, Willes, J.), but the decision in Pike v. Street was but briefly noticed. The case has never in fact been overruled; see Henry v. Smith, 1895, 39 Sol. Jo. 559. Byles, p. 122. Pike v. Street was, however, dissented from in Smith v. Squires, 1901, 13 Man. R. 360.

Sec. 41. Oral evidence, when admissible.

But, Chalmers points out that oral evidence is admissible, as against an immediate party (or a remote party who through absence of consideration, notice of fraud, or other circumstances, may stand on the same footing as an immediate party):—

(*a*) To shew that what purports to be a complete contract has never come into operative existence. This class of cases is provided for by secs. 40 and 41; cf. Brown v. Howland, 1885, 9 O.R. 48, 15 O.A.R. 750; Ontario Ladies' College v. Kendry, 1905, 10 O.L.R. 324. To shew that a document never came into existence as a contract is a different thing from varying or contradicting the document (Carter v. Canadian Northern Ry. Co., 1910, 23 O.L.R. 140), although as Russell, p. 140, says, the distinction touches a difficult branch of the law of evidence. As already pointed out, in the case of an incomplete instrument, oral evidence is admissible under this head even against a holder in due course.

(*b*) To impeach the consideration for the contract. See chapter 39, *infra*.

(*c*) To shew that the contract has been discharged by payment, release or otherwise. See chapter 46, *infra*; but note that under sec. 142 a renunciation must be in writing.

Action by payee against maker of a note. Held, a good defence that at the time of the making of the note an oral agreement (which was afterwards fully performed before action brought) was entered into that if the maker would pay interest on the note and support for life a relative of the payee's, the note should be considered paid. McQuarrie v. Brand, 1896, 28 O.R. 69.

Oral evidence is also admissible to shew that the party apparently primarily liable on the bill is really a surety for another party to the knowledge of the holder, and that the holder has discharged the surety by agreeing for a consideration to give time to the principal. Ewin v. Lancaster, 1865, 6 B. & S. 571; Overend v. Oriental Finance Co., 1874, L.R. 7 H.L. 348; see notes to sec. 133.

Although *primâ facie* the liabilities *inter se* of successive endorsers of a bill are that every prior endorser must indemnify a subsequent one, the presumption may be rebutted by oral evidence of circumstances shewing the real intention and agreement of the parties. Macdonald v. Whitfield, 1883, 8 App. Cas. 733, 4 R.C. 530; see notes to sec. 133.

Sec. 42. Oral evidence, when admissible.

As between immediate parties, a contemporaneous writing (cf. Brown v. Langley, 1842, 4 M. & Gr. 466; Salmon v. Webb, 1852, 3 H.L. Cas. 510; Maillard v. Page, 1870, L.R. 5 Ex. 312, at p. 319), or a subsequent written agreement (McManus v. Bark, 1870, L.R. 5 Ex. 65), may control the effect of a bill, subject to the same conditions that would be requisite in the case of an ordinary contract, but the mere fact that a bill refers to a collateral writing or agreement which is conditional in its terms will not vitiate the bill in the hands of a person who had no notice of its contents. Jury v. Barker, 1858, E.B. & E. 459, 1 Ames 37; see English and American cases reviewed in Taylor v. Curry, 1871, 109 Mass. 36. Chalmers, p. 65. But a written agreement, though contemporaneous, will not restrain the operation of the bill if it be collateral, *e.g.*, if other persons besides the parties to the bill be parties to it. Webb v. Spicer, 1849, 13 Q.B. 894. Byles, p. 121.

Chalmers states that though the terms of a bill may not be contradicted by oral evidence, yet, as between immediate parties, effect may be given to a collateral or prior oral agreement by cross-action or counterclaim citing Lindley v. Lacey, 1864, 34 L.J.C.P. 7, at p. 9. But this statement of the law has been criticized. See Russell, pp. 40-41.

As to evidence of the true date of the drawing, acceptance or endorsement of a bill, see sec. 29.

As to evidence to identify the payee of a bill, see notes to sec. 21.

CHAPTER XXXVII.

Computation of Time, Non-juridical Days and Days of Grace.

Unde. both the English act and the Canadian act days are either business days or non-business days. The latter are excluded in reckoning time where by this act the time limited for doing any act or thing is less than three days (sec. 6).

Non-business or non-juridical days.

Under the Canadian act non-business days are the same as legal holidays or non-juridical days (sec. 2) and are the days mentioned in sec. 43. If the last day of grace falls on a legal holiday or non-juridical day in the province where a bill entitled to days of grace 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 (sec. 42).

Under the English act, however, non-business days are divided into two classes. (1) If the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day; (2) if the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holiday Act, 1871, and acts amending or extending it, or if the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day. Cf. Byles, p. 220.

Where a bill is drawn in one country, and is payable in another, the due date thereof is determined according to the law of the place where it is payable (sec. 164).

Computation of Time, non-juridical days and days of grace.

Computation of time.

42. Where a bill is not payable on demand, three days, called days of grace, are, in every case, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that whenever the last day of grace falls on a legal holiday or non-juridical day in the province where

Last day of grace.

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any such bill 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. 53 V., c. 33, s. 14. [Cf. Eng. s. 14. Cf. N.I.L. ss. 85 and 194.]

Payable on demand.

As to when a bill is payable on demand, see sec. 23. In Canada sight bills are not payable on demand and are entitled to days of grace.

Days of grace.

A bill payable otherwise than on demand is overdue after the expiration of the last day of grace. Leftley v. Miles, 1791, 4 T.R. 170. A non-negotiable bill, not payable on demand, is entitled to days of grace. Smith v. Kendall, 1794, 6 T.R. 123. See Russell, pp. 142-3, for discussion of instruments on which grace is allowed.

A suggestion to abolish days of grace, in accordance with recent legislation in many foreign countries, was made in committee, when the English bill was under consideration, but was withdrawn. Chalmers, p. 39. The principle of days of grace seems to be now confined to the British Empire, and, presumably, to those states of the American Union which have not adopted the Negotiable Instruments Law or have adopted it with modifications. Byles, p. 220.

The proviso to this section is a re-enactment of the similar provision originally contained in the Bank Act of 1872 (35 V., c. 8).

Subject to the proviso, a bill payable February 1st is due on February 4th; a bill dated January 31st payable 30 days after date is due on March 5th (except in a leap year, when it is due on March 4th); as to bills payable at a month or months after date, see sec. 46.

The Negotiable Instruments Law provides (sec. 85): "Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the

option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday." Sec. 94: "Where the day, or the last day, for doing any act herein required or permitted to be done falls on a Sunday or on a holiday, the act may be done on the next succeeding secular or business day." As to the construction of sec. 85 and the diverse legislation in different states, see Brannan, p. 99; Crawford, p. 111. Sec. 42.

Notice of dishonour and action.

Notice of dishonour may be given at any time on the third day of grace immediately upon payment being refused by the acceptor (sec. 98), but no right of action arises until the following day. See notes to sec. 95.

43. In all matters relating to bills of exchange, the following and no other days shall be observed as legal holidays or non-juridical days:— Non-juridical days.

(*a*) In all the provinces of Canada, General.

Sundays,
New Year's Day,
Good Friday,
Easter Monday,
Victoria Day,
Dominion Day,
Labour Day,
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 Canada,
The day next following New Year's Day, Christmas Day, Victoria Day, Dominion Day, and the birthday of the reigning sovereign when such days respectively fall on Sunday;

(*b*) In the province of Quebec in addition to the said days, Quebec.

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The Epiphany,
The Ascension,
All Saints' Day,
Conception Day;

Provincial proclamation.

(c) In any one of the provinces of Canada, 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, and any non-juridical day by virtue of a statute of such province. 53 V., c. 23, s. 14; 56 V., c. 30, s. 1; 57-58 V., c. 55, s. 2; 1 Ed. VII., c. 12, secs. 2 and 4. [Cf. Eng. ss. 14 and 92.]

The 20th day of May, 1910, being the day fixed for the funeral of the late King, was by proclamation appointed "as a Public Holiday to be observed as a Day of General Mourning by all persons throughout our Dominion of Canada."

Legal holidays.

The provisions relating to legal holidays or non-juridical days were originally contained in the Bank Act of 1872. Dominion Day was added in 1879, and Easter Monday in 1883. Under the Bills of Exchange Act, 1890, the Annunciation, Corpus Christi, and the Festival of St. Peter, and St. Paul, were legal holidays in Quebec, but they were struck out in 1893. In 1894 Labour Day and in 1901 Victoria Day respectively were added to the list of Dominion legal holidays. The present Bank Act contains no provision as to legal holidays, but see the Interpretation Act, R.S.C. 1906, c. 1, s. 34 (11).

As to non-business days, see notes at the beginning of this chapter.

Bank holidays.

A bank may be under an implied obligation to its customers to keep its office open during usual banking hours on business days for the payment of cheques unless it gives reasonable notice to the contrary; it must, it is submitted, during reasonable hours on any business day meet its own direct obligations, *e.g.*, pay its own notes or certified cheques presented for payment, and it must not do business on Sunday; but in other respects it is apparently at liberty to open or close its office during any hours and on any days it sees fit. Cf. Canadian Banking Practice, pp. 207-9; Russell, p. 145.

Time of payment.

44. Where a bill is payable at sight, or at a fixed period after date, after sight, or after the happening of a specified event the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment. 53 V., c. 33, s. 14. [Cf. Eng. s. 14. Cf. N.I.L. s. 86.]

The words "at sight or" are not in the English act or in the Negotiable Instruments Law. See notes to sec. 23.

Sight bill.

45. Where a bill is payable at sight or at a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance, or for non-delivery. 53 V., c. 33, s. 14. [Cf. Eng. s. 14.]

There is no corresponding section in the Negotiable Instruments Law. The words "at sight or" are not in the English act. See notes to sec. 23.

A bill is payable at sight. The acceptance bears date March 1st. The bill is due March 4th.

The date is presumed to be the true date unless the contrary be proved (sec. 29). As to omission of date, see sec. 30. The proper date of an acceptance after a previous refusal to accept is the date of the first presentment (sec. 37). As to date of acceptance of a bill payable at sight or after sight, see sec. 80.

Due date of sight bill.

A bill payable after sight is noted for non-acceptance on January 1st. It is accepted *supra* protest on January 5th. The time of payment must be calculated from January 1st (sec. 150).

The holder of a foreign bill, payable 60 days after sight, makes an agreement that if it is dishonoured by non-acceptance, he will re-present it for payment at maturity. Acceptance is refused. The time of payment must be calculated from the day the bill was protested, and not from the day of presentment to the drawee for acceptance. Campbell v. French, 1795, 6 T.R. 200. Chalmers, pp. 40-41.

There is no acceptance of a note (sec. 186); "after sight" in a note therefore means after mere exhibition to the maker. Sturdy v. Henderson, 1821, 4 B. & Ald. 592.

As to protest for non-delivery, see sec. 120.

Due date.

46. Every bill which is made payable at a month or months after date becomes due 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, in which case it becomes due on the last day of that month, with the addition, in all cases, of the days of grace.

'Month'.

2. The term 'month' in a bill means the calendar month. 53 V., c. 33, s. 14. Cf. Eng. s. 14.

The only provision in the English act corresponding to this section is that "The term month in a bill means calendar month." Sub-sec. 1 is a re-enactment of a provision which was originally contained in the statute 35 V., c. 10 (1872). It is declaratory of the usage of merchants.

A bill dated 31st January payable "without grace" one month after date is due on the last day of February. A similar note dated January 1st is due February 1st.

Bills dated 28th, 29th and 30th November, respectively, payable three months after date, all fall due on March 3rd, except in a leap year, when the first note falls due on March 2nd.

CHAPTER XXXVIII.

Capacity and Authority of Parties.

Capacity must be distinguished from authority. Capacity means power to contract so as to bind oneself. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of law. Authority is derived from the the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact. Again capacity to incur liability must be distinguished from capacity to transfer. An executed contract is often valid where an executory contract cannot be enforced. An endorsement usually consists of two distinct contracts, one executed, the other executory. It transfers the property in the bill, and it also involves a contingent assumption of liability on the part of the endorser. Chalmers, pp. 66-67.

Capacity and Authority of Parties.

47. Capacity to incur liability as a party to a bill is co-extensive with capacity to contract; Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or endorser, of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation. 53 V., c. 33, s. 22. [Eng. s. 22 (1).] Capacity of parties. Corporation.

This section is declaratory. There is no corresponding provision in the Negotiable Instruments Law.

There is no special law of capacity applicable to parties to bills and notes. The rule laid down by this section refers the question of capacity to the general law of contracts in the province in which the transactions upon the bill take place. See chapter 50, *infra*. No attempt is made to discuss the general subject of contractual capacity except in so far as it is necessary to do so in order to illustrate the provisions of the act.

Sec. 47. Effect of incapacity of party.

If by the local law applicable to the case, the incapacity of a party renders the contract void, the bill is a nullity as regards such person, even in the hands of a holder in due course. For instance, by English law an infant incurs no liability by drawing, endorsing or accepting a bill, even though the bill is given for the price of necessaries supplied to him during infancy. In re Soltykoff, Ex parte Margrett, [1891] 1 Q.B. 413;(*a*) cf. Ricard v. Banque Nationale, 1893, Q.R. 3 Q.B. 161, a case of a married woman in the Province of Quebec.

But if the law renders such contract voidable and not void, the incapacity can be set up only against a party with notice. For instance, by English law, the contracts of a lunatic or drunken man, known to be such, are voidable only. Neither lunacy nor drunkenness can be set up against a holder in due course. Imperial Loan Co. v. Stone, [1892] 1 Q.B. 599.

Bills of corporations.

The last words of the provision of the English act corresponding to this section are "relating to corporations" instead of "relating to *such* corporation." The change was intended to make it clear that the proviso referred to a special act relating to any particular corporation in question as well as to the law respecting companies in general.

The bills of corporations, so far as the form is concerned, are discussed in the notes to secs. 5 and 35. Sec. 47 relates only to capacity. As to the liability of a person who signs on behalf of a corporation without authority, see notes to sec. 52.

Capacity of company.

A corporation incurs no liability by drawing, endorsing or accepting a bill, unless expressly or impliedly empowered by its act of incorporation or charter so to do. In the case of a trading corporation the fact of incorporation for the purposes of trade confers capacity. In the case of non-trading corporations, the power must be expressly given or there must be terms in its charter wide enough to include such power. Chalmers, pp. 69-70. In re Peruvian Railways Co., 1867, L.R. 2 Ch. 617;

(*a*) "It is not necessary for the protection of persons dealing with an infant that he should be liable on such a contract. The person who has supplied an infant with necessaries can always sue on that contract for the price of what he has supplied." In re Soltykoff, *supra*, Lord Esher at p. 415. In Federal Life v. Hewitt, 1907, 9 O.W.R. 857 (county court), it was held that an infant was not liable on a note given for the first premium for insurance on his own life, notwithstanding the provision of R.S.O. 1897, c. 203, s. 150 (6) [now 2 G. 5, c. 33, s. 169 (9)] allowing a person under 21 and over 15 years to effect insurance on his own life.

Bateman v. Mid Wales Railway Co., 1866, L.R. 1 C.P. 499, at p. 505; cf. the statutory provisions applicable to companies referred to in the notes to sec. 5. Sec. 47.

The capacity to endorse or otherwise become a party to a bill is presumed, that is, in the case of a company, that it has officers who can endorse, etc. Canadian Bank of Commerce v. Rogers, 1911, 23 O.L.R. 109, at p. 120. The principle of Royal British Bank v. Turquand, 1856, 5 E. & B. 248, 6 *ibid.*, 327 (see chapter 6, *supra*) applies.

48. Where a bill is drawn or endorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or endorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto. 53 V., c. 33, s. 22. [Eng. s. 22 (2). Cf. N.I.L. s. 22.] Effect of disability on holder.

The Negotiable Instruments Law, sec. 22, provides that the endorsement or assignment of the instrument by a corporation or by an infant passes the property therein notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. Ames criticizes this provision but the effect seems to be the same as the Canadian act.

This section is probably declaratory, but the law was not very clear. The word "minor" was added to the English bill in committee as the Scotch equivalent of the English term "infant." Chalmers, p. 66.

Under this section, the endorsement passes the property in the bill, though from want of capacity the infant, minor or corporation may not be liable as endorser. Merchants Bank v. McLeod, 1910, 14 W.L.R. 461. The section was applied to a cheque drawn on a bank by an infant. Freeman v. Bank of Montreal, 1912, 26 O.L.R. 451; cf. notes to sec. 95 of the Bank Act, *supra*. Endorsement by person without capacity.

A married woman not being mentioned in sec. 48, the validity of her drawing or endorsement would depend upon her legal position according to the provincial law governing the contract. If by that law her act is invalid, it would be ineffectual except in so far as a party is estopped from setting up the incapacity of another party. Thus the acceptor cannot set up the incapacity of the drawer or payee (sec. 129),

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nor the drawee that of the acceptor or payee (sec. 130), nor the endorser that of the drawer or any previous endorser (sec. 133). Cf. Russell, pp. 153-4.

Forgery.

49. Subject to the provisions of this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is

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sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority: Provided that,—

Ratification.

(*a*) nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery;

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(*b*) if a cheque payable to order is paid by the drawee upon a forged endorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery back of the amount so paid, nor any defence to any claim made by the drawee for the amount so paid, as the case may be, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of such forgery.

Default of notice.

2. In case of failure by the drawer to give such notice within the said period, such cheque shall be held to have been paid in due course as respects every other party thereto or named therein, who has not previously instituted proceedings for the protection of his rights. 53 V., c. 33, s. 24. [Cf. Eng. ss. 24 and 60. Cf. N.I.L. s. 23.]

This section down to and including clause (*a*) of the proviso is a transcript of sec. 24 of the English act. The Canadian bill of 1890 also contained a section corresponding to sec. 60 of the English Act (see notes to next section), but the section was withdrawn in committee. In the Senate clause (*b*) of the proviso and sub-sec. 2 were added. At a subsequent date the provisions of the present sec. 50 were added.

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The Negotiable Instruments Law, sec. 23, is substantially identical with sub-sec. 1 of sec. 49 of the Canadian act, excluding the proviso. For a discussion of the American section, see Brannan, 216 ff., 246 ff.

A bill held under a forged signature must be distinguished from a bill with genuine signatures which has been fraudulently altered (sec. 145), though such alteration may amount to the crime of forgery, and from a bill, with genuine signatures, in which spaces have been wrongfully filled up (sec. 31), and from a bill which has been signed without negligence under the belief that the document is one of a different character (notes to sec. 4).

Subject to the provisions of this Act.

See sec. 50 as to recovery of amount paid on forged endorsement in good faith and in the ordinary course of business, sec. 173 as to protection of bank and drawer, and sec. 175 as to protection of collecting bank, where cheque is crossed. See also sec. 21, sub-sec. 5, which provides that where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer, and secs. 129 and 133 by which a party to a bill may be precluded from denying the genuineness, regularity or validity of the signatures of prior parties.

Forged or unauthorized signature is wholly inoperative.

As to forgery, cf. the Criminal Code, R.S.C. 1906, c. 146, secs. 466 *et seq.*

As to signature by agent, see notes to sec. 4.

As to recovery of money paid under a forged or unauthorized signature, see notes to sec. 50.

Forged or unauthorized signature is inoperative.

A bill is payable to the order of J.S. Another person of the same name gets hold of it, and endorses it to D., who takes it as a holder in due course. D. acquires no title to the bill, he cannot enforce payment against any party thereto. Mead v. Young, 1790, 4 T.R. 28; 1 Ames 429.

A bill is payable to C.'s order. His endorsement is forged. D., a subsequent holder, presents the bill for acceptance. The drawee accepts it payable at his bankers. The bankers pay D. They cannot debit the acceptor with this payment. Robarts v. Tucker, 1851, 16 Q.B. 560, 3 R.C. 680; cf. Bank of England v. Vagliano, [1891] A.C. 107, at pp. 157-8.

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The payee of a note made and payable in Ontario, who had absconded to Michigan, while there and after a writ of attachment in insolvency had issued against him in Ontario, endorsed the note for good consideration to the plaintiffs, who took it in good faith. By the law of Ontario the title to the note had vested in the assignee in bankruptcy before the endorsement. Held, that the plaintiffs could not recover, the payee having no authority to endorse. Jenks v. Doran, 1880, 5 O.A.R. 588, 562.

Ratification of unauthorized or forged signature.

An unauthorized signature not amounting to a forgery may be ratified by the principal, but, as a general rule, a forgery cannot be ratified. Brook v. Hook, 1871, L.R. 6 Ex. 89; Hébert v. Banque Nationale, 1908, 40 S.C.R. 458, 486. This general rule is, however, subject to qualification. An act purporting to have been done for or under the authority of the person sought to be charged is capable of ratification, so as to make such person civilly responsible as if he had originally authorized it but not so as to make a defence for the forger against a criminal charge. Cf. McKenzie v. British Linen Co., 1881, 6 App. Cas. 82 at p. 99; Dominion Bank v. Ewing, 1904, 7 O.L.R. 90 at p. 95, S.C. 35 S.C.R. 133, [1904] A.C. 806; Scott v. Bank of New Brunswick, 1894, 23 S.C.R. 277, 285.

Ratification of unauthorized or forged signature.

If a signature is forged under such circumstances that it is capable of ratification and is in fact ratified, it should follow that the signature becomes valid as if it had been originally authorized. The proviso to sec. 49 does not, however, include ratification of an unauthorized signature amounting to a forgery, and if the section is construed strictly, the endorsement remains inoperative. See Russell p. 164, where the opinion is expressed that this strict interpretation will prevail. But it is to be observed that if a person is estopped or precluded from setting up the forgery, the case is taken out of the provision of the section that the forged signature shall be inoperative. Ratification and estoppel are distinct: see Scott v. Bank of New Brunswick, *supra*, at p. 287.

Precluded from setting up the forgery or want of authority.

The word "precluded" was inserted in committee in lieu of the word "estopped," an English technical term, unknown to Scotch law. Chalmers, p. 81.

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By the fact of becoming a party to a bill, a person may be estopped from setting up that the signatures of other parties thereto are forged or unauthorized. As to acceptor, see sec. 129; endorser, sec. 133; acceptor for honour, notes to sec. 152.

Precluded from setting up the forgery or want of authority.

A person may be estopped by his conduct from denying to an innocent holder the genuineness of his signature, or from setting up that the signatures of other parties to the bill are forged or unauthorized.(*b*)

The case of Ewing v. Dominion Bank, 1904, 35 S.C.R. 133, affirming 7 O.L.R. 90, perhaps goes further than any English decision in the direction of holding a person liable, on the ground of estoppel, upon a note to which his signature has been forged. In that case E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, on the morning of the 16th of August, a letter notifying them that their note for $2,000 to the T. P. Co., would fall due at the bank on a date named and requesting them to provide for the same. The name of E. & Co., had been forged to the note. E. & Co. communicated at once with the forger, but did not communicate with the bank till the following December, a few days before the note fell due. On the 15th and 16th of August the T. P. Co., issued cheques on the bank, payment of which left a balance to their credit at the close of business on the 15th of $1,611, on the 16th of $1,355, and on the 17th of $84. It was held by the Supreme Court, by a majority judgment, that on receipt of the notice, E. & Co. were under a legal obligation to inform the bank, by telegraph or telephone, that they had not made the note, and that as they had not done so they were estopped from denying their signature.

The members of the Judicial Committee, upon application for special leave to appeal, treated the matter as being absolutely a question of fact and dismissed the application upon the ground that they could not say that there was not evidence upon which the courts below might fairly find as they did: [1904] A.C. 806. The judgments in the Supreme Court state the following propositions of law, which are of importance in connection with the question of estoppel.

1. If a person becomes aware that by the unauthorized use of his name, a fraud is being practised upon a bank, there may be a duty to notify the bank of the fraud, although no business

(*b*) For an original and philosophical discussion of the whole subject of estoppel by misrepresentation, see Ewart's book on the subject.

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relation previously existed between him and the bank; sufficient relation is created by the fact that express notice is given by the bank to such person that his name is being used (referring especially to Freeman v. Cooke, 2 Ex. 654, 663, and McKenzie v. British Linen Co., 1881, 6 App. Cas. 82, 109; but cf. Merchants Bank v. Lucas, 1889, 15 O.A.R. 573, 18 S.C.R. 704.)

2. Assuming the duty to notify the bank, modern business methods may require the use of the telegraph or the telephone.(c)

3. If a person is under such a duty, and, by reason of his neglect to notify the bank, the bank is prejudiced, the liability of the person whose name has been used is not limited to the actual amount of the loss sustained by the bank; he is estopped from denying the genuineness of his signature and is liable to the full amount of the document. The loss need not be the direct and necessary consequence of the neglect. Cf. Ogilvie v. West Australian Mortgage Corporation, [1896] A.C. 257, 270.

It is questionable whether the doctrine of estoppel can be invoked against the Crown. See Bank of Montreal v. The King, 1907, 38 S.C.R. 258, an important case on the subject of estoppel, the facts of which are stated in the notes to sec. 50 under "Recove y of money paid by mistake."

In these recent cases there is a tendency to enlarge the sphere of duty, breach of which may preclude a man from asserting his strict legal rights, and failure to fulfil a moral duty has been recognized as having this effect. *E.g.* in McKenzie v. British Linen Co. and in Ewing v. Dominion Bank, the persons whose names were forged were not customers of the banks. The duties attributed to them, therefore, were purely moral ones; but the courts attached to the breach of them the same consequences as if they had been strictly legal duties.

Although, however, a person who knows that a bank is relying upon his forged signature to a bill cannot lie by and not divulge the fact of the forgery until he sees that the position of the bank is altered for the worse, there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which period the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability or an estoppel. McKenzie v. British Linen Co., *supra*.

(c) *Quaere*, however, whether the business custom is not merely to write in due course. Cf. 17 Harv. L.R. 141 (1904).

Sec. 49. Precluded from setting up the forgery or want of authority.

A person whose name has been forged is not *as a matter of law* estopped from setting up the forgery by the fact that he has previously paid another bill on which his acceptance had been forged by the same person. The question whether a person is estopped is a matter of fact, and there must be some evidence of conduct calculated to mislead the holder, *e.g.*, payment of a forged bill which is given in a course of business, implying a continuance of authority. Morris v. Bethell, 1869, L.R. 5 C.P. 47; cf. Simon v. Sinclair, 1907, 6 W.L.R. 638.

A cheque payable to the order of a company is endorsed by the secretary, who has no authority under the by-laws to give a valid endorsement. The company is estopped from denying the want of authority by the fact that on previous occasions the secretary has drawn money on cheques on his sole endorsement, and no notice was ever given to the bank that he was exceeding his authority. Thorold v. Imperial Bank, 1887, 13 O.R. 330; cf. Imperial Bank v. Farmers' Trading Co., 1901, 13 Man. R. 412; Standard Bank v. Stephens, 1907, 16 O.L.R. 115, 118.

A local manager of a company is authorized to endorse cheques for deposit with the bank of B.C. He endorses and cashes at the Bank of M., a cheque drawn on the latter bank. The Bank of M. is liable to the company if there have been no other dealings sufficient to estop the company. Hinton v. Bank of Montreal, 1903, 9 B.C.R. 545.

Unless he gives notice in writing.

The effect of clause (*b*) of the proviso is that if a cheque payable to order is paid by the drawee upon a forged endorsement, there is a special period of limitation applicable to the claim or defence of the drawer against the drawee in respect of the payment made, namely, one year after the drawer has acquired notice of the forgery. Until the year expires, the payment as between the drawer and drawee is invalid in accordance with the general rule that a forged endorsement is wholly inoperative. After the year, the drawer is concluded as against the drawee.

By sub-sec. 2 the same period of limitation is made applicable as respects every other party to the cheque or named therein who has not previously instituted proceedings for the protection of his rights.

Sec. 49. Drawer must give notice within one year after acquiring notice of forgery.

Clause (*b*) of the proviso does not meet the case of payment upon a forged signature of the drawer, but only upon a forged endorsement, because in the former case he is supposed to know the signature of the drawer, and in the latter case is not presumed to know the signature of any endorser. Bank of Montreal v. the King, 1907, 38 S.C.R. 258, at p. 264.

A. draws a cheque in favour of B., and hands it to B., in payment of a debt. It is stolen from or lost by B., and the thief or finder forges B.'s name and obtains payment from the drawee bank. B. has no claim against A., because the delivery of the cheque operates as payment subject only to the condition that, if upon due presentment the cheque is not paid, the original debt revives. Cf. Charles v. Blackwell, 1887, 2 C.P.D. at p. 158. A. cannot be charged by the bank with the amount of the payment unless a year passes after A. acquires notice of the forgery without A.'s having given notice in writing to the bank. If A. fails to give such notice and B. neglects to institute proceedings for the protection of his rights, within the year after A. acquires notice of the forged or unauthorized signature, the cheque shall be deemed to have been paid in due course as respects B.

Russell, p. 168, notes the incongruity between the provisions of sec. 49 now in question and those of sec. 50. He refers also to the editorial opinion expressed in 5 J.C.B.A. 116-117 (Oct., 1897), that clause (*b*) of the proviso to sec. 49 is not intended to give a party the right to sleep on his claim for a year and thereby injure the bank's position, perhaps destroy its chance of getting back the money, but that all that the proviso means probably is that notice given a year after the discovery shall not avail, leaving the question whether the notice given within a year is good or not to be dealt with under the ordinary principles of law. Clause (*b*) of sec. 49 applies to a cheque payable to order which is paid upon a forged endorsement out of the funds of the drawer or is so paid and charged to his account. Sec. 50 applies to a bill bearing a forged or unauthorized endorsement which is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, and requires notice to be given *within a reasonable time* after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorized. It is to be noted further that in most respects the case covered by sec. 49 is included in sec. 50, a cheque being defined by the

act as a bill of exchange. It is not clear why there should be two sections of the act dealing with substantially the same kind of transaction in substantially different modes. See Russell, pp. 168-169. Sec. 49.

50. If a bill bearing a forged or unauthorized endorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid or from any endorser who has endorsed the bill subsequently to the forged or unauthorized endorsement if notice of the endorsement being a forged or unauthorized endorsement is given to each such subsequent endorser within the time and in the manner in this section mentioned. Recovery of amount paid on forged endorsement.

2. Any such person or endorser from whom said amount has been recovered shall have the like right of recovery against any prior endorser subsequent to the forged or unauthorized endorsement. Rights over.

3. Such notice of the endorsement being a forged or unauthorized endorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonour of a bill may be given or addressed under this Act. 60-61 V., c. 10, s. 1. [Cf. Eng. s. 60.] Notice of forgery.

This provision is substantially different from sec. 60 of the English act.(*d*)

The Negotiable Instruments Law contains no provisions corresponding either with sec. 60 of the English act or sec. 50 of the Canadian act.

In England prior to 1853 a banker paying a cheque to a holder, whose title depended upon a forged or unauthorized endorsement, could not under ordinary circumstances debit the English act as to banker paying on forged or unauthorized endorsement.

(*d*) The following history of the Canadian legislation and the analysis of sec. 50 and of the section which it replaced is based upon an article by Z. A. Lash in 4 J.C.B.A. at pp. 22 ff. (Oct., 1896.)

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customer with the payment. In that year an act was passed which was afterwards re-enacted in substance by sec. 60 of the English Bills of Exchange Act, 1882. That section is as follows:

"60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to shew that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

The leading case on the English section is Charles v. Blackwell, 1887, 2 C.P.D. 151, in which it was held that the banker who pays a cheque in good faith and in the ordinary course of business is protected, notwithstanding that the endorsement of the payee has been forged or made without authority, that the customer who draws the cheque is protected, the cheque having been paid, and that the loss must fall upon the payee, who alone of the three innocent parties could have contributed to the circumstances occasioning the loss. See also Grant, p. 22.

English act not adopted in Canada.

A section in the same words as sec. 60 of the English act was contained in the Canadian bill in 1890, but was struck out in committee, probably as a result of a misunderstanding of the effect of the section. In its place clause (*b*) and sub-sec. 2 of the present section 49 were added to the bill in the Senate.

It was doubtful under the act of 1890 whether an acceptor or endorser would, after payment of the bill, have any remedy against endorsers subsequent to the forged endorsement, and in 1891 the following sub-section was added to what is now sec. 49:

Recovery of money paid on forged or unauthorized endorsement.

"If the drawee of a cheque bearing a forged endorsement pays the amount thereof to a subsequent endorser, or to the bearer thereof, he shall have all the rights of a holder in due course for the recovery back of the amount so paid from any endorser who has endorsed the same subsequent to the forged endorsement, as well as his legal recourse against the bearer thereof as a transferrer by delivery; and any endorser who has made such payment shall have the like rights and recourse against any antecedent endorser subsequent to the forged indorsement,—the whole, however, subject to the provisions and limitations contained in the last preceding sub-section."

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Finally in 1897 the amendment of 1891 was repealed and the present sec. 50 enacted in its place.

The meaning of the present section may be illustrated by comparing its terms with those of the former section.

1. The former section applied only to a cheque. The present section applies to a bill of exchange whether drawn on a bank or not and whether payable on demand or otherwise. By virtue of sec. 186, it applies also to promissory notes.

2. The former section was confined to the case of a forged endorsement. The present section applies also to an unauthorized endorsement.

3. A payment to be recovered back under the present section must have been made in good faith, (*i.e.*, honestly whether negligently or not: sec. 3), and in the ordinary course of business.

4. The former section in terms conferred the right of recovery back only upon the bank which had paid the cheque. The present section gives the right to claim repayment to the bank which has made the payment and to the customer on whose behalf the payment has been made.

5. The former section gave the "rights of a holder in due course" for the recovery back of the amount paid from any endorser who had endorsed the same subsequent to the forged endorsement. If the "rights of a holder in due course" meant merely the ordinary rights of a holder of a bill, the bank was confined to a remedy upon the bill itself against the prior endorsers. In that event the section meant one of three things, either (1) that notice of dishonour must have been given within the time limited by the act in ordinary cases—a meaning which gave no practical relief to the bank and made the section illusory; or (2) that the bank had the rights of a holder without the necessity of giving notice and might claim repayment at any time before the statute of limitations had run its course; or (3) that by virtue of the concluding words—"the whole, however, subject to the provisions and limitations contained in the last preceding sub-section"—the bank had one year after acquiring notice of the forgery to notify the endorser. The third is the most probable meaning, but if the act meant either (2) or (3), it was unjust to the endorser in not requiring notice to be given promptly after the discovery of the forgery.

The present section gives the right to recover back the amount paid from the person to whom it was paid or from any

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endorser subsequent to the forged or unauthorized endorsement, but, like the former section in this respect, it confers no right of recovery against an intermediate holder who may have transferred the bill, but who did not endorse it. The present section requires notice of the forgery or want of authority to be given to each endorser subsequent to the endorsement in question, and not merely to the endorser sought to be charged. The notice must be given within a reasonable time after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorized, and may be given in the same manner as notice of protest or dishonour under the act.

As to "reasonable time," cf. secs. 77, 86 and 166, where the same expression is used.

The present section does not affect the rights or position of the drawer or endorsers prior to the forged or unauthorized endorsement, they being in no way responsible for the forgery or want of authority. As a loss must be suffered by some innocent party, it is only right that it should fall upon him who by his negligence or failure to enquire, was imposed upon, and who had it entirely within his power to protect himself at the time of acquiring the bill. This principle is applicable to the first endorser after the forged or unauthorized endorsement and to each subsequent endorsement. But an acceptor is in a different position. When a bill is presented for payment, he has no time to verify the endorsement, and usually has no means of doing so. He must pay at once or let the bill go to protest,—and he is therefore required only to act in good faith and in the ordinary course of business.

Recovery by payer of money paid by mistake.

Recovery by payer of money paid by mistake.

Chalmers, p. 226, states the law as follows: "Where payment of a bill or note is made by mistake to a person who is not entitled to receive payment and who cannot give a discharge, the payer can recover the money so paid from the person who received it when such person did not act in good faith in demanding payment of the bill. Martin v. Morgan, 1819, 3 Moore, 635; Kendal v. Wood, 1871, L.R. 6 Ex. 243. Subject to the provisions of the act as to a collecting bank in the case of a crossed cheque (sec. 175), the payer can recover the money paid from the person who received it when such person acted in good faith in demanding payment of the bill, provided (*a*)

Sec. 50. Recovery by payer of money paid by mistake.

that the payer was not guilty of negligence in making the payment, and (probably) (*b*) that the position of the party receiving payment has not been altered before the discovery of the mistake and notification thereof." See also illustrations given by Chalmers.

The right of a person who pays money on a forged bill in the belief that it is genuine to a person who receives it honestly in the same belief to recover back the money is also discussed in Grant, beginning at p. 264, where it is stated: "In the case of negotiable instruments the law on this point is somewhat unsettled, or at any rate the governing principles cannot be deduced very clearly from the decisions. It is a question whether the presence or absence of negligence on the part of the person paying the money is material.(*e*) But a party is not precluded from recovering money paid under a mistake of fact, unless he paid it intentionally, not choosing to investigate the fact, *i.e.*, without reference to the truth or falsity of the fact."(*f*)

The American and English cases are collected in 10 Lawyers Reports Annotated, New Series, 49-74.

Chalmers, p. 226, further states that the payer of a forged, altered, or cancelled bill, who has been directly induced to pay it by the negligence of his correspondent or customer, and has not himself been guilty of negligence, can recover the money so paid from such correspondent or customer. But at p. 228 he observes that the modern tendency is to minimise the effect of negligence on the part of the customer or correspondent; he cannot be held liable unless his negligence has been the proximate cause of the forgery being taken as genuine.

Ewart on Estoppel, p. 107, puts the matter more strongly: "The English authorities have excluded all questions of negligence from a class of cases in which there is a strong minority opinion for asserting that it ought to play a most important part." The leading case representing this minority opinion is that of Young v. Grote, 1827, 4 Bing. 253, 1 Ames 486, in which the duty of exercising care in not leaving spaces to tempt a possible forger was imposed upon the drawer of a cheque. This case has been adversely criticised on many occasions; see *e.g.* Scholfield v. Londesborough, (H.L.) *infra;* Imperial Bank v.

(*e*) See London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q.B. 7, where Mathew, J. reviews the cases.

(*f*) Kelly v. Solari, 1841, 9 M. & W. 54; approved in Imperial Bank of Canada v. Bank of Hamilton, [1903] A.C. 49.

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Bank of Hamilton (P.C.) *infra;* Colonial Bank of Australasia v. Marshall, (P.C.) *infra;* Smith v. Prosser, [1907] 2 K.B. 746, 748, C.A. Notwithstanding these criticisms, T. Beven considered Young v. Grote as of authority,(*g*) and the editors of Grant, p. 16, express the opinion that it is still open to the House of Lords to adopt or reject the view that a customer is under a duty to his banker to use care in drawing cheques so as not to allow of alteration by forgery without the alteration being readily detected.(*h*) Until the House of Lords does re-establish the credit of Young v. Grote, that case would appear to be entirely discredited so far at least as colonial courts are concerned.

There may be a duty on the part of the drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards the holder. If the customer has induced the banker to act upon the document by his act, or neglect of some act usual in the course of dealings between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled. Scholfield v. Londesborough, [1896] A.C. at p. 523. But whatever the duty of a customer towards his banker may be with reference to his drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not itself any violation of that obligation. Colonial Bank v. Marshall, [1906] A.C. 559, 568; cf. Imperial Bank v. Bank of Hamilton, [1903] A.C. at p. 54.

It is the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given. That is the duty as between principal and agent (Ireland v. Livingston, 1872, L.R. 5 H.L. 395); and although the relation between a customer and his banker is not that of principal and agent, the same considerations would seem to apply. But there is no authority that, beyond the care which must be taken in the transaction itself, a customer must, in the course of carrying on his business, take

(*g*) See article in 23 L.Q.R. 390 (Oct. 1907); Beven on Negligence in Law, 3rd. ed., preface and at pp. 1317, 1340.

(*h*) The learned editors give a list of 16 cases, which they say must be considered and discussed when the decision in question is given. Cf. Byles, pp. 28 ff., 243-4, 315-7.

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reasonable precautions to prevent his servants from forging his signature, or, if the customer be a company, the directors must take reasonable precautions to prevent the company's servants from forging their signatures. Kepitigalla Rubber Estates v. National Bank of India, [1909] 2 K.B. 1010, at p. 1022. But see 26 L.Q.R. 4 (Jan., 1910), for the view that a banker ought not to be exposed to the risks such as that of paying at his peril a cheque signed with a rubber stamp used without authority by a dishonest servant.

The drawee of a cheque is bound to know the handwriting of his customer. Price v. Neal, 1762, 3 Burr. 1355, 1 Ames 407; Smith v. Mercer, 1815, 6 Taunt. 76.(*i*) If in the ordinary course of dealing there comes through one bank to another a cheque purporting to bear the signature of a customer of the latter, which accepts it, pays it and charges it to the customer, the implication from the transaction is that the drawee bank dealt with the cheque in reliance upon his knowledge of the customer's signature, and not upon any supposed representation or warranty of its genuineness by the bank presenting it. Rex v. Bank of Montreal, 1906, 11 O.L.R. 595, 601; S.C. *sub nom.* Bank of Montreal v. The King, 1907, 38 S.C.R. 258.(*j*) Cf. Bank of Ottawa v. Harty, 1906, 12 O.L.R. 218, in which a person who had presented to the plaintiff bank a cheque on a New York bank purporting to be endorsed by the payee, but not in fact endorsed by the payee, was held liable as on a warranty that he, as agent for the rightful owner, was entitled to payment.

The drawee of a cheque, although obliged to know the signature of its customer, is not under a similar obligation in regard to the writing in the body of the cheque—a distinction

(*i*) But Grant, p. 267, submits that no such duty is owed to third parties.

(*j*) Leave to appeal was refused by the Privy Council. The facts briefly stated were as follows. A clerk in a government department forged the signatures of the officers of the department to cheques upon the Bank of Montreal and deposited them to his credit in other banks, which presented them and obtained payment. In an action by the government against the Bank of Montreal this bank caused the other banks to be added as third parties but was held not entitled to recover back from them. The decision in this case was put by some of the judges on the ground stated in the text, and by others on the ground that the collecting banks relied upon the representation that the cheques were genuine which was to be implied from their payment on presentment and subsequently paid out the money, so that the drawee bank was estopped. But this latter ground would have been available in the later case of Dominion Bank v. Union Bank, *infra*, whereas in the latter case the drawee bank was held entitled to recover.

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which as applied to the acceptor of a bill is impliedly preserved by sec. 129. Dominion Bank v. Union Bank, 1908, 40 S.C.R. 366, 367.(*k*) Therefore when a cheque with genuine signature is presented for payment and paid in good faith the drawee is at least no less innocent than the holder. If the drawee pays, the case is one of payment of money without consideration under a mistake of fact, and the money can be recovered back.(*l*) The mere fact that the receiver, while ignorant of the mistake, changes his position by paying the money over to a third person to whose orders he is subject is not an answer to the claim unless the receiver presents the cheque in the character of agent only, and this is known or ought to be known to the drawee.

In Cocks v. Masterman, 1829, 9 B. & C. 902, it is said that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill, and that if he receives the money and is suffered to retain it during the whole of that day the parties who paid it cannot recover it back. This rule, "recently reasserted in even wider language by Mathew, J., in London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q.B. 7, has reference to negotiable instruments, on the dishonour of which notice has to be given to some one, namely, to some drawer or endorser, who would be discharged from liability unless such notice were given in proper time, and is not to be applied to other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay in giving it." Imperial Bank v. Bank of Hamilton, [1903] A.C. 49, at p. 58;(*m*) cf. Bank of Montreal v. The King, 1907, 38 S.C.R. 258, 278.

(*k*) A cheque on the Union Bank with a genuine signature but altered as to date, amount and name of payee was deposited with the Dominion Bank, which received payment from the drawee bank, and afterwards paid the money to the depositor. Held, affirming 17 Man. R. 68, that the drawee bank was entitled to recover from the Dominion Bank. It was held upon the facts that the latter bank was not a mere agent but that it presented the cheque as holder—a principal having itself an interest in the cheque. As to this last point, see Davies, J. at p. 372, and Duff, J. at p. 382.

(*l*) See article in 26 C.L.T. 787, (Oct. 1908) by J. S. Ewart, who questions the reasonableness of the distinction between this case and that of Bank of Montreal v. The King, *supra*. Cf. the dissenting judgment of Idington, J., 40 S.C.R. at pp. 373 ff.

(*m*) A cheque for $5 was certified by the drawee (Bank of Hamilton) at the instance of the drawer, who then fraudulently altered the amount to $500 and negotiated it to a holder in due course (Imperial Bank). It was

Sec. 50. Recovery by payer of money paid by mistake.

The English cases must also be read subject to the provisions of sec. 50, which provides that if a bill bearing a forged or unauthorized endorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid or from any endorser who has endorsed the bill subsequently to the forged or unauthorized endorsement, if notice of the endorsement being a forged or unauthorized endorsement is given to each such subsequent endorser *within a reasonable time* after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorized. Cf. Russell, pp. 158 ff.

In Bank of Toronto v. Hamilton, 1896, 28 O.R. 51, the plaintiff bank under telegraphic instructions from one of its branches, telephoned to one of its sub-agencies to credit the defendant with $2,000. The sub-agency by error credited him with $3,000, which he drew out. The $2,000 had been paid into the branch bank in the first instance by a third person as an advance on the shipping bills of certain cattle bought from the defendant for about $2,800, but of this fact the bank had no notice. The defendant refused to repay the difference between the $2,000 and the price of the cattle, on the ground that on the faith of the payment to him he had allowed them to be shipped abroad, and that by his agreement for sale this was not to be done till payment of the price in full. Held, that the bank was entitled to recover the excess over $2,000.

Collecting a bill is an act of conversion for which a bank is liable to the true owner, if it turns out that the person for whom the bank collected the instrument had no title to it. Grant, pp. 45-6.

C. specially endorses a bill to D. It is stolen before delivery to D., and D.'s endorsement in blank is forged on it. It comes into B.'s hands and he gets his bankers to present it for payment. They receive payment and credit B. with the amount, and B. subsequently draws out the whole sum. C. can recover

paid by the drawee bank to the holder under a mistake of fact. The fraud was not discovered till next day when the drawee bank notified the holder. Held that it was entitled to recover $495. The cheque was good for $5 in the hands of a holder in due course notwithstanding the alteration; see sec. 145.

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the amount of the bill from the bankers in an action for conversion or for money had and received to his use. Arnold v. Cheque Bank, 1876, 1 C.P.D. 578; cf. Toronto Club v. Dominion Bank, 1911, 25 O.L.R. 330. See also North and South Wales Bank v. Macbeth, 1908, A.C. 137, and North and South Wales Bank v. Irvine, *ibid.*, 139,(*n*) as examples of actions for conversion against a bank which has presented and obtained payment of cheques with forged endorsements and paid the proceeds to the forger.

Procuration signatures.

51. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority. 53 V., c. 33, s. 25. [Eng. s. 25. N.I.L. s. 21.]

The section provides for the case of an instrument which shews on its face that it is signed by the hand of an agent. Cf. sec. 4, which provides that an instrument is sufficiently signed by a person if his signature is written thereon by some other person by or under his authority.

As to the signature of a corporation and notes signed on behalf of a corporation, see sec. 5.

As to the form of signature by an agent which is sufficient to shew that the agent is not to be personally liable, providing the authority is sufficient, see sec. 52.

Signature by procuration.

An authority created by power of attorney may be appropriately indicated by "per pro." or "p.p.," and a less formal authority by "p.," "pro." or "for," preceding the principal's name, but "A. by B. atty.," or "A. per B." would be equally effectual methods of indicating that B. signs as agent for A. Any form of signature which purports to be put on by delegated authority is in effect a signature by procuration. Cf. Grant, p. 293. See also conventions and rules respecting endorsements in the notes to sec. 68.

Sec. 51 embodies the rule expressed before the passing of the act in Attwood v. Munnings, 1827, 7 B. & C. 278, 4 R.C. 364, and Stagg v. Elliott, 1862, 12 C.B.N.S. 373. A person who takes a bill signed by procuration is bound to enquire

(*n*) The facts of these two cases are stated in the notes to sec. 21 (fictitious or non-existing payee).

Sec. 51. Signature by procuration.

into the nature and extent of the agent's authority, because the holder's right to sue the principal depends upon the existence of actual authority. It would be only reasonable prudence to require proof of the authority. A power of attorney will be strictly construed.

An appointment as manager and agent of a company "to take the entire charge of the business of the company" in a foreign country, does not authorize the making of a note on behalf of the company, it not being shewn that the giving of the note was necessary for carrying on the business of the company or in the ordinary course of business of such a company. In re Cunningham & Co., 1887, 36 Ch.D. 532.

A power of attorney gave authority "for the purposes aforesaid to sign for me, etc., any and every contract or agreement, acceptance or other document," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign, and transfer" government promissory notes, and "to contract for, purchase and accept the transfer of" the same. Held an authority to sell or purchase such notes, but not to pledge them. Jonmenjoy Coondoo v. Watson, 1884, 9 App. Cas. 561; cf. Jacobs v. Morris, [1902] 1 Ch. 816, an action to restrain the negotiation of a bill accepted by an agent in excess of his authority.

But notwithstanding the existence of a written power of attorney, the real scope of the agency may be ascertained from any admissible evidence. Cooper v. Blacklock, 1880, 5 O.A.R. 535.

Where an agent drew a cheque *per proc.* in excess of his authority and the proceeds were used for the principals' benefit, the principals were held liable to a person who had cashed the cheque in good faith for money had and received, although they were not liable on the cheque itself. Reid v. Rigby & Co., [1894] 2 Q.B. 40; see also Jacobs v. Morris, *ubi supra;* cf. Bridgewater Cheese Factory Co. v. Murphy, 1896, 23 O.A.R. 66, 26 S.C.R. 443; Bannatyne v. MacIver, [1906] 1 K.B. 103.

If the agent has authority, his abuse of it does not affect a holder in due course; the agent's apparent authority is the real authority. Bryant, Powis and Bryant, Ltd., v. Banque du Peuple, [1893] A.C. 170; cf. Hambro v. Burnand, [1904] 2 K.B. 10; Toronto Club v. Dominion Bank, 1911, 25 O.L.R.

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330; Cox v. Canadian Bank of Commerce, 1912, 46 S.C.R. 564, affirming 21 Man. R. 1.

By a resolution of the directors, the chairman of a company is authorized to accept bills drawn by A., against the deposit of securities. He accepts a bill drawn by A., signing *per proc.* the company, without requiring the deposit of security. The bill is negotiated to a *bonâ fide* holder. The company is liable, the provision as to the deposit of securities being a collateral matter, into the observance of which a holder of the bill is not bound to enquire. In re Land Credit Co., Ex parte Overend, Gurney & Co., 1869, L.R. 4 Ch. 460, applying the principle of Royal British Bank v. Turquand, 1856, 6 E. & B. 327: see chapter 6, *supra*.

Liability of agent who signs a bill on behalf of a principal.

A person who, without authority, signs the name of another person to a bill, either simply or by a procuration signature, is not as a general rule, liable on the instrument. Polhill v. Walter, 1832, 3 B. & Ad. 114. But if the alleged principal is fictitious or non-existing, the signer is liable on the instrument. Cf. Kelner v. Baxter, 1866, L.R. 2 C.P. 174; and see sec. 132, sub-sec. 1. In the special case provided for by sec. 115 of the Dominion Companies Act (R.S.C. 1906, c. 79) and similar provisions in other companies acts (see notes to sec. 5), a person signing as agent may be liable on the instrument. See Howell v. Brethour, 1899, 30 O.R. 204. Cf. Chalmers, p. 84.

Liability of agent who signs without authority.

A person signing without authority may, however, be liable in an action for misrepresentation or fraud. Polhill v. Walter, *supra;* West London v. Kitson, 1884, 13 Q.B.D. 360. In such an action the holder must prove damage. Eastwood v. Bain, 1858, 3 H. & N. 738. The fraud which is sufficient to be a ground for an action of deceit is discussed in Derry v. Peek, 1889, 14 App. Cas. 337. Cf. Low v. Bouverie, [1891] 3 Ch. at 100; Le Lievre v. Gould, [1893] 1 Q.B. at 501: negligent misrepresentation is sufficient where there is a contract between the parties and therefore a duty not to be negligent.

A person who signs a bill in the name of another without authority is not liable on the bill itself, because he is not a party to it, and he is not liable to an action of deceit if he acted innocently, but he may be liable on the ground of an implied warranty of authority. Collen v. Wright. 1857, 8 E. & B. 647;

Firbanks v. Humphreys, 18 Q.B.D. 54, better report 56 L.J.Q.B. 57; Starkey v. Bank of England, [1903] A.C. 114.(*o*) The person signing is liable on an implied warranty of authority only if the other contracting party relied on the existence of authority in fact. Halbot v. Lens, [1901] 1 Ch. 344. Where an agent, having had a continuing authority conferred upon him, purports to exercise it after it has been in fact revoked by the principal's lunacy or death, that fact being unknown to the agent as well as the third party, the agent is bound by an implied warranty of his authority as in other cases. Yonge v. Toynbee, [1910] 1 K.B. 215; see 26 L.Q.R. 105 (April, 1910), 30 C.L.T. 734 (Sept. 1910). The same result follows if there never was any principal. Simmons v. Liberal Opinion Ltd., [1911] 1 K.B. 966; Crane v. Lavoie, 1912, 22 Man. R. 330 (signatures of officers before incorporation of company).

Sec. 51. Liability of agent who signs without authority.

52. Where a person signs a bill as a drawer, endorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

Signing in representative capacity.

2. In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted. 53 V., c. 33, s. 26. [Eng. s. 26. Cf. N.I.L. s. 20].

Rule for determining capacity.

The question of the sufficiency of the authority of an agent to sign a bill on behalf of a principal is discussed in the notes to secs. 4, 5 and 51. Sec. 52 deals only with the question whether the form of the signature is such as to render the principal and not the agent liable.

See sec. 132 as to signing a bill in a trade or assumed name or in the name of a firm.

Where a person is under obligation to endorse a bill in a

(*o*) See cases of an agent being held liable on the ground of an implied warranty of authority to transfer stock, cited in the notes to sec. 43 of the Bank Act.

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representative capacity, he may endorse the bill in such terms as to negative personal liability (sec. 61).

Signature as agent or in representative capacity.

This section was re-drafted in committee, and perhaps somewhat modifies the rigour of the common law rule. At any rate the older cases must be examined carefully with regard to the words of the section. The principle is this: the terms agent, manager, etc., attached to a signature are regarded as mere *designatio personæ*. The rule is applied with peculiar strictness to bills, because of the non-liability of the principal (cf. sec. 131) Chalmers, p. 86.

It was held prior to the act that upon a bill addressed to W.C. and accepted "For the Companies—W.C., Purser," W.C. was personally liable. Marc v. Charles, 1856, 5 E. & B. 978. But inasmuch as the signature was "for or on behalf of a principal" within the wording of sec. 52, it seems that this decision should no longer govern. It was not followed in the very similar case of Smith v. Mason, 1911, Q.R. 40 S.C. 75.

A man who puts his name to a bill makes himself personally liable, unless he states upon the face of the bill that he subscribes for another or by procuration of another, which are words of exclusion. Unless he says plainly, "I am the mere scribe," he is liable. Leadbitter v. Farrow, 1816, 5 M. & S. at p. 349. But see Chapman v. Smethurst, and Fairchild v. Ferguson, *infra*.

In considering the question raised by this section, one must not overlook the distinction between bills of exchange and promissory notes. As pointed out in Alexander v. Sizer, 1869, L.R. 4 Ex. at p. 105, a bill of exchange is drawn on the intended acceptor in a personal character and if he accepts, he must do so in that character or not at all. The acceptance of a bill is the signification by the *drawee* of his assent to the order of the drawer (sec. 35; cf. notes to that section). This distinction explains many of the cases in which the principal has been held not liable on a bill, as not being the drawee, although otherwise the bill has been sufficiently signed for him or on his behalf by an agent.

Sec. 20 of the Negotiable Instruments Law reads: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative character, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character,

Sec. 52. Signature as agent or in representative capacity.

without disclosing the principal, does not exempt him from personal liability." This section by implication provides that the agent is liable on the instrument if he was not duly authorized. The section is adopted from the German Exchange Act and in this respect departs from the English act, under which the agent is liable, not on the instrument, but on an implied warranty of authority. (See notes to sec. 51.) The section has been adversely criticized on this account by Ames, and the English rule seems correct in theory, but the change is probably a practical improvement and facilitates recovery by the holder against the agent. See Brannan, pp. 25-6.

Principal liable; agent not liable.

A leading case is that of Fairchild v. Ferguson, 1892, 21 S.C.R. 484. The manager of a company, in payment for goods purchased by him as such, gave a promissory note beginning "sixty days after date *we* promise to pay" and signed "R., manager O.L. Co." Evidence was given that both R. and the payees intended to make the company liable and that R. had authority to bind the contract by note. Held, the company's note and not R's. This decision gives effect to the intention of the parties, but it is difficult to reconcile it with a strict reading of sec. 52. Many of the cases are discussed in the judgments. Cf. Canada Paper Co. v. Gazette, 1893, 32 N.B.R. 689; City Bank v. Cheney, 1857, 15 U.C.R. 400.

A note is given in the form "I promise to pay," etc., and signed "For the M.T. & W. Ry. Co., J.S. secretary." J. S. is not personally liable. Alexander v. Sizer, 1869, L.R. 4 Ex. 102.

Principal liable; agent not liable.

The recent case of Chapman v. Smethurst, [1909] 1 K.B. 927, C.A., reversing the decision of Channell, J. at p. 73, seems to indicate a tendency to look at the substantial intent rather than the form of the document. The note in that case ran "I promise to pay" and was signed "J.H.S. Laundry and Dye Works Limited. J.H.S., managing Director," and action was brought against J.H.S. personally. Although the note did not purport to be signed "for" or "on behalf of" the company, the stamped signature of the company over the written signature of the defendant was held sufficient to shew that it was the company's note, and not the defendant's. See the cases referred to in the judgments; cf. Union Bank v. Cross, 1909, 2 A.L.R. 3.

Sec. 52. Agent personally liable.

Agent personally liable.

Many of the cases are collected in Boyd v. Mortimer, 1899, 30 O.R. 290. In that case an assignee for the benefit of the creditors of a partnership signed notes in the firm name, followed by his own with the word assignee added, and was held personally liable.

A bill is drawn upon "P.C.D., president N.D. & H. Co.," and accepted by him in the same terms. He is personally liable (Bank of Montreal v. De Latre, 1848, 5 U.C.R. 362); he would not have been liable if he had accepted in the company's name, per himself. Cf. Madden v. Cox, 1880, 5 O.A.R. 473, cited in notes to sec. 35.

A bill addressed to A.M., is accepted "A.M., executor of J.P." A.M. is personally liable. Campbell v. McKay, 1892, 24 N.S.R. 404.

A note is signed by an agent or officer in his own name, with the addition after his name of his agency or office, or of the word "attorney," "executor," etc. He is personally liable. McDonald v. Smaill, 1893, 25 N.S.R. 440; Armour v. Gates, 1859, 8 U.C.C.P. 548; Hamilton v. Jones, 1896, Q.R. 10 S.C. 496; Peele v. Robinson, 1860, 9 N.B.R. (4 Allen) 561; Hagarty v. Squier, 1877, 42 U.C R. 165, and cases cited.

A note is made in the form, "we the directors of the A.B. Co., Limited, do promise to pay," and is signed "R.M., chairman, G.H., S.B., H.G." In the left-hand corner were the seal of the company and the signature of a witness attesting the affixing of the seal. Held that the signing directors were personally liable. Dutton v. Marsh, 1871, L.R. 6 Q.B. 361; distinguished in Chapman v. Smethurst, [1909] 2 K.B. at p. 929.

CHAPTER XXXIX.

CONSIDERATION.

Value.

53. Valuable consideration for a bill may be constituted by,—

Sufficiency.

(*a*) any consideration sufficient to support a simple contract;

Antecedent debt.

(*b*) an antecedent debt or liability;

Form of bill.

2. Such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time. 53 V., c. 33, s. 27. [Eng. s. 27. Cf. N.I.L. s. 25.]

"Valuable consideration" and "value" are equivalent expressions in the act (sec. 2). It is not necessary to express on the face of a bill that value has been given (sec. 27), the law raising a *primâ facie* presumption of consideration (sec. 58), but under certain circumstances absence or failure of consideration may be proved as a defence: see notes to secs. 58 and 74. The courts do not, however, enquire into the adequacy or inadequacy of the consideration, except in so far as inadequacy may be evidence of bad faith or fraud. Jones v. Gordon, 1877, 2 App. Cas. 616.

Valuable consideration defined

Valuable consideration has been defined in the case of Currie v. Misa, 1875, L.R. 10 Ex. 153, 4 R.C. 316, as consisting "either in some right, interest, profit or benefit, accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." Consideration is therefore something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise. It must necessarily be *in respect of the promise*, since consideration gives to the promise a binding force. Anson on Contracts, 13th ed., 1912, p. 95.

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a con-

Sec. 53

sideration for the promise." Indian Contract Act; Stack v. Dowd, 1907, 15 O.L.R. at p. 334.

Consideration in Quebec.

The effect of this section, it is submitted, is to introduce in Quebec the English common law as to what constitutes consideration so far as bills are concerned. The phrase "simple contract" is a technical one and has properly been literally translated "*simple contrat*" in the French version.(a) The distinction between simple contract and specialty in regard to the necessity for consideration is not recognized by French law. The result seems to be that while the test of consideration for the purpose of the act is the same in all the provinces, the law of Quebec continues to be different from that of the other provinces in that it does not recognize the validity of a bill or other contract without consideration although under seal.

What is sufficient consideration.

It has been held that a promise which by reason of the Statute of Frauds is unenforceable is sufficient consideration for a bill. Kinzie v. Harper, 1908, 15 O.L.R. 582; disapproving Black v. Gesner, 1847, 3 N.S.R. 157. The same has been held in regard to a debt barred by the Statute of Limitations. LaTouche v. LaTouche, 1865, 3 H. & C. 576, 2 Ames 667. The reason in each case is the same—the statute takes away the remedy by action but does not extinguish the obligation. In the case of Wright v. Wright, 1876, 6 O.P.R. 295, the same result was arrived at, but on the ground that a statute-barred debt was a continuing debt in conscience. This ground cannot be considered valid in view of the decision in Eastwood v. Kenyon, 1840, 11 A. & E. 438, that a mere moral obligation does not constitute valuable consideration. Cf. In re Whitaker, 1889, 42 Ch. D. 119. See also Russell, at pp. 182 and 190.

A note given for repayment of a previous voluntary gift of money is given without consideration, but the defence that the money was advanced by way of gift and not by way of loan must be clearly proved. Hill v. Wilson, 1873, L.R. 8 Ch. at p. 894.

The compromise of a disputed liability is valuable consideration. Cook v. Wright, 1861, 1 B. & S. 559. It is immaterial that the claim ultimately appears to be wholly unfounded, provided the claimant believed in good faith that he had a good claim. Callisher v. Bischoffsheim, 1870, L.R.

(a) *Une cause ou considération valable pour une lettre de change peut être constituée par,*—(a) *toute considération suffisante pour donner validité à une simple contrat.*

5 Q.B. 449, cf. Russell on Bills, p. 189. See also cases cited by Chalmers, pp. 88, 89. Sec. 53. What is sufficient consideration.

The following have been held to constitute valuable consideration:

—a cross acceptance. Rose v. Sims, 1830, 1 B. & Ad. 521, at p. 526.

—the forbearance to proceed under a judgment. Smith v. Frame, 1907, 41 N.S.R. 20.

—the forbearance at the request of the defendant, to sue a third party for a debt, although there was no contract by the plaintiff to forbear from suing. Crears v. Hunter, 1887, 19 Q.B.D. 341; cf. Creelman v. Stewart, 1896, 28 N.S.R. 185; Dickenson v. Clemow, 1850, 7 U.C.R. 421.

—the forbearance to sue or the giving of time to the defendant, as *e.g.* where credit is given by the creditor for the amount of the instrument in question. Royal Bank of Scotland v. Tottenham, [1894] 2 Q.B. 715, 717; Bank of British North America v. Warren, 1909, 19 O.L.R. 257, 263-4.

But where a note made by two persons in favour of the plaintiff is, after maturity, signed by the defendant without any consideration moving directly to such third person or any agreement to extend the time for payment, the signing by the defendant does not imply an agreement not to sue and the defendant is not liable. The Bills of Exchange Act has made no change in this respect. Stack v. Dowd, 1907, 15 O.L.R. 331, following Ryan v. McKerrall, 1888, 15 O.R. 460. See earlier cases discussed in Ryan v. McKerrall and in Russell at pp. 183-189. Cf. Cossitt v. Cook, 1884, 17 N.S.R. 84. It was also held in Stack v. Dowd that even if the original makers were released by the execution of the note by the defendant, such release was not sufficient consideration to support the promise of the defendant inasmuch as there was no evidence of a desire or request or consent on her part that the other parties to the note should be released.

Antecedent debt or liability.

Apart from the words "or liability," sub-sec. 2 embodies the rule laid down by the majority of the Court of Exchequer Chamber in Currie v. Misa, 1875, L.R. 10 Ex.153, 4 R.C. 316 (S.C. *sub nom.* Misa v. Currie, 1876, 1 App. Cas. 554). Prior to that case it was uncertain how far an antecedent debt constituted a sufficient consideration for an instrument payable Antecedent debt.

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on demand. In the case of a bill or note payable *in futuro* it was said that the suspension of the creditor's remedies during the currency of the bill or note constituted valuable consideration, but that when the instrument was payable on demand there was no such giving of time. The court decided that this was not a valid distinction, and that the title of a creditor to a bill given on account of a pre-existing debt, whether payable on demand or at a future day, does not rest upon an implied agreement to suspend his remedies, but upon the fact that the giving of the bill is a conditional payment of the debt, the condition being that the debt revives if the bill is not realized. The instrument is taken by the creditor as money's worth and becomes his property as truly as the money which it represents would have been his had the payment been made in gold. The judgment of the Court of Exchequer in this case was approved in McLean v. Clydesdale Banking Co., 1883, 9 App. Cas. 95. In the latter case, a customer, being indebted to his bankers, got a cheque on another bank from a friend, for the purpose of reducing his overdraft. The cheque was paid in and credited to the customer's account. It was held that the bankers held the cheque for value, and could recover from the drawer, who had stopped payment at the drawee bank. Cf. Ryan v. McKerrall, 1888, 15 O.R. 460; Capital and Counties Bank v. Gordon, [1903] A.C. 240; as to the latter case, see notes to sec. 175.

A company's note was endorsed to and deposited with a bank as collateral security for the company's current indebtedness, and in consideration of the deposit new advances were made by the bank by discount of the company's trade paper. At the maturity of the note the trade paper had been retired, and an overdraft on the company's account had been covered, but the general indebtedness of the company for former loans still subsisted. Held that the repayment of the new advances by retirement of the trade paper so discounted was not satisfaction of the debt for which the note was pledged, and that the bank was entitled to enforce payment of the note to the extent of the company's indebtedness then remaining unsatisfied. Cox v. Canadian Bank of Commerce, 1912, 46 S.C.R. 564, affirming 21 Man. R. 1.

The Negotiable Instruments Law, sec. 25, reads: "Value is any consideration sufficient to support a simple contract. An

antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." This section abrogates the rule prevailing formerly in some American courts that a person taking a negotiable instrument as collateral security for a pre-existing debt is not a holder for value. Cf. Crawford, pp. 39, 41. As to the former law, see American notes in 4 R.C. 330. Sec. 53. Antecedent debt.

The words "or liability" were added to the English bill in committee. They perhaps extend the previous law. Chalmers, p. 89. Or liability.

These words seemed to have been overlooked in the case of Bank of Commerce v. Wait, 1907, 1 A.L.R. 68. It was there held that where a note of a third party (the defendant) was given by a debtor as collateral security for a debt not presently payable, there was no consideration, and therefore the creditor was not a holder in due course who would take free from the defence of fraud available to the defendant against the debtor.

But if the alleged consideration is merely an antecedent liability it is necessary for the holder to shew that the instrument was either taken as conditional payment or as collateral security, because there is no implied lien unless there is a present indebtedness. See notes to sec. 54, *infra*, and notes to sec. 77 of the Bank Act.

54. Where value has, at any time, been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time. Holder for value.

2. Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. 53 V., c. 33, s. 27. [Eng. s. 27. N.I.L. ss. 26 and 27.] In case of lien.

Holder for value.

"Holder" is defined by sec. 2, and "holder in due course" by sec. 56. The latter must take the bill for value, but a holder for value may or may not be a holder in due course. A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself

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a party to any fraud or illegality affecting it, has all the rights of a holder in due course as regards the acceptor and all parties to the bill prior to that holder (sec. 57).

Holder for value.

The holder of a bill who receives it from a holder for value but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it. The payee of a bill who holds it for value, endorses it to D. without value, *e.g.*, by way of gift or for collection. D., as regards the drawer and acceptor, is a holder for value. Chalmers, p. 93; cf. Byles, p. 152.

B. owes C. $50. In order to pay C., A. at B.'s request draws a bill on B. for $50 in favour of C. C. is a holder for value and can sue A., though A. has received no value. Scott v. Lifford, 1808, 1 Camp. 246.

A. draws a bill on B., payable to his own order. B., to accommodate A., accepts it. Subsequently A. gives value to B. A. is a holder for value. Burdon v. Benton, 1847, 9 Q.B. 843.

A., at the request of B., draws a bill payable to C. for B.'s account with C. B. remits the bill to C. C. is a holder for value. It is immaterial that there is no consideration between A. and B., or that the consideration fails. Munroe v. Bordier, 1849, 8 C.B. 862; 2 Ames 660.

As to presumption and impeachment of value, see sec. 58

Where holder has a lien.

The "discount" of a bill must be distinguished from the pledge or deposit of a bill as security. A "discounter" is a holder for full value. The position of a pledgee is this: if he sue a third party he sues as trustee for the pledgor, as regards the difference between the amount he has advanced and the amount of the bill. If the pledgor could have sued on the bill, the pledgee can recover the whole. If the title of the pledgor is defective, the pledgee can recover the amount of his advance, provided he took the bill without notice. Chalmers, pp. 94, 95.

As to the discount and pledge of bills, and the rights and liabilities of holders by way of discount or pledge, see also notes to sec. 76 of the Bank Act. Cf. notes to sec. 53 of the Bills of Exchange Act in regard to an antecedent debt or liability as constituting valuable consideration for a bill.

Sec. 54. Lien on bill.

A bank may have a lien upon a customer's bill either by implication of law, if the customer is presently indebted, although the bill was merely in the bank's hands for collection, or by contract, if the bill is pledged as collateral security, although the customer is merely indirectly liable and not presently indebted. Merchants Bank v. Thompson, 1911, 23 O.L.R. 502, 512-3, S. C. 26 O.L.R. 183. Cf. notes to sec. 77 of the Bank Act, as to the banker's lien, and notes to sec. 76 of the Bank Act as to collateral security.

A bill may be deposited as security for a fluctuating balance, and the pledgee is a holder for value for the amount owing at the time of suit although in the interval since it was deposited the balance had been in favour of the depositor. Atwood v. Crowdie, 1816, 1 Stark 483; Merchants Bank v. Thompson, *supra*.

Accommodation party.

55. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name to some other person.

Liability of party.

2. An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not. 53 V., c. 33, s. 28. [Eng. s. 28. N.I.L. s. 29.]

As Chalmers, pp. 96, 97, points out, an accommodation bill is a bill whereof the acceptor (*i.e.*, the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party to the bill. Any other bill is not correctly spoken of as an accommodation bill, although it may be signed by one or more accommodation parties. The distinction is important in regard to the discharge of the bill. An accommodation bill is discharged when it is paid in due course by the party accommodated (sec. 139), although in form he may not be the principal debtor.

Liability of accommodation parties.

If two or more persons endorse a bill to accommodate the acceptor, their relations *inter se* are those of co-sureties, and not of sureties in succession according to the order of their names on the bill (see notes to sec. 133).

Sec. 55. Liability of accommodation parties.

As a general rule the drawer or endorser for whose accommodation a bill is accepted cannot avail himself of want of due presentment for payment (sec. 92), or of notice of dishonour (secs. 108 and 109), or of protest (sec. 110), because it is his own duty to provide the funds to meet the bill at maturity. As to negotiation of an overdue accommodation bill, see notes to sec. 70.

An accommodation party is liable to a holder for value, although such holder knew, when he took the bill that such party was an accommodation party (sec. 55), but such an accommodation party may avail himself of a right of set-off which the person accommodated could have set up. Bechervaise v. Lewis, 1872, L.R. 7 C.P. 372, 377.

As to holder for value, see secs. 54 and 58.

Ames criticizes the section on the ground that if B. receives $10 for becoming a party to a bill for $1000 for A.'s accommodation, he would not be an accommodation party within the strict wording of the section. But "without receiving value therefor" means without receiving value for the bill, not without receiving value for lending his name, and A. is an accommodation party. Brannan, p. 37.

G. agrees to lend M. $100, provided M. will make a note for the amount in G.'s favour and procure W. to endorse the note as surety for the payment thereof to G. In pursuance of the agreement M. made a note in G.'s favour, G. endorsed to W., and W. endorsed to G. for M.'s accommodation. The fact that W. is surety for the payment of the note to G., negatives G.'s liability upon his previous endorsement to W., and W. may be sued on his endorsement by G. Gunn v. McPherson, 1859, 18 U.C.R. 244; cf. Wilders v. Stevens, 1846, 15 M. & W. 208, 1 Ames 239; and notes to sec. 73.

As to G.'s right to sue W., if W. had endorsed before the endorsement by G. (the payee), see notes to sec. 131.

Action by holder of a note payable to bearer against the maker. Plea that the defendant made the note for the accommodation of C.D. and that there never was any consideration or value for the payment by the defendant of the note, and that the plaintiff holds the same without any value or consideration. Held bad, on demurrer, for the plea does not shew that there was not valid consideration as between C.D. and the plaintiff or shew facts which would disable the plaintiff from suing. Muir v. Cameron, 1853, 10 U.C.R. 356.

Holder in due course.

56. A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

Notice.

(*a*) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;

Good faith.

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

Title defective.

2. In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. 53 V., c. 33, s. 29. [Eng. s. 29 (1)(2). Cf. N.I.L. ss. 52 and 55.]

"Holder in due course" is a convenient substitute for the somewhat cumbrous expression "*bonâ fide* holder for value without notice" formerly used.(*b*)

The various elements of the definition of a holder in due course will be discussed *seriatim*.

As to the rights and powers of a holder, and particularly of a holder in due course, see sec. 74.

As to the burden of proof that the holder is a holder indue course, see sec. 58.

(*b*) Similarly in the French version the old expression *tiers porteur de bonne foi* has been replaced by *détenteur régulier*. Prior to the act the word *porteur* was used with the alternative meanings of "bearer" and "holder," but in the interests of accuracy, it was obviously necessary that the two English words should be represented in the French version by separate words so as to preserve the exact verbal distinctions of the English original. If *porteur* was to continue to receive its primitive meaning of "bearer," another word had to be used for "holder," and *détenteur* was adopted for this purpose. The regret expressed by Girouard, p. 289 (note) that old expressions sanctioned by usage both in Quebec and in France have been replaced by others which do not better express the meaning does not in this instance appear to have any foundation other than a sentimental one.

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Holder.

Holder is defined by sec. 2 (*g*) as the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof. See notes to that section.

Original payee may be holder in due course.

In Lewis v. Clay, 1897, 67 L.J.Q.B. 224, at p. 227, it was suggested that under the act the payee of a bill, being one of the immediate parties and not a person to whom the bill is "negotiated," could never be a holder in due course. See Herdman v. Wheeler, [1902] 1 K.B. 361, at p. 371. This was not the law before the act (see, *e.g.* Watson v. Russell, 1864, 5 B. & S. 986), and under the act it has been held that in view of sec. 2 (*g*), *supra*, the original payee may be a holder in due course. McDonough v. Cook, 1909, 19 O.L.R. 267, at pp. 271, 273; cf. Lloyd's Bank v. Cooke, [1907] 1 K.B. 794, at pp. 806-807; Lilly v. Farrar, 1908, Q.R. 17 K.B. 554; Boston Steel and Iron Co. v. Steuer, 1903, 183 Mass. 140; Knechtel Furniture Co. v. Ideal House Furnishers, 1910, 19 Man. R. 652.

B. is induced by the fraud of C. to draw a cheque to C. or order. C. delivers it for value to D. who takes without notice of the fraud, but C. does not endorse the cheque until after D. gets notice of the fraud. D. is not a holder in due course. Whistler v. Forster, 1863, 14 C.B.N.S. 248, 4 R.C. 332.

Complete and regular on the face of it.

If a person takes a blank acceptance or a bill wanting in any material particular (cf. secs. 31 and 32) he cannot be a holder in due course. Hogarth v. Latham, 1878, 3 Q.B.D. 257, at pp. 646, 647; Fance v. Clark, 1884, 26 Ch. D. 257, at p. 262; Herdman v. Wheeler, [1902] 1 K.B. 361, at p. 370.

If a bill comes to a person's hands in two pieces, its appearance being at least as consistent with its having been divided into two for the purpose of safer transmission by the post as with its having been torn for the purpose of cancelling it (sec. 143), it has been held that the taker may be a holder in due course. Ingham v. Primrose, 1859, 7 C.B.N.S. 82, 1 Ames 530. This case has been often criticized (*e.g.* Baxendale v. Bennett, 1878, 3 Q.B.D. 525, at p. 532, 4 R.C. at p. 644), but is said by Collins, M.R. in Nash v. De Freville, [1900] 2 Q.B. 72, at p. 89 to be "sound in principle, if wrong on the facts." Chalmers, p. 227. But Ames (vol. 2, p. 822) says it was clear

that in Ingham v. Primrose there was an adequate cancellation. Cf. Smith v. Prosser, [1907] 2 K.B., at p. 746. Sec. 56.

It is sufficient if the bill is *apparently* complete and regular. Maxon v. Irwin, 1907, 15 O.L.R. 81; see notes to sec. 145 as to the rights of the holder in due course on a bill which has been materially altered. See also notes, *infra*, as to the necessity for actual notice. Apparently complete and regular.

A bill is not invalid by reason only that it is not dated or that it is antedated or postdated (sec. 27). See notes to that section as to the position under sec. 56 of the holder of a postdated cheque.

Before it was overdue.

Where a bill is not payable on demand, it is overdue after the expiration of the last day of grace (sec. 42). As to bills payable on demand, and the negotiation of overdue bills, see sec. 70.

If a bill provides for payment of interest in instalments before the principal is due, and a person takes it before maturity, but after default in payment of interest, without notice of such default, the bill is not overdue so as to prevent the transferee from being a holder in due course. See notes to sec. 70.

Sec. 70 deals specifically with the case of a bill which is negotiated when it is overdue, although apart from that section it would follow from the definition of a holder in due course (sec. 56) and the provisions of sec. 74 in regard to the rights of the holder that a holder who has taken a bill when it is overdue would not take free from the equities attaching to the bill. Negotiation of overdue bill.

Without notice that it had been previously dishonoured.

A bill taken with notice that it has been previously dishonoured is in the same position as an overdue bill as regards negotiation, but a holder in due course is not affected by the fact of previous dishonour (sec. 72).

For value.

Value means valuable consideration (sec. 2). The latter is defined by sec. 53. As to "holder for value," see sec. 54.

There is a *primâ facie* presumption that value has been given by a party to a bill (sec. 58).

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Every holder of a bill is *primâ facie* deemed to be a holder n due course, but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is a holder in due course is on him, unless and until he proves that subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course (sec. 58).

A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (sec. 57).

The Negotiable Instruments Law, sec. 54, provides: "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

In good faith and without notice.

In good faith and without notice.

A thing is deemed to be done in good faith within the meaning of the act, where it is in fact done honestly whether it is done negligently or not (sec. 3). See notes to that section as to the effect of negligence. As is there suggested, the question of the good or bad faith of the holder and the question of the existence or non-existence of notice on his part of a defect in title to a bill are often merely different aspects of the same enquiry, and for that reason they will be discussed here in connection with each other. Russell, pp. 205 ff. The necessary connection between the two questions is well expressed in the Negotiable Instruments Law, sec. 56: "To constitute notice of an infirmity in the instrument(c) or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in tak ng the instrument amounted to bad faith."

Notice means actual, though not formal notice, that is to say, either knowledge of the facts, or a suspicion of something

(c) The words "infirmity in the instrument or" are inserted in the Negotiable Instruments Law before the words "defect in the title" in the provision corresponding to clause (*b*) of sec. 56 of the Canadian Act.

wrong, combined with a wilful disregard of the means of knowledge. Maxon v. Irwin, 1907, 15 O.L.R. 81, at pp. 87-88, citing Raphael v. Bank of England, 1855, 17 C.B. at p. 174; Ex parte Snowball, In re Douglas, 1872, L.R. 7 Ch. 534, at p. 549. Sec. 56. In good faith and without notice.

The leading case of Jones v. Gordon, 1877, 2 App. Cas. 616, 4 R.C. 415, shews that if the circumstances invite enquiry, a person who wilfully shuts his eyes and evades all enquiry, when the means of knowledge are in his power, is nevertheless fixed with notice of the defects in title of which he might and ought to have learned. As to suspicious circumstances inviting enquiry, cf. Swaisland v. Davidson, 1883, 3 O.R. 320; Reinhardt v. Shirley, 1894, Q.R. 6 S.C. 11.

But the doctrine of constructive notice(*d*) is not applicable to current bills and notes transferred for value; in all cases when the good faith of the holder is in issue the question is a question of fact to be determined on the circumstances of the particular case. Union Investment Co. v. Wells, 1908, 39 S.C.R. 625, at pp. 648, 636, 637. Given facts exciting suspicion, *i.e.* actual suspicion arising from facts known or believed to exist, and either an absence of enquiry or an enquiry which does not remove the suspicion, the situation is incompatible with good faith, but mere suspicion—a speculative surmise that something might be wrong without any objective basis, may be consistent with good faith. S.C., 39 S.C.R. at p. 643. The decision in this case was that the taker of a note before maturity was not fixed with notice of the fact that default had been previously made in payment of an instalment of interest, the ground being that the note was not overdue, and the case therefore did not come within the general rule that a person to whom an overdue bill is negotiated virtually takes with notice of any defect in the title to the bill. See notes to sec. 70.

As decisions upon the facts, see Standard Bank v. Stephens, 1907, 16 O.L.R. 115; Lockhart v. Wilson, 1907, 39 S.C.R. 541; Peters v. Perras, 1909, 42 S.C.R. 244.

Defect of title—defective title.

The question what is a defect of title or equity attaching

(*d*) But actual notice to an agent is actual not constructive notice to his principal. Rose v. Peterkin, 1884, 13 S.C.R. 677; cf. Commercial Bank of Windsor v. Morrison, 1902, 32 S.C.R. 98.

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to the bill is discussed in the notes to sec. 74, which deals with the rights and powers of a holder. The proof of fraud or other defect of title has the effect of shifting the onus of proof to the holder (sec. 58).

Right of subsequent holder.

57. A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder. 53 V., c. 33, s. 29. [Eng. s. 29 (3). Cf. N.I.L. s. 58.]

See sec. 54 (holder for value); sec. 56 (holder in due course); sec. 74 (rights and powers of holder).

The provision of sec. 57 is necessary for the protection of a holder in due course, for otherwise it might be practically impossible for him to negotiate the bill further, by reason of defects in the title of his transferor becoming known after he had acquired the bill without notice. As is pointed out by Russell, p. 225, the section expresses the equitable principle which enables a purchaser with notice of a prior encumbrance to shelter himself behind a prior purchaser for value without notice. See Chalmers v. Lanion, 1808, 1 Camp. 383, 1 Ames 691; May v. Chapman, 1847, 16 M. & W. 355; Wallbridge v. Becket, 1855, 13 U.C.R. 395; Clarkson v. Lawson, 1856, 14 U.C.R. 67; Gauthier v. Reinhardt, 1904, Q.R. 26 S.C. 134.

Transfer from holder in due course.

Brannan, p. 68, citing Andrews v. Robertson, 1901, 111 Wis. 334, says that a payee whose title is defective cannot better it by selling the instrument to a holder in due course and buying it back again. Cf. Russell, p. 225-6, and 1 Ames, p. 292 (note), to the same effect, the latter citing some earlier American cases. This view is in accordance with equitable principles and ought to prevail, but the section is perhaps patient of the construction that a party who is not himself a party to any fraud or illegality affecting the bill, although he is not a holder in due course, may by retransfer from a holder in due course acquire the rights of such holder against prior parties.

If A. gives his note to B. and C. becomes the holder thereof in due course, any subsequent holder could stand on C.'s title and enforce the note against A., though before taking it he

had notice of a defence which A. had as against B.(*e*) But, if the note should be endorsed by C. to D., and by the latter to E., and by him to F., under circumstances which would give D. a defence, then if F. had notice of the equities of both A. and D. he could enforce the note against A., but not against D. Crawford, p. 77. Sec. 57.

58. Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value. Presumption of value.

2. Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if, in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course. 53 V., c. 33, s. 30. [Eng. s. 30. Cf. N.I.L. ss. 24 and 59.] Due course.

The Negotiable Instruments Law, sec. 59, provides: "Every holder is deemed *primâ facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." The last sentence is necessary to qualify the general statement. If A. issues his note to B., and C. gets possession of it and fraudulently negotiates it to D., the fraud of C. in no wise affects A., and is no defence to him when sued on the instrument by D. Thus it has been held that the fact that one who held possession of a note for the payee puts it in circulation in fraud of his rights is no defence in a suit by the holder against the maker; nor does it change the burden of proof so as to require the plaintiff to show in the first instance that he is a holder for value in good faith. Kinney v. Kruse, 1871, 28 Wis. 183. Crawford, p. 79.

(*e*) Provided the holder was not himself a party to any fraud or illegality affecting the note.

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Presumption of Value.

Sub-sec. 1 simply shifts the onus of proving consideration and places it upon the party who alleges that the instrument was given without consideration. Kinzie v. Harper, 1908, 15 O.L.R. 582, at p. 584. The presumption of value may be rebutted by oral evidence: see notes to sec. 74 as to the rights of the holder and as to the cases in which absence or failure of consideration or illegality of consideration may be set up against the holder.

As to what constitutes value, see sec. 53; and as to the circumstances under which a holder is a holder for value, see sec. 54. Value need not be stated in the instrument (sec. 27).

Presumption and proof that a holder is a holder in due course.

The rule expressed in sub-sec. 2 embodies the effect of the case of Jones v. Gordon, 1877, 2 App. Cas. 616, 627, 4 R. C. 415, 426, and particularly Lord Blackburn's judgment.

Before the passing of the act it was uncertain how much the plaintiff had to prove when evidence of fraud or other defect in title had been given, *i.e.*, whether the onus was shifted only to the extent of making it necessary for the plaintiff to prove that value was in fact given, or whether he also had to prove that it was given in good faith. Lord Blackburn in Jones v. Gordon, *supra*, says: "The language of the quotation from Mr. Baron Parke would seem to shew that the onus as to both is shifted, but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case."

Onus of proving value and good faith.

The act has settled the law in accordance with the opinion expressed by Parke, B. A holder in due course must have taken the bill in good faith and for value and without notice of any defect in the title of the person who negotiated it (sec. 56). A holder is presumed to be a holder in due course until fraud, etc., is proved, but when that is proved, then the onus is shifted to the holder to prove that he is a holder in due course. He must prove not only that value has been given but that it has been given in good faith without notice of the fraud, etc. Tatam v. Haslar, 1889, 23 Q.B.D. 345.

The plea of purchase for value without notice is (to quote Farwell, J., in Re Nisbet & Potts Contract, [1905] 1 Ch. 391, at p. 402), a single plea to be proved by the person pleading

it; it is not to be regarded as a plea of purchase for value to be met by reply of notice. Union Bank of Halifax v. Indian and General Investment Trust, 1908, 40 S.C.R. 510, at p. 520.

Sec. 58. Onus of proving value and good faith.

Sec. 58 makes provision as to the onus of proof and the circumstances under which the onus is shifted to the holder. As to what is sufficient proof of value, good faith and other elements which constitute a holder in due course, see notes to sec. 56.

To a defence alleging illegality of consideration and that the plaintiff took the bill when overdue, the plaintiff replied, traversing the latter allegation only, it was held that the onus lay on the defendant as to the latter allegation. Masters v. Barrets, 1849, 2 C. & K. 715. *Quaere*, if the onus on the plaintiff under sec. 58 (2) would extend to shewing that the plaintiff took, not only for value in good faith, but before the bill was overdue. The presumption is ordinarily in the holder's favour: sec. 71, and cf. Lewis v. Parker, 1836, 4 A. & E. 838, where, however, as the plaintiff did not deny that he gave no value, and so was taken to admit the want of it, he could not now have recovered as against the accommodation acceptor: sec. 55 (2). Byles, p. 374, note (*b*).

As to the rights of a holder, whether for value or not, who derives his title through a holder in due course, see sec. 57.

The words "if it is admitted or proved" mean no more than that some evidence in the nature of fraud must be given sufficient to be left to the jury (Tatam v. Haslar, *supra*). An affidavit by a defendant on a motion for summary judgment shewing facts affecting the note sued on with fraud is a sufficient answer to the motion, notwithstanding the plaintiff's affidavit that he is a holder in due course. Farmer v. Ellis, 1901, 2 O.L.R. 544; cf. Flour City Bank v. Connery, 1898, 12 Man. R. 305.

It is to be noted that the matters mentioned in sec. 58 as having the effect of shifting the onus of proof to the holder are defects of title as defined by sec. 56. They do not include mere absence of consideration. See notes to sec. 74 for a discussion of the rights of the holder and the circumstances under which absence or failure of consideration or defects in title may be set up against the holder, and as to what are defects in title.

The provision of sub-sec. 2 of sec. 58 as to shifting the onus of proof does not apply to a case where the holder seeking to

Sec. 58. Onus of proving value and good faith.

enforce the instrument is the person to whom it was originally delivered and in whose possession it remains. Therefore in an action on a note by the payee against a husband and a wife as makers, where the wife pleaded that she was induced to sign by duress on the part of her husband and that the plaintiff knew of the duress, and at the trial proved the duress but gave no evidence of the plaintiff's knowledge, it was held that the onus of proof with regard to the plaintiff's knowledge lay upon the defendant and therefore the plaintiff was entitled to succeed. Talbot v. Von Boris, [1911] 1 K.B. 854, C.A.

It is to be noted that the last seven words of sub-sec. 2 of sec. 58 are not in the corresponding section of the English act, and their insertion in the Canadian act, it would seem, was due to a misunderstanding of the meaning of the subsection.

A. makes a note in favour of B., who endorses to C. If in an action by C. against A., the latter proves that the note was obtained by fraud on B.'s part, the onus is shifted to C. to prove that he is a holder in due course. According to the English section as construed in Tatam v. Haslar, *supra*, C. satisfies this onus by shewing that subsequent to the fraud *he* (C.) gave value in good faith (and necessarily without notice of the fraud). Under the Canadian act, however, the words from "unless and until" to the end of the section can have no application to the case in question, because they require the holder to prove that value has been given in good faith *by some other holder in due course*, which is something C. obviously cannot prove. The result seems to be that the onus can be satisfied by C. only by his proving affirmatively that he is in all respects a holder in due course as defined by sec. 56.

Usurious consideration.

59. No bill, although given for a usurious consideration or upon a usurious contract, is void in the hands of a holder, unless such holder had at the time of its transfer to him actual knowledge that it was originally given for a usurious consideration, or upon a usurious contract. 53 V., c. 33, s. 30.

There is no corresponding section in the English act. The section is practically obsolete, as there is no usury law in force in Canada. See notes to the Bank Act, sec. 91.

The protection of the section is not limited to a holder in due course or a holder for value, the sole condition being that the holder shall not have actual knowledge, etc.

CHAPTER XL.

Negotiation.

Two points must be noted in regard to the negotiation of bills.

1. Every bill which does not contain words prohibiting transfer or indicating an intention that it should not be transferable (sec. 21) is negotiable in the sense that it is subject to negotiation, negotiation being the appropriate transfer by delivery or by endorsement and delivery (sec. 60). A bill negotiable in its origin continues to be negotiable until it has been (*a*) restrictively endorsed, or (*b*) discharged by payment or otherwise (sec. 69). But negotiability in this sense must be distinguished from the quality of negotiability which confers upon a holder in due course (sec. 56) a good title to payment according to the tenor of the bill and irrespective of defects in the title of the transferor (sec. 74). Negotiation in the one sense may take place under the act even where the bill is overdue (sec. 70) or otherwise under circumstances which deprive the bill of the quality of negotiability in the other sense. See chapter 30, *supra*, where the different meanings of negotiability are discussed. Negotiability.

2. The act deals only with transfer by negotiation, that is, transfer according to the law merchant. It leaves untouched (1) the rules of general law which regulate the transmission of bills by act of law, and (2) their transfer as *choses in action* or chattels according to the general law, *i.e.*, the law of the particular country or province applicable to the transaction in question. See notes to sec. 10. Chalmers, at p. 139 ff., sums up the English law on the subject of transmission and transfer of chattels and *choses in action*.

Negotiation.

60. A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. Transfer.

2. A bill payable to bearer is negotiated by delivery. By delivery.

Sec. 60.
By endorsement.

3. A bill payable to order is negotiated by the endorsement of the holder completed by delivery. 53 V., c. 33, s. 31. [Eng. s. 31. Cf. N.I.L. s. 30.]

As to "holder," see sec. 2.

As to "bearer," see sec. 2. A bill is payable to bearer which is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank (sec. 21).

As to the effect of transfer by delivery, see secs. 137 and 138.

As to "delivery," see secs. 2, 40 and 41.

A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (sec. 22).

The Negotiable Instruments Law, sec. 42, provides that where an instrument is drawn or endorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is *primâ facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the endorsement of the bank or corporation or the endorsement of the officer.

The delivery of a bill to the payee is the issue (sec. 2), not the negotiation of the bill. See Herdman v. Wheeler, [1902] 1 K.B. 361, and notes to sec. 32.

As to the modes of endorsement, see secs. 62 ff.

Legal effects of an endorsement.

As Russell, p. 242, points out, there may be three distinct legal effects produced by an endorsement: (1) the transfer of a *jus in rem*, to wit, the property in the bill, which may be the subject of an action of trover or replevin; (2) the transfer of a *jus in personam*, to wit, the right to recover the amount of the bill from the acceptor; (3) the creation of a new *jus in personam*, to wit, the right of the endorsee to recover from the endorser in default of payment by the acceptor (if the requisite proceedings on dishonour are duly taken (sec. 133). The endorser may, however, prevent the third effect by inserting in the endorsement an express stipulation limiting or negativing his own liability (sec. 34), and in the case of endorsement by an infant or corporation having no capacity to incur liability on a bill, the endorsement nevertheless entitles the holder to receive payment of the bill and to enforce it against any other party thereto (sec. 48).

61. Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferrer had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferrer. Without endorsement.

2. Where any person is under obligation to endorse a bill in a representative capacity, he may endorse the bill in such terms as to negative personal liability. 53 V., c. 33, s. 31. [Eng. s. 31. Cf. N.I.L. ss. 49 and 44.] Representative capacity.

Transfer without endorsement.

The holder without endorsement of a bill payable to order, though taken by him in good faith and for value, has no better title than the person from whom he took it; and such holder is affected by fraud, of which he has notice before he obtains the formal endorsement. Whistler v. Forster, 1863, 14 C.B.N.S. 248, 4 R.C. 332; such a bill is not negotiated (sec. 60) until the endorsement is made. The Negotiable Instruments Law, sec. 49, to the same effect, provides that for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the endorsement is actually made.

A., the payee of a bill payable to order, transfers it to B. for value without endorsing. B. can compel A. to endorse, but he has no authority to endorse in A.'s name, and until he gets A.'s endorsement he cannot sue the acceptor in his own name or negotiate the bill to another person. Harrop v. Fisher, 1861, 10 C.B.N.S. 196, 203; 4 R.C. 338, 342. Cf. notes to sec. 74. Rights of transferee without endorsement.

Since the passing of the act it has, however, been held in Scotland that the transferee has a good title to the bill without endorsement and may recover from the acceptor, although he could not have done so at common law. Hood v. Stewart, 1890, 17 Ct. Sess. Cas. 4th ser. 749. So under the Negotiable Instruments Law it has been held that the only effect of the lack of endorsement is that the transferee although without notice takes subject to the equities between the original parties. Crawford, p. 60. Cf. Brannan, p. 50.

In Hood v. Stewart, *supra*, the endorsement was omitted by mistake, and the case was distinguished on this ground in

Sec. 61. Rights of transferee without endorsement.

Good v. Walker, 1892, 61 L.J.Q.B. 736, where the instrument was transferred as a pledge for a lesser sum, there being no intention to transfer the whole of the rights on the instrument. The claim for the endorsement may be combined with the claim on the bill itself. Walters v. Neary, 1904, 21 T.L.R. 146. Cf. Byles, p. 178, note (*o*), p. 381.

The transfer for value of a bill payable to order confers upon the transferee the right to the transferor's endorsement, that is, an endorsement which will transfer the legal title in the bill, but the transferor may endorse without recourse (sec. 34), unless he is obliged in equity or by contract to assume personal responsibility. The transferee could enforce his right to have the transferor's endorsement only by asking for specific performance, and he could get this remedy only on equitable terms. Cf. Street, Foundations of Legal Liability, vol. 2, p. 529; Brannan, pp. 258, 291 (note 4).

Negative personal liability.

The drawer of a bill and any endorser may insert therein an express stipulation negativing or limiting his own liability to the holder (sec. 34). *E.g.* an executor or administrator may endorse, "so far as assets only." It is not sufficient, in order to avoid personal liability, merely to add words to the signature describing the person who signs as filling a representative character (sec. 52).

As to the effect of a qualified endorsement, see the notes to sec. 138.

Endorsing. Writing.

62. An endorsement in order to operate as a negotiation,—

(*a*) must be written on the bill itself and be signed by the endorser;

Entire bill.

(*b*) must be an endorsement of the entire bill.

Allonge.

2. An endorsement written on an allonge, or on a *copy* of a bill issued or negotiated in a country where *copies* are recognized, is deemed to be written on the bill itself.

Partial endorsement.

3. A partial endorsement, that is to say, an endorsement which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally, does not operate as a negotiation of the bill. 53 V., c. 33, s. 32. [Eng. s. 32. Cf. N.I.L. ss. 31 and 32.]

See also sec. 63. The provisions of secs. 62 and 63 were contained in one section prior to 1906. In the revision of that year their internal arrangement was considerably altered. Sec. 62.

As to the meaning of "written," cf. notes to secs. 2 and 17.

An endorsement means an endorsement completed by delivery (sec. 2). As to delivery, see secs. 40 and 41.

It is sufficient if the signature of the endorser is written by some other person by or under his authority (sec. 4).

As to endorsement of bills in a set, see sec. 159.

An endorsement is usually made on the back of a bill, but it may be validly made on the face of it. Young v. Glover, 1857, 3 Jur. N.S. 637, 1 Ames 227. Mode of endorsement.

A signed memorandum on a bill "I hereby assign this draft and all benefit of the money secured thereby to D." is a valid endorsement. Chalmers, p. 117, citing Richards v. Frankum, 1840, 9 C. & P. at p. 225. But Russell, p. 234, questions whether there must not be an order to pay in addition to the words of assignment. The American cases are in conflict as to the effect of words of mere assignment. Brannan, pp. 42, 254.

Where there is no room on a bill for further endorsements, a slip of paper, called an allonge, may be attached thereto. It becomes part of the bill, and endorsements may be written thereon. Some of the foreign codes contain minute provisions to prevent frauds, *e.g.* that the first endorsement on the allonge must begin in the bill and end on the allonge; otherwise an allonge might be taken from one bill and stuck on to another. Chalmers, p. 118. Cf. Byles, p. 168.

"Copies" of bills are not used in England, Canada or the United States; but on the continent of Europe, where the practice of drawing bills in sets is not followed, copies are sometimes used for convenience of transfer while the original is being forwarded for acceptance. Maclaren on Bills, etc., 4 ed. p. 206.

Partial endorsement.

C., the holder of a bill for $100, signs a memorandum on the back "Pay $50 to D. or order, and $50 to E. or order." This is not a valid endorsement, and neither D. nor E. can sue on the bill or further endorse it, but the memorandum although invalid as a negotiation may operate as an authority to receive payment of the amounts thereby specified. Chalmers, p. 119, citing Heilbut v. Nevill, 1869, L.R. 4 C.P. at p. 358; Conova v. Earl, 1868, 26 Iowa 169.

Sec. 62. Mode of endorsement.

If a partial endorsement were recognized the result would be to subject the acceptor to suit at the instance of different persons and thereby split the cause of action. Chalmers, p. 119, citing the case of Hawkins v. Cardy, 1699, 1 Ld. Raym. 360, 1 Ames 219, intimates that an endorsement for part of the amount of the bill is valid if the holder also acknowledges receipt of the balance of the amount; but Russell, p. 235, suggests a doubt whether this opinion is correct in view of the words of the act that a partial endorsement does not operate as a negotiation of the bill. The Negotiable Instrument Law, sec. 32, expressly provides that where the instrument has been paid in part, it may be endorsed as to the residue. Byles, p. 191, states the opinion that the effect of a partial endorsement is to give the endorsee a lien on the bill, but not to transfer a right of action, except in the endorser's name. There can, however, be a partial acceptance (sec. 38), and an endorsement of a bill accepted for part of the sum would doubtless be good. Byles, p. 168.

Signature sufficient.

63. The simple signature of the endorser on the bill, without additional words, is a sufficient endorsement.

Two or more payees.

2. Where a bill is payable to the order of two or more payees or endorsers who are not partners, all must endorse, unless the one endorsing has authority to endorse for the others. 53 V., c. 33, s. 32. [Eng. s. 32. N.I.L. ss. 31 and 41.]

As to sub-sec. 1, see notes to sec. 62. Cf. sec. 67.

A bill payable to the order of C. and D. is endorsed by D. alone to E. E. cannot sue the acceptor. A bill payable to the order of C. and D. is endorsed by C., with D.'s authority, "for self and D." This is a good endorsement by C., but, *quære*, as to D.'s liability. Chalmers, p. 119.

Endorsement by majority of payees.

In Watson v. Evans, 1863, 1 H. & C. 662, the defendant promised to pay B., C. and D., "or to their order, or the major part of them." It was intimated in the course of the argument that an endorsement by any two of the payees would be valid. This would doubtless be so under the act, although the payee who did not endorse would not be liable, but what is probably contemplated by the section is an endorsement by one of two payees both personally and as attorney for the other. Cf. Russell, p. 237.

Sec. 63.

If two or more payees or endorsees are partners, the signature of the name of the firm is equivalent to the signature by the person signing of the names of all persons liable as partners in that firm (sec. 132).

Misspelling payee's name.

64. Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name is misspelt, he may endorse the bill as therein described, adding his proper signature; or he may endorse by his own proper signature. 53 V., c. 33, s. 32. [Eng. s. 32. Cf. N.I.L. s. 43.]

Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty (sec. 21).

The English act and the Negotiable Instruments Law insert the words "if he thinks fit" after the word "adding," and omit the words "or he may endorse by his own proper signature." Cf. sec. 35.

A bill is endorsed to J. Smythe. The endorsee's real name is T. Smith. He can, under the English Act, validly negotiate the bill by endorsing it as J. Smythe. Chalmers, p. 120; *sed quære* under the Canadian act.

Endorsement by payee whose name is misspelt.

The usual and proper course is for the payee to sign first the name as described or spelt in the bill, and then to put underneath his proper signature.

A bill payable to Mrs. John Jones, should be endorsed "Ellen Jones, wife of John Jones." The more usual, and a perfectly valid form, in such a case is for the payee to sign "Mrs. John Jones," adding underneath "Ellen Jones." The signature "Mrs. John Jones" alone is clearly irregular; its validity has never been decided in England (Chalmers, p. 120), but it does not comply with the Canadian act, by which the addition of the proper signature is not left optional.

See also the conventions and rules respecting endorsements (printed in the notes to sec. 68, *infra*), which may be usefully consulted, as indicating correct and convenient commercial practice.

Presumption as to order of endorsements.

65. Where there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. 53 V., c. 33, s. 32. [Eng. s. 32 (5).]

Sec. 65.

The Negotiable Instruments Law has no corresponding provision.

The endorser of a bill by endorsing it engages that if it be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (sec. 133).

The order in which the endorsements appear on the bill may be shewn to be different from the order in which they were in fact made. The *primâ facie* presumption of the liability of prior endorser to subsequent endorser may also be rebutted by circumstances shewing the real intention and agreement of the parties. See notes to sec. 133.

Disregarding condition.

66. Where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer, and payment to the endorsee is valid, whether the condition has been fulfilled or not. 53 V., c. 33, s. 33. [Eng. s. 33. Cf. N.I.L. s. 39.]

Cf. notes to sec. 17 ("unconditional" order). An acceptance may be conditional (sec. 38), although a bill must be drawn unconditionally.

Payer may disregard condition in endorsement.

This section alters the common law rule. Formerly the acceptor of a bill which had been endorsed conditionally paid the endorsee at his peril if the condition was not fulfilled. Robertson v. Kensington, 1811, 4 Taunt. 30; 1 Ames 692; Chalmers, p. 122. As between the endorser and endorsee the condition is binding (Commercial Bank v. Morrison, 1902, 32 S.C.R. 98), and in the event of payment to the endorsee, the endorser is entitled to recover the proceeds paid to the endorsee, if the condition is not fulfilled. The Negotiable Instruments Law (sec. 39) expressly adds that any person to whom an instrument conditionally endorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person endorsing conditionally.

Cf. sec. 68 as to restrictive endorsements.

Endorsement in blank.

67. An endorsement may be made in blank or special.

2. An endorsement in blank specifies no endorsee, and a bill so endorsed becomes payable to bearer.

Special endorsement.

3. A special endorsement specifies the person to whom, or to whose order, the bill is to be payable.

Sec. 67.

Application of Act to.

4. The provisions of this Act relating to a payee apply, with the necessary modifications, to an endorsee under a special endorsement.

Conversion of blank endorsement.

5. Where a bill has been endorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature a direction to pay the bill to or to the order of himself or some other person. 53 V., c. 33, ss. 32 and 34. [Eng. ss. 32 and 34. Cf. N.I.L. ss. 33, 34 and 35.]

Prior to 1906 sub-sec. 1 of this section, sub-sec. 1 of sec. 68, and secs. 62, 63, 64 and 65 all formed one section.

Endorsement in blank.

Bill payable to the order of John Smith. He signs "John Smith" on the back. This act is interpreted by the law merchant as an endorsement in blank by John Smith, and operates as if he had written: (1) I hereby assign this bill to bearer. (2) I hereby undertake that if this bill be dishonoured, I, on receiving due notice thereof, will indemnify the bearer. Chalmers, p. 122. But see further analysis of the effect of an endorsement in the notes to sec. 60.

A bill endorsed in blank may be further negotiated by delivery (sec. 60).

Special endorsement.

An endorsement "Pay to D." or "Pay to the order of D." is equivalent to "Pay to D. or order" (sec. 22). A bill endorsed in any of these ways is specially endorsed, and may be further negotiated by the endorsement of the endorsee completed by delivery (sec. 60).

Before the act an endorsement "Pay to D." meant "Pay to D. or order" (Edie v. East India Co., 1761, 2 Burr. 1216, 4 R.C. 344; Goodwin v. Robarts, 1875, L.R. 10 Ex. at p. 357; Street, Foundations of Legal Liability, vol. 2, p. 398), but a bill originally payable to D. could not be further negotiated by D.: see sec. 22, by which such a bill is now equivalent to a bill payable to D. or order.

A special endorsement following an endorsement in blank controls the effect of the endorsement in blank (sec. 21).

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But if instrument originally payable to bearer, it is not controlled by a special endorsement: see notes to sec. 21.

Provisions relating to a payee.

See secs. 19, 21 and 22.

Conversion of blank into special endorsement.

The Negotiable Instruments Law, sec. 35, provides that the holder may convert a blank endorsement into a special endorsement by writing over the signature of the endorser in blank any contract consistent with the character of the endorsement.

The holder of a bill endorsed by C. in blank, writes over C.'s signature the words "Pay to the order of D." The holder who does this is not liable as an endorser, but the transaction operates as a special endorsement from C. to D. Chalmers, p. 124.

Conversion of blank into special endorsement.

If the holder has already converted the blank endorsement into a special one by writing a direction to pay to his own order over C.'s signature, and he desires to transfer the bill to D., without being liable as an endorser, the ordinary and proper method of doing so is for him to endorse the bill himself "without recourse." It has been held, however, that such holder may with D.'s consent, strike out his own name as payee and substitute D.'s name as payee, and by this act and delivery to D., constitute E. a holder in due course. Sovereign Bank v. Gordon, 1905, 9 O.L.R. 146. This was a judgment of a divisional court on appeal from a county court, and under the Ontario practice no further appeal could be taken. The court was not unanimous, and the cases cited are conflicting. This rough and ready method of transferring a bill should therefore never be adopted. It need hardly be stated that the case is not authority for the proposition that if C., who transferred the bill to the holder in question, had endorsed the bill specially to such holder, the holder would have had any right to strike out his own name and substitute D.'s name as payee. The majority of the court held merely that the holder having converted the blank endorsement into a special one might subsequently, while he was still the holder, restore the endorsement to its original condition, and then convert it into a special endorsement by making the bill payable to D.

Striking out endorsements. Sec. 67.

A holder may strike out endorsements which are not necessary to his title (sec. 143). As to the right of an endorser, who has paid a bill, to strike out endorsements, see sec. 140.

68. An endorsement may also contain terms making it restrictive. Restrictive endorsement.

2. An endorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is endorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D., or order, for collection." What is.

3. A restrictive endorsement gives the endorsee the right to receive payment of the bill and to sue any party thereto that his endorser could have sued, but gives him no power to transfer his rights as endorsee unless it expressly authorizes him to do so. Rights of endorsee.

4. Where a restrictive endorsement authorizes further transfer, all subsequent endorsees take the bill with the same rights and subject to the same liabilities as the first endorsee under the restrictive endorsement. 53 V., c. 33, ss. 32 and 35. [Eng. ss. 32 and 35. Cf. N.I.L. ss. 33, 36 and 37.] If further transfer is authorized.

Prior to 1906, sub-sec. 1 was not part of this section: see notes to sec. 67.

All bills, cheques or notes are transferable, unless they have been restrictively endorsed so as to prohibit transfer (sec. 68), or otherwise contain words prohibiting transfer (sec. 21). A cheque may be "transferable" in its origin, but "not negotiable" in the proper sense of the word, as in the case of its being crossed "not negotiable" (sec. 174), or it may after issue as a negotiable cheque be subsequently so crossed. It is conceived that a bill cannot be drawn as to be in its origin transferable but not negotiable, but must be either fully negotiable or not transferable at all at the time of issue, and that a cheque might be so drawn as not to be transferable, as distinct from not negotiable. Where negotiable in its origin, a bill continues to be so until it is restrictively Transferability and negotiability.

Sec. 68.

endorsed (sec. 69) or is overdue (sec. 70). It may be restrictively endorsed so as to prohibit, or so as to authorize, further transfer. In the latter case, it is transferable only subject to equities; in the former, it is not transferable at all; in either case it is not negotiable (sec. 68). The discharge of a bill, by payment or otherwise, puts an end not merely to its negotiable character (sec. 69), but to its existence as a *chose in action*. Byles, p. 166.

Restrictive endorsements.

The object of a restrictive endorsement is to prevent the money received in respect of the bill from being applied to the use of any person other than the person specified; to whomsoever the money may be paid, it will be paid in trust for such person, and into whose hands soever the bill travels, it carries that trust on the face of it. Cf. Lloyd v. Sigourney, 1828, 5 Bing. at p. 531, 4 R.C. at p. 361.

Restrictive endorsements.

All agents are trustees in the sense that they are ultimately accountable to their principals. An endorsee under a restrictive endorsement is probably also technically a trustee inasmuch as the legal title in the instrument is vested in him so as to enable him to sue in his own name and receive payment. Some forms of restrictive endorsement, *e.g.*, "for collection," are not, however, commonly understood to create more than an agency—"a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof." Whether the endorsee is more correctly described as an agent as Chalmers, p. 127, says, or whether he is a trustee, as was Ames' view, the act by its language avoids the necessity of proof of a technical trust. The same is true of the Negotiable Instruments Law, which provides (sec. 36) that an endorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the endorsee the agent of the endorser; or (3) vests the title in the endorsee in trust for or to the use of some other person. Brannan, p. 43.

Although a restrictive endorsement may be notice that no valuable consideration has been given by the endorsee (4 R.C. at p. 343), the statement in an endorsement that the value for it has been furnished by some person other than the endorsee does not make it restrictive (Potts v. Reed, 1806, 6 Esp. 57; Murrow v. Stuart, 1853, 8 Moo. P.C. 267); *e.g.*, a bill endorsed

"Pay D. or order value in account with E.," is in effect a simple endorsement to D. or order. Buckley v. Jackson, 1868, L.R. 3 Ex. 135. Chalmers, p. 125; cf. Byles, p. 180. Sec. 68. Restrictive endorsements.

As to the mere omission to add words of negotiability to a special endorsement, see secs. 21 and 22. A cheque payable to bearer cannot be restrictively endorsed for deposit so as to render the bank liable for paying the amount to the bearer without notice of the endorsement. Exchange Bank v. Quebec Bank, 1890, M.L.R. 6 S.C. 10. A bill originally payable to bearer remains payable to bearer, notwithstanding a subsequent endorsement: sec. 21.

It seems that a bill cannot be endorsed with a condition that in a certain event, the endorsee shall not have the power to endorse. Soares v. Glyn, 1845, 14 L.J.Q.B. 313. Therefore an endorsement may be conditional or restrictive, but not conditionally restrictive. Byles, p. 173.

Rights of endorsee.

The Negotiable Instruments Law, sec. 37, to the same effect as sub-sec. 3, *supra*, confers upon the endorsee under a restrictive endorsement the right to bring any action thereon that the endorser could bring. Ames criticizes the section because, inferentially, the endorsee cannot sue his endorser. This is just, if the bill was transferred to the endorsee for the benefit of the endorser, but unjust, if the endorsement was for value in trust for a third person. Plainly in the latter case the endorsee should have a right of action against the endorser, and the section is defective unless it can be read as being permissive only and not as being exclusive. Brannan, pp. 44, 257.

A bill endorsed "Pay D. for my account" or "for collection" must be paid to D. personally. The only effect of adding "or order" after D.'s name is to obviate the inconvenience of D.'s having to attend in person to obtain payment, and to enable D. by endorsing the bill to authorize another person to receive payment. The amount is neverthelesss received to the use of A. Lloyd v. Sigourney, 1828, 5 Bing. at p. 532, 4 R.C. at p. 362. It has never been attempted to make the payer responsible in such a case for the due application of the proceeds by the endorsee, and it is clear that he is not responsible. Chalmers p. 126. Cf. Munro v. Cox, 1870, 30 U.C.R. 363. Rights of endorsee under restrictive endorsement.

The first endorsee under a restrictive endorsement may

Sec. 68. Rights of endorsee under restrictive endorsement.

transfer his rights only where the form of the endorsement authorizes him to do so, as where the endorsement makes the bill payable to his order, but, (in the words of the Negotiable Instruments Law, sec. 37,) all subsequent endorsees acquire only the title of the first endorsee under the restrictive endorsement.

Chalmers, pp. 126-7 gives the following illustrations:

1. C. endorses a bill "Pay D. or order for my use." D. endorses it to, and discounts it with E. on his own account. E. collects it at maturity. C. can recover the amount of the bill from E. Lloyd v. Sigourney, 1829, 5 Bing. 525, 4 R.C. 361.

2. C. endorses a bill "Pay D. or order for the use of F." D. collects the bill at maturity. If he misappropriates the money, F. cannot sue him. Wedlake v. Hurley, 1830, Lloyd & Welsby, 330, 1 C. & J. 83. The action must be brought by C. *Ibid.*, at pp. 332, 88.

3. C. endorses a bill "Pay D. or order for account of F." D. is F.'s agent. D. endorses the bill to E., who collects it. F. can sue E. for the amount so received. Treuttel v. Barandon, 1817, 8 Taunt. 100, 1 Ames 694; if D. had not been F.'s agent, C. must have brought the action.

4. A. draws a bill on B., and endorses it to C. C. endorses it "Pay D. or order for my use." The bill is dishonoured, and D. sues A. If A. has any defence against C., he may set it up against D. Wilson v. Holmes, 1809, 5 Mass. 543.

CONVENTIONS AND RULES RESPECTING ENDORSEMENTS.

Adopted by the Council of the Canadian Bankers' Association on the 26th February, 1898, under authority of a resolution passed at the annual meeting of the Association, 6th October, 1897.(*a*)

Mode of endorsement.

Conventions and rules respecting endorsements.

1. An endorsement may be either written or stamped, in whole or in part.

(*a*) See 5 J.C.B.A. 323, April, 1898, and discussion of "Endorsements of various kinds, restrictive, stamped and otherwise," by Z. A. Lash at p. 182 of the same volume (Jany. 1898). These conventions and rules are not of binding force except as between persons who agree to be bound by them. They have been adopted by the association in order to encourage the general use of regular and well-understood endorsements and to attain a maximum of convenience in the exchange of items.

Sec. 68. Conventions and rules respecting endorsements.

Regular endorsements.

2. A regular endorsement within the meaning of these conventions and rules must be neither restrictive nor conditional, and must be so placed and worded as to shew clearly that an endorsement is intended.

If purporting to be the endorsement of the person or firm to whom the item is payable (whether originally or by endorsement), the names must correspond, subject, however, to section 32, sub-sec. 2, of the Bills of Exchange Act, which is as follows: —[now sec. 64, *supra*].

If purporting to be the endorsement of a corporation, the name of the corporation and the official position of the person or persons signing for it must be stated.

If purporting to be made by some one on behalf of the endorser, it must indicate by words that the person signing has been authorized to sign; *ex. gr.*, "John Smith, by his attorney, Thomas Robinson," or "Brown, Jones & Co., by Thomas Robinson, their attorney," of "Per Pro. *or* P.P. the Smith Brown Company Limited, Thomas Robinson."

Irregular endorsements.

3. An endorsement, other than a restrictive endorsement, which is not in accordance with the foregoing definition of a regular endorsement, or which is so placed or worded as to raise doubts whether it is intended as an endorsement, is an irregular endorsement within the meaning of these conventions and rules.

Restrictive endorsements.

4. Section 35 of the Bills of Exchange Act defines a restrictive endorsement as follows:—[now sec. 68, sub-sec. 2, *supra*].

The following further examples shall be treated as restrictive endorsements within the meaning of these conventions and rules, without prejudice, however, to their true character, should the question arise in court, viz:—

"For deposit only to credit of....."
"For deposit in.....bank to credit of....."
"Deposited in.....bank for account of....."
"Credit.....bank."

Sec. 68. Conventions and rules respecting endorsements.

Form and effect of guarantee.

5. A guarantee of endorsements shall be in the following form or to the like effect:—

"Prior endorsements guaranteed by.....(name of bank)."

It may be written or stamped, but shall be signed in writing by an authorized officer of the bank giving it.

By virtue of such guarantee and of these conventions and rules, the bank giving same shall return to the paying bank the amount of the item bearing the guarantee, if, owing to the nature of any endorsement, or to its being forged, or unauthorized, it should appear that such payment was improperly made.

Endorsement by depositing bank.

6. When one bank deposits with or presents for payment to another bank (whether through the clearing house or otherwise) a bill, note or cheque, the item so deposited or presented shall bear the stamped open endorsement of the depositing or presenting bank. Such stamp shall contain the name of the bank, its branch or agency, and the date, and shall for all purposes be the endorsement of the depositing or presenting bank, and, except as hereinafter specified, no further or other endorsement shall be required, whether the item be specially payable to the bank or otherwise, or be payable at the chief office or elsewhere.

Restrictively endorsed items.

7. If a bill, note or cheque bearing a restrictive endorsement be so deposited or presented, the depositing or presenting bank shall *ipso facto*, and by virtue of these conventions and rules, be deemed to have guaranteed such endorsement in accordance with sec. 5 hereof, and shall be liable to the paying bank to the same extent as if such guarantee had been actually placed upon the item, but payment may, notwithstanding, be refused until the restriction be removed.

Irregularly endorsed items.

8. If a bill, note or cheque, bearing an irregular endorsement as above defined, be so deposited or presented, the depositing or presenting bank shall endorse thereon the guarantee referred to in section 5 hereof, but payment may, notwithstanding, be refused, until the irregularity be removed.

Sec. 68. Conventions and rules respecting endorsements.

Letters of credit, deposit receipts, etc.

9. When a letter of credit, deposit receipt, or other item not negotiable, and to which the provisions of the Bills of Exchange Act do not apply, is so deposited or presented, a receipt and indemnity in the following form, or to the like effect shall be written or stamped thereon, signed in writing by an authorized officer of the presenting or depositing bank, viz:—

"Received amount of within from the within named bank, which is hereby indemnified against all claims hereunder by any person."

Agreement as to practice.

10. While it is understood that in general, for convenience of the depositing or presenting bank, no objection will be made to a restrictive endorsement, or to an irregular endorsement if the guarantee above provided for be given, yet in view of the responsibility which a depositing or presenting bank incurs in connection therewith, each bank undertakes to make all reasonable efforts to have all endorsements on items deposited or presented by it made regular in order that its customers and the public generally may ultimately be led to adopt a regular and uniform system.

It is also understood that endorsements regularly made within the meaning of these conventions and rules shall not be objected to except for special reasons to be assigned with the objection.

Amendment.

Adopted by the Canadian Bankers' Association, February 22nd, 1906.

In case of all items, whether restrictively endorsed or otherwise, sent through the exchanges by members of the association, the member sending the items shall be deemed and held as guaranteeing the authenticity of all endorsements thereon, and if such guaranty do not expressly appear it shall be implied.

When negotiability ceases.

69. Where a bill is negotiable in its origin, it continues to be negotiable until it has been,—

(*a*) restrictively endorsed; or,

(*b*) discharged by payment or otherwise. 53 V., c. 33, s. 36. [Eng. s. 36. N.I.L. s. 47.]

Sec. 69.

See the notes at the beginning of this chapter, and the notes to sec. 68. As to restrictive endorsements, see sec. 68, and as to discharge, see secs. 139 to 146.

Overdue bill.

70. Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire

Equities.

or give a better title than that which had the person from whom he took it.

Demand bill when.

2. A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time.

Time.

3. What is an unreasonable length of time for such purpose is a question of fact. 53 V., c. 33, s. 36. [Eng. s. 36. Cf. N.I.L. s. 53.]

Subject to any defect of title.

As to what is a defect of title or equity attaching to a bill, see notes to sec. 74.

The Negotiable Instruments Law contains no provision corresponding to sub-sec. 1, but simply provides (sec. 53) that where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. In this respect, as in some other respects, the Negotiable Instruments Law is drafted with greater simplicity than the Bills of Exchange Act. A person to whom an overdue bill is negotiated is not within the definition of a holder in due course (sec. 56) and therefore does not hold the bill free from any defect of title of prior parties (sec. 74).

Transfer of overdue bill.

Sec. 70, sub-sec. 1, states what was originally a rule of evidence only. The first reported case in which it was enunciated as a rule of law was Brown v. Davies, 1789, 3 T.R. 80, 1 Ames 745. The reason of the rule is that the negotiation of an overdue bill is out of the usual and ordinary course of business, and that circumstance alone is sufficient of itself to excite so much suspicion that, as a rule of law, the endorsee must take the bill on the credit of, and can stand in no better position

Sec. 70. Transfer of overdue bill.

than, the endorser. London and County Banking Co. v. Groome, 1881, 8 Q.B.D. 288, 292. Union Investment Co. v. Wells, 1908, 39 S.C.R. at pp. 632-4. The bill comes "disgraced" to the endorsee, as Lord Ellenborough said in Tinson v. Francis, 1807, 1 Camp. 19. and the endorser must take it subject to the equities.

The position of a holder who takes a bill when overdue is this: he is a holder with notice, because he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two enquiries: (1) Has what ought to have been done really been done, *i.e.*, has the bill in fact been discharged? (2) If not, why not? Is there any equity attaching thereto, *i.e.*, was the *title* of the person who held it at maturity defective? Chalmers, p. 130.

The provisions of the section perhaps do not apply to a bill which is negotiated in a foreign country, where no distinction is recognized between overdue and current bills. Alcock v. Smith, [1892] 1 Ch. 238, affirmed on the ground that the evidence disclosed no defect of title; Chalmers, p. 131; cf. notes to sec. 161.

When overdue.

Where a bill is not payable on demand, it is overdue after the expiration of the last day of grace: cf. sec. 42.

Where interest is made payable periodically during the currency of a note payable at a certain time after date, the note does not become overdue within the meaning of secs. 56 and 70 merely by default in payment of an instalment of such interest. Union Investment Co. v. Wells, 1908, 39 S.C.R. 625, esp. at p. 647, overruling on this point Moore v. Scott, 1907, 16 Man. R. 492, 5 W.L.R. 381, and Jennings v. Napanee, 1885, 4 C.L.T. 595, but neither approving nor disapproving the actual decisions in those cases. "As a clear rule upon the question cannot be gathered from the express provisions of the act, we must under sec. 10 have recourse to the common law for the purpose of arriving at the rule to be applied. The grounds upon which those decisions are based in which the rule limiting the currency of overdue instruments has been enunciated and applied do not in my judgment justify the application of the rule to a bill or note in respect of which the principal is not yet due, merely because a payment of interest

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is in default." Union Investment Co. v. Wells, *ubi supra*, Duff, J., at p. 648.

Instruments payable on demand.

See sec. 23 defining when a bill is payable on demand.

As to "reasonable time," cf. secs. 77 and 166.

As to bills, sub-sec. 2 is probably declaratory. Chalmers, p. 131.

The sub-section applies to cheques (sec. 165), but sec. 182 contains a different provision as to notes. A note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily. Brooks v. Mitchell, 1841, 9 M. & W. at p. 18, 4 R.C. at p. 401.

Stale cheque taken subject to the equities.

It is submitted that the authorities previous to the passing of the act cannot now be relied on so far as they suggest that a cheque, taken after more than a reasonable time has elapsed since its issue, is not taken subject to equities, unless taken under such circumstances as ought to have excited suspicion. In Down v. Halling, 1825, 4 B. & C. 330, it was said that an overdue cheque was like an overdue bill, and Holroyd, J. remarked that the cheque in question, five days old, had been in circulation for more than a reasonable length of time, but the court declined to lay down a definite rule of law as to what constituted reasonable time. In London and County Banking Co. v. Groome, 8 Q.B.D. 288, where the earlier authorities are reviewed, Field, J. was of opinion that the real question for the jury was whether a stale cheque was taken under such circumstances as ought to have excited suspicion, the lapse of time being, although not conclusive, a circumstance to be taken into consideration in coming to a conclusion on that question.(*b*) To leave a case thus to a jury would now appear to be a misdirection. The defendant would be entitled to have it put to the jury whether more than a reasonable time had elapsed since the issue of the cheque, and this is plainly a question of fact, and if it is answered in favour of the defendant, the plaintiff would have no better title than his

(*b*) See also Serrell v. Derbyshire Ry. Co., 1850, 9 C.B. 811, and Rothschild v. Corney, 1829, 9 B. & C. 388; Ex parte Hughes, 1880, 43 L.T. 577. The question of a reasonable time for presentment has been left to the jury entirely as one of fact. See Wheeler v. Young, 1897, 13 T.L.R. 468.

transferor. Byles, pp. 24-5. But the circumstances should be considered in coming to a conclusion on the question whether the cheque appears to have been in circulation for an unreasonable length of time. Bank of British North America v. Warren, 1909, 19 O.L.R. 257. Cf. 4 R.C. at p. 407. Sec. 70.

71. Except where an endorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue. 53 V., c. 33, s. 36. [Eng. s. 36. N.I.L. s. 35.] Presumption as to.

Subject to the exception mentioned, this section puts the onus of proof upon a party who alleges that the negotiation took place when the bill was overdue, a matter of importance in view of the provisions of sec. 70. Chalmers, p. 132, states that sec. 71 is declaratory, but suggests that circumstances of strong suspicion, short of direct evidence, may rebut the *primâ facie* presumption, and make it a case for the jury whether the bill was negotiated before or after maturity: Bounsall v. Harrison, 1836, 1 M. & W. 611.

The Negotiable Instruments Law, sec. 46, provides that, except where the contrary appears, every endorsement is presumed *primâ facie* to have been made at the place where the instrument is dated.

72. Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour; but nothing in this section shall affect the rights of a holder in due course. 53 V., c. 33, s. 36. [Eng. s. 36.] Taking bill with notice of dishonour.

As to dishonour by non-acceptance, see sec. 81. "Holder in due course" is defined by sec. 56.

Chalmers, p. 133, states that this section settles a disputed point, by putting a bill known to be dishonoured on the same footing as an overdue bill (cf. sec. 70). The section would appear, however, to be unnecessary in view of sec. 56, which expressly provides that a holder in due course must have taken the bill without notice that it had been previously dishonoured, if such was the fact. There is no provision in the Negotiable Instruments Law corresponding to sec. 72, but it seems reasonably clear that the result is the same.

Sec. 72.
Taking bill with notice of dishonour.

This section would appear now to cover such a case as Goodman v. Harvey, 1836, 4 A. & E. 870, 1 Ames 709, where it was held that the fact of the notarial marks of dishonour appearing on a bill was not sufficient of itself to impugn the holder's good faith. It had long been established at common law that an endo see without notice was not prejudiced by the fact that a bill had been dishonoured. O'Keefe v Dunn, 1815, 6 Taunt, 305; Whitehead v. Walker, 10 M. & W. 696, 2 Ames 142. Byles, p. 186, note (*o*).

As to dishonour by non-payment, see sec. 95; cf. notes to sec. 70 as to the position of the holder of a note which is not ove due as regards principal but in respect of which an instalment of interest is overdue. In the absence of evidence that a transferee-plaintiff had any knowledge of the fact that the interest had not been paid, he could not be said to have taken a dishonoured note with notice of its character, even "assuming that the note had been dishonoured within the meaning of sec. 72 (which even admitting that default on the payment of interest alone would constitute such dishonour does not on the evidence appear since there is nothing to shew that the note, which was payable at a particular place, was ever presented there or at all, for the payment of interest)." Union Investment Co. v. Wells, 1908, 39 S.C.R. 625, Duff, J. at p. 627.

Re-issue of bill.

73. Where a bill is negotiated back to the drawer, or to a prior endorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable. 53 V., c. 33, s. 37. [Eng. s. 37. N.I.L. s. 50.]

Subject to the provisions of this Act.

Where a bill is negotiable in its origin it continues to be negotiable until it has been restrictively endorsed or discharged (sec. 69). As to further negotiation by the acceptor, see sec. 139, and by the drawer or an endorser, sec. 140. But a bill cannot be re-issued and further negotiated after it has been discharged by payment (secs. 139 and 140) or by the acceptor's becoming the holder of it, at or after its maturity, in his own

ıght (sec. 141), or by renunciation (sec. 142), cancellation (sec. 143), or alteration (sec. 145). Sec. 73.

To whom he was previously liable.

The rule of the latter part of the section is a rule against circuity of action.

The drawer of a bill payable to drawer's order endorses it for value to C., who endorses it to D., who endorses it back to the drawer. The drawer cannot recover from C. or D., for each of them in turn could recover from him as drawer. Cf. Wilders v. Stevens, 1846, 15 M. & W. at p. 212, 1 Ames 239. Rule against circuity of action.

The payee of a bill endorses it "without recourse" to D., who endorses it to E. who endorses it back to the payee. The payee, in his character of third endorsee, can sue D. and E., for they have no claim against him as prior endorser. Cf. Morris v. Walker, 1850, 15 Q.B. at p. 594; there is here no circuity of action.

The drawer of a bill endorses it to C., who has previously undertaken to be responsible for the price of goods supplied to the acceptor. C. endorses the bill back to the drawer. The drawer, in his character of endorsee can sue C., for C. has no remedy over against him. Wilkinson v. Unwin, 1881, 7 Q. B.D. 636; Glenie v. Smith, [1907] 2 K.B. 507, s.c. [1908] 1 K.B. 263; cf. Pegg v. Howlett, 1897, 28 O.R. 473.

When it was desired to obtain the benefit of the endorsement of a person for the accommodation of the acceptor and for the purpose of facilitating the negotiation of the bill, the end was formerly accomplished by the payee's first endorsing to such person "without recourse," and then again endorsing after such person in case of negotiation to a subsequent holder. Duthie v. Essery, 1895, 22 O.A.R. at p. 192. Even if the payee did not add words to his endorsement negativing his liability, evidence could be given to shew that the other person endorsed for the acceptor's accommodation and with the intention of becoming liable as surety for the payment of the bill to the payee. Wilkinson v. Unwin, *supra;* Foster v. Farewell, 1856, 13 U.C.R. 451; Gunn v. McPherson, 1859, 18 U.C.R. 244; Smith v. Richardson, 1865, 16 U.C.C.P. 210. Cf. notes to sec. 133 as to the admission of oral evidence for this purpose.

The prior endorsement of the payee is not, however, necessary. An endorsement on a bill to one who is about to take it

Sec. 73. Rule against circuity of action.

is valid, without the payee's prior endorsement, but the endorsement creates no obligations to those who were previously parties to the bill; it is solely for the benefit of those who take subsequently. Duthie v. Essery, *supra;* cf. cases cited in the notes to sec. 131.

Rights of holder.

74. The rights and powers of the holder of a bill are as follows:—

May sue.

(*a*) He may sue on the bill in his own name;

Prior defects.

(*b*) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

Title from him.

(*c*) Where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and,

Discharge from him.

(*d*) Where his title is defective if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill. 53 V., c. 33, s. 38. [Eng. s. 37. Cf. N.I.L. ss. 51, 57 and 58.]

Holder may sue on the bill in his own name.

A "holder" means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof (sec. 2). See notes to that section. As to a person in possession as agent, see discussion in chapter 15, *supra*, of a bank as collecting agent.

The Negotiable Instruments Law, sec. 51, provides that the holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

Holder may sue in his own name.

A person in possession of an unendorsed bill payable to another person or his order is not a holder and cannot sue in his own name. Good v. Walker, 1892, 61 L.J.Q.B. 736. He will become a holder as from the date of the endorsement, if subsequently made. Day v. Longhurst, 1893, 62 L.J.Ch. 334. Byles, pp. 195-6. But see the notes to sec. 61, as to a bill payable to order transferred for value without endorsement.

Sec. 74. Holder may sue in his own name.

It is a good defence that at the time of the commencement of the action the bill was outstanding in the hands of an endorsee. Cf. Davis v. Reilly, [1898] 1 Q.B. I. But if such endorsee held the bill as an agent or trustee for the plaintiff, the plaintiff may sue, though not in actual possession of the bill (Stones v. Butt, 1834, 2 Cr. & M. 416; National Savings Bank v. Tranah, 1867, L.R. 2 C.P. 556), even though the agent's authority depend on a ratification after action brought. Ancona v. Marks, 1862, 31 L.J. Ex. 163. Byles, p. 359.

The original payee of a note is not entitled to sue on it after he has endorsed it to his bank for discount, and while the bank is still the holder. Pure Colour Co. v. O'Sullivan, 1907, 10 O.W.R. 313.

It has been held that if a bill is endorsed to a bank for collection, but after dishonour the bill is handed back to the original payee, he can sue upon it without any endorsement from the bank. Nova Scotia Carriage Co. v. Lockhart, 1906, 1 E.L.R. 76. But this decision has been criticised, and the proper course in such a case is for the bank to endorse back to the original payee "without recourse." See Russell, pp. 471-2. In Jones v. England, 1906, 7 Terr. L.R. 440, 5 W.L.R. 83, it was held that where the payee had endorsed to his agent for collection, he was entitled to sue in his own name without having the instrument re-endorsed to him.

The holder may strike out any endorsement which is not necessary to his title. See notes to sec. 143.

The endorsement in blank by the payee does not preclude him from suing on the bill, if the bill is produced from the custody of the payee or his solicitor. Canadian Co-operative Co. v. Trauniczek, 1908, 1 S.L.R. 143.

Right to sue distinguished from right to recover.

Sec. 74 deals only with the rights acquired by negotiation (sec. 60), that is, by transfer according to the form required by the law merchant. Clause (*a*) expresses the consequence of the negotiability of an instrument, apart from the question whether the instrument is negotiable in the sense that the holder is entitled to take free from defects of title of prior parties, as defined by clause (*b*). See note at the beginning of this chapter.

As to holder in due course, see sec. 56;

As to payment in due course, see sec. 139;

As to defective title and personal defences, see notes *infra*.

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The power to negotiate a bill must be distinguished from the right to negotiate it. The right is an incident of its ownership; the power is an incident of apparent ownership. Again the right to sue must be distinguished from the right to recover, which depends on the further question whether the holder is a holder for value, and in some cases whether he is a holder for value without notice. See Chalmers. pp. 135 ff., where the law as to the holder's rights of action and proof is stated in a series of rules.

Real defences and personal defences.

In sec. 74 the distinction is explicitly made between defects of title and mere personal defences. The antithesis between personal defences and defects of title must not, however, be allowed to obscure the distinction between personal defences and real defences—a distinction which is implied in any discussion of the rights of a party to recover upon a negotiable instrument.(c)

Real defence.

A real defence is so-called because it attaches to the *res*, *i.e.*, to the instrument itself, regardless of the merits or demerits of the plaintiff. Such defence is good even against a holder in due course, as for instance the absolute incapacity of the defendant to make a binding contract (cf. notes to sec. 47), the forgery of a party's signature, except in so far as he is estopped from denying the validity of the signature (sec. 49), absence of effective delivery of a blank or incomplete document (cf. notes to sec. 32), the material alteration of a document (except in so far as liability is preserved by sec. 145); the discharge by payment in due course, by renunciation at or after maturity, or by intentional and apparent cancellation (secs. 139 to 143), illegality of a nature to make the bill void and not merely voidable (see notes, *infra*, under "Defect of title").

Personal defence.

But fraud, undue influence or duress in obtaining a bill, release or renunciation before maturity, and payment before maturity, are merely personal defences.

Sec. 74 does not deal with real defences, but merely with personal defences. Personal defences are founded upon the agreement or conduct of a particular person in regard to the

(c) The distinction between real and personal defences is very justly emphasized by Russell, pp. 212 ff.

instrument which renders it inequitable for him, though holding the legal title, to enforce it against the defendant. They are called personal defences because they are available only against that person or a subsequent holder who stands in privity with him. Against a purchaser for value without notice they are inoperative. The analogy at once suggests itself, and is believed to be a perfect one, in so far as they affect the title of such a purchaser, between personal defences and equitable encumbrances. See 2 Ames 811-812, 866. Cf. Union Bank of Halifax v. Indian & General Investment Trust, 1908, 40 S.C.R. 510, at p. 520, and notes to sec. 56. Sec. 74.

The Negotiable Instruments Law, sec. 57, provides: "A holder in due course holds the instruments free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." Rights of a holder in due course.

This section differs from clause (*a*) of sec. 74 in two respects. Firstly, the former omits the words "mere personal" as descriptive of the defences from which the holder in due course holds free. As has been already stated a real defence may be set up even against a holder in due course. Secondly, sec. 74 omits the words "for the full amount thereof." The Negotiable Instruments Law thus states explicitly what is only implied in the Bills of Exchange Act, namely, that a holder in due course is entitled to recover the full amount of a bill against prior parties although he may have paid less than its face value for it—this being the rule stated in the Supreme Court of the United States in Cromwell v. County of Sac, 1877, 96 U.S. 51, 60, notwithstanding decisions to the contrary in New York and other states. See Crawford, p. 74. This rule, as is pointed out in the case cited, in no respect impinges upon the doctrine that a person who makes a loan upon the bill or takes it as collateral security may be limited in his recovery to the amount advanced or secured. As to the amount recoverable where a bill is taken as collateral security, see sec. 54. As to the case where the holder has paid part only of the amount to be paid before receiving notice of a defect of title, see notes to sec. 56.

Although no personal defence is available against a holder in due course, it is necessary to distinguish between a personal defence which constitutes a defect of title, and other personal Rights of remote holder not in due course.

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defences, because the former may be set up against a remote party who is not a holder in due course while the latter are available only between immediate parties.

The Negotiable Instruments Law, sec. 58, provides: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." The Bills of Exchange Act has no similar provision of a general character, but less logically contains a provision applicable only to the negotiation of an overdue bill (sec. 70). The general principle is clear, however, that in the hands of a holder other than a holder in due course the negotiation of a bill is subject to the equities in the same sense that an equitable assignment of a *chose in action* is so subject.

Defect of title.

The term "defect of title" or "defective title" occurs in secs. 56 and 70 as well as sec. 74. but most of the cases as to what constitutes a defect of title have arisen in connection with the rule stated in sec. 70, namely, that where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it.

The term "defect of title" was substituted in the English bill for the equivalent expression "equity attaching to the bill," as that expression was unknown to Scotch law. Alcock v. Smith, [1892] 1 Ch. at p. 263.

Right of set-off is not an equity attaching to the bill.

Burrough v. Moss, 1830, 10 B. & C. 558, 1 Ames 755, was an action on a note made by the defendant payable to one Fearn and by him endorsed to the plaintiff after it became due. For the defendant it was contended that he had a right to set off against the plaintiff's claim a debt due to him from Hearn who held the note at maturity, but it was held that the plaintiff took free from this right of set-off. Cf. Whitehead v. Walker, 1842, 10 M. & W. 696. In the case of In re Overend, Gurney & Co., Ex parte Swan, 1868, 6 Eq. 344, 4 R.C. 375, the earlier cases as to what is an equity attaching to a bill are reviewed in the judgment of Malins, V.C. The endorsee of an overdue bill(*d*) takes it subject to all its equities, that is, the

(*d*) And the same is true of any other holder not in due course.

equities of the bill not the equities of the parties. He does not take it subject to a mere right of set-off between the original parties or other right not inherent in the contractual relation represented by the bill. The judgment of Malins V.C. was approved in the later case of Ex parte The Oriental Commercial Bank, In re European Bank, 1870, L.R. 5 Ch. 358, in which P., out of money in his hands (which he held in a fiduciary capacity) belonging to O. purchased for himself overdue bills which he sold to E. at an enhanced price. It was held that the right of O. to follow the money was an equity attaching to the bills, and that the title of E. to the bills was subject to this right, and accordingly that O. was entitled to recover from E. the price which P. paid for the bills out of O.'s money. Cf. Young v. MacNider, 1895, 25 S.C.R. 272.

Sec. 74. Right of set-off is not an equity attaching to the bill.

A mere right of set-off or other right not inherent in the contractual relation represented by the bill cannot be set-up against anyone except an immediate party. Such rights are not defects of title and are not available against a remote holder even with notice. Oulds v. Harrison, 1854, 10 Ex. 572, 1 Ames 766. It would be no defence to the action that the holder had given no value, if value had at some time been given for the bill when the defendant became a party to the bill, sec. 54. Cf. Russell, p. 218. See also notes, *infra*, in regard to absence or failure of consideration as a defence. Under modern rules of practice collateral matters may usually be set-up by way of set-off or counterclaim.(*e*) How far a mere personal defence or counterclaim is available as between immediate parties depends upon the practice prevailing in the jurisdiction in which an action may be brought.

Sec. 56, sub-sec. 2, provides: "In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

What constitutes a defect of title.

This list of defects may not be exhaustive. The words "force and fear" were inserted in the English bill in committee as the equivalent of the English technical term duress,

(*e*) As to the distinction between set-off and counterclaim see sec. 2 (*b*).

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which is unknown to Scotch law, but the signification of the Scotch term is, perhaps, somewhat wider than that of the English term. Chalmers, pp. 101, 104.

A person whose title is defective must be distinguished from a person who has no title at all, and can give none, as, for instance, a person making title through a forged or unauthorized endorsement (sec. 49). In the latter case, as has been already pointed out, there is a real defence good against all the world; in the former case there is merely a personal defence good against a holder other than in due course.

The ordinary rules of the law of contract in the province where the transaction takes place determine what constitutes fraud, duress, etc.: cf. notes to sec. 10 as to the application of provincial law to cases relating to bills and notes. As to conflict of laws, see chapter 50, *infra*.

Fraud.

Fraud is a defect of title which shifts the onus to the holder.

Fraud is a real defence good against a holder in due course only in cases falling within the principle of Foster v. McKinnon, 1869, L.R. 4 C.P. 704, discussed in the notes to sec. 4, the bill in such cases being absolutely void. Otherwise fraud is merely a personal defence good only against an immediate party or a remote party who is not a holder in due course. Cf. Whistler v. Forster, 1863, 14 C.B.N.S. 248, at p. 258, 4 R.C. 332, at p. 334; sec. 58. Even innocent misrepresentation if material may be a ground for avoiding a bill except against a holder in due course. Cf. Redgrave v. Hurd, 1881, 20 Ch.D. 1.

An agreement between the maker and the payee of a note that it shall be used only for a particular purpose constitutes an equity attaching to the instrument. MacArthur v. MacDowall, 1892, 23 S.C.R. 571; cf. Lloyd v. Howard, 1850, 15 Q.B. 995.

If in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of a bill is affected with fraud, etc., the burden of proof is shifted (sec. 58), as illustrated by Chalmers, p. 103, as follows:—

1. The holder of a bill endorses it to D. to get it discounted. D. fraudulently negotiates it to E., who negotiates it to F. F. sues the acceptor. Evidence is given of D.'s fraud. F. must prove that he gave value in good faith. Cf.

Smith v. Braine, 1851, 16 Q.B. 244; Berry v. Alderman, 1853, 14 C.B. 95; Tatam v. Haslar, 1889, 23 Q.B.D. 535. Sec. 74.

Fraud is a defect of title which shifts the onus to the holder.

2. Action against the maker of a note payable to bearer. It is shewn to have been stolen from the true owner. It lies on the holder to prove that he gave value in good faith. Raphael v. Bank of England, 1855, 17 C.B. 161.

3. An acceptance is given in renewal of a bill which turns out to be a forgery. The genuine bill is negotiated, and the holder sues the acceptor. Evidence is given of these facts. It lies on the holder to prove that he gave value in good faith. Mather v. Maidstone, 1856, 18 C.B. 273.

4. A partner accepts a bill in the firm's name for a private debt and in fraud of his co-partners. The bill is negotiated. The holder sues the firm as acceptors. As soon as it appears that the bill was given for a private debt, the holder is called upon to prove that he gave value in good faith. Hogg v. Sheen, 1865, 18 C.B.N.S. 426.

Undue influence or duress.

Undue influence or duress is a defect of title.

To the extent to which a person signing under undue influence has received consideration, he may be liable to repay the amount so advanced with interest at 5%. Aylesford v. Morris, 1873, L.R. 8 Ch. 484. Where a bill is given under undue influence it seems that the burden is cast upon the holder of proving himself to be a holder in due course or a transferee from one. Should he discharge that onus, he would be entitled to recover the full amount payable under the bill; otherwise only the consideration, if any, received by the person charged, with interest. Aylesford v. Morris, *supra;* Lyon v. Home, 1868, L.R. 6 Eq. at p. 681. The act does not expressly advert to bills given under *undue influence*, but the general word "illegality" may cover such a case. A holder of a bill given under *duress*(*f*) is obliged to prove that after the duress value

(*f*) Street remarks as to duress: "In England it seems to have been fully accepted in the decisions and by the text writers, that duress is no defence against an innocent purchaser. And the wording of the English Bills of Exchange Act, sec. 30 (2) [Canadian Act sec. 58 (2)] is such as to settle the question in that country beyond all doubt. To enforce the payment of a bill or note at anybody's instance as against one who is compelled to sign it contrary to his will is, however, utterly at variance with fundamental conceptions of contract law, and American authorities have shown a tendency to hold such an instrument absolutely void in the hands of all parties. Mr. Daniel takes this position, and there are numerous decisions containing strong dicta to the same effect."

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was in good faith given for the bill. He can then recover. Similarly, where a bill has been given under undue influence, a holder discharging the like onus is entitled to recover. For undue influence can no more be a defence against a holder in due course or a transferee from one, than duress is. In no case is it suggested that a holder in due course is prejudiced by the fact of a bill having been given under undue influence. In Maitland v. Backhouse, 1847, 16 Sim. 58, bankers, defendants in equity, were restrained from suing on a note endorsed under undue influence, they knowing the relation of the endorser to the maker to be that of ward and guardian, and making no enquiries of their transferor as to any consideration having been given for it. Cottenham, C., said at p. 65: "The question is . . . whether . . . the facts raise a reasonable suspicion, so as to affect the defendants with the equities, which, beyond all doubt, affect the immediate parties to the transaction." Byles, p. 80.

Illegality.

Illegality of consideration is an equity attaching to the bill (Amory v. Meryweather, 1824, 2 B. & C. 573), but a holder in due course may negotiate the bill to a holder who is not himself a party to any fraud or illegality affecting it (sec. 57).

Effect of illegality of consideration.

Illegality of consideration, total or partial, is a defence against an immediate party, but not against a holder in due course. Hay v. Ayling, 1851, 16 Q.B. at p. 431; Leggatt v. Brown, 1899, 30 O.R. 225; cf. Laprès v. Massé, 1901, Q.R. 19 S.C. 275, where a note, part of the consideration for which was illegal, was held good in part; Bellemare v. Gray, 1899, Q.R. 16 S.C. 581; Jones v. Merionethshire Building Society, [1892] 1 Ch. 173; cf. Byles, p. 156.

When a bill is given for a consideration which a statute expressly declares shall make the bill void, the bill is, as against the party who gave it, void in the hands of all parties whether immediate or remote. Edwards v. Dick, 1821, 4 B. & Ald. 212; Shillito v. Theed, 1831, 7 Bing. 405; Bowyer v. Bampton, 1741, 2 Stra. 1155, 1 Ames 399; cf. 1 Ames 464.

Cf. sec. 59, as to a bill given for a usurious consideration or upon a usurious contract.

B. makes a note payable to C. C. endorses it to D., who sues B. If it appears that B. made the note for an illegal

consideration, D. must prove that he gave value in good faith. Bailey v. Bidwell, 1844, 13 M. & W. 73. But if the consideration was merely void and not illegal, D. is not called upon to prove that he gave value. Fitch v. Jones, 1855, 5 E. & B. 238; Belfast v. Doherty, 1879, 4 Ir. L.R. 124. Sec. 74. Effect of illegality of consideration.

As to gaming and wagering consideration, see Byles, pp. 160 ff. for a discussion of the English law. See also criticism by A. V. Dicey in 25 L.Q.R. 76 (Jan. 1909) of the important case of Hyams v. Stuart King, [1908] 2 K.B. 696. The statutes of the different provinces of Canada on this subject differ in varying degrees from those in force in England.

As to consideration alleged to be illegal on the ground that it involves a breach of the Bank Act, see notes to sec. 76 of that act, under the heading "Share of its own capital stock," and especially the case of Stavert v. McMullen, 1911, 24 O.L. R. 456, there cited.

As to questions of conflict of laws arising from illegality of consideration, see chapter 50 *infra*.

Absence or failure of consideration.

Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value (sec. 58), but oral evidence may be given of absence of consideration, or its failure, total or partial. Cf. Chalmers, p. 104 ff., where the rules as to impeachment of consideration are stated.

Original absence of consideration is not a defect of title or equity attaching to the instrument. The point was first definitely decided in Charles v. Marsden, 1808, 1 Taunt 224, 1 Ames 748, which was followed in Sturtevant v. Ford, 1842, 4 M. & G. 101, 1 Ames 763, and approved apparently in Lazarus v. Cowie, 1842, 3 Q.B. 459, 1 Ames 818. The statute seems to uphold this view, since absence of consideration is not among the defects of title specified in sec. 56. On the other hand the defendant has always been allowed to set up that the instrument, endorsed when overdue, has in fact been paid before endorsement. Brown v. Davies, 1789, 3 T.R. 80; Parr v. Jewell, 1855, 16 C. B. 684. See also Lazarus v. Cowie, *supra*. Byles, p. 187. As already pointed out, discharge of a bill by payment in due course is a real defence good against all the world. Absence of consideration is not a defect of title.

Mere absence of consideration, total or partial, is matter

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of defence against an immediate party, or a remote party who is not a holder for value, but it is not a defence against a holder for value. Cf. Forman v. Wright, 1851, 11 C.B. at p. 492. Chalmers, p. 106. As to value, cf. secs. 53, 54.

It is no defence to an action by the endorsee that the bill was accepted for the accommodation of the drawer without consideration and was endorsed after it became due. In re Overend, Gurney & Co., Ex parte Swan, 1868, L.R. 6 Eq. 344, 4 R.C. 375.

But if there be an agreement express or implied not to negotiate an accommodation bill after maturity, the agreement constitutes an equity attaching to the bill. Parr v. Jewell, 1855, 16 C.B. 684; see also Stein v. Yglesias, 1834, 1 Cr. M. & R. 565, 1 Ames 760; cf. Byles, p. 187.

A. draws a bill on B., and endorses it to C. C. sues B. It is shewn that B. accepted it for A.'s accommodation. C. is not called on to prove that he gave value; he can recover without doing so. Mills v. Barber, 1836, 1 M. & W. 425; cf. Mair v. McLean, 1841, 1 U.C.R. 455; Farmers' Bank v. Dominion Coal Co., 1893, 9 Man. R. 542.

Failure of consideration.

Total failure of consideration is a defence against an immediate party (Bullion v. Cartwright, 1905, 10 O.L.R. 438), but it is not a defence against a remote party who is a holder in due course. Robinson v. Reynolds, 1841, 2 Q.B. at p. 211. As to what amounts to total failure, see Wells v. Hopkins, 1839, 5 M. & W. 7; Hooper v. Treffry, 1847, 1 Ex. 17; Goldie v. Harper, 1899, 31 O.R. 284.

Chalmers, pp. 107-8, adds: "Failure of consideration, it seems, is a defence against a remote holder for value with notice. The reason probably is that it is in the nature of a fraud to negotiate a bill when the holder knows that the consideration on which he received it has failed.(*g*) But might there not be cases in which it would not be fraud to do so? Again, *qu.* as to the effect of failure of consideration after the maturity of the bill, *i.e.* after a cause of action has accrued?"(*h*)

Holmes v. Kidd, 1858, 3 H. & N. 891, 1 Ames 775, was an action by the endorsee of a bill against the acceptor. On the drawing of the bill there was an agreement by the acceptor to deposit with the drawer certain canvas as security, the drawer

(*g*) Cf. Oulds v. Harrison, 1854, 10 Ex. at p. 579, 1 Ames 766.

(*h*) Cf. Watson v. Russell, 1864, 5 B. & S. at p. 968.

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to be at liberty to sell the canvas and apply the proceeds in payment of the bill if it was not paid by the acceptor. The drawer endorsed the bill after maturity to the plaintiff without value and then sold the canvas and held the proceeds. Held that the agreement was an equity attaching to the bill and that the plaintiff took subject to it. Cf. Ching v. Jeffery, 1885, 12 O.A.R. 432, at pp. 435-6. See also Merchants Bank of Canada v. Thompson, 1911, 23 O.L.R. 502 at p. 514; s.c. reversed, 1912, 26 O.L.R. 183.

Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise. Chalmers, p. 108; Day v. Nix, 1824, 9 Moore 159; Warwick v. Nairn, 1855, 10 Ex. 762; Goldie v. Harper, *supra;* O'Donohue v. Swain, 1887, 4 Man. R. 476; Home Life v. Walsh, 1903, 36 N.S.R. 73; Agra Bank v. Leighton, 1866, L.R. 2 Ex. at pp. 64-5; cf. McGregor v. Bishop, 1887, 14 O.R. 7. The rule as to partial failure of consideration is, however, largely a matter of pleading, and, as against an immediate party, if such failure is not a defence, it can under modern rules of practice usually be set up by way of counterclaim. Cf. Maclaren on Bills, etc., 4 ed. p. 173.

Partial failure is not a defence against a remote holder who is a holder for value. Archer v. Bamford, 1822, 3 Stark. 175. Chalmers, p. 108.

Where a note payable three months after date was given in payment of the first premium under a policy of life insurance and it was agreed that upon non-payment of the note at maturity the policy should be void but the maker should remain liable on the note, it was held that there had not been a failure of consideration, but that the liability of the insurer upon the policy during the currency of the note was sufficient consideration to support the note for the full amount. Manufacturers Life Insurance Co. v. Rowes, 1907, 16 Man. R. 340, following Manufacturers Life Insurance Co. v. Gordon, 1893, 20 O.A.R., at p. 335.

The Negotiable Instruments Law, sec. 28, provides: "Absence or failure of consideration is matter of defence as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise." The latter part of this section enacts a different rule from that

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stated above in regard to the effect of partial failure of consideration as between immediate parties, and the effect of the first part of the section apparently is that absence or failure of consideration constitutes a defect of title or equity attaching to the instrument, which may always be set up against immediate parties and remote parties other than holders in due course.

CHAPTER XLI.

Presentment for Acceptance.

Prior to 1906 secs. 75 to 126 (with a few exceptions) were grouped under the heading "General Duties of the Holder." These duties comprise presentment for acceptance, presentment for payment, notice of dishonour and protest in the cases provided for by the sections contained in this and the next following three chapters.

If a party to a bill is discharged from his liability thereon by reason of the holder's omission to perform his duties, such party is also discharged from liability on the debt or other consideration for which the bill was given (cf. notes to sec. 96).

The sections relating to presentment for acceptance do not apply to promissory notes: see sec. 186.

Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking generally, presentment for acceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where the money is. Any one can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again, (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present a bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect presentment. Chalmers, p. 152.

Presentment for acceptance compared with presentment for payment.

Presentment for acceptance.

75. Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

When necessary.

2. Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable else-

Express stipulation.

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where than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

Other cases.

3. In no other case is presentment for acceptance necessary in order to render liable any party to the bill. 53 V., c. 33, s. 39. [Eng. s. 39. Cf. N.I.L. s. 143.]

The words "at sight or" are omitted from sub-sec. 1 of the corresponding section of the English act, sight drafts in England being payable on demand (see notes to sec. 23). Sub-sec. 1 as it reads in the Canadian act is declaratory of the common law. The Negotiable Instruments Law is to the same effect as the English act, except that it also provides that presentment for acceptance must be made "in any other case where acceptance is necessary in order to fix the maturity of the instrument."

When presentment for acceptance is necessary.

Sub-sec. 2 settles a doubtful point. Chalmers, p. 145. Except in the cases mentioned in that sub-section, it has long been settled law that the holder need not present for acceptance a bill payable after date. Ramchurn Mullick v. Luchmeechund Radikissen, 1854, 9 Moo. P.C. at p. 66, 4 R.C. at p. 463. The same rule applies to a bill payable on demand or payable on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain. But in the case of a bill payable at or after sight, presentment is necessary because otherwise the due date cannot be known. An acceptance of such a bill should be dated so that it may be known from what date the time runs.

Subject to the provisions of the act, if a bill payable at or after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time (sec. 77).

Sub-sec. 2 must be read subject to sec. 76.

Except in the case of bills payable at or after sight (secs. 75 and 77) and in the cases mentioned in sub-sec. 2 of sec. 75, presentment for acceptance is not necessary in order to render liable any party to the bill.

It is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay; for, in case of acceptance, the holder obtains the additional security of the acceptor, and, if acceptance be refused, the antecedent parties become liable immediately. It is advisable, too, on account

of the drawer, for, by receiving early advice of dishonour, he may be able to get his effects out of the drawee's hands. Byles, p. 197. Sec. 75.

The rules for due presentment for acceptance are contained in sec. 78.

As to the cases in which presentment is excused, see sec. 79.

76. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and endorsers. 53 V., c. 33, s. 39. [Eng. s. 39. N.I.L. s. 146.] Presentment excused.

This section which is rendered necessary by sub-sec. 2 of sec. 75, was added to the English bill in committee. It settles a moot point and perhaps alters the law. Chalmers, p. 147.

77. Subject to the provisions of this Act, when a bill payable at sight or after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time. Sight bill.

2. If he does not do so, the drawer and all endorsers prior to that holder are discharged. If not presented.

3. In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. 53 V., c. 33, s. 40; 54-55 V., c. 17, s. 5. [Eng. s. 40. Cf. N.I.L. s. 144.] Reasonable time.

The words "at sight or" were added to the Canadian act by amendment in 1891. They are not in the corresponding section of the English act, sight bills in England being payable on demand (see notes to sec. 23), and therefore requiring no presentment for acceptance (see notes to sec. 75).

The Negotiable Instruments Law omits sub-sec. 3 and the words "prior to that holder" in sub-sec. 2.

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As to reasonable time, see also secs. 70, 83, 86 and 166, and Byles, pp. 21-2, 198, 223; Russell, pp. 264 ff.

What is reasonable time.

In determining the question of "reasonable time," regard must be had not only to the interest of the drawer to put the bill into circulation and to the interest of the drawee to have the bill speedily presented, but also to the interest of the holder who is entitled to a reasonable time to put the bill into circulation. The continued solvency of the drawer and the want of proof of actual loss by the laches of the holder constitute no answer to the objection that the holder has not presented or negotiated the bill within a reasonable time. Ramchurn Mullick v. Luchmeechund Radakissen, 1854, 9 Moo. P.C. at pp. 67-69, 4 R.C. at pp. 464-5 and cases there cited.

In the case just cited, A. in Calcutta drew a bill on B. in Hong Kong, payable 60 days after sight. The holder retained if for more than five months during which time China bills were at a discount. He then negotiated it. The court held on the facts that the delay was unreasonable. The holder might in the opinion of the court, have held the bill for some time if there was a reasonable prospect of the state of the market improving, but had no right to keep it as long as he did when there was no hope of the amendment of market conditions.

A. in London draws a bill on B. in Rio, payable 60 days after sight. The payee holds it back for four months, during which time Rio bills are at a discount. He then negotiates it. This may not be an unreasonable delay. Mellish v. Rawdon, 1832, 9 Bing. 416.

A. in Newfoundland draws a bill (in a set) on B. in London. payable 90 days after sight. The payee holds it back for two months, although there are tri-weekly mails, and then forwards it for presentment. No reason for holding back is shewn. This may be an unreasonable delay. Straker v. Graham, 1839, 4 M. & W. 721. If the bill is accepted when presented, but the acceptor fails before the due date, A. is probably discharged; otherwise, if there was no unreasonable delay; Wylde v. Wetmore, 1869, 7 N.S.R. (1 G. & O.) 504, a case in which it was held that it was not an unreasonable delay to hold a bill drawn on Liverpool over two mails, and then to negotiate it about a month after its endorsement.

The effect of allowing negotiation as an alternative to presentment is not very clear. Chalmers asks the question: "Does

not negotiation within a reasonable time *toties quoties* excuse presentment?" Sec. 77.

78. A bill is duly presented for acceptance which is presented in accordance with the following rules, namely:— Rules.

(*a*) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue; By holder to drawee.

(*b*) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, when presentment may be made to him only; To all drawees.

(*c*) Where the drawee is dead, presentment may be made to his personal representative; To personal representative.

(*d*) Where authorized by agreement or usage, a presentment through the post office is sufficient. 53 V., c. 33, s. 41. [Eng. s. 41. N.I.L. s. 145]. Post office.

As to the cases in which presentment for acceptance is necessary, see secs. 75 to 77.

The question of due presentment is material only where the holder of a bill payable at or after sight fails to present it for acceptance or to negotiate it within a reasonable time (sec. 77), or when acceptance cannot be obtained. Acceptance cures the informality of the presentment.

The English act contains also the following words: "Where the drawee is bankrupt, presentment may be made to him or to his trustee." The Negotiable Instruments Law has a similar provision. Presentment is excused in the cases mentioned in sec. 79. The English act excuses presentment also where the drawee is bankrupt, and defines "bankrupt" as including "any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy." These provisions regarding bankrupts are all omitted from the Canadian act, as there is no bankruptcy or insolvency law in force in Canada. See Atty.-Gen. for Ontario v. Atty.-Gen. for Canada, [1894] A.C. 189. Cf. notes to secs. 97 and 116.

Sec. 78.

By or on behalf of the holder.

Holder means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof (sec. 2). For the purpose of presentment the holder need not be the lawful holder. The holder may, without endorsing the bill, present it through an agent. Chalmers, p. 149.

To the drawee or to some person authorized, etc.

Speaking generally, presentment for acceptance should be personal: see note preceding sec. 75, *supra*.

To whom bill should be presented for acceptance.

Presentment to a servant who opened the door would not be sufficient; and if a bill is domiciled for payment at a bank, presentment at the bank would not suffice. Chalmers, p. 149.

There must be proof that presentment has been made to the actual drawee (or to his accredited agent), not to a person who merely refused to accept but who did not represent himself to be the drawee. Cheek v. Roper, 1804, 5 Esp. 175; Byles, p. 200.

As to "business day," see sec. 2.

As to reasonable hour, see notes to sec. 87.

A bill must be presented before it is overdue. It may be accepted when it is overdue (sec. 37), but an acceptance in such a case does not preserve or revive the liability of the drawer and endorsers, except in the case provided for by sec. 76.

The acceptance of some one or more of the drawees, but not of all, is a qualified acceptance (sec. 38).

Where the drawee is dead, presentment is excused (sec. 79), but the holder has the option of presenting the bill to the drawee's personal representative.

The provision as to presentment through the post office gives effect to the recognized practice among English merchants: cf. notes to sec. 90 (presentment for payment).

Excuses.

79. Presentment in accordance with the aforesaid rules is excused, and a bill may be treated as dishonoured by non-acceptance,—

Drawee dead.

(*a*) where the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill;

Impracticability.

(*b*) where, after the exercise of reasonable diligence, such presentment cannot be effected;

(c) where although the presentment has been irregular, acceptance has been refused on some other ground. Sec. 79. Waiver.

2. The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment. 53 V., c. 33, s. 41; 54-55 V., c. 17, s. 6. [Eng. s. 41. N.I.L. s. 148.] Excuse.

Where presentment would otherwise be obligatory, it is excused in the cases mentioned in this section.

As to the cases in which presentment for acceptance is necessary, see secs. 75 to 77.

As to what is due presentment, see sec. 78.

Where the drawee is dead, presentment to his personal representative is optional (sec. 78).

As to fictitious drawee, see the notes to sec. 26.

As to capacity to contract by bill, see sec. 47.

Clause (c) is perhaps new law, and is important, having regard to sub-sec. 2. Chalmers, p. 151. The Negotiable Instruments Law omits sub-sec. 2.

80. The drawee may accept a bill on the day of its due presentment to him for acceptance, or at any time within two days thereafter. Time for acceptance.

2. When a bill is so duly presented for acceptance and is not accepted within the time aforesaid, the person presenting it must treat it as dishonoured by non-acceptance. Dishonour.

3. If he does not so treat the bill as dishonoured, the holder shall lose his right of recourse against the drawer and endorsers. Loss of rights.

4. In the case of a bill payable at sight or after sight, the acceptor may date his acceptance thereon as of any of the days aforesaid but not later than the day of his actual acceptance of the bill. Date of acceptance.

5. If the acceptance is not so dated, the holder may refuse to take the acceptance and may treat the bill as dishonoured by non-acceptance. 2 E. VII., c. 2, s. 1. [Eng. s. 42. N.I.L. ss. 136, 137 and 150.] Refusing acceptance.

Sec. 80.

The corresponding section of the English act reads as follows:—

"When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers."

The English section was much discussed in committee and was eventually reduced to its present vague form, as the bankers and merchants took different views as to the exact rights of the parties. Chalmers, p. 152.

Time for acceptance.

When the Canadian bill was under discussion in 1890, the expression "within the customary time" was considered too vague, especially in view of the fact that the time might vary in the different provinces, and therefore the words "on the day of presentment or within two days thereafter" were substituted. In 1902 the section then in force was repealed, and the present section was substituted, by which it is made clear that the drawee may date the acceptance as of the day he accepts. Cf. Russell, p. 272. The division into the present sub-sections is a result of the revision of 1906.

The effect of the section probably is to allow a longer time for acceptance than is given by the English act. See Bank of Van Dieman's Land v. Victoria Bank, 1871, L.R. 3 P.C. at pp. 542-3, 546-7, and Byles, p. 202.

In reckoning the time non-business days are to be excluded (sec. 6).

As to the date of acceptance, cf. the provision of sec. 37 in regard to acceptance after dishonour. The Negotiable Instruments Law, sec. 136, provides that the drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

Destruction or refusal to return bill.

It is provided by the same act, sec. 137, that where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same. This provision is justly criticized by Ames. On principle, the destruction or refusal to return a bill is conversion, not acceptance.

Brannan, pp. 135, 166; Jeune v. Ward, 1818, 1 B. & Ald. 653, 659, 1 Ames 157, 161. Sec. 80.

Under the English and Canadian acts the destruction or wrongful retention of the bill by the drawee does not amount to an acceptance. Protest may be made on a copy or written particulars (sec. 120), and the holder's remedy against the drawee is an action for damages. Chalmers, p. 153.

81. A bill is dishonoured by non-acceptance,— Dishonour.

(*a*) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or, Presentment

(*b*) when presentment for acceptance is excused and the bill is not accepted. 53 V., c. 33, s. 43. [Eng. s. 43. N.I.L. s. 149.] Excuse.

As to due presentment, see sec. 78.

As to the cases in which presentment is excused, see sec. 79.

As to acceptance, see secs. 35 ff.

If the holder does not obtain an unqualified acceptance, he may treat the bill as dishonoured by non-acceptance (sec. 83).

As to the holder's right of recourse in the event of the dishonour of a bill by non-acceptance, see sec. 82.

Secs. 81 and 82 would be more logically placed with sec. 95 under the heading "Dishonour."

82. Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary. 53 V., 33, s. 43. [Eng. s. 43. N.I.L. s. 151.] Recourse in such case.

Subject to the provisions of the act the holder has an immediate right of recourse against drawer and endorsers. This right is suspended in the event of acceptance for honour with the holder's consent (sec. 147). Even if a bill has been dishonoured by refusal to accept, it is open to the holder to allow the bill to be accepted subsequently (sec. 37).

The holder's right of action is not complete until the defendant has received, or ought to have received, notice of dishonour, and, in the cases where protest is necessary, the bill Right of recourse and right of action.

Sec. 82.

has been protested. As to the necessity for protest, see secs. 112 and 113. As to right of recourse and right of action, and the time from which the statute of limitations begins to run, see notes to sec. 95.

Subject to the provisions of the act, when a bill has been dishonoured by non-acceptance, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged, provided that the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission (sec. 96).

Qualified acceptance.

83. The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

Assent.

2. When the drawer or endorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto. 53 V., c. 33. s. 44. [Eng. s. 44. N.I.L. s. 142.]

As to what acceptances are qualified, see sec. 38.

As to the holder's rights in the event of the dishonour of a bill by non-acceptance, see sec. 82 and notes.

Holder taking qualified acceptance.

The holder is entitled to treat a qualified acceptance as no acceptance, and if he elects to take such an acceptance without having been expressly or impliedly authorized by the drawer or any endorser, the effect, except in the case of a partial acceptance, is to discharge any such drawer or endorser, who does not subsequently assent to the taking of the qualified acceptance (see sec. 84). The holder who takes a qualified acceptance should at once give notice of the qualification to prior parties who have not expressly or impliedly authorized the taking of such acceptance. The notice is sufficient to bind a prior party by a partial acceptance (sec. 84), but in the case of any other qualified acceptance, the prior party may discharge himself from liability on the bill by expressing his dissent to the holder within a reasonable time after the receipt of the notice.

Where it is doubtful if an acceptance be conditional or not, the election of the holder to protest the bill for non-acceptance will preclude him from recovering from the acceptor. Byles, p. 213.

Sec. 83.

Sub-sec. 2 of sec. 83 settles a doubtful point in favour of the holder. Chalmers, p. 156; Rowe, v. Young, 1820, 2 Bligh, 391, 2 Ames 22.

In some trades the practice of accepting against delivery of bills of lading is so common that an authority to take such an acceptance might perhaps be implied. Sometimes, too, the terms of a documentary bill are such as impliedly to authorize it. Chalmers, p. 156.

As to reasonable time, see notes to sec. 77.

Qualified acceptance without authority.

84. Where a qualified acceptance is taken, and the drawer or an endorser has not expressedly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or endorser is discharged from his liability on the bill; Provided that this section shall not apply to a partial acceptance, whereof due notice has been given. 53 V., c. 33, s. 44. [Eng. s. 44. N.I.L. s. 142.]

Partial acceptance.

See notes to sec. 83.

Prior to the revision of 1906, this section and sub-sec. 3 of sec. 112 (protest of unaccepted part of a foreign bill) were placed, as they are in the English act, between sub-secs. 1 and 2 of sec. 83.

The Negotiable Instruments Law omits the proviso to the section.

CHAPTER XLII.

Presentment for Payment.

Presentment for payment, which is provided for in the sections contained in this chapter, is one of the general duties of the holder of a bill. See note at the beginning of chapter 41, *supra*, where presentment for acceptance and presentment for payment are compared. See also notes to sec. 96, as to the consequence of the holder's omission to perform such duties.

The provisions as to presentment of a bill for payment apply in part to a promissory note: see sec. 186, and secs. 180 to 184.

As to dishonour by non-payment, see sec. 95.

Presentment for Payment.

Necessity.

85. Subject to the provisions of this Act, a bill must be duly presented for payment.

Result of none.

2. If it is not so presented, the drawer and endorsers shall be discharged.

Manner of.

3. Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment. 53 V., c. 33, ss. 45 and 52. [Eng. ss. 45 and 52. N.I. L. ss. 70 and 74.]

Prior to 1906 sub-sec. 3 was included in one section with sec. 93.

As to the cases in which presentment for payment is dispensed with, see sec. 92. Delay in making presentment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence (sec. 91). Sec. 76 provides for the special case of a domiciled bill coming forward late.

As to due presentment, see sec. 86 (time of presentment), sec. 87 (by and to whom presentment must be made), secs. 88 to 90 (place of presentment).

Except where delay is excused or presentment is dispensed

with, the failure duly to present a bill for payment discharges the drawer and endorsers. But the acceptor in the absence of express stipulation, is not discharged by failure to present a bill for payment (sec. 93). Sec. 85. Who is entitled to require presentment for payment.

As to presentment to an acceptor for honour, see sec. 94.

Presentment for payment is necessary in order to render the endorser of a note liable (sec. 184). The endorser of a note in this respect is in the same position as the drawer or endorser of a bill. Gibb v. Mather, 1832, 2 Cr. & J. at pp. 262, 263, 4 R. C. at p. 474; cf. sec. 186.

But the maker (or, as he is sometimes called, the drawer) of a note is in a different position, being like the acceptor of a bill, the party primarily liable (sec. 183).

As to presentment of a cheque for payment, see notes to next section.

As presentment for payment is not necessary to charge the acceptor or maker, so presentment is not generally a condition precedent to the liability of a person who has given a guarantee for the payment by the acceptor or maker. Walton v. Mascall, 1844, 13 M. & W. 452, 4 R.C. 483; Carter v. White, 1883, 25 Ch. D. 666. If the drawer were the person guaranteed, or perhaps, if the acceptance were qualified, presentment would be necessary. Chalmers, p. 167.

As to the discharge of a party on the consideration for which the bill is given as well as on the bill itself, see notes to sec. 96.

86. A bill is duly presented for payment which is presented,— Time for.

(*a*) when the bill is not payable on demand, on the day it falls due; Due date.

(*b*) when the bill is payable on demand, within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the endorser liable. Demand bill.

2. In determining what is a reasonable time within the meaning of this section regard shall be had to the nature of the bill, the usage of trade with regard to similar bills and the facts of the particular case. 53 V., c. 33, s. 45. [Eng. s. 45 (1)(2). N.I.L. s. 71.] Reasonable time.

Sec. 86.

As to a bill payable on demand, see sec. 23. When a bill is not payable on demand, it is due and payable on the third day of grace (sec. 42).

So far as an endorser is concerned this section applies to a cheque. A cheque is a bill drawn on a bank payable on demand (sec. 165). But the effect, so far as the drawer of a cheque is concerned, of the failure to present a cheque for payment within a reasonable time of its issue is the subject of special provisions (sec. 166; cf. exception to sub-sec. 2, sec. 165).

As to the presentment for payment of a note payable on demand, see sec. 180.

As to what is reasonable time, cf. notes to sec. 77.

Due presentment as regards time is required as regards the drawer and endorsers (sec. 85), but not as regards the acceptor (sec. 93).

By and to whom.

87. Presentment must be made by the holder or by some person authorized to receive payment on his behalf, at the proper place as hereinafter defined, and either to the person designated by the bill as payer or to his representative or some person authorized to pay or to refuse payment on his behalf, if, with the exercise of reasonable diligence such person can there be found.

Two acceptors.

2. When a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

Personal representative.

3. When the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative if such there is, and with the exercise of reasonable diligence, he can be found. 53 V., c. 33, s. 45. [Eng. s. 45 (3)(6)(7). N.I.L. ss. 72, 75, 76, 77, and 78.]

By whom.

A bill is discharged by payment made by or on behalf of the drawee or acceptor at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective (sec. 139). Presentment for payment must be made by the holder or by some person authorized

to receive payment on his behalf, *i.e.*, by the person who can give a good discharge. The person who presents the bill must exhibit it to the person from whom he demands payments (sec. 85), and upon payment must deliver it up to the party who pays it (sec. 93). As to bills in a set, see sec. 159. Sec. 87.

At the proper place.

See secs. 88 to 90.

To whom.

In an action against drawer or endorsers (sec. 85) the holder must prove due presentment (sec. 86) to the drawee or acceptor, but need not prove any demand of the drawer. Heylyn v. Adamson, 1758, 2 Burr. 669 at p. 678, 4 R.C. at p. 454. In the case of a promissory note, presentment must be made to the maker (*ibid.*).

Presentment is sufficient if made to the representative of the person designated by the bill as payer or some person authorized to pay or to refuse payment on the payer's behalf. The words "or his representative" in sub-sec. 1 are not in the corresponding section of the English act. To whom presentment for payment should be made.

The Negotiable Instruments Law, sec. 72, authorizes presentment "to the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made," *i.e.* at the proper place.

Sub-sec. 2 is probably declaratory, but the point was not clear. Of course if one of two or more acceptors pays or, in refusing payment, acts as the agent of the others, that is enough. Chalmers, p. 161.

The Negotiable Instruments Law, sec. 77, provides that where the persons primarily liable or the instrument are liable as partners, and no place of presentment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Sub-sec. 3 is declaratory. Chalmers, p. 162. Where the drawee of a bill is dead, presentment for *acceptance* is excused (sec. 79), but in the case of presentment for payment different considerations apply, and if no place of payment is specified reasonable diligence must be exercised to present the bill to the personal representative of the drawee. If a place of payment is specified, presentment at such place is sufficient without any effort being made to present to the personal rep-

Sec. 87.
To whom presentment for payment should be made.

resentative. Philpot v. Briant, 1827, 3 C. & P. 244, 2 Ames 133; cf. sec. 88, and Wilkins v. Jadis, 1831, 2 B. & Ad. 188.

Where authorized by agreement or usage, a presentment through the post office is sufficient (sec. 90).

Hour for presentment.

Sub-sec. 1 also differs from the English act and the Negotiable Instruments Law in that these acts require the presentment to be made "at a reasonable hour on a business day." These words are omitted from this section of the Canadian act, but have been retained in sec. 78, which deals with presentment for acceptance.

Hour for presentment

The reasonableness of the hour must depend on whether the bill is payable at a place of business or at a private house. The payer is not bound to stay at his place of business after a reasonable hour. If a bill be payable at a bank it must be presented within banking hours; if at a trader's place of business, then within ordinary business hours; if at a private house, probably a presentment up to bed-time would be sufficient. Chalmers, p. 158; cf. Byles pp. 224-5. See also Russell, pp. 277-280, where the subject is discussed more fully.

The Negotiable Instruments Law, sec. 75, provides that where the instument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

The Canadian act provides that protest for non-payment may be made at any time after three o'clock in the afternoon (sec. 121).

Place of.

88. A bill is presented at the proper place,—

When specified.

(*a*) where a place of payment is specified in the bill or acceptance, and the bill is there presented;

When not specified.

(*b*) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;

When no address given.

(*c*) where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not at his ordinary residence, if known;

(*d*) in any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence. 53 V., c. 33, s. 45. [Eng. s. 45 (4). N.I.L. s. 73.] Sec. 88. Other cases.

This section and secs. 89 and 90 deal with the place of presentment. As to the necessity for presentment, see sec. 85, as to time, see sec. 86, and as to the persons by and to whom presentment must be made, see sec. 87.

The words "or acceptance" in clause (*a*) of sec. 88 are not in the English act.

Place of payment specified.

Where a note is in the body of it made payable at a particular place, it must be presented for payment at that place (sec. 183).

The place of payment may be specified either by the drawer of a bill (Gibb v. Mather, 1832, 2 Cr. & J. 254, 4 R.C. 467), or by the acceptor (Saul v. Jones, 1858, 28 L.J.Q.B. 37). If a place of payment is specified by the acceptor, the acceptance is not thereby rendered conditional or qualified (sec. 38). It is still a general acceptance and therefore does not require the authority or consent of the drawer or endorsers (sec. 84). The change made in the law in this respect (see notes to sec. 38) does not, however, affect the question of presentment for payment as regards the drawer or endorsers. If a place of payment is specified either originally by the drawer, or in the acceptance, it is necessary to present the bill at such place in order to preserve the liability of the drawer or endorsers. Gibb v. Mather, *supra*. As to the acceptor, see sec. 93. If a bill is drawn payable at one place and accepted payable at another, presentment for payment at the latter place is sufficient. Cf. Russell, pp. 281-3. Presentment if place of payment specified.

If two places of payment are mentioned in the instrument, presentment at either is sufficient. Beeching v. Gower, 1816, Holt, N.P.C. 313; 2 Ames 329.

The drawee of a bill accepts it payable at his bank. The bill must be presented at the bank. A presentment to the acceptor personally is insufficient. Gibb v. Mather, *supra*; Saul v. Jones, *supra*. Presentment through the clearing house is sufficient. Reynolds v. Chettle, 1811, 2 Camp. 595; Harris

Sec. 88. Present-ment if place of payment specified.

v. Packer, 1833, 3 Tyr. 370*n*. If when the bill matures, the bank is the holder of the bill, but the acceptor has no assets there, this is sufficient presentment. No personal demand on the acceptor is necessary. Bailey v. Porter, 1845, 14 M. & W. 44; Union Bank v. McKilligan, 1887, 4 Man. R. 29; Rice v. Bowker, 1853, 3 L.C.R. 305, 4 R.J.R.Q. 23; Chalmers, p. 161.

Address given in the bill.

A bill is addressed to "Mr. B., 1 Duke Street, London." B. accepts it generally. The bill is presented at the address mentioned and the house is found shut up. This is sufficient. Hine v. Allely, 1833, 4 B. & Ad. 624; cf. Crosse v. Smith, 1813, 1 M. & S. at p. 554. If the holder takes the bill to the address mentioned and enquires for B., and a person living in the house informs him that B. has left, this is sufficient. Buxton v. Jones, 1840, 1 M. & Gr. 33. Chalmers, p. 161.

Place of business.

See Fitch v. Kelly, 1879, 44 U.C.R. 578, where it was held that a certain place, although not the ordinary place of business of the maker of the note, was, under the circumstances shewn in evidence, his office for the day, or that the person to whom the note was actually presented was there representing the maker authorized by him to receive and answer the presentment. As to proof that a place was the maker's last place of residence, see Kinnear v. Goddard, 1860, 9 N.B.R. (4 Allen) 559.

In any other case.

Personal presentment to the drawee or acceptor wherever he can be found or presentment at his last known place of business or residence will be sufficient only if his ordinary place of business or residence cannot be discovered. Byles, p. 229.

Sufficient presentment

89. Where a bill is presented at the proper place as aforesaid and after the exercise of reasonable diligence, no person authorized to pay or refuse payment can there be found no further presentment to the drawee or acceptor is required. 53 V., c. 33, s. 45. [Eng. s. 45 (5).]

There is no corresponding provision in the Negotiable Instruments Law. Sec. 89.

If no place of payment is specified and no address is given in the bill (see sec. 88), reasonable efforts must be made to find the drawee or acceptor if he has left his last known place of business or residence. Browne v. Boulton, 1832, 9 U.C.R. 64; cf. Russell, pp. 285 ff. But see sec. 90.

90. Where the place of payment specified in the bill or acceptance is any city, town or village, and no place therein is specified, and the bill is presented at the drawee's or acceptor's known place of business or known ordinary residence therein, and if there is no such place of business or residence, the bill is presented at the post office, or principal post office in such city, town or village, such presentment is sufficient. Present-ment at post office.

2. Where authorized by agreement or usage, a presentment through the post office is sufficient. 53 V., c. 33, s. 45. [Cf. Eng. s. 45 (8).] Through post office.

There is no corresponding provision in the Negotiable Instruments Law.

Sub-sec. 1 is not in the English act. It was added to the Canadian bill in committee in 1890, and seems to be inconsistent with the requirement of any diligence or effort to find the drawee or acceptor. Cf. sec. 89; Russell, pp. 288-9.

Sub-sec. 2 recognizes a customary practice. Cf. Heywood v. Pickering, 1874, L.R. 9 Q.B. 428, at p. 432; Prideaux v. Criddle, 1869, L.R. 4 Q.B. 455, at p. 461; Reg. v. Bank of Montreal, 1886, 1 Can. Ex. C.R. 154, at p. 167. But Byles, p. 21, note (*y*), says that the usage of bankers does not authorize presentment by post except by a bank.

91. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. Delay in present-ment.

2. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. 53 V. c. 33, s. 46. [Eng. s. 46. N.I.L. s. 81.] Diligence.

Sec. 91.

As to causes excusing delay, cf. sec. 105 (notice of dishonour) and sec. 111 (protest).

As to the cases in which presentment for payment is dispensed with, see sec. 92.

If presentment is delayed at the request of the drawer or endorser sought to be charged, the delay is presumably excused. Lord Ward v. Oxford Ry. Co., 1852, 2 De G. M. & G. 750.

Excuses for delay or for non-presentment.

Chalmers, p. 163, states that the cases do not clearly distinguish between excuses for non-presentment and excuses for delay in presentment, but that when the question is one of reasonable diligence the distinction is an important one. He gives the following illustrations of the section:—

The holder of a bill dies suddenly just before it matures. The circumstances may be such as to excuse delay. Cf. Rothschild v. Currie, 1841, 1 Q.B. at p. 47.

Bill is drawn in England, payable in Leghorn. At the time the bill matures Leghorn is besieged. The holder is not in Leghorn. Delay is excused. Patience v. Townley, 1805, 2 Smith 223.

A bill is presented through the post office (sec. 90). It is sent off in time to reach the drawee on the day of maturity, but by mistake of the post office is delayed some days. The delay is probably excused. Windham Bank v. Morton, 1852, 22 Conn. 214; Pier v. Heinrichschoffer, 1877, 29 Am. R. 501; cf. sec. 104.

Bill drawn is in England, payable in Paris. By a French moratory law, passed in consequence of war, the maturity of bills payable in Paris is postponed three months. The delay in making presentment is excused. Rouquette v. Overmann, 1875, L.R. 10 Q.B. 525; cf. notes to sec. 162.

Dispensed with.

92. Presentment for payment is dispensed with,—

Impracticable.

(*a*) where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;

Fictitious drawee.

(*b*) where the drawee is a fictitious person;

Useless.

(*c*) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;

(*d*) as regards an endorser, where the bill was accepted or made for the accommodation of that endorser, and he has no reason to expect that the bill would be paid if presented; Sec. 92. Accommodation bill.

(*e*) by waiver of presentment, express or implied. Waiver.

2. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment. 53 V., c. 33, s. 46. [Eng. s. 46. N.I.L. ss. 79, 80 and 82.] Not dispensed with.

Causes which dispense with presentment must be distinguished from causes which merely excuse delay.

Clause (*a*).

The drawee of a bill goes abroad, leaving an agent at home with power to accept bills, and who does in fact accept the bill. The bill must be presented for payment to the agent, if the drawee at the time of maturity continues absent. Phillips v. Astling, 1809, 2 Taunt. 206, 4 R.C. 477. The neglect to present the bill to the agent would be a want of the "reasonable diligence" required in order to dispense with presentment to the drawee. Presentment for payment dispensed with.

In view, however, of the earlier sections of the act which provide for presentment at the place named, or constructive presentment where no place is named, there can seldom be any case calling for the application of clause (*a*). Cf. Russell, p. 291.

The fact that the maker of a note is dangerously ill does not excuse presentment at his residence or place of business, and presentment to his brother in the street near the residence is not sufficient. Nowlin v. Roach, 1843, 4 N.B.R. (2 Kerr) 337.

Clause (*b*).

This is declaratory. Smith v. Bellamy, 1817, 2 Stark. 223.

As to fictitious drawee, see notes to sec. 26.

Presentment for *acceptance* is excused not only where the drawee is a fictitious person, but also where he is a person not having capacity to contract by bill. Incapacity of acceptor does not excuse presentment for *payment*, unless the case falls within clause (*c*). Cf. Chalmers, p. 165.

Sec. 92. Presentment for payment dispensed with.

Clauses (c) and (d).

Cf. secs. 107 and 108, *infra*, and notes, as to dispensing with notice of dishonour.

Bill payable to drawer's order is accepted and endorsed to accommodate the drawer. The drawer discounts it, but does not provide the acceptor with funds to meet it at maturity. Presentment is not necessary to charge the drawer (Terry v. Parker, 1837, 6 A. & E. 502), but is necessary to charge the accommodation endorser. Saul v. Jones, 1858, 28 L.J.Q.B. 37; cf. Turner v. Samson, 1876, 2 Q.B.D. 23. A cheque is drawn on the Union Bank, the drawer not having sufficient funds there to meet it, and having no reason to expect that it will be honoured. Presentment is not necessary to charge the drawer. Wirth v. Austin, 1875, L.R. 10 C.P. 689. Chalmers, pp. 165-6. Under clause (c) the fact that the drawer has no reason to believe that the bill will be paid if presented does not alone excuse presentment. The first condition of the clause must also be complied with. See Russell, pp. 292-3.

Clause (e).

This is declaratory. Hopley v. Dufresne, 1812, 15 East, 275; cf. Bank of Upper Canada v. Turcotte, 1865, 15 L.C.R. 203, 13 R.J.R.Q. 197, 199.

Cf. sec. 106, as to waiver of notice of dishonour.

The waiver may be either before or after the time for presentment. A promise to pay after the bill is due is waiver of notice (McCarthy v. Phelps, 1870, 30 U.C.R. 57; Deering v. Hayden, 1886, 3 Man. R. 219), if made with knowledge of the want of presentment. Nowlin v. Roach, 1843, 4 N.B.R. 337; McFatridge v. Williston, 1892, 25 N.S.R. 11; Ayer v. Murray, 1909, 39 N.B.R. 170.

As to express stipulation in the bill waiving some or all of the holder's duties, see sec. 34.

Waiver of notice of dishonour does not of itself include a waiver of presentment for payment. Hill v. Heap, 1823, D. & R. N.P.C. 57; Nowlin v. Roach, *supra*.

Waiver of demand of payment is waiver of presentment. Burton v. Goffin, 1897, 5 B.C.R. 454.

A memorandum running "my note coming due the 10th inst. good for 10 days after date," given by the endorser of a note to the holder in reference to a note coming due the 11th,

held sufficient waiver. Burnett v. Monaghan, 1871, 3 R.L. 448, 24 R.J.R.Q. 29. Sec. 92. Presentment for payment dispensed with.

Part payment is a waiver of presentment. Rice v. Bowker, 1853, 3 L.C.R. 305-6, 4 R.J.R.Q. 23. *Sed quære*, if the person making the payment did not know the facts. Russell, pp. 293-4.

Sub-sec. 2.

This provision is omitted from the Negotiable Instruments Law.

The drawer of a bill orders the acceptor not to pay it. The holder hears of this. Presentment is not dispensed with. Hill v. Heap, *supra;* cf. Blackley v. McCabe, 1889, 16 O.A.R. 295.

The acceptor of a bill informs the holder that he cannot, or will not, pay it when due. Presentment is not dispensed with. Baker v. Birch, 1811, 3 Camp. 107; Ex parte Bignold, 1836, 1 Deac. 712.

The acceptor of a bill becomes bankrupt before it matures. Presentment is not excused. Esdaile v. Sowerby, 1809, 11 East, at p. 117; Bowes v. Howe, 1813, 5 Taunt. 30. B. makes a note payable "at 1 X Street, London." Before it becomes due he becomes insolvent and absconds. Presentment at the address mentioned is not dispensed with. Sands v. Clarke, 1849, 19 L.J.C.P. 84; Pierce v. Cate, 1853, 66 Mass. 190. Chalmers, p. 164.

93. When no place of payment is specified in the bill or acceptance, presentment for payment is not necessary in order to render the acceptor liable. When no place specified.

2. When a place of payment is specified in the bill or acceptance, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures, but if any suit or action be instituted thereon before presentation the costs thereof shall be in the discretion of the court. If place specified. Neglect.

3. When a bill is paid the holder shall forthwith deliver it up to the party paying it. 53 V., c. 33, s. 52. [Eng. s. 52. Cf. N.I.L. s. 70.] Delivery on payment.

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Prior to the revision of 1906, sub-sec. 3 of this section and sub-sec. 3 of sec. 85 formed one sub-section as in sec. 52 of the English act.

Presentment for payment when necessary as regards acceptor.

The sub-sections of sec. 52 of the English act corresponding to sub-secs. 1 and 2 of this section are as follows:—

"(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures."

In regard to the difference in the wording of the two acts the difference explained in the notes to sec. 38 must also be carefully noted. An acceptance payable at a particular place is a general acceptance in England as in Canada, but an acceptance payable only at a particular place is a qualified acceptance in England but a general acceptance in Canada.

In England, when a bill is accepted payable at a particular place, but not there only, presentment is not necessary in order to render the acceptor liable. But if the acceptance is to pay at a particular place and not elsewhere, as, *e.g.*, "payable at the A. Bank only," the effect is to require presentment at the specified place before the acceptor can be sued (Halstead v. Skelton, 1843, 5 Q.B. 86, at pp. 93, 94), but the presentment need not be made on the day the bill matures, in the absence of an express stipulation to that effect.

In Canada, when a bill is accepted payable at a particular place, whether there only or not, presentment is not dispensed with by the act, but the omission to present the bill on the day it matures does not discharge the acceptor, in the absence of an express stipulation to that effect. If, however, a suit or action is instituted on the bill before presentation the costs shall be in the discretion of the court. As to sub-sec. 2, see the notes to sec. 183, where the conflicting decisions are collected in regard to a similar provision in regard to presentment as regards the maker, but that section also provides that, where a note is in the body of it made payable at a particular place, it must be presented for payment at that place. Cf. sec. 85 as to bills generally.

See the corresponding provision of the Negotiable Instruments Law (sec. 70), quoted in the notes to sec. 183.

Sec. 93. Presentment for payment when necessary as regards acceptor.

Chalmers, p. 195, says: "When a bill is accepted payable at a particular place and there only, the acceptor's position is for many purposes analogous to that of the drawer of a cheque. Bishop v. Chitty, 1742, 2 Stra. 1195; Ramchurn Mullick v. Luckmeechund Radakissen, 1854, 9 Moo. P.C. at p. 70, 4 R.C. at p. 466. If, then, he could shew that he was damnified by the holder's omission to present it on the proper day, he would probably be discharged. Cf. Alexander v. Burchfield, 1842, 7 M. & G. 1061, case of a cheque where bank failed."

This statement does not seem to be consistent with the provisions of the act that the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission. The cases cited by Chalmers were decided before the passing of the act. The "express stipulation" required by the English act seems to be something different from the terms of the qualified acceptance which require presentment. An acceptance to pay at a particular place and there only requires presentment (Halstead v. Skelton, *supra*), but such qualified acceptance cannot reasonably be regarded as also amounting to an express stipulation that presentment shall be made on the day of maturity, especially in view of the rule laid down in Smith v. Vertue, 1860, 9 C.B.N.S. 214, 4 R.C. 246, that qualifications in acceptances should not be extended beyond the terms in which they are expressed. In that case an acceptance "payable, on delivering bill of lading, at the London and Westminster Bank," was held not to require presentment on the day of maturity, as regards the acceptor's liability. Cf. Byles, p. 226.

Unlike the acceptor, the drawer and endorsers are entitled, subject to the provisions of the act (sec. 85), to have the bill presented for payment. As to the proper place for presentment, see secs. 88 to 90.

The reason why presentment is not necessary as regards the maker or acceptor if no place of payment is specified is that at common law the debtor is bound to seek out his creditor to pay him. Cranley v. Hillary, 1813, 2 M. & S. 120; Walton v. Mascall, 1844, 13 M. & W. at p. 458, 4 R.C. at p. 488. Chalmers, p. 194. It is clear that the acceptor cannot avail himself of any informality in the presentment. But Chalmers' suggestion that if a holder brings an action without first apply-

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ing for payment the court will probably make him pay the costs and deprive him of interest, is justly criticized by Russell, pp. 297-8.

Time for presentment.

94. Where the address of the acceptor for honour of a bill is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity.

Parties in different places.

2. Where the address of the acceptor for honour is in some place other than the place where it is protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

Excuses for delay.

3. Delay in presentment or non-presentment is excused by any circumstance which would in case of acceptance by a drawee excuse delay in presentment for payment or non-presentment for payment. 53 V., c. 33, s. 66. [Eng. s. 67. Cf. N.I.L. ss. 168 and 169.]

As to acceptance for honour, see secs. 147 to 152.

Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need, and if the bill is dishonoured by the acceptor for honour it must be protested for non-payment by him (sec. 117).

Time for presentment for payment.

Sub-secs. 1 and 2 reproduce the effect of the English statute 6 and 7 W. 4, c. 58. Non-business days are excluded in reckoning the time (sec. 6).

If the bill be not presented in due time to the acceptor for honour, it is conceived that he, and any party who would have been discharged if he had paid the bill, are discharged by the holder's laches; but there is no decision in point. Chalmers, p. 253.

As to circumstances which would excuse delay in presentment for payment or non-presentment for payment to the drawee, see secs. 91 and 92.

CHAPTER XLIII.

Dishonour.

Subject to the provisions of the act, when a bill has been dishonoured by non-acceptance (sec. 81) or non-payment (sec. 95) notice of honour must be given to the drawer and to each endorser (sec. 96). The giving of notice is one of the duties of the holder. As to these duties generally, see notes at the beginning of chapter 41, *supra*.

Dishonour.

Non-payment or presentment.

95. A bill is dishonoured by non-payment,—

(*a*) when it is duly presented for payment and payment is refused or cannot be obtained; or,

Excuse.

(*b*) when presentment is excused and the bill is overdue and unpaid.

Recourse.

2. Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer, acceptor and endorsers accrues to the holder. 53 V., c. 33, s. 47. [Eng. s. 47. N.I.L. ss. 83 and 84.]

As to due presentment, see sec. 86.

As to the cases in which presentment is excused, see sec. 92.

The corresponding sections relating to dishonour by non-acceptance are secs. 81 and 82. They belong properly to this chapter.

Subject to the provisions of this act.

See secs. 147 to 155 in regard to acceptance and payment for honour, sec. 96 as to notice of dishonour, and secs. 112 ff. as to protest.

Default in payment of interest.

If a note is payable with interest and an instalment of interest comes due before the principal, *quaere* whether non-pay-

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ment of the interest constitutes dishonour of the note. See notes to sec. 70 and 72 and the case there cited of Union Investment Co. v. Wells, 1908, 39 S.C.R. 625.

Right of recourse and right of action.

Right of recourse and right of action on dishonour of bill.

Right of recourse must be distinguished from right of action. As against the acceptor, no notice of dishonour is necessary (sec. 96), and the holder's right of action accrues as soon as the bill is overdue. The word "acceptor" in sub-sec. 2 is not in the English act, but no change in the law appears to have been made by the insertion of the word in the Canadian act. The similar provision in regard to dishonour by non-acceptance (sec. 82) omits the word "acceptor."

As against the drawer and each endorser, subject to the provisions of the act, notice of dishonour must be given (sec. 96). The bill may be, and in certain cases must be, noted or protested (secs. 112 and 113).

As a general rule the holder's right of action against a drawer or endorser dates from the time when notice of dishonour is or ought to be received and not from the time when it is sent. Castrique v. Bernabo, 1844, 6 Q.B. 498, 2 Ames 818. Chalmers, p. 167.

At any time on the day when a bill is payable the holder of a bill may, immediately upon payment being refused by the acceptor, give notice of dishonour to the drawer and the endorsers (sec. 98). But the drawer and endorsers, as well as the acceptor, still have the whole of such day in which to pay the bill, and if payment is made subsequently on the same day, the payment is good and the notice of dishonour becomes of no avail. Kennedy v. Thomas, [1894] 2 Q.B. at pp. 764, 765.

Russell, pp. 302-3, points out that while the right of action is complete as against the acceptor on the expiration of the last day of grace, it may not be complete as against the drawer or endorser for some days or even weeks, if the interpretation is correct which Chalmers puts on the decision in Castrique v. Bernabo, *supra*.

In Kennedy v. Thomas, the English Court of Appeal decided that an action brought by the holder against the acceptor on the last day of grace must be dismissed as premature. In Upper Canada, however, the Court of Queen's Bench had previously held the contrary. Sinclair v. Robson, 1858, 16

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U.C.R. 211. Sinclair v. Robson was a case of a promissory note payable at a bank. The note was dishonoured and by virtue of a statute similar to the provision of sec. 121 (authorizing protest for non-payment on the day of dishonour at any time after three oclock) was protested for non-payment on the same day. The plaintiff, an endorsee, paid the note at three o'clock, and sued out a writ at five o'clock. Held that the action was not premature.

A similar question in regard to a bill of exchange came before a divisional court in Ontario in Edgar v. Magee, 1882, 1 O.R. 287. The case of Sinclair v. Robson was remarked upon but not overruled. One member of the court approved of it, one disapproved of it, and the third distinguished it on the ground that a cause of action would accrue upon a bill or note on the last day of grace provided it was presented at the place of payment on that day and payment refused. In the result it was held that a writ issued on the 1st December, 1881, upon a note falling due on 1st December, 1875, was not too late under the statute of limitations.

The rule was stated by the Judicial Committee in Trimble v. Hill, 1879, 5 App. Cas. 342, that where a colonial legislature has passed an act in the same terms as an imperial statute, and the latter has been authoritatively construed by the Court of Appeal in England, such construction should be adopted by the courts of the colony. This rule has not been always observed in Ontario. See McDonald v. Elliott, 1886, 12 O.R. 98, under the authority of which in Bank of Toronto v. McBean, 1900, 21 C.L.T. 44, Sinclair v. Robson was followed in preference to Kennedy v. Thomas. The rule has, however, since been applied in various cases. See Hollender v. Ffoulkes, 1894, 26 O.R. 1; McVity v. Trenmouth, 1905, 9 O.L.R. at p. 109; but see Toronto v. Toronto Ry. Co., 1905, 9 O.L.R. at p. 339, where it is suggested that owing to a provision in the Ontario Judicature Act the courts of Ontario must follow a decision of the Court of Appeal for Ontario notwithstanding any later expression of opinion in any English court, except the Judicial Committee itself; see also Hutt v. Hutt, 1911, 24 O.L.R. 574, at p. 582. As to the position of the Supreme Court of Canada in regard to English decisions, see Stuart v. Bank of Montreal, 1909, 41 S.C.R. 516, at p. 548.

It would appear therefore that Kennedy v. Thomas must be

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followed in preference to Sinclair v. Robson, unless the absence from the English act of any provision similar to that of sec. 121 referred to above constitutes a sufficient difference between the two statutes to take the case out of the rule laid down in Trimble v. Hill. Kennedy v. Thomas was followed in Westaway v. Stewart, 1908, 1 S.L.R. 200. Demers v. Rousseau, 1892, Q.R. 1 S.C. 440, is a decision to the same effect.

Accrues to the holder.

As to the rights of a holder, see the notes to sec. 74.

Limitations and prescription.

Limitation of action is usually governed by the law of the place where the action is brought: see chapter 50, *infra*.

Chalmers, pp. 322 ff., states and gives examples of the following rules as to the statute of limitations:

Rules as to limitation of action.

1. Subject to the case provided for by sec. 96 (*a*) and to rule 5, no action on a bill can be maintained against any party thereto after the expiration of six years from the time when a cause of action first accrued to the *then* holder against such party. Whitehead v. Walker, 1842, 9 M. & W. 506; Woodruff v. Moore, 1850, 8 Barb. (N.Y.) 171.

2. As against the acceptor, time begins to run from the maturity of the bill, unless,—

(1) Presentment for payment is necessary in order to charge the acceptor, in which case time (probably) runs from the date of such presentment (cf. sec. 93); or,

(2) The bill is accepted after its maturity, in which case time (probably) runs from the date of acceptance (cf. sec. 23).

3. As regards the drawer or an endorser, time (generally) begins to run from the date when notice of dishonour is received. Cf. Castrique v. Bernabo, 1844, 6 Q.B. 498, 2 Ames 818; and notes to sec. 82.

4. When an action is brought against a party to a bill, to enforce an obligation collateral to the bill, though arising out of the bill transaction, the nature of the particular transaction determines the period from which time begins to run.

5. Any circumstance which postpones or defeats the operation of the statute of limitations in the case of an ordinary contract postpones or defeats it in like manner in the case of a bill.

No endorsement or memorandum of any payment written or made upon a bill by or on behalf of the party to whom such payment is made is sufficient to defeat the operation of the statute. 9 G. 4, c. 14, s. 3. Sec. 95. Rules as to limitation of action.

96. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer, and each endorser, and any drawer or endorser to whom such notice is not given is discharged: Provided that,— Notice of dishonour.

(*a*) where a bill is dishonoured by non-acceptance, and due notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission; Subsequent holder.

(*b*) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill shall in the meantime have been accepted. Notice of non-payment.

2. In order to render the acceptor of a bill liable it is not necessary that notice of dishonour should be given to him. 53 V., c. 33, ss. 48 and 52. [Eng. ss. 48 and 52. N.I.L. ss. 89, 116 and 117.] Notice of acceptor.

Prior to 1906 sub-sec. 2 and sec. 109 formed one sub-section of a section which included the provisions of sec. 93 and sub-sec. 3 of sec. 85. There is no provision in the Negotiable Instruments Law corresponding to sub-sec. 2.

As to dishonour by non-acceptance, see sec. 81, and by non-payment, see sec. 95.

As to holder in due course, see sec. 56.

Secs. 97 ff. contain the rules regarding the time and manner of giving notice of dishonour, the persons by whom and to whom it should be given and the persons for whose benefit it enures.

Delay in giving notice may be excused (sec. 105), and notice may be dispensed with (secs. 106 to 108) under certain circumstances. Otherwise, notice of dishonour is essential to the holder's cause of action against the drawer or an endorser. Berridge v. Fitzgerald, 1869, L.R. 4 Q.B. 639, 4 R.C. 494.

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As to the drawer of a cheque if there are not sufficient funds at the bank, see the notes to sec. 107.

"Notice of dishonour" means notification of dishonour, *i.e.*, formal notice. Chalmers, p. 169. The fact that the drawer or endorser knows that it has been dishonoured does not dispense with the necessity for giving him notice. Miers v. Brown, 1843, 11 M. & W. 372; East v. Smith, 1847, 16 L.J.Q.B. 292; cf. In re Fenwick, Deep Sea Fishery Co.'s Claim, [1902] 1 Ch. 507.

Discharge of party by failure to give notice of dishonour

The discharge of a party to a bill must be distinguished from the discharge of the bill (cf. secs. 139 ff.)

An endorser of a bill who has not received due notice of dishonour is discharged; and if he then pays the bill, he does so in his own wrong, and cannot recover upon it against a prior endorser, although the latter receives notice of dishonour on the same day on which he would have received it if all the notices had been given in due course. Turner v. Leach, 1821, 4 B. & Ald. 451, 4 R.C. 523; cf. Savaria v. Paquette, 1899, Q. R. 20 S.C. 314.

Where a bill is endorsed when it is overdue, as regards such endorser, it is a bill payable on demand (sec. 23). Therefore the endorser is entitled to have it presented within a reasonable time and is entitled to notice of dishonour.

Even though an acceptance be qualified, the acceptor will not be entitled to notice. Byles, p. 276.

The maker of a note is not entitled to notice (cf. sec. 186), even though he be an accommodation maker to the knowledge of the holder. Hough v. Kennedy, 1910, 3 A.L.R. 114.

A person who has given a guarantee for the payment of a bill by the acceptor is not entitled to notice of dishonour. Walton v. Mascall, 1844, 13 M. & W. 72, 452, 4 R.C. 483. Carter v. White, 1883, 25 Ch. D. 666. See full discussion in Russell, pp. 304 ff. as to guarantors and other persons not parties to the bill.

A person who is not a party to a bill, but who is liable on the consideration for which it was given, is (probably) entitled to notice of dishonour, though the same strict and technical notice of dishonour would not apparently be required to charge such party as is requisite to charge a party liable on the bill. Chalmers, p. 187, and cases there cited.

A person who is discharged from the liability on a bill is

also discharged from liability on the consideration for which the bill was given. See notes to sec. 139 under "Payment by bill." Sec. 96. Discharge of party by failure to give notice of dishonour.

It has been held by the Court of Review in Quebec that an endorser *pour aval*, that is one who puts his name on the back of a bill before its endorsement by the payee (sec. 131) is liable without notice of dishonour or protest. Nicholson v. McKale, 1912, 5 D.L.R. 237, following Pratt v. MacDougall, 1868, 12 L.C.J. 515, 17 R.J.R.Q. 493, and other cases decided before the act; see also Merchants Bank of Canada v. Cunningham, 1892, Q.R. 1 Q.B. 33. But see, since the act, Emard v. Marcille, 1892, Q.R. 2 S.C. 525; Banque Jacques Cartier v. Gagnon, 1894, Q.R. 5 S.C. 499.

97. Notice of dishonour in order to be valid and effectual must be given,— Notice.

(*a*) not later than the juridical or business day next following the dishonour of the bill; Time for.

(*b*) by or on behalf of the holder, or by or on behalf of an endorser, who at the time of giving it, is himself liable on the bill; By holder or endorser.

(*c*) in the case of the death, if known to the party giving notice, of the drawer or endorser, to a personal representative, if such there is and with the exercise of reasonable diligence he can be found; Personal representative.

(*d*) in case of two or more drawers or endorsers who are not partners, to each of them, unless one of them has authority to receive notice for the others. 53 V., c. 33, s. 49. [Cf. Eng. s. 49 (1)(9)(11)(12). N.I.L. ss. 90, 98 to 104.] Two drawees.

Sec. 49 of the English act, re-enacted with some important modifications by sec. 49 of the Canadian act of 1890, contains fifteen rules in accordance with which notice of dishonour must be given in order to be valid and effectual. The revision of 1906 has effected a complete re-arrangement of the provisions of the old section and these provisions are now contained in secs. 97 to 104.

Clause (10) of the English section, which provides that

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"where the drawer or endorser is bankrupt, notice may be given either to the party himself or to the trustee," is omitted from the Canadian act.(*a*) Cf. notes to sec. 78.

The English and Canadian acts are different in respect to two other matters relating to notice of dishonour. One is noted under sec. 103; the other concerns the time when notice must be given.

Time for notice of dishonour.

Both acts provide that the notice may be given as soon as the bill is dishonoured (sec. 98). In Canada, however, the notice must be given not later than the juridical or business day next following the dishonour of the bill, while in England it must be given "within a reasonable time thereafter."(*b*) The English act further provides that "In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless,—

(*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill;

(*b*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter."

These provisions of the English act simply express the law as clearly laid down in the old cases (see *e.g.*, Smith v. Mullett, 1809, 2 Camp. 208, 2 Ames 380, and Bray v. Hadwen, 1816, 5 M. & S. 68. See the matter fully discussed in Studdy v. Beesty, 1889, 60 L.T. 647, at p. 648, 4 R.C. at p. 500. See also notes to secs. 105 (excuse for delay in giving notice of dishonour) and 106 (notice dispensed with).

Any hardship which might result from the application of the absolute requirement of the Canadian act that notice of dishonour must be given not later than the juridical or business day next following the dishonour of the bill is avoided by the provisions of sec. 103. That section permits notice of dis-

(*a*) The Negotiable Instruments Law, sec. 101, contains a similar provision to that of the English act.

(*b*) The Negotiable Instruments Law, sec. 102, provides that, unless delay is excused as thereinafter provided, notice must be given within the times fixed by the act. Then follow (secs. 103-4) special provisions somewhat similar to, but more detailed than, those of the English act.

honour of any bill payable in Canada to be given by post, and provides that the notice is sufficient if addressed to any party at the place at which the bill is dated unless any such party has, under his signature, designated another place, in which case such notice is sufficiently given if addressed to him at such other place. By sec. 104, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office. Sec. 97. Time for notice of dishonour.

If a bill is payable out of Canada, the necessity for and sufficiency of notice of dishonour is determined by the law of the place where the bill is dishonoured (sec. 162), and therefore sec. 97 would not apply. See Fleming v. McLeod, 1907, 39 S.C.R. 290.

As to what are juridical or business days, see secs. 2 and 43.

Although notice of dishonour need not be given until the following day, protest where necessary (secs. 112 and 113) must be made or noted on the day the bill is dishonoured (sec. 119).

A person who gives notice to a remote party must give notice within the same time as is limited for giving notice to an immediate party. Rowe v. Tipper, 1853, 13 C.B.N.S. 249, 2 Ames 385. If the holder does not give notice to a remote party in due time, he cannot rely upon his own notice, but if he has given due notice to his immediate endorser, but not to remote parties, his right as against the remote parties may yet be saved by due notice given by his immediate endorsers (cf. secs. 101 and 102). Chalmers, p. 177. Notice to remote party.

By whom notice must be given.

The Negotiable Instruments Law, sec. 90, provides that the notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

Where the attorney duly authorized by the holder has given notice, but by mistake states it as given by the authority of an endorser who is also liable on the bill, the notice was held good, as there was in fact notice authorized by a competent person, and the mistake could not mislead—the notice being good on its face. Harrison v. Ruscoe, 1846, 15 M. & W. 231, By whom notice must be given.

Sec. 97. By whom notice must be given.

2 Ames 373. It is observed in this case that an acceptor, as he himself could not sue upon the bill after taking it up, is excluded from the category of persons who can give notice, and that the instances in which a notice by an acceptor has been held to be good at *nisi prius, e.g.*, Rosher v. Kieran, 1814, 4 Camp. 87, 2 Ames 418, are explained in Bayley on Bills on the supposition that in those cases the acceptor had a special authority to give notice. Cf. Byles, p. 276.

When a bill is presented for payment through the post office (sec. 90), the acceptor is deemed to be the agent of the holder for the purpose of giving notice of dishonour. Cf. Bailey v. Bodenham, 1864, 33 L.J.C.P. at p. 255; Prideaux v. Criddle, 1869, L.R. 4 Q.B. at p. 461; Heywood v. Pickering, 1874, L.R. 9 Q.B. 428. If the holder does not promptly get an answer from the drawee, it would be prudent for him at once to give notice of dishonour himself. Chalmers, p. 171.

Cf. sec. 98, as to notice given by an agent.

A bill endorsed by C. and held by D. is dishonoured. E., who was at one time employed by the drawer to get the bill discounted, but who is not in any way acting on D.'s behalf, informs C. that the bill has been dishonoured. This is not sufficient; C. is discharged. Stewart v. Kennett, 1809, 2 Camp. 177, 2 Ames 416; cf. East v. Smith, 1847, 16 L.J.Q.B. 292. C. is the first endorser of a dishonoured bill held by D. D. gives notice to C. one day late. C. on the *same* day gives notice to the drawer; thus, as it were, making up the lost day. This notice is ineffectual; for C., having been discharged by the holder's delay, is a mere stranger. Turner v. Leech, 1821, 4 B. & Ald. 451; 4 R.C. 523. Chalmers, p. 170.

Death of drawer or endorser.

Clause (*c*) is probably declaratory, although there is no English decision in point. It has been held in New York that notice sent to an endorser in ignorance of his death is sufficient. The act appears to affirm this view. Chalmers, p. 176.

Notice if drawer or endorser dead.

The Negotiable Instruments Law, sec. 98, adds: "If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased." Under the Canadian act, as under the English act, the joint effect of clause (*c*) of sec. 97 and sec. 106 would appear to be to dispense with notice altogether where there is no personal

representative or none can, with reasonable diligence, be found. Byles, p. 279. Sec. 97.

But notice of dishonour of a bill payable in Canada is not invalid by reason only of the fact that the party to whom it is addressed is dead, provided it has been addressed and posted as provided in sec. 103.

Partners.

The Negotiable Instruments Law, sec. 99, provides that where the parties notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

98. Notice of dishonour may be given,— Notice.

(*a*) as soon as the bill is dishonoured; Earliest time.

(*b*) to the party to whom the same is required to be given, or his agent in that behalf; To whom.

(*c*) by an agent either in his own name or in the name of any party entitled to give notice whether the party is his principal or not; By agent.

(*d*) in writing or by personal communication and in any terms which identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment. Manner.

2. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. 53 V., c. 33, s. 49. [Eng. s. 49 (2) (5) (7) (8) (12). N.I.L. ss. 91, 95, 96, 97 and 102.] Misdescription.

As soon as the bill is dishonoured.

Notice must be given not later than the juridical or business day next following the dishonour of the bill (sec. 97).

To the party or his agent.

A. and his wife endorse a note given as one of a series of renewals during some years under an agreement of which the husband had knowledge. A.'s wife has no personal knowledge of the transaction, and leaves the matter entirely to A., simply endorsing as she is directed. A notice of dishonour given to A. is a good notice to his wife. Counsell v. Livingstone, 1902, 4 O.L.R. 340.

Sec. 98. Notice to the party or his agent.

It is the duty of the drawer or endorser of a bill, if he be absent from his place of business or residence, to see that there is some person there to receive notice on his behalf. Cf. Allen v. Edmundson, 1848, 2 Ex. at p. 723; see Chalmers, p. 175, giving the following illustrations (so far as they are taken from the English reports) of notice to an agent:—

C. is the endorser of a bill which is dishonoured. Verbal notice to his solicitor is not sufficient. Crosse v. Smith, 1813, 1 M. & S. at p. 554.

D., who has authority to endorse for C., endorses a bill in C.'s name. Notice of dishonour given to D. is (perhaps) sufficient. Cf. Firth v. Thrush, 1828, 8 B. & C. at p. 391.

The drawer of a bill is a non-trader. Verbal notice of dishonour given to his wife at his house, in his absence, may be sufficient. Housego v. Cowne, 1837, 2 M. & W. 348; cf. Wharton v. Wright, 1844, 1 C. & K. 585 But delivery of notice to a man cutting wood in the yard is insufficient, there being no evidence that the man was an inmate of the family. Commercial Bank v. Weller, 1848, 5 U.C.R. 543.

The endorser of a bill is a merchant. Notice of dishonour, verbal or written, given to or left with a clerk at his office is sufficient. Allen v. Edmundson, 1848, 2 Ex. at p. 724; cf. Viale v. Michael, 1874, 30 L.T.N.S. 453.

C. endorses a bill "in need at Messrs. D. & Co." Notice of dishonour given to D. & Co. is not sufficient to charge C. In re Leeds Bank, ex parte Prange, 1865, L.R. 1 Eq. at p. 5.

The question of notice to an agent is discussed by Russell, pp. 315-317.

By an agent, etc.

See Harrison v. Ruscoe, cited under sec. 97.

Where a note endorsed in blank is left at a bank for collection, notice of dishonour may be given by the bank, although it has no interest in the note. Howard v. Goddard, 1860, 4 Allen (N.B.) 452; cf. Wilson v. Pringle, 1856, 14 U.C.R. 230.

C. the endorser of a bill, holds it as agent for the endorsee. C. presents it for payment, and it is dishonoured Notice of dishonour given by C. in his own name is sufficient. Lysaght v. Bryant, 1850, 9 C.B. 46. Cf. Byles, p. 276.

Clause (d)—form of notice.

As to form, see also sec. 99.

This clause originally ended with the words, "and that the

party to whom notice is given is held liable." These words were struck out of the English bill in committee. Notices of dishonour are now construed very liberally. In 1834 the House of Lords, in Solarte v. Palmer, 1834, 1 Bing. N.C. 194, decided that the notice must inform the holder, either in terms or by necessary implication, that the bill had been presented and dishonoured. This inconvenient decision was frequently regretted (see *e.g.*, Everard v. Watson, 1853, 1 E. & B. at p. 804), and was eventually got rid of by considering it merely as a finding on the particular facts. Paul v. Joel, 1858, 27 L.J. Ex. at p. 384. Since 1841 (see Furse v. Sharwood, 1841, 2 Q.B. 388, where the notice would now probably be sufficient) it does not appear that any written notice of dishonour has been held bad on the ground of insufficiency in form. Chalmers, p. 173. See Counsell v. Livingstone, 1902, 2 O.L.R. 582, 4 O.L.R. 340, where some of the authorities are reviewed. In that case the following notice was held to be sufficient: "I beg to advise you that Mr. L.'s note for $3,500 in your favour and endorsed by yourself and wife and held by our estate was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand."

Sec. 98.

Form of notice of dishonour.

Chalmers, pp. 172-3, gives the following examples of written notices which have been held to be sufficient:

1. I give notice that a bill, etc. (described), endorsed by you, lies at 1 B. Street, dishonoured. King v. Bickley, 1842, 2 Q.B. 419.

2. B.'s acceptance due to-day is unpaid and your immediate attention to it is requested. Cf. Bailey v. Porter, 1845, 14 M. & W. 44; Paul v. Joel, 1858, 27 L.J. Ex. 380, 1859, 28 L.J. Ex. 143.

3. Your draft which became due yesterday is unpaid. Unless the same is paid immediately I shall take proceedings. Noting 5s. Armstrong v. Christiani, 1848, 5 C.B. 687; Everard v. Watson, 1853, 1 E. & B. 801.

Express notice that a bill has been protested, if protest be necessary, is not required. Ex parte Lowenthal, 1874, L.R. 9 Ch. 591.

An insufficient written notice may be supplemented and validated by oral communication and a written notice need not be signed (sec. 99).

Sec. 98.

Personal communication.

The holder's clerk goes to the drawer and tells him that his bill has been presented, and that the acceptor cannot pay it. The drawer replies that he will see the holder about it. This may be sufficient. Metcalfe v. Richardson, 1852, 11 C.B. 1011; cf. Housego v. Cowne, 1837, 2 M. & W. 348, notice to drawer's wife.

The Negotiable Instruments Law, sec. 96, provides that the notice may be in writing or "merely oral."

Misdescription of bill.

A notice may be sufficient although it misdescribes the bill in the following respects, namely, one which describes the bill as payable at the A. bank, when in fact it was payable at the B. Bank (Bromage v. Vaughan, 1846, 16 L.J. Q.B. 10), or which describes a bill as a note (Stockman v. Parr, 1843, 11 M. & W. 809; Bain v. Gregory, 1866, 14 L.T.N.S. 601), or which transposes the names of drawer and acceptor (Mellersh v. Rippen, 1852, 7 Ex. 578), or which describes the acceptor by a wrong name (Harpham v. Child, 1859, 1 F. & F. 652), or which contains an error as to the amount of the bill (Thompson v. Cotterell, 1854, 11 U.C.R. 185), or its due date (Cassidy v. Mansfield, 1874, 24 U.C.C.P. 383). Chalmers, p. 174; cf. Byles, pp. 265-6.

Form.

Return of bill.

Signature.

Verbal supplement.

99. In point of form,—

(*a*) the return of a dishonoured bill to the drawer or an endorser is a sufficient notice of dishonour;

(*b*) a written notice need not be signed.

2. An insufficient written notice may be supplemented and validated by verbal communication. 53 V., c. 33, s. 49. [Eng. s. 49 (6) (7). N.I.L. s. 95.]

As to form of notice, cf. sec. 98.

Clause (*a*) approves a common practice of collecting bankers which was previously of doubtful validity. Chalmers, p. 174. The clause is omitted from the Negotiable Instruments Law.

The usual and natural practice of collecting bankers would seem to be to return the bill or cheque to their own customer. If, however, the instrument be made, or has become, payable to bearer, the customer is not within the clause, unless en-

dorsement for collection be sufficient to constitute the customer an endorser within it. Byles, p. 267. Sec. 99.

A written notice need not be signed, but it must come from a person entitled to give notice (secs. 97 and 98).

In Maxwell v. Brain, 1864, 10 L.T.N.S. 301, an unsigned notice was held sufficient, but it was written upon the sender's letter-head.

Russell, p. 320, quotes Paget's opinion to the effect that a telegraphic notice of dishonour is sufficient. See also Fielding v. Corry, [1898] 1 Q.B. 268, in the notes to sec. 100.

Supplementing written notice.

The sufficiency or insufficiency of the notice is a question of fact. Houlditch v. Carty, 1838, 4 Bing. N.C. 411.

A notice may be by personal communication (sec. 98).

A notary's clerk takes a bill, with the notary's ticket attached, to the drawer's office, and shews it to a clerk there. The clerk looks at it, says the drawer is out and has left no orders. The notary then leaves the usual notice that the bill is due at his office. This may be sufficient. Viale v. Michael, 1874, 30 L.T.N.S. 453; cf. East v. Smith, 1847, 16 L.J.Q.B. 292; Chard v. Fox, 1849, 14 Q.B. 200; Jennings v. Roberts, 1855, 24 L.J.Q.B. 102. Chalmers, p. 174.

100. Where a bill when dishonoured is in the hands of an agent he may himself give notice to the parties liable on the bill, or he may give notice to his principal, in which case the principal upon receipt of the notice shall have the same time for giving notice as if the agent had been an independent holder. Notice to agent.

2. If the agent gives notice to his principal he must do so within the same time as if he were an independent holder. 53 V., c. 33, s. 49. [Cf. Eng. s. 49 (13). N.I.L. s. 94.] Time for.

This section was not improved in the revision of 1906. In addition to a re-arrangement of the sub-clauses, the phrase "in which case" has been—not very happily—substituted for "if he gives notice to his principal."

As to the time for giving notice under the Canadian act, see sec. 97.

Chalmers, pp. 178-9, gives the following illustrations:

Sec. 100. Notice when bill dishonoured in hands of agent.

1. A bill payable in London is endorsed in blank by the holder, and deposited with a country banker for collection. The country banker's London agent presents if for payment and gives him due notice of its dishonour. The country banker on the day after the receipt of such notice gives notice to his customer, who in turn gives similar notice to his endorser. The endorser has received due notice. Bray v. Hadwen, 1816, 5 M. & S. 69; cf. Firth v. Thrush, 1828, 8 B. & C. 387. Cf. Byles, p. 274.

2. C. endorses a bill to the Liverpool branch of the D. Bank. The Liverpool branch sends it to the Manchester branch, and the latter endorses it to the head office in London, which presents it for payment. The head office sends notice of dishonour to the M. branch, the M. branch sends notice to the L. branch, which gives notice to C. Each branch as regards time is to be considered a distinct party. Clode v. Bayley, 1843, 12 M. & W. 51, approved Prince v. Oriental Bank, 1878, 3 App. Cas. at p. 332; cf. Steinhoff v. Merchants Bank, 1881, 46 U.C.R. 25, 35.

3. B. at London pays a bill *supra* protest for the honour of C., an endorser, who resides at Bruges, and the same day posts the bill to C. C. by return of post sends the bill back to B., who at once gives notice of dishonour to the drawer. Although six days have elapsed since the dishonour, the notice is in time, and B. can sue the drawer. Goodall v. Polhill, 1845, 14 L.J.C.P. 146.

4. A bill bearing several endorsements is sent to a branch bank for collection. The branch bank forwards it to a London bank, which on the day of the dishonour of the bill gives notice by error to another branch of the forwarding bank. Next day notice is sent to the right branch by wire, and the subsequent notices of dishonour are given in due time. The first endorser of the bill cannot rely on the defence that the first notice of dishonour was out of time. Fielding v. Corry, [1898] 1 Q.B. 268, C.A. As to this decision, see Byles, p. 274. It appears to go the length of saying that notice is good if it reaches the party to whom it is addressed on the same day as a notice posted on the proper day would have reached him.

Notice to antecedent parties.

101. Where a party to a bill receives due notice of dishonour he has, after the receipt of such notice, the same period of

time for giving notice to antecedent parties that a holder has after dishonour. 53 V., c. 33, s. 49. [Eng. s. 49 (14). N.I.L. s. 107.]

Sec. 101. Notice to antecedent parties.

Cf. notes to sec. 100.

The holder must give notice not later than the juridical or business day next following the dishonour of the bill (sec. 97).

As to the persons for whose benefit the notice accrues, see sec. 102.

The judgment of Brett, L.J. in Horne v. Rouquette, 1878, 3 Q.B.D. 514 (quoted in part in the notes to sec. 102) contains an exposition of the duties of successive endorsers according to the law of England in regard to giving notice of dishonour. This must be read with due regard to the difference between the English and Canadian acts in regard to the time which the holder has for giving notice (see notes to sec. 97). It has been laid down, as a rule of practice in England, that each party should be allowed one entire day for the purpose of giving notice. Bray v. Hadwen, 1816, 5 M. & S. 68. In Canada each party would be allowed until the end of the juridical or business day next following the receipt by him of due notice of dishonour.

If the holder, according to the usual custom in Canada, gives notice to all parties, he must give notice to a remote party within the same time as is limited for giving notice to an immediate party: cf. notes to sec. 97. It is the safest course for the holder to give notice himself to all the parties against whom he may wish to proceed. Cf. Byles, p. 277.

102. A notice of dishonour enures for the benefit,— Benefit enures.

(*a*) of all subsequent holders and of all prior endorsers who have a right of recourse against the party to whom it is given, where given on behalf of the holder;

(*b*) of the holder and of all endorsers subsequent to the party to whom notice is given, where given, by or on behalf of an endorser entitled under this Part to give notice. 53 V., c. 33, s. 49. [Eng. s. 49 (3)(4). N.I.L. ss. 92 and 93.] Parties to whom.

A notice of dishonour may be given by or on behalf of the holder, or by or on behalf of an endorser who at the time of giving it, is himself liable on the bill (sec. 97).

Sec. 102.

The holder of a bill is entitled to avail himself of notice of dishonour given by any party to a bill (Chapman v. Keane, 1835, 3 A. & E., 193, 4 R.C. 490), provided such party is himself liable on the bill. Harrison v. Ruscoe, 1846, 15 M. & W. 234, 236; Lysaght v. Bryant, 1850, 9 C.B. 46.

Duties of successive endorsers as to notice of dishonour.

If there are several endorsements and the bill is dishonoured in the hands of the last endorsee, such last endorsee, the holder, must give notice of dishonour. He may give it either only to his immediate endorser, or only to the drawer, or to these and to all the intermediate endorsers. Whatever notice he gives he must give at once, *i.e.*, within the time limited for giving notice to his immediate endorsee (sec. 97). Each endorser, as he receives notice, must, if he would preserve his remedy over, give notice to his endorser, or to all above him, within a similar period after he has himself received notice (sec. 101). If all give due notice, each can recover against his immediate endorser or against any endorser whose name is before his on the bill. But if any one fails to give due notice, no one whose name is before his on the bill is liable to pay him, nor are prior parties liable to pay each other. If those below him, who have failed to give due notice, have given notice only to him, or to each in succession up to him, they cannot recover from any one above him: otherwise if they have given a direct notice to those above him. Horne v. Rouquette, 1878, 3 Q.B.D. at p. 517. See also Russell, pp. 321 ff. Usually, however, the holder gives notice to all prior parties, and thus makes it unnecessary for intermediate parties to give notice to those prior to them respectively.

Sufficiency of giving.

103. Notice of the dishonour of any bill payable in Canada shall, notwithstanding anything in this act contained be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice, at his customary address or place of residence or at the place at which such bill is dated, unless any such party has, under his signature, designated another place, in which case such notice shall be sufficiently given if addressed to him in due time at such other place.

Sufficiency of notice.

2. Such notice so addressed shall be sufficient, although the place of residence of such party is other than either of the places

aforesaid, and shall be deemed to have been duly served and given for all purposes if it is deposited in any post office, with the postage paid thereon, at any time during the day on which presentment has been made, or on the next following juridical or business day. Sec. 103.

3. Such notice shall not be invalid by reason only of the fact that the party to whom it is addressed is dead. 53 V., c. 33, s. 49. [Cf. N.I.L. s. 108.] Death of party.

This section is not in the English act. Cf. R.S.C., 1886, c. 123, secs. 5 and 23, and C.C. Lower Canada, art. 2328.

The Negotiable Instruments Law, sec. 108, provides in effect that where a party has added an address to his signature, notice of dishonour must be sent to that address, but that if he has not given such address, notice must be sent to the post office nearest to his place of residence or to the post office where he is accustomed to receive his letters, or to his place of business, or to his place of residence or the place where he is sojourning; but that if the notice is actually received by him within the time specified in the act, it will be sufficient, though not sent in accordance with the requirements of this section. Address of notice of dishonour.

Notice of dishonour in Canada must be given not later than the juridical or business day next following the dishonour of the bill (sec. 97), whereas in England notice need be given only within a reasonable time thereafter (see notes to sec. 97 where the English provision is set out in full). Sec. 103 provides a safe and comparatively easy method of giving notice by post of the dishonour of any bill payable in Canada. If a party to a bill does not take the precaution of designating under his signature a sufficient address, the notice may never reach him, but will be good nevertheless, although it is addressed to him only at the place where the bill is dated or at such party's customary address or place of residence.

Under the English act, where the holder does not know the endorser's address, he must exercise due diligence in searching for him (cf. notes to sec. 106). If the endorser has held out a place of business as his own, notice may be addressed to him there (Berridge v. Fitzgerald, 1869, L.R. 4 Q.B. 639, 4 R.C. 494), and where a person drew a bill dating it generally "London," it was held that proof of a letter containing the notice

Sec. 103. Address of notice of dishonour.

of dishonour having been put into the post office addressed to the drawer at "London" was evidence of notice, on the ground that he must be taken to have said, "London is the place where I shall be found." Clarke v. Sharpe, 1838, 3 M. & W. 166; cf. Burmester v. Barron, 1852, 17 Q.B. 828. Cf. Byles, p. 269; Russell, pp. 325 ff.

In Canada if the bill is not dated at any place, and the actual or customary address or place of business of the endorser or person to receive notice is not known to the holder or other person who has to give notice, the latter must exercise due diligence to find the endorser. If by due diligence the holder cannot give notice within the time limited by sec. 97, the delay in giving notice is excused (see notes to sec. 106).

A notice addressed to an endorser at his place of residence and posted in due time in accordance with the act is sufficiently given, although there is no local delivery by letter carriers in the town. Merchants Bank v. McNutt, 1883, 11 S.C.R. 126.

"Under his signature" in the section does not mean "below his signature," but means that the address shall be written so that the signature covers it. If a wrong address of an endorser is written in pencil under his name, and no proof is given as to who wrote it, a notice sent to such address, not being the place where the instrument is dated, is insufficient. Banque Jacques Cartier v. Gagnon, 1894, Q.R. 5 S.C. 499.

Nor does "under his signature" mean that the name of the place must be written by the party's own hand; it may be written by another person if that other person has in any way any kind of authority from the party to write it. Where a place has been so designated by any party, a notice sent to the party at such place is sufficient, even if the person giving the notice knows or has reason to think that such place is not the party's place of residence or place of business. Hay v. Burke, 1889, 16 O.A.R. 463.

In Baillie v. Dickson, 1882, 7 O.A.R. 749, the signature of an endorser was so peculiar that no one unacquainted with it could decipher it, although the holder of the instrument was well acquainted with the signature, but omitted to communicate the name to the notary. The notary made, as near as might be, a *facsimile* of the signature, and so addressed the notice to the endorser's correct address, but the endorser swore that the notice never reached him. It was held that the

endorser was discharged. See, however, Byles, p. 269, to the effect that if the notice miscarry from the indistinctness of a party's handwriting on the bill, he will not be discharged (citing Hewitt v. Thomson, 1836, 1 Moo. & R. 543).

Sec. 103. Address of notice of dishonour.

The statute declares the notice to be sufficient if it is deposited in the post office "at any time during the day." A notice mailed in the post office between eight and nine in the evening of the day after dishonour is sufficient, although it is stamped by the postmaster only on the following day and with the post mark of that day. Wilson v. Pringle, 1856, 14 U.C.R. 230; cf. Union Bank v. McKilligan, 1887, 4 Man. R. 29.

A notice addressed and posted as provided in this section is good notwithstanding any miscarriage by the post office (sec. 104.)

A notice so addressed and posted is also good, although the party to whom it is addressed is dead. *Quære* whether subsec. 3 is to be subject to clause (*d*) of sec. 97. If the death of the drawer or an endorser is known to the person giving notice of dishonour, it would be prudent to give notice to a personal representative, if such there is and with the exercise of reasonable diligence he can be found. Cf. Cosgrave v. Boyle, 1881, 6 S.C.R. 165; Russell, p. 314.

This section applies only to bills payable in Canada. The case of the dishonour of a bill payable out of Canada will be governed by the law of the place where the bill is dishonoured (see sec. 162).

104. Where a notice of dishonour is duly addressed and posted, as provided in the last preceding section, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office. 53 V., c. 33, s. 49. [Eng. s. 49 (15). N.I.L. ss. 105, 106.]

Miscarriage in post service.

The corresponding sections of the English act and of the Negotiable Instruments Law omit the words "as in the last preceding section provided." These words were substituted in the revision of 1906 for the words "as above provided," which were inserted in the Canadian bill of 1890 in the Senate and were intended to refer to the provision of sec. 103 with regard to depositing the notice of dishonour in the post office "with the postage paid thereon." See Debates, House of Commons, 1890, col. 4263.

Sec. 104. Miscarriage in post service.

It is not clear however that the words "as provided in the last preceding section" do not qualify "addressed" as well as "posted." If they do, then sec. 104 must be confined to a notice which falls within the provisions of sec. 103, and does not apply to a case where a notice is addressed to the endorser at the place where he is in fact, but not being an address expressly authorized by sec. 103, and is lost in the post office. Such a case, if the words in question are to be so construed, is not provided for by the act and would have to be decided according to the common law of England (sec. 10). The English section appears, however, to be declaratory of the common law. Woodcock v. Houldsworth, 1846, 16 M. & W. 124, delay; Mackay v. Judkins, 1858, 1 F. & F. 208, loss; Renwick v. Tighe, 1860, 8 W.R. 391, loss; Chalmers, p. 171.

The Negotiable Instruments Law, sec. 106, provides that notice is deemed to have been deposited in the post-office when deposited in any branch office or in any letter box under the control of the post-office department. Doubtless this would be so under the Canadian act.

Excuse for delay.

105. Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence.

Diligence.

2. When the cause of delay ceases to operate the notice must be given with reasonable diligence. 53 V., c. 33, s. 50. [Eng. s. 50 (1). N.I.L. s. 113.]

The old rule was that notice must be given (1) before action brought and (2) within a reasonable time after dishonour. The English act has simply codified the law in this respect. See notes to sec. 97; Studdy v. Beesty, 1889, 60 L.T.N.S. 647, 4 R.C. 498.

If the cause of delay arises from circumstances beyond the control of the party giving notice and not imputable to his default, misconduct or negligence he is excused for not giving it within what in other circumstances is held to be reasonable time. But if the cause of delay ceases to operate before action brought the notice must then be given with reasonable diligence.

The cause of delay only excuses the delay, it does not dispense with notice altogether, because under sec. 106, unless

notice is waived, it is dispensed with only when after the exercise of reasonable diligence, notice as required by the act, (*i.e.*, notice before action brought), cannot be given to, or does not reach, the drawer or endorser sought to be charged. So, where the holder attempted to give notice at the time of the dishonour, but had not been able to find the drawer, it was held that the delay was excused, but that, having subsequently, before action brought, learned the drawer's address, he was bound to give him notice with reasonable diligence and was not entitled to sue him before giving notice. This was also the law before the passing of the act. Studdy v. Beesty, *supra;* cf. The Elmvale, [1904] P. 319.

Sec. 105. Causes which excuse delay do not dispense with notice.

In applying this state of law to a bill dishonoured in Canada, it must be borne in mind that, as a consequence of the provisions of sec. 103, it will rarely happen that there can be any excuse for not giving notice within the time limited by sec. 97, on the ground that the person to receive notice cannot be found. But even on that ground, delay in giving notice may be excused in a case which does not fall within sec. 103, and in that event the English common law rule may apply. If delay is excused, due notice must still be given, *i.e.*, it must be given with reasonable diligence, after the cause of delay ceases to operate and before action brought.

Delay may also be excused on other grounds than inability to ascertain the address of the person to receive notice, *e.g.*, an accident to the person making out the notice, or taking it to the post office, or the death or sudden illness of the holder or his agent who has the bill. Cf. Rothschild v. Currie, 1841, 1 Q.B. at p. 47. Cf. Byles, p. 282.

As to causes excusing delay, cf. sec. 91 (presentmen for payment), sec. 111 (protest).

Delay caused by miscarriage by the post office is excused (sec. 104).

When the delay is caused by the negligence of the party to whom notice is sent, it is conceived that, though that party is liable, he cannot give an effectual notice to antecedent parties. Chalmers, p. 180; cf. Shelton v. Braithwaite, 1841, 8 M. & W., at pp. 254, 255.

Dispensed with.

106. Notice of dishonour is dispensed with,—

Reasonable diligence.

(*a*) when after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or endorser sought to be charged;

Waiver.

(*b*) by waiver express or implied.

Time of.

2. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice. 53 V., c. 33, s. 50. [Eng. s. 50 (2) (*a*) (*b*). Cf. N.I.L. ss. 109 and 112.]

As to the necessity for notice of dishonour if not dispensed with, see sec. 96.

Dispensation with notice of dishonour must be distinguished from excuse for delay in giving notice (sec. 105).

Under clause (*a*), it must be shewn that notice could not have been given or did not reach the drawer, etc., by the exercise of due diligence at any time prior to action brought (see notes to sec. 105).

This section deals with dispensation with notice from causes arising subsequently to the negotiation of the bill. Notice may also be dispensed with by the circumstances arising from the relation of the parties to the bill or otherwise existing at the time the contracts on the bill are made (secs. 107 and 108).

Notice of dishonour is dispensed with in some cases where presentment for payment is not (cf. sec. 92).

Waiver.

Cf. notes to sec. 92 (*e*).

The drawer of a bill and any endorser may insert therein an express stipulation waiving as regards himself some or all of the holder's duties (sec. 34).

Waiver of notice of dishonour in favour of the holder enures for the benefit of parties prior to such holder as well as subsequent holders (Rabey v. Gilbert, 1861, 30 L.J. Ex. 170), but does not affect parties liable prior to the endorser who waives notice. Turner v. Leach, 1821, 4 B. & Ald. 451, 4 R.C. 523. Waiver of notice of dishonour may not include a waiver of presentment for payment. Keith v. Burke, 1885, C. & E. 551. Chalmers, p. 183.

Waiver of notice.

Waiver of notice may be implied from an admission of liability or from a promise to pay. An admission of liability

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may be evidence of due notice having been given or evidence of waiver of notice. So with a promise to pay. "A promise to pay may operate either as evidence of notice of dishonour, or as a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired (inasmuch as notice may be given at any time within the limits prescribed by law), a promise to pay is always evidence from which a jury may infer due notice. But even where the other evidence is conclusive to shew that the notice has not been given, or when a jury refuses to draw the inference that it was given, yet a promise to pay made within the time for giving notice is a dispensing with notice, and made after that time is a waiver of notice . . . The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour." Cordery v. Colville, 1863, 14 C.B.N.S. 374; cf. Britton v. Milsom, 1892, 19 O.A.R. 96, and cases cited; McLaurin v. Seguin, 1897, Q.R. 12 S.C. 63; cf. Byles, p. 283.

The drawer of a bill tells the holder before it is due that he has no fixed residence, and that he will call in a few days to see if the acceptor has paid the bill. This waives notice. Phipson v. Kellner, 1815, 4 Camp. 285; cf. Burgh v. Legge, 1839, 5 M. & W. 418. The drawer of a bill informs the holder that it will not be paid on presentment. This (probably) waives notice (Brett v. Levett, 1811, 13 East, at p. 214), but the fact that the drawer or endorser sought to be charged has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for giving him notice of dishonour. Carew v. Duckworth, 1869, L.R. 4 Ex. at p. 319. Chalmers, pp. 181, 183.

If the promise or acknowledgment be made under a misapprehension of *fact*, as, if the bill had been presented for acceptance, and acceptance has been refused, a promise to pay, in ignorance of the circumstances, is no waiver of the consequence of *laches*. Blesard v. Hirst, 1770, 5 Burr. 2670, 2 Ames 109; Goodall v. Dolley, 1787, 1 T.R. 712. But a promise to pay will entirely dispense with proof of presentment or notice, and will throw on the defendant the double burden of proving *laches*, and that he was ignorant of it. Taylor v. Jones, 1809, 2 Camp. 105; Stevens v. Lynch, 1810, 12 East, 38. Byles, p. 283.

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In the Scotch case of MacTavish's Judicial Factor v. Michael's Trustees, [1912] S.C. 425, a bill was not presented for payment at maturity nor was notice of dishonour given. After the bill was due, a payment on account was made by the endorser, under the erroneous belief that she was not an endorser but a joint acceptor and so liable to pay. In an action for payment of the balance due under the bill, it was held that the presumption, arising from the payment on account, that the endorser had waived the statutory requirements, had been rebutted by proof that the payment had been made in error, and that the endorser was discharged.

Dispensed with.

107. Notice of dishonour is dispensed with as regards the drawer where,—

Same person.

(*a*) the drawer and drawee are the same person;

Fictitious person.

(*b*) the drawee is a fictitious person or a person not having capacity to contract;

Presented to drawer.

(*c*) the drawer is the person to whom the bill is presented for payment;

No obligation.

(*d*) the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill;

Countermand.

(*e*) the drawer has countermanded payment. 53 V., c. 33, s. 50. [Eng. s. 50 (2) (*c*). Cf. N.I.L. s. 114.]

See notes to sec. 106.

As to clauses (*a*) and (*b*), see the notes to sec. 26. The holder may treat the drawer as the maker of a note and as such not entitled to notice. The term "fictitious person" is fully discussed in the notes to sec. 21, sub-sec. 5; cf. notes to sec. 108.

When notice dispensed with.

Russell, p. 335, puts the question whether clause (*c*) is intended to apply merely to a case in which the bill is properly presented to the drawer for payment, as, for instance, if he is the personal representative of the deceased acceptor (cf. Caunt v. Thompson, cited in the notes to sec. 108), or whether the clause will be construed so as to dispense with notice in every case in which the bill has been presented to the drawer. As Russell points out, the latter construction is the literal one, and it may be adopted in view of the manner in which the House of Lords in Bank of England v. Vagliano, [1891] A.C. 107, treated sub-sec. 5 of sec. 21.

The Negotiable Instruments Law, sec. 114, in place of clause (*d*), has the words, "the drawer has no right to expect or require that the drawee or acceptor will honor the instrument." Sec. 107. When notice dispensed with.

Clause (*d*) of sec. 107, as it stood originally in the English bill of 1882, had the additional words "and the drawer has no reason to expect that it will be honoured on presentment," but these words were struck out in committee. Cf. sec. 92 (*c*). Chalmers, p. 185, says that the cases in which, before the act, notice was held necessary, must be reconsidered with reference to this amendment. He gives the following illustrations of the section:—

A bill is made payable at the drawer's house. It is accepted and dishonoured. *Primâ facie* this is a bill for the accommodation of the drawer, and he is not entitled to notice. Sharp v. Bailey, 1829, 9 B. & C. 44; cf. Carter v. Flower, 1847, 16 M. & W. 743.

A bill is signed by the drawer in order to accommodate the acceptor. The drawer is entitled to notice. Sleigh v. Sleigh, 1850, 5 Ex. 514.

A., having the balance of £10 at his bankers, and having no authority to overdraw, draws a cheque for £50. A. is not entitled to notice. Carew v. Duckworth, 1869, L.R. 4 Ex. 313, 2 Ames 493; cf. Wirth v. Austin, 1875, L.R. 10 C.P. 689; Stayner v. Howatt, 1882, 15 N.S.R. 267.

A bill is drawn and accepted to accommodate D., who is not a party to it, but who is to provide for it. The drawer is entitled to notice of dishonour. Lafitte v. Slatter, 1830, 6 Bing. 623; cf. Turner v. Samson, 1876, 2 Q.B.D. 23.

A bill is drawn, accepted and endorsed by three persons in order to raise money for their joint benefit. The drawer and endorser are entitled to notice. Foster v. Parker, 1876, 2 C. P.D. 18.

See also Byles, pp. 285-289.

108. Notice of dishonour is dispensed with as regards the endorser where,— Dispensed with.

(*a*) the drawee is a fictitious person or a person not having capacity to contract, and the endorser was aware of the fact at the time he endorsed the bill; Fictitious person.

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(*b*) the endorser is the person to whom the bill is presented for payment;

(*c*) the bill was accepted or made for his accommodation.

53 V., c. 33, s. 50. [Eng. s. 50 (2) (*d*). N.I.L. s. 115.]

A fictitious person means a person who is fictitious by the pretence of the drawer (see the notes to sec. 21, sub-sec. 5). The drawer is necessarily aware that there is no real drawee, and therefore he is not entitled to notice of dishonour under clause (*b*) of sec. 107. But the endorser may not be aware of the fictitious character of the drawee, and, if he is not aware of it, he is entitled to notice of dishonour under clause (*a*) of sec. 108.

See notes to sec. 107.

Clause (*c*) of this section as it stood originally in the English bill of 1882 had the additional words, "and he has no reason to expect that it will be honoured on presentment," but these words were struck out in committee. Chalmers, pp. 185-6. Cf. sec. 92 (*d*). See the notes to clause (*d*) of sec. 107 (which was amended in the same way).

The endorser of a bill becomes the executor of the acceptor. It is presented to him and he dishonours it. He is not entitled to notice. Caunt v. Thompson, 1849, 18 L.J.C.P. 125; but see the notes to clause (*c*) of sec. 107.

CHAPTER XLIV.

PROTEST.

Protest is, in certain cases, one of the duties of the holder of a bill. As to such duties generally, see notes at the beginning of chapter 41, *supra*.

Protest.

Necessity of.

109. In order to render the acceptor of a bill liable it is not necessary to protest it. 53 V., c. 33, s. 52. [Eng. s. 52.]

There is no corresponding provision in the Negotiable Instruments Law.

Prior to 1906 this section and sub-sec. 2 of sec. 96 formed one sub-section in a section which included the provisions of sec. 93 and sub-sec. 3 of sec. 85.

The acceptor of a bill is not entitled to notice of dishonour (sec. 96). The same rule in regard to protest and notice of dishonour applies to the maker of a note (sec. 186) as to the acceptor of a bill.

As to drawer and endorsers, see secs. 112 to 114.

Dispensed with.

110. Protest is dispensed with by any circumstances which would dispense with notice of dishonour. 53 V., c. 33, s. 51. [Eng. s. 51 (9). N.I.L. s. 159.]

As to dispensing with notice of dishonour, see secs. 106 to 108.

Waiver of protest.

As to express waiver of protest written on the bill, see the notes to sec. 34. The Negotiable Instruments Law, sec. 111, provides that a waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver, not only of a formal protest, but also of presentment and notice of dishonour. Crawford, p. 131. In Canada waiver of protest includes waiver of notice of dishonour (Russell, pp. 475-6), but may not include waiver of presentment. Cf. notes to sec. 106.

Delay excused.

111. Delay in noting or protesting is excused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence.

Diligence.

2. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. 53 V., c. 33, s. 51. [Eng. s. 51 (9). N.I.L. s. 159.]

As to excuse for delay, cf. sec. 91 (presentment for payment) and sec. 105 (notice of dishonour).

Foreign bill, non-acceptance.

112. Where a foreign bill appearing on the face of it to be such has been dishonoured by non-acceptance it must be duly protested for non-acceptance.

Non-payment.

2. Where a foreign bill which has not been previously dishonoured by non-acceptance is dishonoured by non-payment, it must be duly protested for non-payment.

Balance.

3. Where a foreign bill has been accepted only as to part it must be protested as to the balance.

Discharge.

4. If a foreign bill is not protested as by this section required the drawer and endorsers are discharged. 53 V., c. 33, ss. 44 and 51. [Eng. ss. 44 and 51(2). N.I.L. s., 152.]

Prior to the revision of 1906, sub-sec. 3 formed part of one section with secs. 83 and 84. See notes to sec. 84. The provision of sub-sec. 3 is omitted from the Negotiable Instruments Law.

Protest of foreign bill.

An inland bill is a bill which is, or on the face of it purports to be, (*a*) both drawn and payable within Canada, or (*b*) drawn within Canada upon some person resident therein. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill (sec. 25). In the act of 1890 sub-secs. 1, 2 and 4 of the present sec. 112 formed one sub-section, and it was clear that the present sub-secs. 2 and 4 referred to "a foreign bill appearing on the face of it to be such." The effect appears to be same under the present act, but to make the sub-sections consistent with each other, it would have been better to omit the qualifying words in sub-sec. 1 or to say "such foreign bill" in the other sub-sections. See Russell, p. 339.

Protest is necessary in the case of a foreign bill by the custom of merchants. Gale v. Walsh, 1793, 5 T.R. 239, 2 Ames 114. If a foreign bill is dishonoured and is not protested, the drawer and endorsers are discharged. Noting for protest is sufficient (sec. 118). As against the acceptor, no protest is necessary. An inland bill, except in the province of Quebec, need not be protested (sec. 113). Protest of a note is unnecessary except for the preservation of the liabilities of endorsers of a foreign note (sec. 187). Sec. 112.

113. Where an inland bill has been dishonoured, it may, if the holder thinks fit, be noted and protested for non-acceptance or non-payment as the case may be; but it shall not, except in the province of Quebec, be necessary to note or protest an inland bill in order to have recourse against the drawer or endorsers. 53 V., c. 33, s. 51. [Cf. Eng. s. 51 (1). Cf. N.I.L. s. 118.] Protest of inland bill. Quebec.

The corresponding section of the English act omits the words "and protested," and the words "except in the province of Quebec."

The section recognizes the propriety of the usual practice of protesting an inland bill. It is advantageous to protest an inland bill, because the protest is *primâ facie* evidence of presentment and dishonour and of service of notice of such presentment and dishonour as stated in such protest (sec. 11). The expense of noting and protesting any bill and the postages thereby incurred are to be allowed and paid to the holder in addition to any interest thereon (sec. 124). If a bill is duly noted, the formal protest may be extended thereafter at any time as of the date of the noting (sec. 119). As to form of noting see the notes to sec. 125. Protest of inland bill.

The Negotiable Instruments Law, sec. 118, provides that where any negotiable instrument has been dishonoured it may be protested for non-acceptance or non-payment, as the case may be, but that protest is not required except in the case of foreign bills of exchange.

Noting or protest is a necessary preliminary to acceptance for honour (sec. 147) and to presentment for payment to the acceptor for honour or the referee in case of need (sec. 117).

Sec. 113. Protest of inland bill.

As to the necessity for protest in case of the dishonour of a bill which appears on its face to be a foreign bill, see sec. 112. A bill drawn upon any person in Quebec or payable or accepted at any place in that province must be protested (unless in cases in which notice of dishonour would be dispensed with: secs. 106 to 108) in order to preserve the liability of parties, other than the acceptor, liable on the bill. In other cases protest in cases of dishonour is unnecessary (sec. 114).

Prior to the revision of 1906 the provisions of this section were expressly made "subject to the provisions of this Act with respect to notice of dishonour." Notice of dishonour to the drawer and endorsers is provided for by sec. 96, the provisions of which are not in any case affected by provisions as to the necessity or non-necessity of protest.

Discharge in default of protest.

114. In the case of an inland bill drawn upon any person in the province of Quebec or payable or accepted at any place in the said province the parties liable on the said bill other than the acceptor are, in default of protest for non-acceptance or non-payment as the case may be, and of notice thereof, discharged, except in cases where the circumstances are such as would dispense with notice of dishonour.

Protest unnecessary.

2. Except as in this section provided, where a bill does not on the face of it appear to be a foreign bill, protest thereof in case of dishonour is unnecessary. 53 V., c. 33, s. 51. [Cf. Eng. s. 51 (2). Cf. N.I.L. s. 152.]

Sub-sec. 1 and the words "except as in this section provided" in sub-sec. 2 do not appear in the corresponding section of the English act.

In Quebec, as in the other provinces and in England, it is not necessary to protest a bill in order to render the acceptor liable (sec. 109). As against other parties, there must in Quebec be protest and notice of protest unless these are dispensed with (cf. secs. 106 to 108 as to dispensing with notice of dishonour).

Protest of inland bill unnecessary.

In the other provinces, the English rule prevails and any bill which does not appear on its face to be a foreign bill need not be protested. The Canadian act, unlike the English act, expressly recognizes the propriety of the protest of any dishonoured bill (sec. 113).

Prior to 1906 secs. 113 and 114 were parts of one sub-section. Some alteration in the wording was effected in the revision. The provisions of sub-sec. 1 of sec. 114 which require protest and notice of protest were formerly expressed to be "subject, nevertheless, to the exceptions in this section hereinafter contained." Among the subsequent provisions of the old section were the provisions now contained in secs. 110 and 111, 120 and 121. The revisers (probably correctly) have selected the provisions as to dispensing with notice of dishonour as being the only ones constituting an "exception" to the provisions requiring protest and notice. Sec. 114.

If a bill is payable in the province of Quebec, sec. 114 is in accord with the principle of sec. 162, namely, that the duties of the holder with respect to the necessity for protest are determined by the place where the bill is dishonoured. But sec. 114 also provides that if a bill is accepted in the province of Quebec, protest is necessary, and in so far as the section applies to a bill payable elsewhere than in that province, it conflicts with the principle of sec. 162. An extreme case would be that of a bill drawn in Ontario, accepted in Quebec, and subsequently negotiated to a holder in Ontario who is unaware of the fact that the acceptance took place in Quebec (assuming that there is nothing on the bill to shew that it was accepted in Quebec). If sec. 114 covers such a case, and renders protest necessary, it should be amended so as to bring it into accord with sec. 162. Cf. Russell, pp. 341-2. Protest of bill payable or accepted in Quebec.

115. A bill which has been protested for non-acceptance, or a bill of which protest for non-acceptance has been waived, may be subsequently protested for non-payment. 53 V., c. 33, s. 51. [Eng. s. 51 (3). N.I.L. s. 157.] Subsequent protest for non-payment.

The words "or a bill of which protest for non-acceptance has been waived" are not in the English act or in the Negotiable Instruments Law.

As to waiver of protest, see secs. 110 and 106.

It may be advisable to effect this second protest if action be intended in a foreign country, for rarely, if ever, does protest for non-acceptance excuse the subsequent protest for non-payment in foreign law. Byles, p. 258. Generally, however, the duties of the holder would by the comity of nations be reg-

Sec. 115.

ulated by the law of the place where they are to be performed (cf. sec. 162; Chalmers, p. 189).

Subject to the provisions of the act, when a bill is dishonoured by non-acceptance an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary (sec. 82.)

Protest for better security.

116. Where the acceptor of a bill suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and endorsers. 53 V., s. 33, s. 51; 54-55 V., c. 17, s. 7. [Eng. s. 51 (5). N.I.L. s. 158.]

The corresponding section of the English act reads "Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment," etc. Cf. notes to sec. 78. The words "or insolvent" were omitted from the Canadian act of 1890, and the words "becomes bankrupt or" were struck out by amendment in 1891. The Negotiable Instruments Law is substantially to the same effect as the English act.

Under some of the foreign codes, when the acceptor fails during the currency of a bill, security can be demanded from the drawer and endorsers. English law provides no such remedy, and the only effect of such a protest in England is that the bill may be accepted for honour (cf. sec. 147). In France, if the acceptor fails, the bill may at once be treated as dishonoured and protested for non-payment. Chalmers, p. 190. Should it be desired to obtain security in a foreign country, a protest for better security drawn up in this country would presumably be sufficient, since notarial acts are recognized by foreign courts. Byles, p. 262.

In Quebec a bill becomes immediately exigible upon the insolvency of the acceptor before maturity. The provisions of the act in regard to presentment for payment, protest and notice then become applicable and must be observed in order to bind an endorser. Banque Nationale v. Martel, 1899, Q.R. 17 S.C. 97.

Acceptance for honour.

117. Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

2. When a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him. 53 V., c. 33, s. 66. [Eng. s. 67. N.I.L. ss. 167 and 170.] Sec. 117. Protest for non-payment.

Prior to 1906 this section and sec. 94 (as to presentment to acceptor for honour) formed one section.

It is in the option of the holder to resort to the referee in case of need or not, as he may think fit (sec. 33).

It is sufficient if the bill has been noted for protest before it is presented for payment (sec. 118).

As to the nature and effect of acceptance for honour, see secs. 147 to 152.

Presumably the failure to protest would discharge the acceptor for honour, as well as the party for whose honour he accepted and subsequent parties. Russell, pp. 343-4, citing Maclaren to this effect.

118. For the purposes of this Act, where a bill is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding. 53 V., c. 33, x. 92. [Eng. s. 93. Cf. N.I.L. s. 155.] Noting equivalent to protest.

The corresponding section of the English act concludes "and the formal protest may be extended at any time thereafter as of the date of the noting." These words are now part of sec. 119.

As to the Negotiable Instruments Law, see the notes to next section.

As to the form of noting, see the notes to sec. 125.

119. Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonour. Noting or protest.

2. When a bill has been duly noted, the formal protest may be extended thereafter at any time as of the date of the noting. 53 V., c. 33, ss. 51 and 92. [Eng. ss. 51 (4) and 93. N.I.L. s. 155.] Extending protest.

Sec. 119.

Sec. 51 (4) of the English act reads as follows: "Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting." Cf. notes to sec. 118.

The wording of the Negotiable Instruments Law, sec. 155, is preferable: "When a bill is protested, such protest must be made on the day of its dishonour, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting."

As to the time of noting or protest, see sec. 121 (bill returned by post dishonoured). Delay may be excused (sec. 111), or protest dispensed with (sec. 110).

Noting on the day of dishonour.

Before the act it was not clear that a bill could not be lawfully noted for protest on the day after its dishonour; but the business members of the select committee were unanimous in thinking that noting on the day of dishonour should be made obligatory. Chalmers, p. 190.

As to the extension of the protest, cf. sec. 118. The protest may be extended at any time before the commencement of the suit, or even before or during the trial; and antedated accordingly. Byles, p. 259, note (*k*).

Although the protest may be extended "thereafter at any time," notice of dishonour or, where protest is necessary, notice of protest, must be sent within the time limited by sec. 97 or sec. 126 (as the case may be). Notice of protest is governed by the same rules as notice of dishonour in regard to time and manner of giving notice (sec. 126).

Protest on copy or particulars.

120. Where a bill is lost or destroyed, or is wrongly or accidentally detained from the person entitled to hold it, or is accidentally retained in a place other than where payable, protest may be made on a copy or written particulars thereof. 53 V., c. 33, s. 51. [Eng. s. 51 (8). N.I.L. s. 160.]

The English act and the Negotiable Instruments Law omit the word "accidentally" (where it first occurs) and the clause "accidentally retained in a place other than where payable."

As to lost bills, see further sec. 156 (holder's right to duplicate of lost bill), and sec. 157 (action on lost bill).

A copy means an ordinary copy or transcript of the bill. Cf. sec. 62 as to endorsement of a bill issued or negotiated in a country where "copies" are recognized.

121. A bill must be protested at the place where it is dishonoured, or at some other place in Canada situate within five miles of the place of presentment and dishonour of such bill: Provided that,— Place of protest.

(*a*) when a bill is presented through the post office and returned by post dishonoured, it may be protested at the place to which it is returned, not later than on the day of its return or the next juridical day; Where bill returned.

(*b*) every protest for dishonour, either for non-acceptance or non-payment may be made on the day of such dishonour, and in case of non-acceptance at any time after non-acceptance, and in case of non-payment at any time after three o'clock in the afternoon. 53 V., c. 33, s. 51. [Cf. Eng. s. 51 (6). Cf. N.I.L. s. 156.] Time when.

The corresponding section of the English act reads as follows:—

"A bill must be protested at the place where it is dishonoured. Place of protest.

Provided that,—

(*a*) where a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day.

(*b*) when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary."

The Negotiable Instruments Law is to the same effect as the English act, omitting clause (*a*). Clause (*a*) of the English section was inserted in committee to protect a common practice of the Liverpool notaries with regard to bills drawn on cotton-spinners in Lancashire. Clause (*b*) reproduces the effect of 2 and 3 W. 4, c. 98. Suppose a bill is drawn on B. in Liverpool, "payable at the A. Bank in London." It is dishonoured by non-acceptance. It is to be protested for non-payment in

Sec. 121. Place of protest.

London without any further demand on B. Ordinarily the protest recites the demand on the acceptor or other payer. Chalmers, p. 191.

In the Canadian bill as first brought down the wording was the same as the English section, but it was amended by striking out clause (*b*), by inserting the clause which allows protest to be made at any place in Canada within five miles of the place of presentment and dishonour, and by altering the wording of clause (*a*). The intention in striking out clause (*b*) of the English act was to make it optional whether in the case there provided for the holder should, after dishonour by non-acceptance, protest the bill again for non-payment. Debates, House of Commons, 1890, col. 4264; cf. sec. 115.

There is no provision in the English act corresponding to clause (*b*) of sec. 121. Cf. sec. 119, and notes to sec. 95.

If a bill fell due on Saturday, the notary might present it at any time during business hours, *e.g.*, at 10 a.m. if it is payable at a bank; he need not present it again later in the day, but he must not protest it for non-payment before 3 p.m. Cf. Russell, p. 346.

As to juridical days, see sec. 43. As to presentment through the post office, see sec. 90.

Contents of protest.

122. A protest must contain a copy of the bill, or the original bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify,—

Person. (*a*) the person at whose request the bill is protested;

Place. (*b*) the place and date of protest;

Reason. (*c*) the cause or reason for protesting the bill;

Proceeding. (*d*) the demand made and the answer given, if any; or,

Excuse. (*e*) the fact that the drawee or acceptor could not be found.

53 V., c. 33, s. 51. [Eng. s. 51 (7). N.I.L. s. 153.]

The words "or the original bill may be annexed thereto" are not in the English act.

As to form of protest, see sec. 125.

As to protest by a justice of the peace, when the services of a notary cannot be obtained at the place where the bill is dishonoured, see sec. 123.

Words requiring a protest to be under seal were struck out

in committee. Chalmers, p. 192. In practice protests are under the notary's official seal, though this is not required by law. Byles, p. 260. Sec. 122.

The Negotiable Instruments Law requires the protest to be under the hand and seal of the notary. It contains clauses substantially the same as clauses (*b*), (*c*), (*d*) and (*e*) of sec. 122, and provides that the protest must specify the fact that presentment was made and the manner thereof.

Official when notary is not available.

123. Where a dishonoured bill is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any justice of the peace resident in the place may present and protest such bill and give all necessary notices and shall have all the necessary powers of a notary in respect thereto. 53 V., c. 33, s. 93. [Cf. Eng. s. 94. Cf. N.I.L. 154.]

The corresponding section of the English act omits the words after "dishonoured" (where it secondly occurs) and provides that "any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill," and in a schedule provides a form which may be used. The English section also contains the words "or note" after the word "bill" in the first line. The Negotiable Instruments Law, sec. 154, provides that protest may be made (1) by a notary public; or (2) by any respectable resident of the place where the bill is dishonoured, in the presence of two or more credible witnesses.

No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed (sec. 13). A notary who is one of the endorsers of a bill is not entitled to act as notary in protesting the bill. Pelletier v. Brosseau, 1890, M.L.R. 6 S.C. 331.

Expenses.

124. The expense of noting and protesting any bill and the postages thereby incurred, shall be allowed and paid to the holder in addition to any interest thereon.

Fees.

2. Notaries may charge the fees in each province heretofore allowed them. 53 V., c. 33, s. 93.

Sec. 124.

The expenses of noting and protest are part of the measure of damages allowed by sec. 134 where a bill is dishonoured.

R.S.C. 1886, c. 123 (repealed by the Bills of Exchange Act, 1890) contains provision relating to notary's fees: sec. 7 (Nova Scotia); sec. 8 (Prince Edward Island); sec. 25 (Ontario); schedule B. (Quebec).

In the other parts of Canada, the charges appear to be regulated by usage, although in New Brunswick a provincial statute (46 Vict., c. 11) purports to prescribe a tariff.

Forms.

125. The forms in the schedule to this Act may be used in noting or protesting any bill and in giving notice thereof.

Contents.

2. A copy of the bill and endorsement may be included in the forms, or the original bill may be annexed and the necessary changes in that behalf made in the forms. 53 V., c. 33, s. 93.

The English act provides a form only for the case of the protest of a bill by a householder or substantial resident. See the notes to sec. 123.

As to sub-sec. 2, cf. sec. 122.

The forms in the schedule are not obligatory. As to form of notice of dishonour, see notes to sec. 96.

Form of noting.

Noting is a minute made on the bill by the notary at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year, the noting charges, and a reference to the notary's register. A ticket or label is also attached on which is written the answer given to the notary's clerk when he made the presentment. Byles, p. 259, citing Brooke's Notary. Cf. Geralopulo v. Wieler, 1851, 10 C.B. 690, 4 R.C. 654. Any memorandum written on the bill and signed by the notary, shewing the dishonour of the bill and the noting thereof, and containing the particulars from which the formal protest might afterwards be drawn up, would be a sufficient noting.

When notice of protest shall be given.

126. Notice of the protest of any bill payable in Canada shall be sufficiently given and shall be sufficient and deemed to have been duly given and served, if given during the day on which protest has been made or on the next following juridical

or business day, to the same parties and in the same manner and addressed in the same way as is provided by this Part for notice of dishonour. 53 V., c. 33, s. 49. Sec. 126.

Subject to the provisions of the act, protest must be made or noted on the day of the dishonour of a bill (sec. 119). Notice of protest may be given on that day or on the next following juridical day.

As to the persons to whom notice must be given, see sec. 96 and notes. As to the manner, see secs. 98 and 99. As to the manner in which the notice is to be addressed, see secs. 103 and 104 and notes.

CHAPTER XLV.

Liabilities of Parties.

The sections comprised in this chapter define the terms of the various contracts which are entered into by parties to a bill. A person signing a bill may be liable as acceptor (secs. 128 and 129) or as drawer (sec. 130). When a person signs a bill otherwise than as acceptor or drawer he thereby incurs the liabilities of an endorser to a holder in due course (sec. 131). The obligations of an endorser are provided for by sec. 133. A transferor by delivery is not liable on the bill (sec. 137), but by virtue of negotiating it, enters into a contract with his immediate transferee, being a holder for value (sec. 138).

The measure of damages for dishonour of a bill and the recovery of such damages is provided for by secs. 134 to 136.

Equitable assignment.

127. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. 53 V., c. 33, s. 53. [Eng. s. 53 (1). N.I.L. s. 127.]

The corresponding section of the English act provides that it shall not extend to Scotland and further, by sub-sec. 2, that "in Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee." The law of France is similar to that of Scotland. Chalmers, p. 198.

A bill not an equitable assignment.

A bill of itself does not operate as an assignment of funds in the hands of the drawee available for the payment thereof. The drawee *as such* incurs no liability to the holder, there being no privity of contract between them. Hopkinson v. Forster, 1874, L.R. 19 Eq. 74, 3 R.C. 755, 2 Ames 801.

But, as Chalmers (p. 198) points out, privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement. Cf. Grant, p. 258.

Sec. 127. A bill not an equitable assignment.

B. draws a bill on A. payable to C. A. does not accept the bill, but states that he will honour it when funds come into his hands about the 15th of August. Funds came into A.'s hands soon after the date mentioned. Although A. is not liable on the bill, an action will lie against him for money had and received to the use of C. Griffin v. Weatherby, 1868, L.R. 3 Q.B. 753; cf. Torrance v. Bank of British North America, 1873, L.R. 5 P.C. 246.

A. telegraphs to B. authorizing him to draw for a stated amount. B. shews the telegram to the manager of the plaintiff bank, who on the faith of it discounts a sight bill drawn by B. upon A. A. refuses to accept. Privity is created between the bank and A., entitling the former to sue the latter for the money so advanced. Bank of Montreal v. Thomas, 1888, 16 O.R. 503, and cases there cited.

In Adams v. Craig and the Ontario Bank, 1911, 24 O.L.R. 490, the plaintiff sold goods to C. and received from C. a cheque upon the bank, of which C. was a customer, for the price agreed upon. The manager of the bank knew that a sale had been arranged by C. of goods which included the goods of the plaintiff, and that the proceeds were to be placed to C.'s credit in the bank, and that without the plaintiff's acquiescence the sale arranged could not be carried out. In these circumstances (C.'s account in the bank being much overdrawn), the manager made an oral promise to the plaintiff that, upon the sale being completed, and the proceeds paid into the bank, the bank would pay the amount of the cheque. It was held that the bank was liable, either for money received by it for the plaintiff, or upon an oral promise which was not within the Statute of Frauds, because the bank had an interest in the sale of the goods and the object of the promise was to secure the plaintiff's acquiescence in the sale and not the answering for the debt of another person. See the "property cases" discussed in Harburg India Rubber Comb Co. v. Martin, [1902] 1 K.B. 778; Davys v. Buswell, [1913] 2 K.B. 47.

What Chalmers (p. 198) calls a *quasi*-privity is created by sec. 166, which provides that when the holder of a cheque omits to present it within a reasonable time, whereby the drawer has been damnified (*i.e.*, by the failure of the bank), the drawer is *pro tanto* discharged, and the holder is substituted as a creditor of the bank. As to the applicability of sec. 127 to a cheque, see notes to sec. 165.

Sec. 127.
A bill not an equitable assignment.

Subject to the rule that a customer is entitled to draw cheques on his bank, a creditor, as such, is not entitled to draw on his debtor in respect to his debt; and the drawee of an unaccepted bill is under no obligation to accept or pay it unless he has for valuable consideration expressly or impliedly agreed to do so. Cf. Goodwin v. Robarts, 1875, L.R. 10 Ex. at p. 351. See also Chalmers, p. 200; Byles, p. 207.

As to the liability upon a promise to accept a bill, see the notes to sec. 36.

An order to pay out of a particular fund is not an unconditional order and is therefore not a bill of exchange. See sec. 17 and cases illustrating that section. But an order invalid as a bill on this ground may be valid as an equitable assignment and may confer a right of action upon the payee. Buck v. Robson, 1878, 3 Q.B.D. 686. See Grant, p. 469.

A. having an account against B. gives C. an order upon B. In the absence of acceptance by B., B. is not liable to C. One of the very incidents which makes the instrument a valid bill of exchange, namely, that it is not drawn against or payable out of any particular fund, prevents it from operating as an equitable assignment. Hall v. Prittie, 1890, 17 O.A.R. 306, and cases cited; Percival v. Dunn, 1885, 29 Ch. D. 128.

But where the evidence shewed that there was only one fund out of which the drawee could be expected to pay the order; that the nature of the fund and its origin were well known to all the parties; that when the drawer promised to give the persons with whom he dealt orders upon the drawee, he intended to give and these persons expected to get, orders which were to be paid out of the particular fund; and that the drawee understood the order as intended to deal with portions of the fund and to be payable only out of the fund; it was held that the court should look to the real intention of the parties to the transaction and should give effect to such intention by declaring that the drawer did make an equitable assignment to the order-holder of a portion of the fund. Lane v. Dungannon, 1892, 22 O.R. 264;(*a*) cf. Sovereign Bank v. International Portland Cement Co., 1907, 14 O.L.R. 511.

(*a*) The decision in Lane v. Dungannon seems difficult to support on principle. The order was a simple bill of exchange in form. If it is legitimate to take into consideration the knowledge of the parties as to the existence of a particular fund out of which the order is intended to be paid, the result is that a cheque on a bank operates as an equitable assignment, although it is clear that the payee of an uncertified cheque has no right of action against the bank.

Sec. 127.
A bill not an equitable assignment.

Where there is a specific appropriation of funds with the assent, express or implied, of the drawee there is privity between the drawer and the holder. De Bernales v. Fulier, 1810, 14 East, 590n., 13 R.R. 321n, was a case where money was expressly paid into the defendant bank for the specific purpose of taking up a bill, the purpose being declared by the payer at the time, and not being repudiated by the bank until afterwards. The case is referred to in Prince v. Oriental Bank, 1878, 3 App. Cas. 325, 334, as a case which has never been overruled; the bank so receiving the money must be held to have received it for the use of the holder of the bill, and cannot apply the money to the general indebtedness of the acceptor who paid in the money.

Effect of drawer's death on authority or obligation to accept.

Whether the authority or obligation to accept is or is not revoked by the death of the drawer does not appear to be well settled in England. Chalmers, p. 200, says, "Apart from something special in the contract, it seems that the authority or obligation to accept is not revoked by the death of the drawer, while it is by notice of his bankruptcy; for this renders funds in the hands of the drawee no longer available for the payment of the bill, and incapacitates the drawer from fulfilling his part of the contract." Chitty, (11 ed. p. 202) says, "If the drawing of a bill is to be considered as a bare authority that is revocable, then the death of the drawer would determine the authority of the drawee to accept or pay; but if it is an authority coupled with an interest in favour of a payee or indorsee, then death would be no countermand." Cf. Trunkfield v. Proctor, 1901, 2 O.L.R. at p. 332. In the case of a cheque notice of the customer's death determines the duty and authority of the bank to pay the amount of the cheque.

A. and D. are indebted to C. on a mortgage. A. has funds in B.'s hands. A. addresses to B. a bill payable on demand to C. and hands the bill to B. B. tells C. that A. has left money with him (B.) to pay on the mortgage. C. states that he does not want the money till the first of the following month. B. also shews the bill to D., who acts upon it by paying to B. for A. an annuity instalment which he has been withholding until A. should pay C. the amount due by him on the mortgage, D. having previously agreed to pay the balance of the mortgage. There is either a valid equitable assignment of the fund in B.'s hands to the amount of the bill, or a trust in respect to the

Sec. 127.

fund for the payment of the amount of the bill to C. in discharge of that part of the mortgage indebtedness which A. had undertaken to pay, so that C. is entitled to payment, notwithstanding A.'s death before B. has paid over the money. Trunkfield v. Proctor, 1901, 2 O.L.R. 326.

Engagement by acceptance.

128. The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance. 53 V. c. 33, s. 54. [Eng. s. 54 (1). N.I.L. s. 62.]

The simple meaning of an acceptance is "I will pay" (cf. notes to sec. 38). The primary, and, in general, absolute, liability of an acceptor must be distinguished from the secondary and conditional liability of a drawer or endorser. Cf. notes to sec. 130.

Contract of acceptor.

The drawee by accepting a bill becomes the party primarily liable thereon to the holder. As to the admissibility of oral evidence to shew that the acceptor's liability is secondary as regards other parties, see the notes to sec. 133.

As to presentment for payment to charge the acceptor, see sec. 93.

An acceptance may be either general or qualified (sec. 38).

As to the measure of damages for the dishonour of a bill, see sec. 134.

If a bill is negotiated back to the acceptor, he may, subject to the provisions of the act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable (sec. 73).

Estoppel.

129. The acceptor of a bill by accepting it is precluded from denying to a holder in due course,—

Genuineness and authority.

(*a*) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

Capacity of drawer.

(*b*) in the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement;

Payee and capacity.

(*c*) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse, but not the genuineness or validity of his endorsement. 53 V., c. 33, s. 54. [Eng. s. 54 (2). Cf. N.I.L. s. 62.]

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As to a holder in due course, see sec. 56.

The distinction between capacity and authority(*b*) reconciles the cases, which otherwise appear to be in conflict. It is clear that capacity to draw must be identical with capacity to endorse, this being a question of *status;* while an authority to draw on behalf of another does not necessarily include an authority to endorse on his behalf. Chalmers, p. 203.

Acceptor estopped by the act of acceptance.

By the act of acceptance the acceptor is precluded from denying to a holder in due course the genuineness of the signature of the drawer, but not the genuineness of the writing in the body of the bill. See Dominion Bank v. Union Bank of Canada, 1908, 40 S.C.R. at p. 367, and cf. notes to sec. 50 in regard to recovery of money paid by mistake.

The acceptor as such makes no representation as to the genuineness or validity of the payee's signature, if the payee is a real person, but the acceptor may be liable on the ground that the payee is a fictitious or non-existing person and that the bill is therefore payble to bearer (sec. 21).

If a person draws a bill payable to the drawer's order in a fictitious name, the acceptor's liability has been based, in some instances, on a different ground, namely, that he undertakes to pay in pursuance of an endorsement in the same handwriting as the drawer's signature. Cooper v. Meyer, 1830, 10 B. & C. 468; Beeman v. Duck, 1843, 11 M. & W. at p. 256, 4 R.C. at p. 625; Phillips v. im Thurn, 1866, L.R. 1 C.P. at p. 471, 4 R.C. at p. 632; Chalmers, pp. 203-4; Byles, 17 ed., 214. But if the endorsement of the drawer-payee, being a real person, is upon the bill at the time of the acceptance and the handwriting of the drawing is the same as that of the endorsement, the acceptor is not estopped from setting up that the endorsement is forged or made without authority, provided he did not know of the forgery or want of authority. Beeman v. Duck, 1843, 11 M. & W. 251, 4 R.C. 622; Byles, 17 ed., 214, note (*s*); Phillips v. im Thurn, 1866, L.R. 1 C.P. 463, 4 R.C. 626; cf. Ryan v. Bank of Montreal, 1887, 14 O.A.R. 533, 536, and cases cited.

Some of the authorities are discussed in London and South Western Bank v. Wentworth, 1880, 5 Ex.D. 96. In that case, however, the defendant accepted a bill of exchange in blank and delivered it for the purpose of negotiation, and the

(*b*) See note at the beginning of chapter 38, *supra*.

Sec. 129. Acceptor estopped by the act of acceptance.

person who received it forged the drawing and the drawer's endorsement. It was held that the acceptor was liable and that the case must be governed, not by the rules of law applicable to cases in which the acceptor has signed his name after that of the drawer has been inserted, but by those which ought to prevail where the acceptor has signed his name upon a blank piece of paper or on a paper upon which a drawing in blank has been written (cf. secs. 31 and 32).

Where a bill or acceptance is materially altered, the acceptor is not precluded by this section from setting up such alteration (cf. sec. 145).

Drawer.

130. The drawer of a bill, by drawing it,—

Engages acceptance and compensation.

(*a*) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken;

Estoppel as to payee.

(*b*) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

53 V., c. 33, s. 55. [Eng. s. 55 (1). N.I.L. s. 61.]

As to due presentment, see sec. 78 (for acceptance) and sec. 86 (for payment).

As to dishonour, see secs. 81 and 95.

As to the requisite proceedings on dishonour, see sec. 96 (notice of dishonour) and secs. 112 to 114 (protest).

As to a holder in due course, see sec. 56.

The drawer and any endorser may insert in the bill an express stipulation negativing or limiting his own liability to the holder or waiving, as regards himself, some or all of the holder's duties (sec. 34).

The drawer of a cheque engages that on due presentment it shall be paid, not accepted and paid, the holder having as against the drawer no right to present it for any purpose other than payment. See notes to sec. 165 in regard to certification of cheques.

Contract of drawer.

Subject to the provisions of sec. 21, as to a fictitious or non-existing payee, the drawer is not estopped from denying the genuineness or validity of the payee's signature. Cf. notes to sec. 129.

Subject to any express stipulation to the contrary and subject to the necessity for due presentment and for the requisite proceedings on dishonour, the drawer and endorsers are jointly and severally responsible to the holder for the due acceptance and payment of the bill. If it be dishonoured the holder may enforce payment from the drawer, or an endorser, or the acceptor, or any or all of them at his option. The liability of the drawer or endorser of an accepted bill must in general be measured by that of the acceptor. Cf. Chalmers, p. 205, citing Rouquette v. Overmann, 1875, L.R. 10 Q.B. 525, at pp. 536-7, 4 R.C. 287, at p. 298. See sec. 134 as to the measure of damages. Sec. 130.

If a bill is dishonoured and the requisite proceedings on dishonour are taken, *primâ facie* the drawer is liable to the holder or to any endorser who has been compelled to pay the bill (sec. 135). The presumption that the drawer is liable to an endorser who has been compelled to pay the bill may be rebutted by shewing that both drawer and endorser became parties to the bill to accommodate some third party, and that the one who pays the bill is therefore only entitled to contribution as a co-surety, or by proving an express agreement, properly evidenced, that the relations of the parties to the bill are other than those which are *primâ facie* presumed. As to the relation of principal and surety between parties to bills or to bill transactions, and the consequences of such relation, and as to the admissibility of oral evidence in regard to the relations *inter se* of parties to a bill, see the notes to sec. 133.

131. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such: Provided that when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of the Act respecting endorsers. 53 V., c. 33, ss. 23 and 56. [Eng. ss. 23 and 56. Cf. N.I.L. ss. 17 (6), 18, 63, 64 and 67.] Liability by signature.

Who has not signed it as such.

The Negotiable Instruments Law, sec. 18, provides that "no person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided."

Sec. 131. No person liable on bill who has not signed it.

Prior to 1906 the first clause of sec. 131 formed one section with the provisions in regard to the signature of a firm now contained in sec. 132.

By sec. 4 the signature to a bill may be written by the hand of an agent, but it must be the principal's signature, not the agent's. In the case of a corporation, a bill is sufficiently signed if it is sealed with the corporate seal (sec. 5).

The rule of law as to simple contracts in writing, other than bills and notes, is that parol evidence is admissible to charge unnamed principals, and so it is to give them the benefit of the contract; but it is inadmissible for the purpose of *discharging* the agent, who signs as if he were principal in his own name. And the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, for it admits the agent to be entitled or bound; but in the latter case such evidence would be inconsistent with the terms of the instrument. Higgins v. Senior, 1841, 8 M. & W. 834. But the laws as to negotiable instruments is different in one respect, to wit, that where the principal's name does not appear, he is not liable on a bill or note as a party to the instrument. Secs. 127 and 131. See observations of Holroyd, J. in Leadbitter v. Farrow, 1816, 5 M. & S. at p. 350; Ex parte Rayner, 1868, 17 W.R. 64. Byles, p. 60.

A person who has not signed, though not liable on the instrument, may of course be liable on the consideration; *e.g.*, B. and X. are jointly indebted to C. B. alone makes a note in favour of C. for the amount of the debt. B. alone is liable on the note. X. is liable on the consideration. Siffkin v. Walker, 1809, 2 Camp. 308, 2 Ames 550. The distinction is this: in the one case the liability is transferable; in the other it is not; also the *onus probandi* is shifted. Chalmers, p. 74.

Signs a bill otherwise than as drawer or acceptor.

The words "and is subject to all the provisions of this Act respecting endorsers" are not in the English act. As to the object of the addition of these words, see McDonough v. Cook, 1909, 19 O.L.R. 267, at p. 273. As to the liability of an endorser, see sec. 133.

Irregular endorsement.

The Negotiable Instruments Law contains the following provisions:—Sec. 63: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by ap-

propriate words his intention to be bound in some other capacity." Sec. 64: "Where a person not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:— (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." Sec. 67: "Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser." The wording of sec. 64 was criticized by Ames. See Brannan, pp. 76, 171. Cf. 2 Ames, pp. 838-9, as to the liability of an anomalous endorser prior to the act.

Sec. 131. Irregular endorsement.

An endorsement, properly so-called, must be made by the holder; but when a person who is not the holder of a bill or note backs it with his signature, he is not an endorser, but a *quasi* endorser. The law annexes to his acts consequences similar to those which follow the endorsement of a bill by the holder. Formerly, when a stranger to the bill backed it with his signature, a pleading difficulty arose, as to whether he was to be described as an endorser or as a new drawer. The difficulty was, it is submitted, simply technical, for the consequences are identical. Now, it would be sufficient to state the facts or describe the person signing as an endorser. Chalmers, p. 208.

Lord Blackburn in Steele v. McKinley,(c) 1880, 5 App. Cas. at p. 772, 4 R.C. at p. 227, says: "An endorsement in general is a transfer in writing by the holder of the bill to a new holder on whom the property is thereby conferred. But I quite agree that by the custom of merchants, as modified by English law, there may also be an endorsement by a person, not a holder of a bill, who puts his name on the bill to facilitate the transfer to a holder. By the old foreign law, not in this respect entirely adopted by the English law, this might be done by what was call an *aval* (said to be an antiquated word signifying "underwriting"), either on the bill itself or on a separate paper; and if such an *aval* was given by any one his obligation to all

(c) See notes to sec. 35, where the facts of this case are briefly stated.

Sec. 131. Irregular endorsement.

subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the *aval* was given. It appears from Pothier, that the *aval* might be given by one who gave his name, either by way of incurring responsibility for the drawer, placing the signature under the name of the drawer, or for the endorser, placing it under the endorsement, or for the acceptor, placing it under that of the acceptance. An *aval* for the honour of the acceptor, even if on the bill, is not effectual in English law, as appears by Jackson v. Hudson, 1810, 2 Camp. 447. But the endorsement by a stranger to the bill on it to one who is about to take it is efficacious in English law, and has the same effect as an *aval*. The effect, according to English law, of such an endorsement is recognized by Lord Holt, in Hill v. Lewis, 1 Salk. at p. 133, and again in Penny v. Innes, 1 C.M. & R. 439; 4 L.J. Ex. 12: such an endorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently. It is not a collateral engagement, but one on the bill."

The section says that "where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course, and is subject to all the provisions of this Act respecting endorsers." The section is also applicable to promissory notes, and for this purpose (sec. 186) the maker of a note is deemed to correspond with the acceptor of a bill, and the first endorser of a note with the drawer of an accepted bill payable to drawer's order. Therefore when we wish to apply this section to a note payable to order we must read "where a person signs a note otherwise than as a maker or payee," etc., for according to the terms of the note the first endorser must be the payee.

It has been said that the section does not establish any new law and, as stated by one of the judges in Ex parte Yates, 1858, 2 DeG. & J. 191, it has been settled for more than a century that it makes no difference where the signature is placed if the intention is proved. In that case the intention was proved that a person was to sign a note in the character of endorser, and the note when produced shewed his signature not below that of the maker's, but in a different part of the note, although on its face. He was held liable. In Carrique v. Beatty, 1897, 24 O.A.R. 302, a person signed his name below the makers' names. There was no evidence that he intended to sign as

endorser nor was there anything on the face of the note to throw doubt upon or qualify the character in which it purported to be signed by him, which was that of maker. It was held therefore that the section did not apply and that the note was voided, by reason of material alteration, as against an accommodation maker who had not assented to the addition of the name. Sec. 131. Irregular endorsement.

Since the passing of the act, there has been a difference of judicial opinion as to the liability of a stranger to an instrument who signs his name on the back before the payee has endorsed. Signature by stranger before payee's endorsement.

In Duthie v. Essery, 1895, 22 O.A.R. 191, E. made two notes in favour of D. & Sons or order. K. endorsed them before delivery to the payees, who afterwards endorsed them for value to the plaintiff. In an action against K. it was held that the plaintiff as holder in due course was entitled to recover, the majority of the court basing their decision on sec. 131 of the act. The third member of the court expressed the opinion that the payees themselves could not have recovered upon the note, but decided in favour of the plaintiff, as a holder in due course, apart from the act. It is pointed out in this case (22 O.A.R. at p. 192) that, in order to render a note backed by a third party's signature capable of being sued upon by the payee, the old practice was for the payee to endorse without recourse to such party: see notes to sec. 73.

In Jenkins & Sons v. Coomber, [1898] 2 Q.B. 168, the plaintiffs addressed to C. a bill payable to their own order. C. accepted, and procured the defendant to write his name on the back of the bill in order to guarantee payment. C. then delivered the bill to the plaintiffs who endorsed it. Held by a divisional court that the drawers could not recover from the defendant. This decision was based on the fact that in the view of the court the plaintiffs were not holders in due course, in that they did not take a bill "complete and regular on the face of it" (sec. 56). The bill in question was not on the face of it complete and regular, since when the defendant endorsed it, the bill had not been endorsed by the payees. Sec. 131 therefore did not apply. It was also urged that the defendant was liable as an endorser under sec. 133, but the court held that the plaintiff was met by the same difficulty as that which defeated the claim of the plaintiff in Steele v. McKinley,

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supra, namely, that the bill was never made complete so far as he was concerned by the necessary endorsement of the drawer. If the bill had been made complete by the endorsement of the drawers before the defendant wrote his name upon the back of it, then it would have been competent for the drawers to shew that by the agreement between the parties, they were not subject to the ordinary liability of drawers to compensate the endorser (sec. 130) and therefore there was no obstacle by reason of circuity of action to suit by them against the endorser (cf. notes to sec. 73). But the bill not being complete it was necessary for the plaintiffs, in order to succeed, to prove a contract of suretyship independently of the bill, and in this they failed because they could not satisfy the Statute of Frauds.(*d*)

In Canadian Bank of Commerce v. Perram, 1899, 31 O.R. 116, the defendant put his name on the back of a promissory note before it was endorsed by the plaintiffs, the payees. The payees afterwards endorsed the note. A divisional court held that the defendant was not liable, following Jenkins v. Coomber, *supra*. The case of Small v. Henderson, 1899, 27 O.A.R. 492, was decided prior to Canadian Bank of Commerce v. Perram but the judgments were not handed out until later. The facts relevant to the present subject were very similar, and the Court of Appeal for Ontario followed Jenkins v. Coomber and Steele v. McKinley.

In 1901 the question of the endorsement of an incomplete note again came before the Court of Appeal. The defendant put his name on the back of a note before its endorsement by the payee, intending thereby to become surety for the maker. The maker subsequently executed a chattel mortgage to the defendant to indemnify him against the payment of the note. The note was discounted by the payee, and upon the maker's failure to pay it at maturity, the defendant paid it. The maker afterwards made an assignment for the benefit of his creditors, and an action was brought by the assignee to set aside the mortgage as fraudulent and void as against creditors. The Court of Appeal, while adhering to the view that a person

(*d*) Jenkins v. Coomber was distinguished in Glenie v. Smith, [1907] 2 K.B. 507 (following Wilkinson v. Unwin, 1881, 7 Q.B.D. 636; see notes to sec. 73); S.C. affirmed [1908] 1 K.B. 263 rather on the ground that it was a case within sec. 32. But Jenkins v. Coomber was approved and Glenie v. Smith distinguished by the English Court of Appeal in M. J. Shaw & Co. Ltd. v. Holland, [1913] 2 K.B. 15.

in the position of the defendant would not be liable on the note, held that the mortgage ought not to be set aside (Robinson v. Mann, 2 O.L.R. 63). On appeal to the Supreme Court of Canada, however, it was held that the payee was a holder in due course and that the defendant was liable under sec. 131 (31 S.C.R. 484). The judgment of the court was an oral one, delivered by Strong, C.J. Neither the English case of Jenkins v. Coomber, nor any of the Ontario cases above mentioned, were cited in the judgment, or, so far as appears by the official report, in argument. In Ayr v. Wallace, 1892, 21 S.C.R. 256, the same judge had expressed a strong opinion that under the act a person signing his name on the back of a note before endorsement by the payee would be liable as an endorser, but in that case the plaintiff failed for want of notice of dishonour.

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The decision in Robinson v. Mann is doubtless satisfactory to the mercantile community, as it gives effect to the clear intention of the parties, and being an express decision on the point raised, it must be followed by all courts in Canada. They cannot call in question a decision of the highest court in Canada as not being in accordance with the previous cases. Slater v. Laboree, 1905, 10 O.L.R. 648.

In Lehigh Cobalt Silver Mines Co. v. Heckler, 1908, 18 O.L.R. 615, it was held that persons not otherwise parties to a note whose signatures appeared on the back beneath the words "We guarantee payment of the within note" were liable as endorsers. Robinson v. Mann has been followed in McDonough v. Cook, 1909, 19 O.L.R. 267; Knechtel Furniture Co. v. Ideal House Furnishers, 1910, 19 Man. R. 652; Johnson v. McRae, 1911, 16 B.C.R. 473.

As to giving notice of dishonour to a person who signs *pour aval* or who signs as guarantor, see the notes to sec. 96.

132. Where a person signs a bill in a trade or assumed name he is liable thereon as if he has signed it in his own name.

Trade or assumed name.

2. The signature of the name of a firm is equivalent to the signature by the person so signing, of the names of all persons liable as partners in that firm. 53 V., c. 33, s. 23. [Eng. s. 23. Cf. N.I.L. s. 18.]

Firm name.

In the English act the provisions of this section read as a

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proviso to the clause "no person is liable as drawer, endorser or acceptor of a bill who has not signed it as such," which is now part of sec. 131 in the Canadian act.

There is no provision in the Negotiable Instruments Law corresponding to sub-sec. 2.

Trade or assumed name.

John Smith carries on business under the name of "John Brown," or "Brown & Co.," or the "London Iron Co." He is liable on a bill drawn, endorsed, or accepted by him in any of these names. Chalmers, p. 73.

Firm signature.

The signature of a firm is deemed to be the signature of all persons who are liable as partners in the firm, whether working, dormant, or secret (Pooley v. Driver, 1876, 5 Ch.D. 458), or who, by holding themselves out as partners, are liable as such to third parties. Gurney v. Evans, 1858, 27 L.J. Ex. 166. Chalmers, p. 74.

Partnership signature.

Sub-sec. 2 relates merely to the formal effect of the signature of a firm name—the signature is equivalent to the signature of the names of all persons liable as partners in the firm. In English law a firm as such has no existence; partners carry on business both as principals and agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity. Sadler v. Whiteman, [1910] 1 K.B. 868, at p. 889, quoted in Rex v. Holden, [1912] 1 K.B. at p. 487.

In order to bind the firm, the signature must be that of the firm name. If a partner or other person signs his own name and not that of the firm, he alone is liable. Cf. notes to sec. 35.

Whether the firm is liable upon the signature of the firm name is a question of the authority of the person signing, an authority which depends on the doctrine of agency. In re Cunningham & Co., Simpson's Claim, 1887, 36 Ch.D. 532, at p. 538. As to signature by an agent, see sec. 4. As to the rights and liabilities of partners in regard to bills, see Byles, pp. 63 ff., Grant, pp. 364 ff.

Where the name of a firm and the name of one of the partners in it is the same, and that partner draws, endorses, or accepts a bill in the common name, the signature is *primâ facie* deemed to be the signature of the firm; but the presumption

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may be rebutted by shewing that the bill was not given for partnership purposes or under the authority of the firm. Yorkshire Banking Co. v. Beatson, 1880, 5 C.P.D. 109, in which the English and American cases are reviewed; cf. Standard Bank v. Dunham, 1887, 14 O.R. 67.

B., a partner in a firm which trades as C.D., makes a note in respect of a partnership transaction, signing it D. & Co. If he has no authority from his partners to vary the firm style, the firm is not liable, but B. is liable. Faith v. Richmond, 1840, 11 A. & E. 339; Royal Canadian Bank v. Wilson, 1874, 24 U.C.C.P. 362; but as to an accidental mis-spelling or an immaterial and unintentional variation in the name, see Kirk v. Blurton, 1841, 9 M. & W. at p. 289, 2 Ames 552; Forbes v. Marshall, 1855, 11 Ex. 166; cf. Chalmers, p. 73.

In order to bind the firm the person signing must have authority to bind his partners, unless the partners sought to be charged have afterwards ratified the signing, or are precluded from setting up the want of authority. As to estoppel see sec. 49.

The authority may be actual or it may be implied by law. A partner has implied authority to do any act necessarily incidental to the proper conduct of the partnership business and there the presumption of authority ends. This general rule as applied to bills signed in the name of trading partnerships and non-trading partnerships respectively, gives rise to two distinct rules, which are stated by Chalmers, pp. 75-76, as follows:

1. A partner in a trading firm has *primâ facie* authority to bind the firm by drawing, endorsing or accepting bills in the firm name for partnership purposes; and if the bill gets into the hands of a holder in due course, the presumption of authority becomes absolute, and it is immaterial whether it was given for partnership purposes or not. Bank of Australasia v. Breillat, 1847, 9 Moo. P.C. 152, at p. 194; Wiseman v. Easton, 1863, 8 L.T.N.S. 637; McLeod v. Carman, 1869, 12 N.B.R. (1 Han.) 602.

2. A partner in a non-trading firm has *primâ facie* no authority to render his co-partners liable by signing bills in the firm name. The holder must shew authority, actual or ostensible. Dickinson v. Valpy, 1829, 10 B. & C. at p. 137; Thicknesse v. Bromilow, 1832, 2 Cr. & J. 425. As to drawing postdated cheques, see the notes to sec. 27.

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The following have been held to be non-trading partnerships: professional firms (*e.g.*, solicitors, Garland v. Jacomb, 1873, L.R. 8 Ex. at p. 219; Wilson v. Brown, 1881, 6 O.A.R. 411), mining firms (Ricketts v. Bennett, 4 C.B. at p. 699), agricultural firms (Kimbro v. Bullit, 1859, 20 Howard, 256), and commission agencies (Yates v. Dalton, 1858, 28 L.J. Ex. 69). Auctioneers, perhaps, are non-traders, (Wheatley v. Smithers, [1906] 2 K.B. 321, reversed on a different ground, namely, authority in fact, [1907] 2 K.B. 684). Chalmers, p. 76.

If a person takes a note signed in a firm name knowing that it was not made or endorsed for partnership purposes, or if the circumstances or the nature of the transaction indicate that the making or endorsing of the note is not for the benefit of the firm or is in fraud of the partners other than the one who signs, the onus is cast upon the person so taking the note of proving that the partnership signature was authorized or assented to by the other partners. Union Bank v. Bulmer, 1885, 2 Man. R. 380; Federal Bank v. Northwood, 1884, 7 O.R. 389; McConnell v. Wilkins, 1885, 12 O.A.R. 438; Creighton v. Halifax Banking Co. 1890, 18 S.C.R. 140.

Where a bill is payable to the order of a firm, a partner who cannot by his endorsement render his co-partners liable may transfer the property in the bill by negotiating it in the firm name to an endorsee without notice. Cf. Smith v. Johnson, 1858, 3 H. & N. 222; Heilbut v. Nevill, 1870, L.R. 5 C.P. 478. When a bill is payable to the order of a firm and the partnership is subsequently dissolved the endorsement of an ex-partner in the late firm name transfers the property in the bill and authorizes its payment. King v. Smith, 1829, 4 C. & P. 108; Lewis v. Reilly, 1841, 1 Q.B. 349. The latter case may be open to question in so far as it lays down that an ex-partner by endorsing a bill in the late firm name, renders his former partners liable as endorsers to a holder with notice of the dissolution. Chalmers, p. 77.

In Ross v. Chandler, 1911, 45 S.C.R. 127, 19 O.L.R. 584, C., a member of a partnership of R.M. & C., received a cheque payable to the firm for a sum due to the firm, and endorsed it in the name of the firm, which he had a right to do. Instead, however, of depositing the cheque to the credit of the firm, he and M., without the knowledge or consent of R., opened an account with the defendant bank in the name of a new firm, M. C. & M., of which they were members, and deposited the

cheque, endorsed also in the name of the new firm. The bank made no enquiry, and the amount of the cheque was placed to the credit of the new firm and ultimately paid out. It was held that an action would not lie by R. against the bank for conversion of the cheque or for misapplication of it in breach of trust. See also the notes to sec. 96 of the Bank Act. Sec. 132. Partnership signature.

133. The endorser of a bill, by endorsing it, subject to the effect of any express stipulation hereinbefore authorized,— Endorser.

(*a*) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or a subsequent endorser, who is compelled to pay it, if the requisite proceedings on dishonour are duly taken; Engages acceptance or compensation.

(*b*) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements; Genuineness and regularity.

(*c*) is precluded from denying to his immediate or a subsequent endorsee that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto. 53 V., c. 33, s. 55. [Eng. s. 55 (2). Cf. N.I.L. s. 66.] Validity.

In this section as enacted in 1906 the word "endorsee" was printed "endorser" in the second line of clause (*c*). The mistake was corrected by 7-8 E. 7, c. 8, s. 1.

As to negotiation by endorsement, and the various forms of endorsement, see secs. 60 ff.

As to the liabilities and rights of successive endorsers of a bill in regard to notice of dishonour, see secs 101 and 102 and notes.

It is conceived that the words "according to its tenor" mean the tenor of the bill at the time of its endorsement, and not its tenor at the time it was drawn, if its effect has been varied, *e.g.*, by a qualified acceptance or by an alteration of the sum payable. Cf., however, Lebel v. Tucker, 1867, L.R. 3 Q.B. at p. 81, with Gibbs v. Fremont, 1853, 9 Ex. at p. 31; Chalmers, p. 206.

The provisions of clauses (*b*) and (*c*) may usefully be com-

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pared with sec. 129. In each case the party who signs a bill by the act of signing represents to a holder in due course that all the signatures on the bill at the time of his so signing are genuine and valid. The endorser in addition is estopped from denying to his immediate or a subsequent endorsee that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title to it. This additional obligation of the endorser, based in the act upon the principle of estoppel, is analogous to the obligation incurred by the transferor of a chattel, and the Negotiable Instruments Law, sec. 66, uses language borrowed from the law of sales of goods—the endorser "warrants" that the instrument is genuine and in all respects what it imports to be, that he has a good title to it, and that all prior parties had capacity to contract. See Street, Foundations of Legal Liability, vol. 2, pp. 411-5.

Sec. 133 expresses the contract of a person who endorses without qualification. As to an "express stipulation" modifying the contract, see secs. 34, 61 and 93. As to the obligation under a qualified endorsement, see the notes to sec. 138.

The endorser of a promissory note, purporting to be made by a corporation, is estopped from alleging that the making of the note was *ultra vires* of the corporation. Merchants Bank v. United Empire Club, 1879, 44 U.C.R. 468; cf. Ross v. Dixie, 1850, 7 U.C.R. 414 (a bill drawn by a married woman).

The rule laid down in this section is probably intended to be a mere statement of the contract which *primâ facie* is the contract of the endorser, and is doubtless conclusively the contract as between the endorser and a subsequent holder in due course (cf. Elder v. Kelly, 1850, 8 U.C.R. 240). The section adopts the statement of Byles, J., in Susé v. Pompe, 1860, 8 C.B.N.S. 538, with the qualification as to due notice of dishonour observed upon by Lord Blackburn in Duncan Fox v. North & S.W. Bank, 1880, 6 App. Cas. 1 at p. 18, 4 R.C. 491 at p. 606.

The nature of the contract as between the endorser and his immediate endorsee is stated in Castrique v. Buttigieg, 1855, 10 Moo. P.C. 94 at p. 108, as follows: "The liability of an endorser to his immediate endorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an endorsement, and which is

indeed necessary to the existence of the contract in question; but that contract arises out of the written instrument itself, the delivery of the bill to the endorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties, and their relative situations) under which the delivery takes place."

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The act has always been construed with certain exceptions, as a declaratory act, to be interpreted with due regard to the principles more fully explained by existing authoritative decisions. It cannot therefore have been the intention of sec. 133 to overrule the weight of authority above cited and to say that the contract of the endorser is to all intents and purposes the same as if he had made an express contract in writing in the terms of the clause of the act. To maintain the consistency of the view here put forward with the words of clause (*a*), we must read the clause with the implied addition "*primâ facie* as between the immediate parties to the act of endorsement, and conclusively as to a subsequent holder in due course." See Macdonald v. Whitfield, 4 Ruling Cases, at p. 547, where the editors state the law substantially as above.

Admissibility of evidence to qualify or invert relative liabilities of parties.

The liabilities *inter se* of the successive endorsers of a bill must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant. He who is proved or admitted to have made a prior endorsement must, according to these principles, indemnify subsequent endorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue and transfer of a bill may legitimately be referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party according to the law merchant is not altered or affected by reference to such facts and circumstances,

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he may still obtain relief by shewing that the party from whom he claims indemnity agreed to give it to him; but in that case he sets up an independent and collateral guarantee, which he can prove only by means of a writing which will satisfy the Statute of Frauds. Macdonald v. Whitfield, 1883, 8 App. Cas. 733, at pp. 744-745, 4 R.C. 530, at p. 541. See also the notes to sec. 73. Sec. 65 provides that where there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. The Negotiable Instruments Law, sec. 68, provides that, as respects one another, endorsers are liable *primâ facie* in the order in which they endorse; but that evidence is admissible to shew that as between or among themselves they have agreed otherwise.

It may be shewn that a party apparently secondarily liable is the principal debtor and that he agreed with the party apparently primarily liable to save him harmless. *E.g.*, C. promises B. that if B. will draw a bill, to be accepted by A. and endorsed by C., B. shall not be called upon. B. is compelled to pay the bill. He can sue C., the promise of the latter not being a guarantee within the Statute of Frauds but a promise to indemnify B.(*e*) Batson v. King, 1859, 4 H. & N. 739; De Colyar on Guarantees, 3 ed. 96. Cf. Simpson v. Dolan, 1908, 16 O.L.R. 459.(*f*)

So if A. and M. make a joint and several promissory note in favour of B., A. is entitled to shew that to the knowledge of B. A. was surety only for M., the principal debtor, and that after maturity B. made a binding agreement to give time to M. and thus discharged A. in equity. Greenough v. McClelland, 1860, 2 El. & El. 424. It is immaterial that the holder, when he took the bill was ignorant of the real relation between the apparent co-contractors, if he had notice of the relation at the time of his dealing with the real principal. Ewin v. Lancaster, 1865, 6 B. & S. 571, 2 Ames 78; Overend v. Oriental Financial Corporation, 1874, L.R. 7 H.L. 348, 4 R.C. 576. Even if two

(*e*) That is, a promise by C. to save B. harmless from a liability which B. incurs at the request of C. C.'s promise is an original promise outside the statute as distinguished from a collateral promise to answer for the debt on default of A. which would be within the statute. As to this distinction, see Guild & Co. v. Conrad, [1894] 2 Q.B. 885; Beattie v. Dinnick, 1896, 27 O.R. 285; Harburg India Rubber Comb Co. v. Martin, [1902] 1 K.B. 778.

(*f*) Distinguished on the facts in McWilliams v. Sovereign Bank, 1909, 14 O.W.R. 561.

or more persons are orignially indebted as principals, and it is afterwards agreed between them that as between themselves one shall be surety only and this agreement is made known to the creditor, the rule as to the discharge of a surety by dealings with the principal applies. Rouse v. Bradford, [1894] A. C. 586; Allison v. McDonald, 1894, 23 S.C.R. 635. Sec. 133.

During the currency of a bill the drawer and endorsers are not sureties, but principal debtors, jointly and severally liable. While the bill is current there is nothing to prevent the holder from dealing in any way he thinks fit with any other parties so long as he does not prevent himself from giving notice of dishonour so that the parties notified may in turn have their remedies against prior parties, and the sole condition of the liability of the drawer and endorsers is that the requisite proceedings on dishonour be duly taken. *E.g.* where a bank is holder of a bill accepted by a customer and endorsed by a third person, it may vary the securities received from the customer according to the ordinary course of business during the currency of the bill. But after the bill is dishonoured and due notice of dishonour is given, the drawer and endorsers are in a position so far analogous to that of surety that they are entitled to the benefit of securities deposited with the holder by the acceptor, being the principal debtor on the bill. Duncan Fox & Co. v. North and South Wales Bank, 1880, 6 App. Cas. 1, 4 R.C. 591; cf. De Colyar, *op. cit*, 323. Relation of principal and surety.

As to the circumstances under which a surety will be released by the conduct of the creditor, see De Colyar, *op. cit.* 394 ff. and Chalmers, pp. 241 ff. As to presentment for payment to charge a surety, see the notes to sec. 85, and as to notice of dishonour, see the notes to sec. 96.

A bill is drawn by one person and endorsed by another for the accommodation of the acceptor. The drawer is compelled to pay the bill. He can sue the endorser for contribution as a co-surety (Reynolds v. Wheeler, 1861, 10 C.B.N.S. 561), although he could not sue him on the bill. Steele v. McKinley, 1880, 5 App. Cas. 754, 4 R.C. 218.

Where the directors of a company mutually agree to become sureties to a bank, for certain debts, and in pursuance of the agreement successively endorse certain notes of the company, the presumption is that they are entitled and liable to equal contribution *inter se*, and are not liable to indemnify each other successively according to the priority of their endorsements. Relation of principal and surety.

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Macdonald v. Whitfield, 1883, 8 App. Cas. 733, 4 R.C. 530, overruling Ianson v. Paxton, 1873, 23 U.C.C.P. 439, and Fisher v. Meehan, 1876, 40 U.C.R. 146; cf. Steacy v. Stayner, 1904, 7 O.L.R. 684; Vallée v. Talbot, 1892, Q.R. 1 S.C. 223; Clipperton v. Spettigue, 1868, 15 Gr. 269; Cockburn v. Johnson, 1869, 15 Gr. 577.

Accommodation party.

An accommodation party and his liability on the bill to a holder for value are defined by sec. 55. As to what is an accommodation bill, see notes to that section.

When a person draws, endorses, or accepts a bill for the accommodation of another, the person accommodated impliedly engages (*a*) that he will provide funds for the payment of the bill at maturity, and (*b*) that if, owing to his omission so to do, the accommodation party is compelled to pay the bill, he will indemnify such party. Reynolds v. Doyle, 1840, 1 M. & Gr. 753; Sleigh v. Sleigh, 1850, 5 Ex. at pp. 516-7; cf. Hawley v. Beverley, 1843, 6 M. & Gr. at p. 227; Asprey v. Levy, 1847, 16 M. & W. 851; Chalmers, p. 217. Farrow v. McPherson, 1910, 2 O.W.N. 70, 16 O.W.R. 1009.

Measure of damages.

134. Where a bill is dishonoured, the measure of damages which shall be deemed to be liquidated damages shall be—

Amount of bill.

(*a*) the amount of the bill;

Interest.

(*b*) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case;

Expenses.

(*c*) the expenses of noting and protest. 53 V., c. 33, s. 57. [Eng. s. 57(1).]

There is no corresponding provision in the Negotiable Instruments Law.

The recovery of the damages mentioned in this section is provided for by sec. 135. In addition to the damages mentioned in this section, in the case of a bill dishonoured abroad, re-exchange, with interest thereon until payment, can be recovered (sec. 136 and notes to that section).

Measure of damages on dishonour.

It is still the law, as laid down before the act in Walker v. Hamilton, 1860, 1 DeG. F. & J. 602, and In re General South American Co., 1877, 7 Ch.D. 637, 4 R.C. 565, that the drawer of a bill of exchange in a foreign country, accepted in Canada is

entitled, upon the bill being dishonoured and protested, to recover from the acceptor, not only the amount of the bill with interest, but also all such reasonable expenses, including damages in the nature of re-exchange, as the drawer is by the foreign law liable to pay to the holder of the bill. The liability of the drawer in such a case depends on the foreign law, and sec. 10 preserves the former liability of the acceptor to indemnify the drawer against his liability. Sec. 134 is not addressed to this point at all. In re Gillespie, Ex parte Robarts, 1886, 18 Q.B.D. 286;(*g*) cf. R.S.C. 1886, c. 123, sec. 6, now repealed.

Sec. 134. Measure of damages on dishonour.

When a bill is dishonoured the holder has the option to sue on the bill or, when the action is between immediate parties, on the consideration, except in the case of a transferor by delivery (sec. 138), who is not generally liable on either. But it is advisable to sue on the bill, (1) because it reduces the debt to a certainty; (2) because less evidence is necessary; (3) because in an action on the bill proof of payment of the bill lies on the defendant, but in an action on the consideration only, if the defendant shew that a bill was given, the plaintiff must prove that the bill was not paid. Byles, p. 358; Hebden v. Hartsink, 1801, 4 Esp. 46.

Interest.

The amount of the bill includes interest until maturity and exchange, if these are provided for in the bill (sec. 28). Until the maturity of the bill, the interest, if any, is part of the debt; after maturity, interest is given as damages.

The agreement between the parties for payment of interest after maturity at a certain rate fixes the rate of interest recoverable as damages, however exorbitant it may be. Young v. Fluke, 1865, 15 U.C.C.P. 360, cf. McKay v. Fee, 1860, 20 U.C.R. 268; Popple v. Sylvester, 1882, 22 Ch.D. 98.

Interest as damages.

But unless the instrument provides in unequivocal terms for payment of interest at a particular rate *after maturity*, only the statutory rate, namely, 5%, is payable. See notes to sec. 91 of the Bank Act, *supra*.

(*g*) In the court below (16 Q.B.D. 702) Cave, J. expressed the opinion that sec. 134 is intended to describe the damages which may be treated as liquidated damages for the purpose of the special endorsement of a writ so as to permit of motion for judgment, and does not deprive the drawer of the right to recover from the acceptor any special damage of an unliquidated character which he can shew that he has sustained. But see *contra*, per Mathew J. in Banque Populaire v. Cave, 1895, 1 Com. Cas. 67, 69; cf. Chalmers, p. 211; Byles, p. 357.

Sec. 134. Interest as damages.

Sec. 57 (3) of the English act contains the following provision which is omitted from the Canadian act: "Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper." See Byles, pp. 350, 353.

Since the passing of the act, when a bill is dishonoured by non-acceptance, interest can be recovered only from the date of maturity, and not from the date of dishonour. This perhaps does not accord with the practice before the act. Chalmers, p. 211.

Expenses of noting and protest.

The English act reads, "The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest."

It has been held in England that where a bill which had been protested for better security (sec. 116) has been accepted by a bank for the honour of the drawer (sec. 147), the bank cannot recover the expenses of the protest for non-payment or the commission for so accepting. In re English Bank, Ex parte Bank of Brazil, [1893] 2 Ch. 438. So far as the expenses of protest are concerned, the decision is put upon the ground that such protest was not "necessary" (sec. 114) and is inapplicable to the Canadian act. Under our act, it is always proper to protest a dishonoured bill (sec. 113) and by sec. 134 the damages include "the expenses of noting and protesting."

Recovery of damages.

135. In case of the dishonour of a bill the holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser, the damages aforesaid. 53 V., c. 33, s. 57. [Eng. s. 57 (1).]

There is no corresponding provision in the Negotiable Instruments Law.

As to the parties liable on a bill, see sec. 128 (acceptor),

sec. 130 (drawer), secs. 131 and 133 (endorser), sec. 186 (parties to a note). Sec. 135.

The "damages aforesaid" are provided for by sec. 134. Prior to 1906, the provisions of secs. 134, 135 and 136 were parts of one section.

136. In the case of a bill which has been dishonoured abroad in addition to the damages aforesaid, the holder may recover from the drawer or any endorser, and the drawer or an endorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. 53 V., c. 33, s. 57. [Eng. s. 47 (2).] Re-exchange and interest.

There is no corresponding provision in the Negotiable Instruments Law.

The corresponding provision of the English act provides for the recovery of re-exchange only "in lieu of the above damages," whereas under the Canadian act re-exchange may be recovered "in addition" to the damages provided for by sec. 134. Apparently in the Canadian act the word re-exchange is used to signify not the whole amount of the damages (exclusive of interest) as used in the English act and as explained by Byles, J., in Susé v. Pompe, 1860, 8 C.B.N.S. 538, 565, but the excess of those damages over the amount of the bill and the expenses of noting and protest. Cf. Willans v. Ayres, 1877, 3 App. Cas. 133, 144, and judgments in In re Gillespie, Ex parte Robarts, 1886, 16 Q.B.D. 702, 18 Q.B.D. 286.

The wording of the Canadian act renders inapplicable the decision in In re Commercial Bank, 1887, 36 Ch.D. 522, in which it was held that the only damages which the holder of a bill dishonoured abroad can recover are the amount of the re-exchange, with interest thereon, as provided by sub-sec. 2 of sec. 57 of the South Australian act [sec. 136], and that he has no option to sue for interest under sub-sec. 1 [sec. 134].

Re-exchange in sec. 136 must be distinguished from the expenses or damages in the nature of re-exchange which the person suing may have had to pay under the foreign law to the holder of a foreign bill drawn upon an acceptor in Canada. Cf. In re Gillespie, Ex parte Robarts, in notes to sec. 134.

Sec. 136.
Re-exchange and interest.

The re-exchange in the sense in which it is used in the English act, is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour at the then rate of exchange on the place where the drawer or endorser sought to be charged resides) must be drawn in order to realize at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour. The expenses consequent on dishonour are the expenses of protest, postage, customary commission and brokerage, and when a re-exchange bill is drawn, the price of the stamp. Chalmers, p. 212-3. Cf. Byles, p. 355.

The holder is entitled to draw a re-exchange bill upon the party liable. If the drawee accepts and pays such bill, he fulfils his contract of indemnity. According to English practice the re-exchange bill is now seldom drawn, but the right of the holder to draw it is settled by the law merchant, and it is only by a reference to this supposed bill that the re-exchange, in other words, the true damages in an action on the original bill, can be scientifically understood and computed. In re Commercial Bank, 1887, 36 Ch.D. at p. 528.

As to the measure of damages where the parties liable have signed in different countries, and no rate of interest has been fixed, see the notes to sec. 161.

Transferrer by delivery.

137. Where the holder of a bill payable to bearer negotiates it by delivery without endorsing it, he is called a 'transferrer by delivery.'

Liability of.

2. A transferrer by delivery is not liable on the instrument. 53 V., c. 33, s. 58. [Eng. s. 58 (1)(2).]

There is no corresponding provision in the Negotiable Instruments Law, but see notes to sec. 138.

No person is liable as endorser who has not signed the bill (sec. 131), but the transferor by delivery, by the act of negotiating it gives a warranty to his immediate transferee, being a holder for value, in the terms mentioned in sec. 138.

It is conceived to be the general rule of the English law, and the fair result of the English authorities, that the transferor is not even liable to refund the consideration, if the bill transferred by delivery without endorsement turn out to be of no value, by reason of the failure of the other parties to it.

For the taking to market of a bill payable to bearer without endorsing it is *primâ facie* a sale of the bill. And there is no implied guarantee of the solvency of any party. Byles, p. 181. The rule, however, is not without exceptions. *Ibid.*, pp. 183; cf. Russell, pp. 379 ff. Sec. 137.

See sec. 2 as to "holder" and "delivery," and sec. 21 as to "bill payable to bearer." As to negotiation, see sec. 60.

138. A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value,— Warranty by.

(*a*) that the bill is what it purports to be; Genuineness.

(*b*) that he has a right to transfer it; and, Right to transfer.

(*c*) that at the time of transfer he is not aware of any fact which renders it valueless. 53 V., c. 33, s. 58. [Eng. s. 58 (3). Cf. N.I.L. ss. 65 and 69]. *Bona fides.*

A transferor by delivery is not liable on the instrument (sec. 137), but as an incident of the contract of sale he warrants the genuineness of the instrument, like the vendor of a chattel. This warranty of genuineness is to be distinguished from the liability on the consideration.

Chalmers (p 216) gives the following illustrations of this section:

1. C. discounts with D. a bill payable to bearer without endorsing it. It turns out that, unknown to C., the amount of the bill had been fraudulently altered by a previous holder. D. can recover from C. the money paid. Jones v. Ryde, 1814, 5 Taunt. 488; cf. Burchfield v. Moore, 1854, 23 L.J.Q.B. 261. Liability of transferor by delivery.

2. A *bill broker* discounts with a bank a bill endorsed in blank by the payee. The endorser absconds and the signatures of the drawer and acceptor turn out to be forgeries. The bank can recover the money paid from the broker. Fuller v. Smith, 1824, R. & M. 49.

3. An agent gets a bank to discount a bill drawn and endorsed in blank by his principal, and then pays over the money to his principal. The signature of the acceptor was a forgery, but the agent did not know it. The drawer fails. The bank cannot recover from the agent. Ex parte Bird, 1851, 4 DeG. & S. 273.

4. The *bonâ fide* holder of a bill purporting to be drawn by

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A., accepted by B., and endorsed in blank by C., discounts it with a banker. It turns out that the signatures of A. and B. were forgeries, and that C., whose endorsement was genuine, is insolvent. The banker can recover from the holder the money he paid. Gurney v. Womersley, 1854, 24 L.J.Q.B. 46; Merriam v. Wolcott, 1861, 85 Mass. 258.

Under the Negotiable Instruments Law, sec. 65, a transferor by delivery warrants, (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. As already noted under sec. 133, the obligations of an endorser without qualification include the first three warranties by virtue of sec. 66 of the Negotiable Instruments Law.

The Bills of Exchange Act contains no provision as to the obligations of an endorser under a qualified endorsement. Under the Negotiable Instruments Law, sec. 65, such endorser is liable upon the same warranties as a transferor by delivery, except that the warranties of the latter extend only to his immediate transferee. Ames questions the reasonableness of the distinction, his later opinion being that the warranties both of a transferor by delivery and of an endorser under a qualified endorsement should extend only to the immediate transferee. Brannan, pp. 81, 293; cf. Street, Foundations of Legal Liability, vol 2, pp. 411-5.

The third warranty mentioned in sec. 65 of the Negotiable Instruments Law does not apply to persons negotiating public or corporation securities, other than bills and notes. Sec. 69 of the same act provides that where a broker or other agent negotiates an instrument without endorsement, he incurs all the liabilities prescribed by sec. 65, unless he discloses the name of his principal, and the fact that he is acting only as agent.

CHAPTER XLVI.

Discharge of Bill.

A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument. The discharge of a bill must be distinguished from the discharge of one or more parties thereto, *e.g.*, a particular endorser may be discharged by want of notice of dishonour, while the drawer and other endorsers remain liable, or an endorser may be discharged as regards a particular party, but not as regards subsequent parties.(*a*) Chalmers, p. 219.

Modes of discharge.

A bill may be discharged by payment in due course by the person primarily liable (sec. 139), by renunciation (sec. 142), by cancellation (secs. 143 and 144), or by material alteration (secs. 145 and 146). A bill is discharged if the acceptor is or becomes the holder at or after its maturity in his own right (sec. 141). As to payment by drawer or endorser, see sec. 140. For a summary of the various ways in which a bill may be discharged or extinguished, see also 2 Ames pp. 821 ff.; Story on Bills, ss. 440 ff.

Chalmers (p. 219) also points out that a right of action on a bill must be distinguished from a right of action which a party to a bill may have arising out of the bill transaction, but wholly independent of the instrument. The former can be transferred by negotiating the instrument, the latter cannot. The former is, the latter may or may not be, extinguished by the discharge of the instrument. If an acceptance be given for a debt, and the acceptance is paid, both the debt and the bill are discharged, but as to the personal right of action of an accommodation acceptor or one of two joint acceptors who pays a bill, see notes to sec. 139.

The discharge of a party from his liability in a bill transaction, as distinguished from the discharge of the bill, may be governed by the provincial law of property and civil rights. See the notes to sec. 10.

(*a*) cf. notes to sec. 96.

Discharge of Bill.

Payment.

139. A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

Payment in due course.

2. Payment in due course means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

Accommodation bill.

3. Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged. 53 V., c. 33, s. 59. [Eng. s. 59 (1) (3). N.I.L. ss. 88 and 119.]

Payment of a bill.

A plea of payment of a bill should be supported by proof of payment in money, and not merely by proof of satisfaction of it by an agreement. Morley v. Culverwell, 1840, 7 M. & W. 174, at p. 183, 1 Ames 497, at p. 501; (a bill or note must provide for payment of a sum certain in money; secs. 17 and 176). If payment otherwise than in money be alleged, it must be proved that the party to whom such payment was made elected to treat a payment in that form as equivalent to a payment in money. Cf. Camidge v. Allenby, 1827, 6 B. & C. 373, 2 Ames 587; Guardians of Lichfield Union v. Green, 1857, 26 L.J. Ex. 140. Thus if bonds be accepted in payment, the payment is good though they prove to be worthless. Schroder's Case, 1870, L.R. 11 Eq. 131. Byles, pp. 239-40.

Payment of a bill.

A set-off amounts to payment if there is a mutual agreement that one demand shall be set off against the other.(*b*) Callander v Howard, 1850, 19 L.J.C.P. 312; Cripps v. Davis, 1843 12 M. & W. 159.

As to appropriation of payments and set off, see notes to sec. 95 of the Bank Act. As to payment between banks through the clearing house, see chapter 27, *supra*.

A negotiable instrument may be accepted in satisfaction of a bill for a larger amount. Sibree v. Tripp, 1846, 15 M. & W. 23, 2 Ames 603. As to payment of a smaller sum in satisfaction of a larger sum, see Foakes v. Beer, 1884, 9 App. Cas. 605, 1 R.C. 370, but by statute in Ontario part performance of an obligation either before or after breach, when expressly accepted by the creditor in satisfaction or rendered in pursuance

(*b*) In Quebec compensation may take effect without an agreement for set-off. See chapter 50, *infra*, under "Set-off and compensation."

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of an agreement for that purpose, though without any new consideration, extinguishes the obligation. 1 G. 5, c. 17, s. 41.

In Day v. McLea, 1889, 22 Q.B.D. 610, the defendant sent to the plaintiffs a cheque "in full of all demands." The plaintiffs kept the cheque, stating that they did so on account, and brought an action for the balance of their claim. It was held that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of their claim, but that it was a question of fact on what terms the cheque was kept. Day v. McLea was applied in Mason v. Johnston, 1893, 20 O.A.R. 412; see also Nathan v. Ogdens, Ltd., 1905, 93 L.T. 553, 94 L.T. 126. But if a payment is made by a third party in settlement of a creditor's claim, it can be accepted only on the terms on which it is made. The creditor must be taken to have accepted the amount in satisfaction and is not entitled to sue the debtor for the balance. Hirach and Punamchand v. Temple, [1911] 2 K.B. 330.

Part payment of a bill in due course operates as a discharge *pro tanto*. Chalmers, p. 220, citing Graves v. Key, 1832, 3 B. & Ad. 313; cf. Cook v. Lister, 1863, 32 L.J.C.P. at p. 125, 4 R.C. at p. 560. As to part payment by the drawer or an endorser, see the notes to sec. 140.

As to payment by bill, see notes, *infra*.

The Negotiable Instruments Law, sec. 119, after providing for discharge by payment in due course and by intentional cancellation, enacts that a negotiable instrument is discharged by "any other act which will discharge a simple contract for the payment of money." This is a correct statement of the law, provided that premature discharge by payment or otherwise cannot be set up against a subsequent holder in due course.(c) But, as the holder may under sec. 142 renounce his rights against any party, the rule as to accord and satisfaction after breach of contract is not applicable to bills; see notes to that section; cf. Cook v. Lister, 1863, 13 C.B.N.S. at p. 593, 4 R.C. at p. 561.

The payee of a note payable on demand takes also a mortgage to secure the debt. He then transfers the mortgage, receiving the amount of the note. This does not constitute payment of the note, and the payee may afterwards negotiate

(c) See criticism of the provision by Ames because of the omission of some such proviso. Brannan, p. 118.

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it to a holder in due course. Glasscock v. Balls, 1889, 24 Q.B.D. 13. As to merger, see Byles, 248.

By or on behalf of the drawee or acceptor.

It is obvious that it is the acceptor's primary duty to pay the bill, and by his due payment thereof he discharges all the other parties thereto from liability on the bill. Story on Bills, sec. 410. The same principle applies to payment by the maker of a note (sec. 186). As to the effect of payment by the drawer or an endorser, see sec. 140.

If one of several joint acceptors pays the holder in due course or purchases the bill during its currency and holds it until maturity, the bill is discharged, and cannot be further negotiated. The acceptor paying may have a right of action, not on the bill, against his co-acceptors for contribution or indemnity if the state of the accounts between them or the terms on which they agreed to become joint acceptors should afford ground for such an action, *e.g.* if the payer had accepted for the accommodation of his co-acceptors. Harmer v. Steele, 1849, 4 Ex. 1, at p. 13, 4 R.C. 515, at p. 519.

A joint and several note is paid at maturity by one of the makers. The note is discharged. Beamont v. Greathead, 1846, 2 C.B. 494.

Payment to the creditor by a stranger of the amount of the bill must be for and on account of the debt, and the payment must be made with the prior authority or the subsequent ratification of the debtor. Belshaw v. Bush, 1851, 11 C.B. 191; Kemp v. Balls, 1854, 10 Ex. 607; Simpson v. Eggington, 1855, 10 Ex. 845; Re Rowe, [1904] 2 K.B. 483. But the assent of the debtor ought, it has been stated, to be presumed; per Willes, J., Cook v. Lister, 1863, 32 L.J. C.P., at p. 127, 4 R.C. at p. 562. The payment may be ratified by pleading payment. Walter v. James, 1871, L.R. 6 Ex. at p. 127.

Payment by a stranger of the amount of a bill to the bankers at whose house the bill is made payable by the acceptor, the party obtaining payment of the bill for a collateral purpose of his own, is not payment by the acceptor. Deacon v. Stodhart, 1841, 2 M. & G. 317; Thomas v. Fenton, 1847, 5 D. & L. 28. Byles, p. 238.

To the holder thereof in good faith and without notice.

See sec. 2 as to holder, sec. 3 as to good faith, and sec. 56 as to defective title and notice.

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Payment must be made to the holder or to some person authorized to receive payment on his behalf (cf. sec. 87). Payment to any other person is no discharge; unless, indeed the money finds its way into the holder's hands and the holder treats it as received in liquidation of the bill. Cf. Byles, 17 ed. 235, citing Field v. Carr, 1828, 5 Bing. 13.

Chalmers, p. 222, gives the following illustrations:

1. A bill is endorsed payable to John Smith or order. Another person of the same name gets the bill and presents it. The acceptor pays him. The bill is not discharged. The acceptor is still liable to the real John Smith.

2. A bill endorsed in blank is stolen, The thief presents it to the acceptor at maturity, and obtains payment. If the acceptor pays him in good faith the bill is discharged, for the thief is the holder.

3. The endorsee of a bill has obtained it by fraud. He presents it at maturity to the acceptor, who pays him in good faith. The bill is discharged.

As to recovery of money paid by mistake to a person who is not the holder and who cannot give a discharge, see notes to sec. 50.

At or after maturity.

Payment in order to discharge a bill must be payment in due course and not by anticipation. Burbridge v. Manners, 1812, 3 Camp. 193, 1 Ames, 465. Premature payment is valid between the parties to the payment, but the acceptor who pays a bill before maturity is the purchaser of it, in the same position as if he had discounted it, and may negotiate it further (sec. 73) so as to entitle a holder in due course to recover upon it. Morley v. Culverwell, 1840, 7 M. & W. 174, 1 Ames 497. Attenborough v. Mackenzie, 1856, 25 L.J. Ex. 244, 1 Ames 842. If, however, the acceptor holds the bill until maturity, it is discharged (sec. 141).

Evidence is admissible to show that a person paying a bill paid as transferee, not as agent for the acceptor or drawer, notwithstanding that the holder gives a general receipt importing that he has received payment. Graves v. Key, 1832, 3 B. & Ad. 313; Byles, pp. 191, 243, 380.

Sec. 139. Payment of a bill.

By the party accommodated.

Accommodation party is defined by sec. 55. As to what is an accommodation bill, see notes to that section.

Ordinarily if a drawer or endorser pays a bill it is not discharged; see sec. 140. But if he is the party accommodated, he is the party ultimately liable upon it, and if the bill is paid by him it has done its work and is no longer a negotiable instrument. Lazarus v. Cowie, 1842, 3 Q.B. 459, 1 Ames 818. If a bill is accepted for the accommodation of the drawer and at maturity paid by him, it is discharged. The drawer cannot sue the party who accepted for his accommodation, nor can the holder as his action could only be for the benefit of the drawer. Cooke v. Lister, 1863, 32 L.J.C.P. 121, 4 R.C. 552; Roche v. Kempt, 1873, 33 U.C.R. 387; cf. 2 Ames 825.

As to discharge of party accommodated by the giving of time to the principal debtor, see notes to sec. 133.

Payment by bill, note or cheque.

The taking of a bill for and on account of a debt *primâ facie* operates to suspend the remedy by action to recover the debt until the maturity of the bill. Walton v. Mascall, 1844, 13 M. & W. 452, 4 R.C. 483. It may, however, be shewn that the bill is taken as collateral security only. In that event the remedy on the debt is not suspended. See the notes to sec. 76 of the Bank Act, *supra*, under the heading "Collateral security."

Payment by bill.

The taking of a bill does not suspend the creditor's remedy on a specialty (Freeman v. Canadian Guardian Life Ins. Co., 1908, 17 O.L.R. 296, 303, and cases cited), or by distress or secured debt, there being no presumption that the creditor is deprived of a better remedy than an action on the bill. In re Defries, Eichholy v. Defries, [1909] 2 Ch. 423, 428.

A creditor who takes a bill in respect of a pre-existing debt presumably takes it as conditional payment of the debt. Currie v. Misa, 1875, L.R. 10 Ex. at p. 163, 4 R.C. at p. 321; Belshaw v. Bush, 1851, 11 C.B. 191, 2 Ames 609; cf. 2 Ames, pp. 874-5. If the bill is paid in due course the payment of the debt becomes absolute as of the time of the taking of the bill. Marreco v. Richardson, [1908] 2 K.B. 584, 593. If the bill is dishonoured, the condition of the payment is broken and

the debt revives. Valpy v. Oakeley, 1851, 16 Q.B. 941, 21 R.C. 39; Yglesias v. River Plate Bank, 1877, 3 C.P.D. 60. The creditor may sue on the debt although he has an unsatisfied judgment on the bill. Wegg Prosser v. Evans, [1895] 1 Q.B. 108. But the creditor must be the holder of the bill when he sues for the debt. Davis v. Reilly, [1898] 1 Q.B. 1; In re A Debtor, [1908] 1 K.B. 344. Sec. 139. Payment by bill.

Notwithstanding the presumption to the contrary, it may be shewn that a creditor who takes a bill takes it as absolute payment, and his remedy is then on the bill alone, as, *e.g.*, where the creditor, having the option of taking cash, elects to take a bill of a third party upon which the debtor is not liable. Smith v. Ferrand, 1827, 7 B. & C. 19; cf. Byles, p. 329; Chalmers, p. 342.

Even if the payment is conditional in the first place and the bill is not paid, the creditor may lose his remedy on the debt by laches. If he takes a bill drawn or endorsed by the debtor, the bill is subject to the law incident to all bills and if the debtor is discharged from liability on the bill by the lack of presentment for payment or notice of dishonour, he is discharged also from the debt which entered into the consideration for the bill. Soward v. Palmer, 1818, 8 Taunt. 277; Bridges v. Berry, 1810, 3 Taunt. 130, 1 Ames 584; cf. notes to sec. 96. Similarly if the creditor takes from his debtor the bill or note of a third party, the creditor must use due diligence to obtain payment, and in default will be assumed to have accepted the instrument as cash or to have discharged the debtor by his laches. Camidge v. Allenby, 1827, 6 B. & C. 373, 21 R.C. 47; cf. Freeman v. Canadian Guardian Life Ins. Co., 1908, 17 O.L.R. 296, 301; Chalmers, p. 341; Byles, pp. 327-330.

When a bill is given in renewal of a former bill, and the holder retains the former bill, the renewal, in the absence of special agreement, operates merely as a conditional payment of the former bill. Cf. Lewis v. Lyster, 1835, 2 C.M. & R. 704; Lumley v. Musgrave, 1837, 4 Bing. N.C. at p. 15; Noad v. Bouchard, 1860, 10 L.C.R. 476, 8 R.J.R.Q. 473. If the renewal bill be paid in due course or otherwise discharged, the original bill is likewise discharged. Dillon v. Rimmer, 1822, 1 Bing. 100; cf. Soward v. Palmer, 1818, 2 Moore 274; Lumley v. Hudson, 1837, 4 Bing. N.C. 15. Renewal of bill.

But if the renewal bill be dishonoured, then the liabilities

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of the parties to the original bill (other than a surety who has been released by the extension of time given to the principal) revive, and they may be sued thereon. Ex parte Barclay, 1802, 7 Ves. p. 597; Norris v. Aylett, 1809, 2 Camp. 229; cf. Kendrick v. Lomax, 1832, 2 Cr. & J. 405; Sloman v. Cox, 1834, 1 C.M. & R. at p. 472; Fenton v. Blackwood, 1874, L.R. 5 P.C. 167. Renewing a bill or note operates as an extension of the time for paying it. Hence if a bill be renewed without the assent of all parties liable thereon as sureties, the parties so liable are discharged. Chalmers, pp. 247-8. As to the discharge of a surety, see the notes to sec. 133.

Payment by drawer or endorser.

140. Subject to the provisions aforesaid as to an accommodation bill, when a bill is paid by the drawer or an endorser, it is not discharged; but,—

Gives rights.

(*a*) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill;

Second negotiation.

(*b*) where a bill is paid by an endorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent endorsements, and again negotiate the bill. 53 V., c. 33, s. 59. [Eng. s. 59 (2). Cf. N.L.I. s. 121.]

A bill is discharged by payment in due course by or on behalf of the drawee or acceptor, or, in the case of an accommodation bill, by the party accommodated (sec. 139). In either of these cases the payment which discharges the bill is that of the person ultimately liable. But except as aforesaid a bill is not discharged by payment by the drawer or an endorser.

Effect of payment by drawer or endorser.

Clause (*a*) expresses the rule stated in Williams v. James, 1850, 15 Q.B. 498, 505, 1 Ames 832, 834.

Clause (*b*) expresses the rule stated in Callow v. Lawrence, 1814, 3 M. & S. 95, 1 Ames 809; cf. Black v. Strickland, 1883, 3 O.R. 217. The party paying is not entitled to enforce

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payment against any intervening party to whom he was previously liable (sec. 73).

It was long an unsettled question whether payment in part or in full by the drawer to the holder would discharge the acceptor *pro tanto*, or whether the holder might, nevertheless, recover the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer, as money received of the acceptor to the drawer's use. This section expressly provides for the case of payment in full by a drawer or endorser, but does not deal with the case of part payment. In the event, however, of a bill remaining in the hands of a holder after a payment in part or in full by the drawer or an endorser, there can now be little doubt but that the holder can sue the acceptor for the entire amount, holding in trust for the party who has so paid the amount of his payment, and any defence or set-off open to the acceptor against the party who has so paid is available against the holder. The party paying may, it would seem, leave the bill in the hands of the holder that he may take action thereon. Byles, pp. 237-8; Jones v. Broadhurst, 1850, 9 C.B. 173, 1 Ames 824 and later cases cited in Thornton v. Maynard, 1875, L.R. 10 C.P. 695; Williams v James, *supra;* Cook v. Lister, 1863, 13 C.B.N.S. at p. 596, 4 R.C. at p. 563. As to defences available against a holder, see the notes to sec. 74.

The C. Bank discounts a bill, which is accepted payable at the bank, and then endorses it away. At maturity it is presented to the bank and paid. It is a question of fact whether the bank paid as the agent and banker of the acceptor, or whether it took up the bill as endorser. In the latter case the bill is not discharged and the bank can sue the drawer, or, if he be a customer, debit him with the amount of the bill. Pollard v. Ogden, 1853, 2 E. & B. 459.

A drawer or endorser who pays the bill is, like a surety, entitled to the benefit of any securities deposited by the principal debtor with the holder and retained by the holder at the time of the dishonour of the bill. Duncan Fox & Co. v. N. & S. Wales Bank, 1880, 6 App. Cas. 1, 4 R.C. 591; cf. notes to sec. 133. *Quære* as to the rights of the endorsee to the securities, if the drawer or endorser again negotiates the bill Chalmers, p. 225.

Acceptor holding at maturity.

141. When the acceptor of a bill is or becomes the holder of it, at or after its maturity, in his own right, the bill is discharged. 53 V., c. 33, s. 60. [Eng. s. 61. N.I.L. s. 119.]

The transfer of a bill to the acceptor before maturity does not discharge it. See notes to sec. 139 under heading "At or after maturity."

It is no objection to the negotiability of a bill that it has during its currency and before it was payable become the property of one of several joint acceptors. But if at the time of maturity it is held by one of the acceptors,—that acceptor being entitled to receive as well as liable to pay the amount of the bill,—the liability upon the contract of acceptance is discharged as to all the acceptors. Harmer v. Steele, 1849, 4 Ex. 1, 4 R C. 515.

In this latter case it may be that the acceptor who has paid the bill may have a right of action against the other joint acceptors for contribution, if the state of accounts between them, or the terms on which they agreed with one another to become joint acceptors, should afford ground for such an action; but that action would not be on the contract of acceptance or on the bill, but on a different contract, arising out of the state of accounts between the joint acceptors, or the terms on which they agreed together to accept; and the right to bring it would not be capable of being transferred by act of the parties, by endorsement of the bill or otherwise. *Ibid.*

The expression "in his own right" is not used in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person and good against all the world. In Nash v. De Freville, [1900] 2 Q.B. 72, A. gave three notes to cover his indebtedness to the payee, and subsequently gave two more notes in substitution for the first three and to cover further advances. All the notes were payable on demand and were given on the understanding that they should not be negotiated. The payee endorsed all five notes to B. Afterwards A. paid to the payee the amount due on the last two notes, and at a later date the payee obtained the five notes from B. by fraud and handed them to A. In an action by B. against A. it was held that A., when he received back the note did not become holder for value, since the previous satisfaction of the notes by him was not a consideration given by him when he received back the notes, and that, as they were then over-

due, he acquired no better title than the payee had, and that B. could therefore recover. Cf. notes to sec. 20 of the Bank Act, as to holder "in his own right." Sec. 141. Acceptor holding at maturity.

As to the effect of the appointment of the acceptor as executor or as administrator of the holder, see Chalmers, p. 232, Byles, p. 76.

The mode of discharge provided for by this section is called in the civil law *confusio*, and is recognized in the countries the law of which is founded on the civil law.

142. When the holder of a bill, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. Renouncing rights.

2. The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity. Against one party.

3. A renunciation must be in writing, unless the bill is delivered up to the acceptor. Writing.

4. Nothing in this section shall affect the rights of a holder in due course without notice of renunciation. 53 V., c. 33, s. 61. [Eng. s. 62. N.I.L. s. 122.] Holder in due course.

It is a general rule of law that a simple contract may, *before breach*, be waived or discharged without a deed, and without satisfaction; but after breach, unless there be a release, there must be satisfaction. To this rule it has been repeatedly held that contracts on bills of exchange form an exception, and that the liability of the acceptor or other party, remote or immediate, though complete, may be discharged by an express renunciation of his claim on the part of the holder, without consideration. Cf. *per curiam*, Foster v. Dawker, 1851, 6 Ex. at p. 851, 1 Ames, at p. 840; Northern Crown Bank v. International Electric Co., 1911, 24 O.L.R. at p. 63. See Byles, p. 247, 251-2, where an explanation is given of the reason why negotiable instruments are in an exceptional position.

The words requiring the renunciation to be in writing were added in committee. They alter the English law, but bring it into accordance with Scotch law. Chalmers, p. 234; cf. Street, Foundations of Legal Liability, vol. 2, p. 410, note (1), characterizing the common law rule allowing oral renunciation as having been erroneously adopted in England. Renunciation in writing.

Sec. 142. Renunciation in writing.

In Edwards v. Walters, [1896] 2 Ch. 157, and In re George, Francis v. Bruce, 1890, 44 Ch. D. 627, the point was taken that *before* maturity of a bill a renunciation may be by parol, as at common law, but the section seems to exclude the common law rule. Byles, p. 252, note (*a*). In any event, a demand note is "at maturity" within this section as soon as it is made, although if it is negotiated a different rule applies for the purpose of affecting the holder with defects of title of which he had no notice (sec. 182). Northern Crown Bank v. International Electric Co., 1911, 24 O.L.R. 57, at p. 63, and cases cited.

The renunciation in writing required by the statute must be in itself a record of the renunciation, not a memorandum or note of the renunciation or of an intention or desire to renounce, *e.g.*, a written direction by the holder of a note that it be destroyed as soon as found, though given *in articulo mortis* and because the note could not at the time be found to be cancelled or given back to the maker, is not sufficient. In re George, *supra*.

Where the instrument is delivered up, delivery within the section does not include delivery to a devisee of the acceptor or maker, but delivery to the personal representatives is, it would seem, good. Byles, p. 252; Edwards v. Walter, *supra*.

The mere possession by the debtor of the instrument representing a debt raises only a presumption of *remise volontaire*—as renunciation is known in French law—which may be rebutted by evidence. Lewis v. Moore, 1908, Q.R. 34 S.C. 109.

As to a holder in due course, see sec. 56.

Cancellation of bill.

143. Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

Of any signature.

2. In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent.

Discharge of endorser.

3. In such case, any endorser who would have had a right of recourse against the party whose signature is cancelled is also discharged. 53 V., c. 33, s. 62. [Eng. s. 63 (1) (2). Cf. N.I.L. ss. 119 and 120.]

The Negotiable Instruments Law omits the qualification, "and the cancellation is apparent thereon," in sub-sec. 1.

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A cancellation by the holder *animo cancellandi* is equivalent to a destruction of the instrument. Yglesias v. Mercantile Bank of the River Plate, 1877, 3 C.P.D. 60. It is difficult to state with accuracy what will be a sufficient cancellation to affect a purchaser with notice. In Ingham v. Primrose, 1859, 7 C.B.N.S. 82, 1 Ames 530, the bill had been torn in two pieces which had afterwards been joined together again. The tear was apparent, but the question was whether cancellation was to be inferred from the appearance of the bill, and whether therefore a subsequent taker could be a holder in due course. Cf. notes to sec. 56 under the heading, "Complete and regular on the face of it."

The Negotiable Instruments Law. sec. 48, provides that the holder may at any time strike out any endorsement which is not necessary to his title; the endorser whose endorsement is struck out, and all endorsers subsequent to him, are thereby relieved from liability on the instrument. The rule of English law is the same. Mayer v. Jadis, 1833, 1 M. & Rob. 247; Wilkinson v. Johnson, 1824, 3 B. & C. 428; Bartlett v. Benson, 1845, 14 M. & W. 733; Fairclough v. Pavia, 1854, 9 Ex. at p. 695; Barthe v. Armstrong, 1869, 5 R.L. 213, 25 R.J.R.Q. 130.

Effect of cancellation of signature.

In general subsequent parties, from whom payment is enforced when the bill is dishonoured, have a right of recourse against prior parties; hence in general cancellation of the acceptance frees the drawer and all endorsers; cancellation of the drawer's signature, all the endorsers, and cancellation of an endorser's signature, all subsequent endorsers. Cancellation of the acceptance is therefore virtually a cancellation of the bill; hence, perhaps, the drawer is not mentioned as discharged in sub-sec. 3, but only the endorsers. But in a bill accepted for the accommodation of the drawer, *quære* if he would be discharged by cancellation of the acceptor's signature, though the endorsers would be; and if the bill were accepted for the accommodation of the payee, cancellation of the drawer's signature would not free the payee, the first endorser, for he would have no right of recourse against the drawer. Byles, p. 254, note (*n*).

B. accepts the first part of a foreign bill drawn in a set of two, and sends it, as directed, to a bank to be held at the disposition of the holder of the second. The drawer who is the holder of the second part, failing to discount it, cancels it, and

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directs the bank to deliver up the first to B. B. gets the first part and cancels his acceptance. B. is discharged, and if the drawer subsequently issues a fresh second part, the holder cannot sue B. Ralli v. Dennistoun, 1851, 6 Ex. 483, 4 R.C. 505; Chalmers, p. 235.

Unintentional cancellation.

144. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative: Provided that where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. 53 V., c. 33, s. 62. [Eng. s. 63 (3). N.I.L. s. 123.]

Burden of proof.

The proper and safe mode of cancelling is to draw the pen through the name, so as to leave it legible. Byles, p. 255, citing Wilkinson v. Johnson, 1824, 3 B. & C. 428, and Ingham v. Primrose, cited in the notes to sec. 143. In Wilkinson v. Johnson the plaintiff paid certain bills of exchange for the honour of one endorser and struck out the subsequent endorsements. The same morning it was discovered that the signatures of the drawer, the acceptor and the endorser for whose honour the bills had been paid were forged. Notice was immediately sent to the holder. Held that the rights of the parties were not altered by the erasure of the endorsements, that having been done by mistake, and being capable of explanation by evidence. See also Warwick v. Rogers, 1843, 5 M. & G. 340, in chapter 28, *supra*, on "The Clearing House"; Prince v. Oriental Bank Corporation, 1878, 3 App. Cas. 325.

Alteration of bill.

145. Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent endorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. 53 V., c. 33, s. 63. [Eng. s. 64 (1). Cf. N.I.L. s. 124.]

Holder in due course.

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As to what is a material alteration, see sec. 146. As to holder in due course, see sec. 56.

Effect of material alteration.

It was stated in Pigot's Case, 1614, 11 Rep. 26, that "when any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void." In Master v. Miller, 1791, 4 T. R. 320, 2 R.C. 669, it was decided that a similar rule is applicable to negotiable instruments and other documents not under seal. See also Carrique v. Beaty, 1897, 24 O.A.R. 302; Maxon v. Irwin, 1907, 15 O.L.R. 81.

As to alteration by a stranger, see Davidson v. Cooper, 1843, 13 M. & W. 343; Stack v. Dowd, 1907, 15 O.L.R. 331, 333; but cf. Byles, 302, referring to Taylor on Evidence, 10 ed., par. 1827-9, doubting Davidson v. Cooper.

Read grammatically, the section would seem to enact that a material alteration of a bill has the effect of nullifying it, as against all parties except the party who made the alteration and such as, at the time of or before the making of it, had authorized or assented to it, but in any case a subsequent ratification would not give validity to an alteration amounting to forgery. Hébert v. Banque Nationale, 1908, 40 S.C.R. 458, 485; cf. notes to sec. 49.

Rights of holder in due course of altered bill.

The proviso was introduced into the English bill in committee to mitigate in favour of the holder in due course the rigour of the common law rule. Chalmers, p. 237.

The proviso is not applicable for the protection of a holder in due course as against a person who is alleged to be a party to it, if the document left such party's hands in an incomplete state and if it had never been delivered by him for the purpose of its being converted into a complete instrument. Hubbert v. Home Bank, 1910, 20 O.L.R. 531; see notes to sec. 32, which governs a case of this kind.

The word "apparent" in the proviso means an alteration which can be discerned by the holder. Cunnington v. Peterson, 1898, 29 O.R. 346, dissenting from the *dictum* of Denman J., in Leeds & County Bank v. Walker, 1883, 11 Q.B.D. at p. 90 to the effect that an alteration is apparent if the person sought to be made liable can at once discover by some incongruity on the face of the bill, and point out to the holder that it is not what it was, that is to say that it has been materially and

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fraudulently altered, even if the alteration is not an obvious one to all mankind. This *dictum* was not followed in Scholfield v. Earl of Londesborough, [1896] A.C. 514, and would do away with the benefit to the holder in due course designed by the proviso. Cf. Maxon v. Irwin, *supra*, in which a word was erased in such a way that the alteration was discernible only by the use of a microscope.

In Cunnington v. Peterson it appeared that the name of one of the alleged makers of a note was not signed by him or with his authority but was added to the note after some and before others of the makers had signed, and before the note came to the hands of the plaintiff, a holder in due course. Held that the alteration was not apparent and the plaintiff was entitled to recover on the note as if it had not been altered.

Where a drawer of a bill after acceptance fraudulently altered the amount, it was held that the holder in due course might recover on the bill as it was originally accepted. Scholfield v. Londesborough, *supra;* cf. Imperial Bank v. Bank of Hamilton, [1903] A.C. 49; see notes to sec. 50.

When alteration extinguishes the debt.

An alteration by the drawer of a bill payable to the drawer's order, or by the payee of a note, though it avoids the instrument, does not extinguish the debt (Sutton v. Toomer, 1827, 7 B. & C. 416; Atkinson v. Hawdon, 1835, 2 A. & E. 628; Sloman v. Cox, 1834, 1 Cr. M. & R. 471), unless the bill or note were taken in satisfaction of the debt. McDowall v. Boyd, 1848, 17 L.J.Q.B. 295. But an alteration by an endorsee not only avoids the security as against all parties, but also extinguishes the debt due to the endorsee from the endorser. Alderson v. Langdale, 1832, 3 B. & Ad. 660. Byles, p. 308. See Chalmers, p. 240, as to the exceptions to the general rule that the holder of a bill which has been avoided by a material alteration cannot sue on the consideration for which it was negotiated to him. Cf. 2 R.C. at p. 694.

Where a bill appears to have been altered, or there are marks of erasure on it, the onus is on the party seeking to enforce the bill to shew that it is not avoided thereby. Chalmers, p. 241; Byles, p. 309.

Material.

146. In particular any alteration,—

Date.

(*a*) of the date;

Sum.

(*b*) of the sum payable;

(*c*) of the time of payment; Sec. 146. Time.

(*d*) of the place of payment; Place.

(*e*) by the addition of a place of payment without the acceptor's assent where a bill has been accepted generally; Adding parties.

is a material alteration. 53 V., c. 33, s. 63. [Eng. s. 64 (2). Cf. N.I.L. s. 125.]

As to the cases in which material alteration will make a bill void, see sec. 145.

An alteration is material which in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial. Gardner v. Walsh, 1855, 5 E. & B. 83, 89; Boulton v. Langmuir, 1897, 24 O.A.R. 618; cf. Suffell v. Bank of England, 1882, 9 Q.B.D. 555, 568, 574-575. The materiality of an alteration is a question of law (Vance v. Lowther, 1876, 1 Ex. D. 176), and must be considered with reference to the contract itself and not with reference to the surrounding circumstances. Re Commercial Bank, Banque d'Hochelaga's Case, 1894, 10 Man. R. 171. What is a material alteration.

Sec. 146 is not exhaustive. Cf. Chalmers, pp. 238-9, where examples (in part reproduced below) are given of material and immaterial alterations respectively.

The following have been held to be material alterations:—

1. An alteration of the date of a bill payable at a fixed period after date, whereby the time of payment is postponed (Outhwaite v. Luntley, 1815, 4 Camp. 179; Hirschman v. Budd, 1873, L.R. 8 Ex. 171), or accelerated. Master v. Miller, 1793, 4 T.R. 320, 2 R.C. 669; Walton v. Hastings, 1815, 4 Camp. 223. But if a bill or acceptance is undated, the holder may insert the true date (sec. 30).

2. An alteration of the date of a cheque or bill payable on demand (Vance v. Lowther, 1876, 1 Ex.D. 176; Beltz v. Molsons Bank, 1876, 40 U.C.R. 253; Boulton v. Langmuir, 1897, 24 O.A.R. 618), although the effect is to make less interest payable.

But an alteration to correct a manifest error was held to be immaterial. Cf. Merchants Bank v. Stirling, 1880, 13 N.S.R. (1 R. & G.) 439, an accommodation note dated "6th, 1875," changed to "8th June, 1875," the 6th of June being a Sunday.

3. The alteration of the sum payable. Cf. Hamelin v. Bruck, 184€, 9 Q.B. 306.

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4. The superscription upon the face of the bill and over an endorsement of a particular rate of exchange. Hirschfeld v. Smith, 1866, L.R. 1 C.P. 340.

5. The alteration of a specified rate of interest. Sutton v. Toomer, 1827, 7 B. & C. 416. The alteration of a bill payable "with lawful interest" by adding the words "interest at six per cent." Warrington v. Early, 1853, 23 L.J.Q.B. 47. The insertion of a rate of interest in a clause providing for interest but with the rate left blank would be authorized by sec. 31. In Fitch v. Kelly, 1879, 44 U.C.R. 578, it was held that there was sufficient evidence to shew that the note was altered (by the addition of the words "with interest at seven per cent.") to conform to the original intention of the parties, and that the endorsers subsequently agreed to it.

6. The alteration of the time of payment. Westloh v. Brown, 1878, 43 U.C.R. 402. The conversion of a bill payable after date into one payable after sight. Long v. Moore, 1790, 3 Esp. 155 n.

7. An alteration of the place of payment, or an addition of a place of payment, without the acceptor's consent. Tidmarsh v. Grover, 1813, 1 M. & S. 735; Burchfield v. Moore, 1854, 3 E. & B. 683; McQueen v. McIntyre, 1879, 30 U.C.C.P. 426. *Quære*, if the acceptor consents: see sec. 145. See Walter v. Cubley, 1833, 2 Cr. & M. 151; Mason v. Bradley, 1843, 11 M. & W. at p. 594; but see Gibb v. Mather, 1832, 2 Cr. & M. at p. 262; Saul v. Jones, 1858, 28 L.J.Q.B. 37.

8. The addition of a new maker's name to a joint and several note. Gardner v. Walsh, 1855, 5 E. & B. 83; Carrique v. Beaty, 1897, 24 O.A.R. 302.

9. The conversion of a joint note into a joint and several note. Perring v. Hone, 1826, 4 Bing. 28; Banque Provinciale v. Arnoldi, 1901, 2 O.L.R. 624.

10. The addition of a new maker to a joint and several note. Gardner v. Walsh, 1855, 5 E. & B. 83; cf. Clerk v. Blackstock, 1816, Holt, N.P. 474. The intentional erasure or cutting off of the name of a maker of a joint and several note. Nicholson v. Revill, 1836, 4 A. & E. 675; cf. Mason v. Bradley, 1843, 11 M. & W. 590.

11. The alteration of marked cheque by the drawer's making it payable to bearer instead of to order. Re Commercial Bank, Banque d'Hochelaga's Case, 1894, 10 Man. R. 171.

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12. An alteration in the crossing of a cheque. Sec. 170, overriding Simmonds v. Taylor, 1858, 27 L.J.C.P. 248.

13. The substitution of a particular consideration for the words "value received." Knill v. Williams, 1809, 10 East 431; cf. Wright v. Inshaw, 1842, 1 D.N.S. 802. *Quære* as to the erasure of the word "renewal" in the corner of a note. Maxon v. Irwin, 1907, 15 O.L.R. 81, 86.

14. An alteration in the number of a Bank of England note. Suffell v. Bank of England, 1882, 9 Q.B.D. 555; Leeds Bank v. Walker, 1883, 11 Q.B.D. 84.

Immaterial alteration.

The following alterations have been held to be immaterial:—

1. Conversion of a bill or cheque payable to bearer into one payable to order. Attwood v. Griffin, 1826, 2 C. & P. 368.

2. The conversion of a blank endorsement into a special endorsement. Hirschfeld v. Smith, 1866, L.R. 1 C.P. 340; sec. 67.

3. The alteration in the name of the firm to which a bill is addressed so as to correspond with the name in which it is accepted, being the true name of the firm. Farquhar v. Southey, 1826, 1 M. & M. 14; but see Bank of Montreal v. Exhibit & Trading Co., 1906, 11 Com. Cas. 250, as to adding the word "Limited" to the name of an unincorporated company.

4. The addition to a promissory note, in which no time of payment is expressed, of the words "on demand," which are implied by law. Aldous v. Cornwall, 1868, L.R. 3 Q.B. 573; cf. sec. 23.

5. Striking out the word "order" in a bill payable "to order of A.B." Decroix v. Meyer, 1890, 25 Q.B.D. 343; S.C., [1891] A.C. 520; cf. sec. 22.

6. The alteration of the marginal figures. Garrard v. Lewis, 1882, 10 Q.B.D. 30; cf. sec. 28; cf. Maxon v. Irwin, *supra*.

7. The addition of an erroneous due date. Fanshawe v. Peet, 1857, 26 L.J. Ex. 314.

8. The insertion of the words "pour aval" over a signature on the back of a note, the person having signed above the payee and as a guarantor. Abbott v. Wurtele, 1894, Q.R. 6 S.C. 204; cf. notes to sec. 131.

CHAPTER XLVII.

Acceptance and Payment for Honour.

The sections relating to acceptance *supra* protest do not apply to promissory notes: see sec. 186.

A bill may be accepted (sec. 147), or paid (sec. 153) *supra* protest for the honour of any person liable on the bill, or for the honour of the person for whose account the bill is drawn. The last mentioned person is commonly called the "third account."

Acceptance and Payment for Honour.

Acceptance for honour *supra* protest.

147. Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. 53 V., c. 33, s. 64. [Eng s. 65 (1). N.I.L. s. 161.]

As to dishonour by non-acceptance, see sec. 81, and as to protest generally see secs. 113 and 114. As to protest for better security, see sec. 116.

As to the liability of the acceptor for honour, see sec. 152.

The holder may refuse to allow an acceptance for honour. He may desire to exercise his immedate right of recourse against the drawer and endorsers (sec. 82). If a referee in case of need is named in the bill, it is in the option of the holder to resort to him or not, as the holder may think fit (sec. 33).

As to the form of acceptance for honour, see sec. 151.

Acceptance for honour is an exception to the general rule that no one can become a party to a bill qua acceptor who is not a proper drawee, or in other words, an addressee. Steele v. McKinlay, 1880, 5 App. Cas. 779, 4 R.C. at p. 232; cf. notes to sec. 131.

In part.

148. A bill may be accepted for honour for part only of the sum for which it is drawn. 53 V., c. 33, s. 64. [Eng. s. 65 (2). N.I.L. s. 161.]

An ordinary acceptance to pay part only of the amount for which the bill is drawn is a qualified acceptance (sec. 38), which the holder may refuse to take (sec. 83).

The Negotiable Instruments Law also provides that where there has been an acceptance for honour of one party, there may be a further acceptance by a different person for the honour of another party.

Deemed to be for honour of drawer.

149. Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer. 53 V., c. 33, s. 64. [Eng. s. 65 (4). N.I.L. s. 163.]

Cf. notes to sec. 151.

Maturity of after sight bill.

150. Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of protesting for non-acceptance, and not from the date of the acceptance for honour. 53 V., c. 33, s. 64. [Eng. s. 65 (4). N.I.L. s. 166.]

The English Act has the word "noting" instead of the word "protesting." Cf., however, secs. 118 and 119.

The section brings the law into accordance with mercantile understanding, and gets rid of an inconvenient ruling (see Williams v. Germaine, 1827, 7 B. & C. 468 at p. 471) to the effect that maturity was to be calculated from the date of acceptance for honour. Chalmers, p. 251.

See also sec. 45, which provides that where a bill is payable at sight, or at a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance, or for non-delivery.

Requirements.

151. An acceptance for honour *supra* protest, in order to be valid must,—

Writing.

(*a*) be written on the bill, and indicate that it is an acceptance for honour; and,

Signature.

(*b*) be signed by the acceptor for honour. 53 V., c. 33, s. 64. [Eng. s. 65 (3). N.I.L. s. 162.]

Sec. 151.

The Negotiable Instruments Law provides that the acceptance must be "in writing" instead of "written on the bill."

Method of acceptance *supra* protest.

The method of accepting *supra* protest is said to be as follows, viz., the acceptor *supra* protest must personally appear before notary public, with witnesses, and declare that he accepts such protested bill in honour of the drawer or endorser, as the case may be, and that he will satisfy the same at the appointed time. This declaration is known as the "act of honour," and must be written at the foot of the protest. See forms, Brooks' Notary, 6 ed. 173 ff. The act is silent as to the necessity of this declaration, though it is undoubtedly required by the law merchant. Brooks, p. 90. In the case of payment *supra* protest the payment must by sec. 154 always be attested by an act of honour. But inasmuch as a similar requirement is not to be found in sec. 151, it may be doubtful how far the rule of the law merchant is under sec. 10 to be regarded as consistent with the express provisions of the act. Byles, p. 216.

Chalmers, p. 250, states that a clause requiring an acceptance for honour to be attested by a notarial act of honour was struck out in committee, and that, perhaps, this is no longer essential, but he considers that it would scarcely be safe to omit the act of honour and that for charging parties abroad the usual is certainly the safer course.

It would be sufficient if the acceptor for honour merely wrote "Accepted S.P." on the bill and signed his name underneath; but it is usual for him to state for whose honour he accepts. Chalmers, p. 250.

If the acceptance does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer (sec. 149).

Liability of acceptor for honour.

152. The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts.

To holder and other parties.

2. The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted. 53 V., c. 33, s. 65. [Eng. s. 66. Cf. N.I.L. ss. 164 and 165.]

Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need (sec. 117). Sec. 152.

Nature and effect of acceptance for honour.

The nature and effect of acceptance for honour is considered in the cases of Hoare v. Cazenove, 1812, 16 East 391, and Williams v. Germaine, 1827, 7 B. & C. 468, 2 Ames 42. An acceptance for honour is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, "keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have the money." (7 B. & C. at p. 477). It must be duly presented for payment to the original drawee, for "effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied if presented to him again when the period of payment had arrived" (16 East at p. 398). As to acceptance for honour see also Story on Bills, ss. 121 ff.

As to due presentment to the drawee, see sec. 86, and to the acceptor for honour, sec. 94.

It seems an acceptor for honour is bound by the estoppels which bind an ordinary acceptor, and and also by the estoppels which would bind the party for whose honour he accepted; as to which see secs. 129, 130 and 133. Chalmers, p. 252, citing Phillips v. im Thurn, 1866, L.R. 1 C.P. at p. 471.

It is sufficient if the bill has been noted for protest before the bill is presented for payment to the acceptor for honour (sec. 118). The formal protest may be extended at any time as of the date of the noting (sec. 119).

If the bill is dishonoured by the acceptor for honour, it must be protested for non-payment by him (sec. 117).

Payment for honour *supra* protest.

153. Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

If more than one offer.

2. Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

Sec. 153.
Refusal to receive payment.

3. Where the holder of a bill refuses to receive payment *supra* protest, he shall lose his right of recourse against any party who would have been discharged by such payment.

Entitled to bill.

4. The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest.

Liability for refusing.

5. If the holder does not on demand in such case deliver up the bill and protest, he shall be liable to the payer for honour in damages. 53 V., c. 33, s. 67. [Eng. s. 68 (1)(2)(6)(7). N.I.L. ss. 171, 174, 176 and 177.]

Prior to 1906 the provisions now contained in this and the next two following sections were all parts of one section, as they are in the English act. In the revision, the order of the sub-sections has been altered. There is no provision in the Negotiable Instruments law corresponding to sub. sec. 5.

It is not necessary that the formal protest should have been extended. Noting for protest is sufficient (secs. 118 and 119).

Under sub-sec. 3, a holder who refuses to take a payment *supra* protest does so at his peril, whereas under sec. 82 a holder is under no obligation to allow an acceptance for honour.

As to the rights acquired by payment for honour *supra* protest, see sec. 155. The payment must be attested by a notarial act of honour (sec. 154).

The "protest" referred to in sub-sec. 4 means the protest for non-payment by the acceptor, and not protest for better security. The expense of protest for better security being a voluntary act for the benefit of the holder (sec. 116) is not chargeable against the acceptor. In re English Bank, Ex parte Bank of Brazil, [1893] 2 Ch. 438, 444. But see the notes to sec. 134.

Attestation of payment for honour.

154. Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it.

Declaration.

2. The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf

declaring his intention to pay the bill for honour and for whose honour he pays. 53 V., c. 33, s. 67. [Eng. s. 68 (3)(4). N.I.L. ss. 172 and 173.] Sec. 154.

Hence there cannot be a payment for honour, even by a referee in case of need, without protest and the notarial declaration, and a would-be payer for honour failing to comply with these formalities would be simply in the position of an endorsee of an overdue or dishonoured bill to which all defects of title affecting it at maturity attach as against him. Byles, p. 245; cf. Ex parte Wyld, 1860, 2 De G. F. & J. 642. For the form of the notarial act of honour, see Brooks' Notary, 6 ed. 180; Geralopulo v. Wieler, 1851, 10 C.B. 690, at p. 708, 4 R.C. 654, at p. 661.

155. Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party. 53 V., c. 33, s. 67. [Eng. s. 68 (5). N.I.L. s. 175.] Discharge. Subrogation

The payer for honour *supra* protest succeeds to the rights and duties of an endorsee from the person for whose honour he pays. He must give such person notice of dishonour, and may himself give notice to prior parties or avail himself of notice given in due time by the person for whose honour he has paid. Goodall v. Polhill, 1845, 1 C.B. 233; cf. 2 Ames 856. As to notice of dishonour, see the notes to sec. 96.

All parties subsequent to the party for whose honour the bill is paid are discharged. If the bill is paid for the honour of the drawer, the payer can look to the acceptor alone as if there had been no endorsers. The payer's right of action against the acceptor, however, is not subject to any right of set-off which the acceptor would have had against the drawer, this not being an equity attaching to the bill. In re Overend, Gurney & Co. Ex parte Swan, 1868, L.R. 6 Eq. 344, 4 R.C. 375; cf. notes to sec. 74. Discharge by payment for honour.

CHAPTER XLVIII.

Lost Instruments.

The fact that a bill has been lost or destroyed does not excuse the omission to demand payment or to give notice of dishonour. Thackray v. Blackett, 1812, 3 Camp. 164, 2 Ames 464. Protest may be made on a copy or written particulars of a lost or destroyed bill (sec. 120).

There are no provisions in the Negotiable Instruments Law corresponding to secs. 156 and 157.

Lost Instruments.

Holder to have duplicate of lost bill.

156. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again.

Refusal. Compulsion.

2. If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so. 53 V., c. 33, s. 68. [Eng. s. 69.]

Action on lost bill.

Indemnity.

157. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question. 53 V., c. 33, s. 69. [Eng. s. 70.]

It has been held that the section applies to non-negotiable instruments and gives the person liable on such instruments the right to require an indemnity. Pillow v. Lespérance, 1902, Q.R. 22 S.C. 213. If no tender of an indemnity is made before suit, the court may refuse the plaintiff the costs of the suit. King v. Zimmerman, 1871, L.R. 6 C.P. 466; Banque Jacques Cartier v. Strachan, 1869, 5 O.P.R. 159; Tessier v. Caillé, 1902, Q.R. 25 S.C. 207.

In an action on a lost note, when the loss is pleaded, the plaintiff should, in general, tender the defendant a proper bond of indemnity with a sufficient surety or sureties before applying to set aside the plea under sec. 157, in order to avoid paying the costs of this defence and of the application. Although the words of the statute are that an indemnity be given "to the satisfaction of the court or a judge," the security may be left to the master to settle. Orton v. Brett, 1899, 12 Man. R. 448; cf. Palmer v. Reilly, 1906, 2 E.L.R. 309. Sec. 157.

Lost or destroyed instruments.(a)

At common law if a negotiable bill has been lost, so that the holder cannot deliver it up on receiving payment, he is not entitled to sue on it, whether it is lost before or after maturity (Hansard v. Robinson, 1827, 7 B. & C. 90, 2 Ames 38), or though it is payable to order and not endorsed (Ramuz v. Crowe, 1847, 1 Ex. 167, 2 Ames 62); nor is he entitled to sue on the consideration. Crowe v. Clay, 1854, 9 Ex. 604, 4 R.C. 648.

But to enable a defendant to avail himself of such a defence to an action when brought, a special plea is necessary, otherwise the plaintiff may recover upon secondary evidence. Blackie v. Pidding, 1848, 6 C.B. 196, 2 Ames 65; Charnley v. Grundy, 1854, 14 C.B. 608. Lost or destroyed instruments.

A similar defence could not be set up to an action on a non-negotiable instrument. Wain v. Bailey, 1839, 10 A. & E. 616. As to what is a non-negotiable bill, see sec. 21.

In the case of a lost negotiable bill the holder was not formerly entirely without a remedy. He might tender sufficient indemnity to the acceptor, and if it was refused, he might enforce payment upon the bill in a court of equity. Hansard v. Robinson, *supra;* King v. Zimmerman, 1871, L.R. 6 C.P. 466, 468. The statute 9 & 10 W. 3, c. 17, s. 3, enacted that if any inland bill were lost or miscarried within the time limited for its payment, the drawer should upon request, and security given to indemnify him if such bill were found again, give another bill of the same tenor and form, but this statute remained a dead letter at common law since the common law courts could not compel the plaintiff to furnish or the defendant to accept an indemnity; see Ex parte Greenway, 1802, 6 Ves.

(a) See especially Byles, pp. 343 ff.; Harrison, Common Law Procedure Act, 1856, 486-7; Ames, Cases on Bills and Notes (Summary).

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812; Davies v. Dodd, 1817, 4 Price, 176; in this latter case the plaintiff had previously failed at law (1812, 4 Taunt. 602), the court indicating that his remedy was on the statute. See also King v. Zimmerman, *supra*. Bayley, J. (Bills, 6 ed., chap. 5, note 38), inferred from the judgment of Hardwicke, C., in Walmsley v. Child, 1749, 1 Ves. Sen. 341, that the equity of the statute would comprehend endorsements. Byles, p. 345, note (*p*). This statute is reproduced in more general form in sec. 156.

In the Common Law Procedure Act, 1854,(*b*) there was contained a provision substantially the same as sec. 157, the object being to allow a plaintiff, upon tendering indemnity, to recover at law instead of his being driven to a court of equity.

As to the case of an instrument destroyed, not lost, there is common law authority that an action would lie, and secondary evidence be admissible of the contents of the bill, on its destruction being proved (Pierson v. Hutchinson, 1809, 2 Camp. at 212, 2 Ames 18; Woodford v. Whiteley, 1830, M. & M. 517; Blackie v. Pidding, *supra*; cf. Clarke v. Quince, 1834, 3 Dowl. P.C. 26), and accordingly a bill in equity was dismissed in such a case on the ground that the plaintiff had a remedy at law. Wright v. Maidstone, 1855, 1 K. & J. 701. On the other hand, the suggested distinction between the case of a destroyed and that of a lost negotiable bill was apparently not recognized in a case on a lost bill, and it seems to have been thought that no action would lie in either case, the remedy being by bill in equity. Hansard v. Robinson, *supra*. The distinction is now of slight importance. If sound, it would perhaps enable a plaintiff to sue on a destroyed bill without giving an indemnity, as, if a right of action existed at common law on a destroyed bill, that right was necessarily independent of any indemnity. Neither sec. 156 nor sec. 157 in express terms applies to destroyed bills. Byles, pp. 345-6.

(*b*) 17 & 18 V., c. 125, s. 87, adopted in Upper Canada by the C.L.P. Act, 1856, s. 292.

CHAPTER XLIX.

Bill in a Set.

Foreign bills are often drawn in parts called the first of exchange, the second, etc. The several parts are made on separate pieces of paper, each part being numbered and referring to the other parts, all the parts constituting one bill (sec. 158). Each part usually contains a condition that it shall continue payable only so long as the others remain unpaid. One part may be forwarded for acceptance, while the other is delivered to the endorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the endorser's security immediately and diminishing the chances of losing the bill. Cf. Byles, pp. 139-140; Story on Bills, ss. 66-7.

A part of a set (*duplicata* or *exemplaire*) must be distinguished from a "copy" (*copie*); cf. sec. 62.

Secs. 158 and 159 do not apply to promissory notes (sec. 186).

Bill in a Set.

158. Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill. Bill in set.

2. The acceptance may be written on any part, and it must be written on one part only. 53 V., c. 33, s. 70. [Eng. s. 71 (1) (4). N.I.L. ss. 178 and 181.] Acceptance.

If one part of a set omit reference to the other parts, it becomes a separate bill in the hands of a holder in good faith. It has been held that an agreement to deliver up an unaccepted bill drawn in a set is an agreement to deliver up all the parts in existence (Kearney v. West Grenada Co., 1856, 26 L.J. Ex. 15); and that a person who negotiates a bill drawn in a set is bound to deliver up all the parts in his possession, but by negotiating one part he does not warrant that he has the rest. Pinard v. Klockman, 1863, 32 L.J.Q.B. 82. Chalmers, p. 259.

Endorsing more than one part.

159. Where the holder of a set endorses two or more parts to different persons, he is liable on every such part, and every endorser subsequent to him is liable on the part he has himself endorsed as if the said parts were separate bills.

Negotiation to different holders.

2. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill: Provided that nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

Acceptance in due course

More than one part accepted.

3. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

Part accepted.

4. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

Payments without delivery.

Discharge.

5. Subject to the provisions of this section, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. 53 V., c. 33, s. 70. [Eng. s. 71 (2) (3) (5) (6) (7). - N.I.L. ss. 179 to 183.]

As to holder in due course, see sec. 56.

Is the true owner entitled to get the remaining parts from the person who in good faith has given value for them? There are *dicta* to this effect (cf. Holdsworth v. Hunter, 1830, 10 B. & C. 449, at pp. 450, 454), but such a rule seems inconsistent with the rights given by sub-sec. 2. Chalmers, p. 261.

Payment where different parts endorsed.

So far as observations in Société Générale v. Metropolitan Bank, 1873, 27 L.T. 849 (*e.g.*, at p. 854), suggest that an endorser is not bound to pay a dishonoured set until all parts bearing his endorsement are delivered up to him or accounted for, the case would not appear to be law at the present day in view of sub-sec. 5, as the payment of one part discharges the whole, except, as regards the endorser, where he has endorsed the several parts to separate endorsees, to each of whom, as on a separate bill he remains liable. In the case cited the

parts were endorsed and delivered to the same person. A discharge of one part would discharge the whole bill and the endorser would therefore have no interest in claiming the outstanding parts. Whereas if he endorsed to separate endorsees, he would remain liable to them and would have no right to the possession of any parts outstanding in their hands. Cf. Byles, p. 141, note (*o*). Sec. 159.

CHAPTER L.

Conflict of Laws.

There is no provision in the Negotiable Instruments Law on the subject of conflict of laws.

Prior to 1906 the provisions now contained in secs. 160 to 164 were all comprised in one section, as they are in the English act, and all the clauses were governed by the words which introduced the section, namely "where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:"

Conflict of laws between two provinces.

Conflict of laws may arise between two or more provinces of the Dominion, and doubtless the word "country," as used in sec. 160, includes province.

As between different provinces, a conflict of laws may arise: (1) in regard to the provisions of the act which create special rules for the province of Quebec, *e.g.*, as to non-juridical days (see secs. 43 and 164) or protest (see secs. 114 and 162); and (2) in regard to matters not expressly or impliedly provided for by the act and not governed by the law merchant within sec. 10. Such matters include the law relating to capacity, limitations and prescription, set-off and compensation, evidence, principal and surety, joint and several liability, illegality, payment and discharge of parties.

In theory questions of conflict of laws may arise in regard to this second class of matters between any two provinces, as they may between a particular province and a foreign country, but practically the only conflict within Canada that is likely to arise is that between the law of the province of Quebec and the law of one of the other provinces.

Capacity.

Conflict of laws.

When laws conflict, capacity is for some purposes determined according to the *lex domicilii* of the contracting party, but for mercantile purposes it is probably determined by the *lex loci contractus*. Chalmers, p. 67; Dicey's Conflict of Laws, 2 ed. 538; Byles, p. 340; but see Westlake, Private International Law, 5 ed, 1912, pp. 43-45.

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The courts of Quebec make no distinction in this respect between mercantile and other contracts. Thus, although under Quebec law a minor engaged in trade is deemed to be of age for all the purposes of his trade, a minor domiciled in a country, the law of which gives no recourse against such minor, cannot validly oblige himself in that province in the course of his trade. Lafleur on Conflict of Laws, 1898, p. 147, citing Jones v. Dickinson, 1895, Q.R. 7 S.C. 313.

Evidence.

Evidence is governed by the law of the place where the action is brought or proceedings are taken. Leroux v. Brown, 1852, 12 C.B. 801; cf. notes to sec. 160. The general rules of the English law of evidence prevail in Quebec in regard to commercial matters (chapter 1, *supra*).

Limitation and prescription.

Limitation of action, also, is governed by the *lex fori*, if the lapse of time merely bars the remedy. Garden v. Bruce, 1868, L.R. 3 C.P. 300; Don v. Lippmann, 1837, 5 Cl. & F. 1, 5 R.C. 930; Alliance Bank v. Carey, 1880, 5 C.P.D. 429; Davis v. Isaacs, 1887, 26 N.B.R. 292. But if the lapse of time extinguishes the obligation according to the law which governs the contract, as *e.g.*, in Quebec, the obligation will be held to be extinguished wheresoever it is sued on. Cf. Huber v. Steiner, 1835, 3 Bing. N.C. 202.

Set-off and compensation.

Set-off by English law is not a modification of a party's obligation but a matter incidental to the enforcement of it, and therefore belongs to the *lex fori*. Westlake, p. 320; Rouquette v. Overmann, 1875, L.R. 10 Q.B. at p. 541, 4 R.C. at p. 302. In Quebec a different rule would apply. Compensation corresponds approximately to set-off. But compensation may take place by the sole operation of law, and the effect is to extinguish the debts in so far as they correspond. Cf. Allen v. Kemble, 1848, 6 Moo. P.C. 315; Wilkinson v. Simson, 1838, 2 Moo. P.C. 275.

Matters of interpretation or modification of obligation.

The law of principal and surety, joint and several liability, illegality, payment and discharge relates to the interpretation

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and legal effect of the contracts on a bill or to the modification of the obligations of parties thereon. The question whether the law of one country or province or that of another is to govern must be determined by the rules laid down in secs. 160 to 164, or by the general rules of private international law.

These sections contain a set of rules as to the law which is applicable to cases in which the contracts on a bill are entered into, or the obligations thereon are to be performed, in different countries. For the most part the sections embody the general rules applicable to cases of conflict of laws relating to contracts. If the provisions of the act are inconsistent with such general rules, the act governs (cf. Embiricos v. Anglo-Austrian Bank, [1905] 1 K.B. at p. 686), but the provisions of the act are not exhaustive and cases may frequently arise in which recourse must be had to the general rules of private international law. Cf. S.C., [1904] 2 K.B. at pp. 875-6).

Specific provision is made by the act as to the formal validity of a bill, the interpretation of the various contracts on a bill (including probably their "legal effect"), the duties of the holder with respect to presentment, etc., rate of exchange, and due date.

The general rule is that a discharge or defence good by the law of the place where the contract is made or is to be performed is to be held of equal validity in every other place where the question may come to be litigated. This rule is, however, applicable only to defences *on the merits*, as distinguished from matters of evidence, limitation of action, forms and mode of action, etc. which are governed by the *lex fori*. Story on Bills ss. 160 ff.; cf. Story, Conflict of Laws, ss. 330-1.

Illegality of consideration.

In Robinson v. Bland, 1760, 1 W. Bl. 234, 256, 2 Burr. 1077, the defendant in Paris drew a bill upon himself in England payable to the plaintiff's order, as to part in payment of money lost by the defendant to the plaintiff at gaming, as to part in payment of a loan made at the time and place of play. It was held that the *lex loci solutionis* applied and that the bill was void under the statue 9 Anne, c. 14, although the play was lawful in France. In Moulis v. Owen, [1907] 1 K.B. 746, X. gave A. in France a cheque drawn on an English bank, as to part in payment of money lent by A. to X. to enable X. to play baccarat in France, as to part to be applied by A. in discharging

debts incurred by X. in playing baccarat in France. The majority of the Court of Appeal held that the consideration was illegal under 5 & 6 W. 4, c. 41, and the cheque void under 8 & 9 V., c. 109, and 55 & 56 V., c. 9. But see note by A. V. Dicey, approved by Sir F. Pollock, in 23 L.Q.R. 249, (July, 1907), disapproving of the decision and expressing the opinion that the gaming statutes have no application to a contract in a foreign country governed by the law of that country and valid by that law; cf. article by A. Cohen in 28 L.Q.R. 127 (April, 1912), to the effect that Robinson v. Bland was wrongly decided because the court in applying English law treated the transaction as an English one, whereas both in Robinson v. Bland and in Moulis v. Owens the transactions were French, and the correct rule of English law would be that the consideration was valid because it was lawful in France. Cf. Story v. McKay, 1888, 15 O.R. 169. In Saxby v. Fulton, [1909] 2 K.B. 208, it was held that money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in England. In the last mentioned case the court followed Quarrier v. Colston, 1842, 1 Ph. 147, (an action on the debt not on the security, which was distinguished on this ground in Moulis v. Owen). Sec. 159.

Conflict of Laws.

160. Where a bill drawn in one country is negotiated, accepted or payable in another, the validity of the bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance *supra* protest, is determined by the law of the place where the contract was made: Provided that,— Requisites of form.

(*a*) where a bill is issued out of Canada, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; Unstamped bills.

(*b*) where a bill, issued out of Canada, conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid Conforming to the law of Canada.

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as between all persons who negotiate, hold or become parties to it in Canada. 53 V., c. 33, s. 71. [Eng. s. 72.]

Cf. sec. 60, as to negotiation;
sec. 35, as to acceptance;
sec. 2, as to issue;
sec. 62, as to endorsement;
sec. 147, as to acceptance *supra* protest;
secs. 128 ff. as to the various contracts on a bill;
sec. 17, as to form of bill;
sec. 176, as to form of note.

The general rules in regard to the form of contracts have been stated by Westlake, (5 ed. p. 295-6) as follows:

Conflict of laws as to formalities of contract.

"§207. Subject to proposition 208, the formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are sufficient for its external validity in England." Guepratte v. Young, 1851, 4 DeG. & S. 217.

"§208. But a contract, although externally perfect according to the law of the place where it was made, cannot be enforced in England unless evidenced in such manner as English law requires." This doctrine being based on the maxim that the *lex fori* governs procedure; cf. Leroux v. Brown, 1852, 12 C.B. 801.

"§209. The formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are also necessary for its validity in England." *E.g.*, recovery cannot be had upon a written contract, which, by reason of the absence of a stamp, is not good by the *lex loci contractus*. Alves v. Hodgson, 1797, 7 T.R. 241; but see Bristow v. Sequeville, 1850, 5 Ex. 275. §209 is subject to the exception created by clause (*a*) of the proviso to sec. 160.

Sec. 160 adopts the general rule that the formalities of a contract are governed by the law of the place where it is entered into. It also determines a question about which the English authorities gave no clear result, namely, whether parties to a bill, so far as their liability depends on an endorsement made by a third party, contract to pay one who takes by an endorsement valid according to the law of their contract. The question arises on instruments endorsed in blank in France, where such an endorsement does not transfer the property in a bill, though it does so by English law. See Trimbey v. Vignier,

1834, 1 Bing. N.C. 151, 1 Ames 358; Lebel v. Tucker, 1867, L.R. 3 Q.B. 77, 1 Ames 364; Bradlaugh v. DeRin, 1870, L.R. 5 C.P. 473, 1 Ames 371, reversing L.R. 3 C.P. 538, on the ground that the court below had mistaken the French law; cf. Alcock v. Smith, [1892] 1 Ch. at p. 237, and proviso to sec. 161. The section has decided the special question in favour of the forms required by the *lex actus* of the endorsement, which is in agreement with the usual principles of our subject and with the opinion of Story. Westlake, pp. 317-8. Sec. 160. Conflict of laws as to formalities of contract.

But an exception is made to the general rule by clause (*b*) of the proviso, which allows a bill which is formally valid according to Canadian law to be validly issued out of Canada as between all persons who negotiate, hold, or become parties to it in Canada. Where a bill is drawn and endorsed out of Canada upon an acceptor in Canada, the bill would be a Canadian bill as regards the acceptor, and the endorsement would be valid, if it conforms to the law of Canada even though it does not conform to the *lex loci*. Cf. In re Marseilles Extension Co., Smallpage's and Brandon's Cases, 1885, 30 Ch. D. 598. But see Byles, pp. 334-5, as to possible limitations to the applicability of clause (*b*).

161. Subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance or acceptance *supra* protest of a bill, drawn in one country and negotiated, accepted or payable in another, is determined by the law of the place where such contract is made: Provided that where an inland bill is endorsed in a foreign country, the endorsement shall, as regards the payer, be interpreted according to the law of Canada. 53 V., c. 33, s. 71. [Eng. s. 72.] *Lex loci.* Law of Canada.

An inland bill is a bill which is, or on the face of it purports to be, (*a*) both drawn and payable within Canada or (*b*) drawn within Canada upon some person resident therein (sec. 25).

The rule of private international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of bills by endorsement. Embiricos v. Anglo-Austrian Bank, [1905] 1 K.B. 677, following Alcock v. Smith, [1892] 1 Ch. 238, as a decision to that effect. This proposition is independent of sec. 161, unless the word "interpretation" in Conflict of laws as to interpretation of contract.

Sec. 161. Conflict of laws as to interpretation of contract.

the section means the "legal effect" of the endorsement ([1905] 1 K.B. at p. 685).

Embiricos v. Anglo-Austrian Bank was an action by the payee of a cheque against an endorsee who claimed under a forged endorsement which was good in the country where the endorsement was made, although not good by English law (see sec. 49). In Alcock v. Smith, the bill was payable to bearer and the transfer was not by endorsement but by process of law in the shape of a judicial sale. The transfer was valid according to the *lex loci contractus* because by that law an overdue bill, as this was, could be negotiated free from any equities, but the transfer being that of a inland bill was equally valid within the proviso to sec. 161 by English law, as there was in fact no defect in title of which the endorsee could have notice.

A bill is drawn by A. in Buenos Ayres on B. in New York and endorsed in blank in Buenos Ayres. It is subsequently transferred to plaintiff in Quebec and action is brought there against the endorser after dishonour. The obligations of the endorser are governed by the law of the Argentine Republic, and therefore the endorser is discharged by the holder's failure to use diligence to collect the amount out of the freight, hull and cargo before applying to the endorser. Interpretation means legal effect of the endorsement including the obligation of the parties thereunder. London and Brazilian Bank v. Maguire, 1895, Q.R. 8 S.C. 358, where many of the cases are collected.

A bill is drawn at Halifax on Manchester, accepted at Manchester payable at London. The interpretation of the acceptance is governed by English law. Sanders v. St. Helen's Smelting Co., 1906, 39 N.S.R. 370.

Westlake (pp. 318-9) states the proposition (§ 229) that the "obligation incurred by accepting a bill is measured by the law of the place where it is payable. It is a familiar example that the allowance of days of grace is regulated by the law of the place of payment" (cf. sec. 164). If "interpretation" in sec. 161 includes "obligation" as has been suggested (*e.g.*, Chalmers, p. 266, and cf. "legal effect," *supra*), this proposition is consistent with sec. 161 only on the theory that the place of payment is the true place of the making of the contract.

It is generally admitted that, on principle, the obligations

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of an acceptor of a bill of exchange should be interpreted by the law of the country where the bill is made payable, and not as sec. 161 indicates, by the law of the country where the bill is accepted. Dicey explains this anomaly by shewing that the rule expressed in the section was probably derived from Story, and that it reproduces his words rather than his meaning. For Story really intended to lay down the rule that each contract embodied in a bill should be interpreted according to the law of the place of performance. Dicey, 2 ed. pp. 593-4; Lafleur on Conflict of Laws, 182-3. But see Byles, pp. 337-8; Russell, p. 412.

Story (Conflict of Laws, ss. 242, 280), states that it is adopted as a general rule in the interpretation of contracts, that they are to be deemed contracts of the place where they are made, unless they are to be performed or paid elsewhere. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice, and the Roman law has adopted it as a maxim: *Contraxisse unusquisque in eo loco intelligitur, in quo, ut solveret, se obligavit.*

The law governing the drawing and putting in circulation or endorsing of a bill will in general be the law of the place where the bill is signed, but if it is signed in one country and delivered in another, the contract is made in the latter. Chapman v. Cottrell, 1865, 34 L.J. Ex. 186; Horne v. Rouquette, 1878, 3 Q.B.D. 515, 521, 532-4; as to delivery, see sec. 39.

As regards damages for default in payment, the place at which each party to a bill undertakes that *he himself* will pay it determines with regard to him the *lex loci contractus* according to which his liability is governed. The acceptor is liable to pay interest at the rate fixed by the law of the place where the bill is payable. Cooper v. Waldegrave, 1840, 2 Beav. 282. But the drawer and endorsers do not contract to pay the money in the place on which the bill is drawn (cf. Horne v. Rouquette, 1878, 3 Q.B.D. at p. 523), but only to guarantee its payment in that place by the acceptor, and in default of such payment they agree upon due notice to reimburse the holder in principal and damages at the places where they respectively entered into

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the contract. Story, Conflict of Laws, sec. 315. The damages against the drawer are measured by the law of the place where the bill is drawn (Gibbs v. Fremont, 1853, 9 Ex. 25), and against each endorser by the law of the place where he endorses. Story, sec. 314. Cf., however, Hooker v. Leslie, 1868, 27 U.C.R. 295, and cases cited; North Western Bank v. Jarvis, 1883, 2 Man. R. 53.

Nevertheless the doctrine that the drawer's or endorser's obligation is to be determined by the *lex loci* of the drawing must be accepted with some qualification. As the drawer and endorsers are in the nature of sureties for the due performance by the acceptor of his obligation, it is obvious that the law of the place where the bill is payable, which regulates such due performance, must affect their obligation by affecting that of the acceptor. Cf. Westlake, p. 319, and see Rouquette v. Overmann, 1875, L.R. 10 Q.B. 525 at pp. 536-7, 4 R.C. 287, at pp. 297-8, where it is said that, at least as regards presentment for payment, protest and notice of dishonour, the liability of the drawer is to be measured by that of the acceptor, whose surety he is, and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the drawer.

Law as to duties of holder.

162. The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, are determined by the law of the place where the act is done or the bill is dishonoured. 53 V., c. 33, s. 71. [Eng. s. 72.]

Cf. sec. 75, as to presentment for acceptance;
sec. 85, as to presentment for payment;
secs. 81 and 85, as to dishonour;
sec. 96, as to notice of dishonour;
secs. 112 and 113, as to protest.

The propositions stated by Westlake (pp. 320-1) on the subject dealt with in this section are:

Conflict of laws as to duties of holder.

"§231. In case of failure by the drawee to accept a bill of exchange, or of failure in payment by the acceptor of a bill or the maker of a promissory note, the necessity and sufficiency of demand, protest or notice of dishonour, by the last holder, in order to charge any other party to the bill or note, is de-

termined by the law of the place where it was payable." Rothschild v. Currie, 1841, 1 Q.B. 43; Hirschfeld v. Smith, 1866, L.R. 1 C.P. 340; Horne v. Rouquette, 1878, 3 Q.B.D. 514; Rouquette v. Overmann, *supra;* Fleming v. McLeod, 1907, 39 S.C.R. 290. Sec. 162. Conflict of laws as to duties of holder.

"§232. But when an indorser has been made duly liable on a bill or note, the notice which he must give to his indorser, or to the drawer if there be no intermediate party, depends on the law governing the contract made by the indorsement to him or by the drawing."

§231 is a consequence of the principle of the *lex loci actus.* Sec. 162 appears to agree with it notwithstanding the strange wording by which parliament is made to say that the necessity of an act is to be determined by the law of the place where it is done, while it is just when an act has not been done that the question of its necessity arises. Westlake, p. 320.

As to §232, the drawer of the bill, and each endorser, contracts with the next following party to pay him on due notice of dishonour being given; and such notice must be measured by the law of the contract, whenever no question arises about the formalities to be observed in a particular place. The doctrine of the proposition is asserted by the judges in Horne v. Rouquette, *supra*, and according to Westlake, is not overruled by the act. Sec. 162 must therefore be interpreted as applying only to the *last* holder. The words "or is not done" must be understood after the word "done" in the section. Westlake, p. 321.

By sec. 114, in the case of an inland bill drawn upon any person in the province of Quebec or payable or accepted at any place in the said province the parties liable on the said bill other than the acceptor are, in default of protest for non-acceptance or non-payment as the case may be, and of notice thereof, discharged, except in cases where the circumstances are such as would dispense with notice of dishonour.

163. Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. 53 V., c. 33, s. 71. [Eng. s. 72.] Currency.

Cf. sec. 136.

Due date.

164. Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. 53 V., c. 33, s. 71. [Eng. s. 72.]

Cf. notes to sec. 161.

By English law days of grace are allowed on bills payable after date. By French law they are not. A bill drawn in Paris on London is entitled to 3 days' grace, but a bill drawn in London on Paris is not entitled to grace. Rouquette v. Overmann, 1875, L.R. 10 Q.B. 525, at pp. 535-538, 4 R.C. 287, at pp. 296-299; cf. Bank of America v. Copland, 1881, 4 L.N. 154.

A bill is drawn in England payable in Paris 3 months after date. After the bill is drawn, but before it is due, a "moratory" law is passed in France, in consequence of war, postponing the maturity of all current bills for one month. The maturity of this bill is for all purposes to be determined by French law. Rouquette v. Overmann, *supra*.

CHAPTER LI.

CHEQUES ON A BANK.

Secs. 165 to 167 contained in this chapter, and secs. 168 to 175 contained in chapter 52, compose in the Bills of Exchange Act "Part III" under the heading "Cheques on a Bank."

PART III.

CHEQUES ON A BANK.

165. A cheque is a bill of exchange drawn on a bank, payable on demand. Cheque defined.

2. Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque. 53 V., c. 33, s. 72. [Eng. s. 73. N.I.L. s. 185.] Provisions as to bills apply.

A cheque under the act is drawn upon a "bank," *i.e.*, an incorporated bank or savings bank carrying on business in Canada: see sec. 2—the corresponding word in the English act is "banker," the definition of which is pointed out in the notes to sec. 2. It has been held that an instrument in the form of a cheque drawn on a private banker is merely a bill of exchange. Trunkfield v. Proctor, 1901, 2 O.L.R. 326.(*a*)

If this section is read with sec. 17, which defines a bill of exchange, a cheque may be said to be defined by the act as "an unconditional order in writing addressed to a bank, signed by the person giving it, requiring the bank to pay on demand a sum certain in money to or to the order of a specified person, or to bearer."

A cheque must be payable on demand *i.e.*, expressed to be

(*a*) It is submitted however, that such an instrument which is a cheque by the law merchant, is still a cheque notwithstanding the passing of the act. The act does not apply to it except in so far as the act is declaratory of the earlier law, but to call such a cheque a bill of exchange is to confuse two different things. See comparison of cheques and bills, *infra*.

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payable on demand or on presentation, or in which no time for payment is expressed: sec. 23.

As to the other elements of the definition, see notes to sec. 17.

Bill and cheque compared.

For some purposes a postdated cheque is equivalent to a bill payable after date (see notes to sec. 27). A cheque is embraced within the definition of a bill of exchange and is analogous to it in many respects. Cf. McLean v. Clydesdale Banking Co., 1883, 9 App. Cas. at pp. 106, 113; and cases cited in Boyd v. Nasmith, 1889, 17 O.R. at pp. 44-5. But a cheque and a bill of exchange are in many respects different.

Bill and cheque compared.

It has been said that a cheque is "a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance; in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment; it is not entitled to days of grace; and though it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note or the acceptor of a bill of exchange, payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that place." Parke, B. in Ramchurn Mullick v. Luckmeechund Radakissen, 1854, 9 Moo. P.C. at pp. 69-70, 4 R.C. at pp. 465-6.

Some of the points of resemblance between a bill and a cheque are now embodied in the act as a result of sec. 165 by which the provisions applicable to a bill payable on demand apply to a cheque except as otherwise provided in this part of the act, *i.e.* by secs. 165 to 175.

Some of the differences between the two instruments are expressed in the next following sections. Other differences must also be noted which are only implied in the act but which indicate a real distinction between the nature of a bill and that of a cheque.

Sec. 165. Bill and cheque compared.

To speak of a cheque as an "appropriation" of money in the hands of the banker is misleading. A cheque, like a bill, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof (sec. 127); the holder cannot sue the bank on the cheque. Hopkinson v. Forster, 1874, L.R. 19 Eq. at p. 76, 3 R.C. at p. 757; Boyd v. Nasmith, 1889, 17 O.R. at p. 45; Percival v. Dunn, 1885, 29 Ch. D. 128; Negotiable Instruments Law, sec. 189; see also Young v. Cashion, 1909, 19 O.L.R. 491, at pp. 496-7 (bank draft). But the bank may become liable upon a separate promise made by it to the payee to pay the amount of the cheque (see Adams v. Craig, 1911, 24 O.L.R. 490, in notes to sec. 127), or may make itself liable on the cheque by certifying or marking it (see notes below).

An exception to the general rule that a cheque does not operate as an assignment of funds in the hands of the bank is made by clause (*b*) of sec. 166 in favour of the holder of a cheque to the extent to which the drawer has been discharged by the holder's neglect to present the cheque for payment within a reasonable time of its issue. See notes to sec. 166 where the difference in the position of the drawer of a bill and the drawer of a cheque in regard to presentment for payment is noted.

Being a bill payable on demand, a cheque is not entitled to days of grace (sec. 42).

A bank which has sufficient funds in its hands belonging to its customer is liable to him if it dishonours his cheque,(*b*) whereas the drawee of a bill, in the absence of contract is not bound to accept, or, in the case of a demand bill, to pay, a bill drawn upon him, even if he has sufficient funds of the drawer in his hands. Cf. Goodwin v. Robarts, 1875, L.R. 10 Ex. at p. 351.

The holder in the case of either a bill or a cheque has his recourse against the drawer (sec. 95), subject to the necessity of giving due notice of dishonour (sec. 96).

If the drawer of a cheque has not sufficient funds at the bank to meet the cheque, notice of dishonour will be dispensed with (sec. 107). It has been held that protest in Quebec is unnecessary as against the drawer of a cheque where the cheque

(*b*) As to the obligation of a bank to honour its customer's cheque, and as to the relation of bank and customer in respect of a current account, see the notes to sec. 95 of the Bank Act.

Sec. 165. Bill and cheque compared.

has not been paid by reason of the failure of the bank. Banque Jacques Cartier v. Limoilou, 1899, Q.R. 17 S.C. at p. 224; cf De Serres v. Enard, 1899, Q.R. 17 S.C. 199.

When Mr. Baron Parke stated that "a cheque is not intended for circulation, it is given for immediate payment," he pointed out what is perhaps the inherent and essential difference between a cheque and a bill.(c) A cheque, being a bill, may, however, be transferred by endorsement and delivery, although it is payable to a named person and not to his order, provided it does not contain words prohibiting transfer or indicating an intention that it should not be transferable (sec. 22). It is not clear, however, that under the act a cheque payable to bearer or to order can be made not negotiable except under the provisions in secs. 168 to 175 as to crossed cheques. National Bank v. Silke, [1891] 1 Q.B. at p. 438, 4 R.C. at p. 443. As to crossed cheques, see chapter 52, and as to the title of a person who takes a crossed cheque which bears on it the words "not negotiable," see sec. 174.

Notice of the death of a customer who has drawn a cheque upon a bank, terminates the bank's authority to pay the cheque (sec. 167); the death of the drawer of a bill usually has no effect upon the duties of the parties to the bill (see notes to sec. 127).

Under the Canadian act a cheque and a bill of exchange are in the same position as regards payment upon a forged or unauthorized endorsement, except that clause (*b*) of the proviso to sec. 49 contains a special provision applicable to cheques alone. The protection to a paying banker afforded by sec. 60 of the English act is not available to a bank in Canada: see the notes to secs. 49 and 50, *supra*.

Marking or certification of cheque.

In England the marking of a cheque is recognized only as importing a promise or undertaking to pay, as between banker and banker, for the purpose of clearance. In Canada and the United States, however, there is a common and well-recognized practice of marking or certifying cheques. The marking or certification may or may not take the form of an acceptance, but it is clear that under some circumstances at

(c) See also a discussion of the negotiability of cheques, by R. E. MacNaghten in 13 J.C.B.A. (1906), 134, 221.

least certification is not equivalent merely to the acceptance of a bill of exchange.(*d*) Sec. 165.

"In ordinary parlance," says Lord Alverstone, C.J., in Macbeth v. North and South Wales Bank, [1908] 1 K.B., at p. 18, "there is no acceptor to a cheque. The bank which pays the money alone stands in the position of the acceptor. If the bank gives credit it simply honours the cheque and pays the money." In Keane v. Beard, 1860, 8 C.B.N.S. 372, it was suggested that there is nothing to prevent a banker from accepting a cheque, if he chooses, though in practice it is not done. Chalmers (p. 273) says "a cheque is not intended to be accepted, but at common law there is no objection to the acceptance of a cheque, if the holder likes to take it in lieu of payment." Having regard to sec. 166, the act seems to contemplate only one presentment, *i.e.*, presentment for payment. Banque Jacques-Cartier v. Limoilou, 1899, Q.R. 17 S.C. at pp. 215 and 223; cf. Boyd v. Nasmith, 1889, 17 O.R. 40. No acceptance of cheque.

In Gaden v. Newfoundland Savings Bank, [1899] A.C. 281, A. drew a cheque payable to herself or bearer, presented it to the ledger keeper of the drawee bank, who, by direction of the manager, certified it by writing his initials across it and handed it back to A. At the same time the cheque was charged to A.'s account in the books of the bank, and an entry made in A.'s pass-book. A. then deposited the cheque at the Newfoundland Savings Bank, which presented it for payment within a reasonable time, but before the cheque was so presented, the drawee bank suspended payment. It was contended by A. that the initialing of the cheque had the effect of making it current as cash, but the Privy Council, in the absence of evidence of usage in favour of this contention, held that a cheque certified before delivery is subject, as regards its subsequent negotiation to all the rules applicable to uncertified cheques, and that the only effect of the certifying is to give the cheque additional currency by shewing on the face of it that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn. A. therefore failed to recover in an action against the Newfoundland Savings Bank. Cf. Re Commercial Bank, Banque d'Hochelaga's Case, 1894, 10 Man. R. 171. Marking or certification of cheque.

The cheque in question in Gaden v. Newfoundland Savings

(*d*) See notes *infra*, as to the effect on the drawer's liability of certification at the instance of the holder.

Sec. 165. Marking or certification of cheque.

Bank was certified before delivery. So far as the liability of the drawee bank is concerned there is no difference between such a cheque and a cheque certified after delivery at the request of the payee or a subsequent holder. Northern Bank v. Yuen, 1909, 2 A.L.R. 310, at p. 315. There is, however, a very important difference so far as the liability of the drawer is concerned, as a result of the principle that certification or so-called acceptance of a cheque at the instance of the holder is merely a substitute for payment.

If a cheque is certified or marked by the drawee bank at the request of the payee or holder, the amount of the cheque being charged by the bank to the drawer's account, and if the payee or holder does not there and then require payment, the drawer is discharged from all liability either on the cheque or on the original consideration for which it was given. Boyd v. Nasmith, 1889, 17 O.R. 40; Banque Jacques-Cartier v. Limoilou, 1899, Q.R. 17 S.C. 211; Re Commercial Bank, Banque d'Hochelaga's Case, *supra;* Brunelle v. Ostiguy, 1911, Q.R. 21 K.B. 302. The true ground upon which this proposition is based is expressed by Street, J., in the first case, and by Mathieu, J., and White, J., in the second. The drawer's whole contract is that upon due presentation the cheque will be paid, if the payee so desires. The payee's whole right is to present the cheque and receive the money. The payee has no right as between himself and the drawer to present the cheque for any purpose except payment, and if, when he presents the cheque and ascertains that the bank is prepared to pay it, he elects not to draw the money at once, he thereby accepts in place of payment, the bank's undertaking to pay. The drawer's whole obligation is performed, and the amount of the cheque is withdrawn from his control and charged to his account.(*e*)

The reason why the drawer is not liable upon the original consideration is that in the case of a cheque certified or marked at the request of the payee-holder, the drawer's contract is

(*e*) Cf. editorial note in 9, J.C.B.A. at p. 323, to the same effect. It is as if a negotiable deposit receipt had been issued by the bank to the holder of the cheque. 22 Harv. L.R. 448 (April 1909). The Negotiable Instruments Law, sec. 188, provides that where the holder of a cheque procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon (cf. 5 Cyc. 540-2), but the reason for this result is obscured by the provision of sec. 187 that the certification of a cheque is equivalent to an acceptance.

fully performed. The cheque is duly paid and therefore the conditional payment or satisfaction of the original consideration by the giving and taking of the cheque becomes absolute. Cf. notes to sec. 139 as to "Payment by bill," and see Légaré v. Arcand, 1895, Q.R. 9 S.C. 122.

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But in the case of a cheque certified before delivery, no presentment at the time of the certification is made by the payee or holder who alone is entitled to present the cheque for payment, and therefore he cannot be said to have elected to accept the bank's undertaking to pay in place of actual payment. He is still entitled to present for payment, and, if he so desires, to receive the money.

It appears to have been assumed in the reasons for judgment in Gaden v. Newfoundland Savings Bank, *supra*, that the cheque there in question was sufficiently certified so as to render the drawee-bank liable to the holder, *i.e.*, by the mere writing of the ledger-keeper's initials across the face of the cheque.(*f*) The certification may be, and often is, more formal. Sometimes the bank stamps upon the cheque the word "certified" or "accepted," accompanied by the date and the name of the bank. In Imperial Bank v. Bank of Hamilton, [1903] A.C. 49, the form was, "Bank of Hamilton, Toronto. Entered January 25, 1897" (see 31 O.R. at p. 101). In Banque Jacques-Cartier v. Limoilou the cheque is referred to in the judgments as having been "accepted."

In Rose-Belford Co. v. Bank of Montreal, 1886, 12 O.R. 544, the Bank of M. permitted another bank to issue a cheque upon the face of which appeared the words "payable at the Bank of M., Toronto, at par." Held that the whole effect of the words was that the Bank of M. at T. would make no charge for cashing the cheque, and that the bank did not assume the

(*f*) cf. Northern Bank v. Yuen, 1909, 2 A.L.R. 310, at p. 315. The alleged certification in that case was held to have been unauthorized and therefore not binding on the bank. It is submitted that the opinion there expressed that the certification is equivalent to acceptance under sec. 36 is not well founded. In the case of Scott v. Merchants Bank, 1911, 2 O.W.N. 514, 17 O.W.R. 849, there is an *obiter dictum* indicating an opinion that since the passing of the Bills of Exchange Act no marking or certification of a cheque is valid unless it is a valid acceptance under sec. 36. It is submitted that this is not the law. The alleged certification consisted of the simple initial "D" and no evidence was given of the circumstances under which or the purpose for which the initial was placed on the cheque, and it was not necessary to decide that a form of certification such as was regarded as valid in Gaden v. Newfoundland Savings Bank would be of no effect.

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risk of there being funds to meet it or lose the right to charge the amount back on ascertaining that there were no funds.

Present-ment for payment.

166. Subject to the provisions of this Act,—

(*a*) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid;

Measure of damage.

Holder becomes creditor.

(*b*) the holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it.

Reasonable time.

2. In determining what is a reasonable time, within this section, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case. 53 V., c. 33, s. 73. [Eng. s. 74. Cf. N.I.L. s. 186.]

By virtue of secs. 85 and 86, the endorser of a cheque, like the endorser of a bill payable on demand, is discharged unless presentment for payment is made within a reasonable time after endorsement. The drawer of a cheque, however, is in a very different position from the drawer of a bill in respect to presentment for payment.

Duty to present cheque for payment.

At common law the omission to present a cheque for payment did not discharge the drawer until six years had elapsed, unless some injury resulted to him from the delay, as for instance where the fund was lost by the failure of the bank. Robinson v. Hawksford, 1846, 9 Q.B. 51, 2 Ames 725; Laws v. Rand, 1857, 3 C.B.N.S. 442. But if a cheque was not presented within a reasonable time and the drawer suffered actual damage by the delay, the drawer was absolutely discharged, even though the damage suffered was less than the amount of the cheque, *e.g.*, where the bank failed, but ultimately paid a substantial portion of its liabilities. Alexander v. Burchfield, 1842, 7 M. & G. 1061.

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The former part of the common law rule is impliedly preserved by the act, namely, that if the drawer does not suffer damage by the delay, the holder may present a cheque within any period not exceeding the period of limitation of action or prescription. The rigour of the latter part of the common law rule has been mitigated by the provisions of sec. 166—introduced in the House of Lords by Lord Bramwell when the English bill was before parliament. Cf. Chalmers, p. 275.

The drawer of a bill payable on demand is discharged if it is not presented for payment within a reasonable time after its issue (sec. 86); the drawer of a cheque in such case is discharged only if he had the right at the time of presentment as between him and the bank to have the cheque paid and suffers actual damage through the delay, and only to the extent of such damage (sec. 166).

Clause (*b*) of this section has adopted the principle of the civil law and modifies the general rule of sec. 127 (cf. notes to sec. 165) that a cheque does not operate as an assignment of funds in the hands of the bank. If the drawer is discharged under clause (*a*), the holder may recover from the bank, *i.e.*, out of the drawer's funds, to the extent to which the drawer is discharged. Banque Jacques-Cartier v. Limoilou, 1899, Q.R. 17 S.C. at p. 223.

The effect of the section may be illustrated in this way. B. gives C. a cheque for $100 upon a bank where B has sufficient funds and C. does not present it within a reasonable time nor until after the failure of the bank. The bank ultimately pays a dividend of 40% to depositors. By reason of the non-presentment of the cheque, B. is a creditor of the bank, to the extent of $100 more than he would otherwise have been. This is the test of his damage under the act and therefore as between himself and C. he is discharged as to $100(*g*), but C. has the right to rank as a creditor of the bank in his place and receives a dividend of $40. Before the act B. would have been discharged as to the whole amount and would nevertheless have received the dividend as well. The Negotiable Instruments Law, sec. 186, provides simply that a cheque must be presented

(*g*) Unless the drawer's credit has been used in paying other cheques which would not otherwise have been met. Grant, p. 59. If, however, the drawer had no funds to his credit, but was authorized to overdraw, the drawer would still be discharged; but the holder could not prove against the bank. Chalmers, p. 277.

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for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. In the case supposed, B. would receive a dividend of $40, his actual loss caused by the delay would be $60, and as to the latter amount he would be discharged from liability on the cheque, the ultimate result being the same as under the Canadian act.

If the delay in presentment is pursuant to an agreement between the drawer and the holder, the drawer would have to bear the loss resulting from the failure of the bank in the meantime. Marreco v. Richardson, [1908] 2 K.B. at p. 593.

The holder should present the cheque within a reasonable time of its issue, not only to guard against the contingency of the bank failing, but to guard against any possible revocation of the bank's authority to pay, as by its receiving notice of the customer's death. And, further, the holder must bear in mind that he may be put to much trouble and inconvenience by his neglect to present the cheque within a reasonable time, because banks in general understand it as a rule of business not to pay old cheques without enquiry. The drawer's account may have been overdrawn, or he may have ceased to have an account with the bank in the interval; and in either of these cases, the payee might be obliged to resort to an action to recover the value. Again the drawer might in the interval have become insolvent, when it would be improbable that the holder would recover the full value. Grant, p. 59.

Reasonable time.

Sub-sec. 2 perhaps introduces a new and less rigorous measure of reasonable time. The earlier cases are now to be considered subject to the statutory recognition of the custom of bankers. Byles, p. 22. The common law rule is stated by Chalmers (p. 276), as follows:—

Reasonable time for presentment

(1) If the person who receives a cheque and the banker on whom it is drawn are in the same place the cheque must, in the absence of special circumstances (Firth v. Brooks, 1861, 4 L.T. N.S. 467), be presented for payment on the day after it is received. Alexander v. Burchfield, 1842, 7 M. & Gr. 1061.

(2) If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it

is forwarded must, in like manner, present it or forward it on the day after he receives it. Hare v. Henty, 1861, 20 L.J.P.C. 302; Prideaux v. Criddle, 1869, L.R. 4 Q.B. 455; Heywood v. Pickering, 1874, L.R. 9 Q.B. 428. Sec. 166. Reasonable time for presentment.

(3) In computing time non-business days must be excluded (sec. 6); and when a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is probably excused. Cf. Alexander v. Burchfield, 1842, 7 M. & Gr. at p. 1067; since this case the crossing of cheques has received legislative sanction; see secs. 168 ff.

As to unreasonable delay in presentment of cheque in view of the evidence as to the usage of trade and banks and the facts of the particular case, see Banque Jacques-Cartier v. Limoilou, *supra*, where it was held that a cheque issued on the 11th of the month and presented on the 15th was not presented within a reasonable time. Cf. Legaré v. Arcand, 1895, Q.R. 9 S.C. 122, where one day's delay was held to be unreasonable in view of the fact that it was known that there had been a run on the bank and that suspension of payment was likely to follow.

The question of reasonable time for the purposes of sec. 166 must be distinguished from the question of reasonable time under other sections of the act. By sec. 70 a bill payable on demand is deemed to be overdue so that it can be negotiated only subject to any defect of title affecting it at its maturity, when it appears to have been in circulation for an unreasonable length of time; see notes to that section as to cheques. Cf., also, sec. 77, which is applicable only to bills payable at sight or after sight.

167. The duty and authority of a bank to pay a cheque drawn on it by its customer, are determined by,— Authority to pay.

(*a*) countermand of payment; Countermand.

(*b*) notice of the customer's death. 53 V., c. 33, s. 74. [Eng. s. 75.] Death.

There is no corresponding provision in the Negotiable Instruments Law.

Countermand of payment.

If a bank refuses to pay an unmarked cheque the holder has no action against the bank (see notes to sec. 165). If

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payment of such a cheque is stopped, the holder may look to the drawer (McLean v. Clydesdale Bank, 1883, 9 App. Cas. 95) and endorsers, subject to the provisions of the act applicable to the rights and liabilities of parties upon the dishonour of a bill. If payment of a cheque is stopped before it is presented, the debt, if any, for which the cheque was given in payment remains subsisting. Cohen v. Hale, 1878, 3 Q.B.D. 371.

Countermand of payment.

If a cheque has been certified by the drawee bank at the request of the holder, it is to be considered as duly paid (see notes to sec. 165). It seems clear that the drawer cannot countermand payment. If the drawer assumed to stop payment of a certified cheque and the bank refused payment, the holder could recover from the bank, not upon the cheque, which has been discharged by payment (sec. 139), but upon the undertaking to pay implied in the act of certification.

If the drawer of a cheque has it certified, he is entitled, before its delivery, to have the certification cancelled and the debit entry of the amount of the cheque reversed in the books of the bank. But if the cheque has been delivered, the drawer cannot countermand payment so as to justify the bank in refusing to pay the cheque to a holder otherwise entitled to demand payment. The holder is under no obligation, so far as the bank is concerned, to demand payment within a reasonable time, because virtually he is in the position of an ordinary creditor of the bank. Willets v. Phoenix Bank, 1853, 2 Duer (N.Y.) 736, 2 Ames 736.

In Curtice v. London, City and Midland Bank, [1908] 1 K.B. 293, the drawer of a cheque at 5 p.m., after business hours, telegraphed the bank to stop payment. The telegram was delivered at 6.15 p.m. by being placed in the letter-box in the door of the bank, the bank being closed. On the following morning, by an oversight, the telegram was not taken out of the letter-box, and the cheque was duly presented and paid on the same day. In an action by the customer against the bank for money had and received to his use, it was held that payment had not in fact been countermanded, although it might well be that it was due to the negligence of the bank that the notice had not been received. For such negligence the bank might be liable, but the measure of damages would be by no means the same as in an action for money had and

received. A telegram, it was said, might reasonably and in the ordinary course of business be acted upon by the bank at least to the extent of postponing the honouring of the cheque until further enquiry could be made, but the court did not hold that the bank was bound, as a matter of law, to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque. Sec. 167. Countermand of payment.

The bringing of an action by the drawer of a cheque against the bank for the amount on deposit to his credit (including the amount of the cheque) operates as a countermand of payment. Blackley v. McCabe, 1889, 16 O.A.R. 295.

A vendor of goods, after receiving payment, fraudulently sold them to another purchaser, who bought in good faith and gave his cheque in payment. This cheque was drawn on a bank at T., but was cashed by a bank at O. on payment being guaranteed by an endorser. The second purchaser, on being served with attachment proceedings by the first, stopped payment of the cheque, and paid the money into court. The endorser, meanwhile, paid the bank at O., and now claimed the money in court. Held that he was entitled to it. Wilder v. Wolf, 1902, 4 O.L.R. 451.

Notice of death.

Clause (*b*) is declaratory. The bank cannot charge the customer's account with cheques presented after notice to the bank of the customer's death. Bailey v. Jellett, 1884, 9 O.A.R. 187. *Quoad* the bank payment after the death but before notice is valid but the payee of the cheque may have to repay the amount of the cheque to the drawer's estate, *e.g.*, if the giving of the cheque was an intended gift of its amount by the drawer to the payee. McLellan v. McLellan, 1911, 23 O.L.R. 654, at pp. 658-9, 25 O.L.R. 214.

As to the effect of the death of the drawer of a bill, see notes to sec. 127.

When a firm of two partners has a banking account and one dies, the authority of the surviving partner to draw cheques on the firm account is not determined. Backhouse v. Charlton, 1878, 8 Ch.D. 444; Usher v. Dauncey, 1814, 4 Camp. 97. In Quebec, partnership is dissolved by the death of one of the partners, and the mandate and authority of the partners to act for the partnership cease with the dissolution, except

See 167. Countermand of payment.

for such acts as are a necessary consequence of business already begun. Civil Code, art. 1897.

Attaching order.

A bank is under no obligation to honour its customer's cheques if it is served with an attaching order, even though the balance to the customer's credit exceeds the amount of the judgment. If the bank honoured cheques subsequent to notice of the order, it would do so at its own risk, for it might turn out, for instance, that a portion of the money in the bank's hands might, without the bank's knowledge, be money of which the judgment debtor was trustee. That portion could not be ordered to be paid to the judgment creditor. Rogers v. Whiteley, 1889, 23 Q.B.D. 236, [1892] A.C. at p. 238; cf. Yates v. Terry, [1901] 1 Q.B. 102; cf. Grant, pp. 241 ff.

As to the attachment in one province of a deposit made in another province, see notes to sec. 95 (Locality of deposits).

CHAPTER LII.

Crossed Cheques.

The Negotiable Instruments Law contains no provisions on the subject of crossed cheques.

There is no provision in the English act corresponding to sub-sec. 7 of sec. 169 of the Canadian act. In other respects secs. 168 to 175 are copied from the English act with the exception of the substitution in the Canadian act of the word "bank" throughout for the word "banker," and of "bank" in clause (*a*) of sub-sec. 1 of sec. 168 for "and company or any abbreviation thereof," and the verbal alterations rendered necessary by these differences.

Although the provisions of the English act have been adopted in the Canadian act, the practice of using crossed cheques which is well known and frequent in England has never become usual and is in fact little understood in Canada.

Long before any legislation on the subject(*a*) the custom existed in England of crossing cheques either with the name of a particular bank or simply with the words "& Co.," the popular impression being that such crossing restrained the negotiability of the cheque and made it payable, in the one case to the bank named, in the other only to some bank. It was held however in Bellamy v. Marjoribanks, 1852, 7 Ex. 389, (where the origin of the custom is explained), that such was not the effect of the crossing, but that the object and effect of crossing was merely to oblige the holder to present it for payment through a banker.

English legislation as to crossed cheques.

A statute of 1857, (19 & 20 V., c. 25) declared that a crossed draft should be "payable only to or through some banker." But in Simmonds v. Taylor, 1858, 4 C.B.N.S. 463, it was held (1) that the statute applied only where, at the time of the presentment for payment the cheque bore the crossing on its face, and not to a case where the crossing had been obliterated by a thief so completely as to make the crossing invisible except on very minute inspection; (2) that the crossing might

(*a*) The history of the English legislation in regard to crossed cheques and the meaning of the provisions of the present act are discussed by Z. A. Lash in an article in 6 J. C. B. A. 166 (Jan. 1899).

English legislation as to crossed cheques.

be put on by one holder and taken off by another; (3) that the crossing was not part of the cheque itself, and therefore that an alteration in it would not avoid the instrument.

In consequence of this decision the statute 21 & 22 V., c. 79 was passed in 1858. This statute (1) made the crossing a material part of the cheque; (2) made the obliteration of a crossing forgery; (3) exempted a banker from liability for paying a cheque when the crossing or alteration did not plainly appear, "unless such banker shall have acted *malâ fide* or been guilty of negligence in so paying such cheque."

The statute also authorized a holder to cross a cheque which had been issued uncrossed or to cross it with the name of a banker where it had been crossed simply "& Co." and provided that where a cheque was crossed with the name of a banker, the drawee bank should not pay the cheque to any other than the banker with whose name it was crossed.

Notwithstanding the last mentioned provision, it was held in Smith v. Union Bank, 1875, 1 Q.B.D. 31, 4 R.C. 436, that where the holder of a cheque had rendered it negotiable by endorsing it in blank, it was not rendered non-negotiable by the fact that he had also crossed it with the name of his own bank, and that, if the cheque was stolen, his bank was not liable to him in damages for paying the cheque when it was presented through another bank by a *bonâ fide* holder for value to whom the cheque had been transferred by the thief.

Each of these decisions was a great surprise to the merchants, and at their instance The Crossed Cheques Act, 1876 (39 & 40 V. c. 81) was passed. That act introduced the "not negotiable" crossing, and gave a remedy to the true owner of a crossed cheque if it should be paid contrary to the crossing. It has been embodied, with some slight modifications indicated below, in the Bills of Exchange Act.

Crossed Cheques.

Definition.

168. Where a cheque bears across its face an addition of,—

(*a*) the word 'bank' between two parallel transverse lines, either with or without the words 'not negotiable'; or,

(*b*) two parallel transverse lines simply, either with or without the words 'not negotiable';

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such addition constitutes a crossing, and the cheque is crossed generally.

2. Where a cheque bears across its face an addition of the name of a bank, either with or without the words 'not negotiable,' that additon constitutes a crossing, and the cheque is crossed specially and to that bank. 53 V., c. 33, s. 75. [Eng. s. 76.] Sec. 168. Special.

A cheque may be crossed in six ways: (1) with two parallel transverse lines, (2) with the word "bank" between two parallel transverse lines, (3) with the name of a particular bank, or in any of these three forms with the added words "not negotiable." When a cheque bears across its face an addition of the name of a particular bank, with or without the words "not negotiable," and either between two parallel transverse lines or not, it is crossed specially and to the bank named. In the other cases mentioned, the crossing is general. The effect of adding the words "not negotiable" is that the person taking it does not acquire and cannot give a better title to the cheque than that which the person from whom he took it had (sec. 174). Method of crossing cheques.

The crossing in any of the six ways may be made by the drawer. If the cheque is issued uncrossed, the holder may cross it in any of the six ways. If it is crossed generally, the holder may cross it specially. If it does not bear the words "not negotiable," the holder may add them. If it is once crossed specially, the crossing cannot be altered otherwise than by the addition of the words "not negotiable," except in two cases: (1) the bank to which it is crossed may again cross it specially to another bank for collection; (2) a crossed cheque may be re-opened or uncrossed by the drawer writing between the transverse lines the words "Pay cash," and initialling the same. See sec. 169.

The crossing is a material part of the cheque and may not be obliterated, or, except as above mentioned, added to or altered by any person (sec. 170).

Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection (sec. 169), the drawee bank must refuse payment (sec. 171).

Subject to the proviso of sec. 172 and to sec. 173, the drawee bank is liable to the true owner of the cheque for any loss he sustains by the payment of the cheque in three cases: (1) if the drawee bank pays a cheque crossed specially as in the last paragraph mentioned, (2) or pays any other specially crossed Effect of crossing.

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cheque otherwise than to the bank to which it is crossed, or a bank acting as the agent for collection of such last mentioned bank, (3) or pays a generally crossed cheque otherwise than to some bank (sec. 172).

As to the liability of a bank which receives for a customer payment of a crossed cheque, where the customer has no title or defective title, see sec. 175.

By drawer.

169. A cheque may be crossed generally or specially by the drawer.

By holder.

2. Where a cheque is uncrossed, the holder may cross it generally or specially.

Varying.

3. Where a cheque is crossed generally, the holder may cross it specially.

Words may be added.

4. Where a cheque is crossed generally or specially, the holder may add the words *Not negotiable*.

By bank for collection.

5. Where a cheque is crossed specially the bank to which it is crossed may again cross it specially to another bank for collection.

Changing crossing.

6. Where an uncrossed cheque, or a cheque crossed generally, is sent to a bank for collection, it may cross it specially to itself.

Uncrossing.

7. A crossed cheque may be re-opened or uncrossed by the drawer writing between the transverse lines, the words *Pay cash*, and initialling the same. 53 V., c. 33, s. 76. [Eng. s. 77.]

See notes to sec. 168.

Sub-sec. 7 is not in the English act. Chalmers (p. 286) says: "The drawer of a cheque sometimes strikes out a crossing at the request of the payee, and writes 'Pay cash' on it. The act does not sanction this practice but it is difficult to see who in such case could have any effective remedy."

Sub-secs. 1 and 6 were not in the English act of 1876, but sec. 1 is declaratory. Sec. 4 of the English act of 1876, in terms only authorized the "lawful holder" to cross a cheque. See now "holder" defined by sec. 2, *supra*. It includes an agent for collection. Akrokerri Mines v. Economic Bank, [1904] 2 K.B. at p. 472. Chalmers, p. 285.

A crossing may not be obliterated or, except as authorized by this section, added to or altered, by any person (sec. 170).

170. A crossing authorized by this Act is a material part of the cheque. Materially.

2. It shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing. 53 V., c. 33, s. 77. [Eng. s. 78.] Altering crossing.

This section reproduces the effect of sec. 6 of the English act of 1876 (see notes, *supra*).

As to the cases in which a crossing may be added to or altered, see sec. 169. As to an obliteration or alteration which is not apparent, see sec. 172. As to the effect of material alterations generally, see sec. 145.

171. Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof. 53 V., c. 33, s. 78. [Eng. s. 79.] Crossed to more than one bank.

This section reproduces the effect of sec. 8 of the English act of 1876 (see notes, *supra*). As to the liability of a bank which pays a cheque in contravention of this section, see sec. 172.

Where a cheque is crossed specially the bank to which it is crossed may again cross it specially to another bank for collection (sec. 169).

172. Where the bank on which a cheque so crossed is drawn nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or, if crossed specially, otherwise than to the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid: Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having Liability for improper payment. Payment in good faith and without negligence.

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been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be. 53 V., c. 33, s. 78. [Eng. s. 79.]

This section reproduces the effect of secs. 10 and 11 of the English act of 1876 (see notes, *supra*).

Prior to 1906, this section and sec. 171 formed one section. "A cheque so crossed" refers to a cheque crossed specially to more than one bank, except when crossed to another bank as agent for collection (sec. 171). As to the other forms of crossing mentioned in this section, see sec. 168.

Liability for payment in contravention of crossing.

In a case before the act of 1876, a crossed cheque payable to order was stolen from the payee. His endorsement was forged, and the cheque was paid in contravention of the crossing to a person who gave value in good faith. The drawer gave the payee another cheque. On these facts it was held (1) that the banker had no right to debit the drawer's account with the first cheque, (2) that the payee who lost the cheque might have recovered the amount from the person who received the money for it, but (3) that the drawer, having allowed his account to be debited with the cheque, might himself recover the amount from the person who got the cash for it. Bobbett v. Pinkett, 1876, 1 Ex. D. 368, at p. 372. The act does not appear to affect this decision, but it gives an additional remedy against the banker to the true owner, who, in the case referred to, would have been the payee. If the cheque had been payable to bearer, or had been endorsed in blank by the payee before it was stolen and had got into the hands of a *bonâ fide* holder for value, there would it seems be no remedy (Smith v. Union Bank, 1875, 1 Q.B.D. 31), unless the cheque was crossed "not negotiable." Chalmers, pp. 287-8; but see Byles, p. 38.

It is to be noted that the bank is protected only if it pays the cheque "in good faith and without negligence," whereas under sec. 50 the protection of the act extends to a payment of a bill bearing a forged or unauthorized endorsement made "in good faith and in the ordinary course of business." The difference is important, as by sec. 3 a thing is deemed to be done in good faith, within the meaning of the act, where it is done honestly whether it is done negligently or not.

Protection in such case.

173. Where the bank, on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof. 53 V., c. 33, s. 79. [Eng. s. 80.]

This section reproduces the effect of sec. 9 of the act of 1876 (see notes, *supra*). As to the forms of crossing mentioned in this section, see sec. 168. As to the expression "in good faith and without negligence," see notes to sec. 172.

"Not negotiable" crossing.

174. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it. 53 V., c. 33, s. 80. [Eng. s. 81.]

This section reproduces the effect of the first part of sec. 12 of the English act of 1876 (see notes, *supra*).

A crossed cheque which bears on it the words "not negotiable" is put very much on the same footing as an overdue bill (sec. 70). It is still negotiable in the sense that it is subject to negotiation, but it does not possess the quality of negotiability which confers upon a holder in due course (sec. 56) a good title to payment according to the tenor of the bill and irrespective of defects in the title of the transferor. Cf. chapter 40, *supra*. It seems that only crossed cheques can be marked "not negotiable." Byles, p. 166; see the notes to sec. 68 as to the transferability and negotiability of bills.

A bank which pays a cheque crossed "not negotiable" takes it at its own risk, and if it obtains payment of the cheque from the drawee bank, its title to the money so obtained is as defective as its title to the cheque itself, unless it comes within the protection of sec. 175. Great Western v. London and County Bank, [1901] A.C. 414, 422, 424.

Customer without title.

175. Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment. 53 V., c. 33, s. 81. [Eng. s. 82.]

This section reproduces the proviso to sec. 12 of the English act of 1876 (see notes to sec. 174). It was held in Mathiessen v. London and County Bank, 1879, 5 C.P.D. 7, that the proviso protected the collecting banker whether the cheque was crossed with or without the words "not negotiable," for the proviso was to be construed as an independent section. The proviso was accordingly re-enacted in the Bills of Exchange Act as an independent section. Chalmers, p. 290.

As to general and special crossings, see sec. 168.

As to the expression "in good faith and without negligence," see notes to sec. 172.

Bank receiving payment for a customer.

No section of the act probably has been more often under review in recent years than sec. 82 of the English act; moreover, it is the only section of that act that has yet required legislative amendment. See Byles, pp. 39 ff.; Chalmers, pp. 289 ff.

C., having obtained by fraud a cheque which is crossed "& Co., not negotiable," takes it to a bank, which cashes it for him. He has no account at the bank, but for many years the bank has been in the habit of cashing cheques for him. C. is not a customer of the bank, and it is not protected by the section in obtaining payment of the cheque. Great Western Ry. v. London and County Bank, [1901] A.C. 414.

Prior to the act a bank in dealing with a cheque drawn on another bank, stood unprotected against the risk of a signature on a cheque being forged, and if the bank dealt with such a cheque on the strength of a forged endorsement in a manner contrary to the rights of the true owner, it was liable to an action by him. Gordon v. London City, etc., Bank [1902] 1 K.B. at p. 262, where the scope of the present section is discussed. By the act, the bank is now protected where, in good faith and without negligence, it receives for a customer payment of a cheque crossed generally or specially to itself. It is not protected in the case of a cheque crossed specially to

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another bank or a cheque which comes to it uncrossed. As to the protection afforded by the English act to the drawee bank in paying an uncrossed cheque on the faith of a forged endorsement, see notes to sec. 50.

In Capital and Counties Bank v. Gordon, [1903] A.C. 240, a merchant's clerk stole crossed cheques payable to order, forged his employer's endorsement, and paid the cheques in to his own banking account. The banker at once credited his account with the amount of the cheques, which were duly paid by the drawee bank. It was held that the bank in collecting these cheques did not "receive payment for a customer" but received payment for itself as holder, and was not protected by the section. The true owner was therefore entitled to recover the money. The "inconvenient rule" (22 L.Q.R. 452) established by this case is law in Canada, but has been abolished in England by 6 E. 7, c. 17, which provides that "a banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof." The Gordon case was distinguished in Bevan v. National Bank, 1906, 23 T.L.R. 65; Bank of Montreal v. The King, 1907, 38 S.C.R. at p. 277; Ross v. Chandler, 1909, 19 O.L.R. at pp. 586-7; see also Akrokerri Mines v. Economic Bank, [1904] 2 K.B. 465.

CHAPTER LIII.

Promissory Notes.

While a promissory note continues in its original shape of a promise by one man to pay to another, it bears no similitude to a bill of exchange. When it is endorsed, the resemblance begins; for then it is an order by the endorser upon the maker of the note (his debtor by the note), to pay to the endorsee. Heylyn v. Adamson, 1758, 2 Burr. at p. 676, 4 R.C. at p. 452.

Application of the act to notes.

Secs. 176 to 187, under the heading "Promissory Notes," compose part IV. of the act. It is enacted by sec. 186 that, except as in that section provided, and subject to the provisions of this part, the provisions of the act relating to bills of exchange apply, with the necessary modifications, to promissory notes, and that in the application of such provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

Generally speaking, the provisions of the act relating to a bill of exchange as an *order* to pay are inapplicable to a promissory note which is a *promise* to pay, although, as will be noted under sec. 176, many of the other elements of a bill as defined by sec. 17 equally belong to a note.

Sec. 186 expressly provides that the provisions of the act as to bills relating to presentment for acceptance, acceptance, acceptance *supra* protest, and bills in a set, do not apply to notes. Other sections of part IV. by enacting special rules for notes, impliedly render inapplicable to notes some of the earlier provisions of the act relating to bills.

A bank note is a promissory note made by a bank payable to bearer on demand: see chapter 15, *supra*. As to dominion notes, see chapter 30, *supra*.

See also sec. 9 of the Bills of Exchange Act as to the English acts, 15 G. 3, c. 51, and 17 G. 3, c. 30, which have never been expressly repealed in Canada.

PART IV.

Promissory Notes.

Definition.

176. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

Endorsed by maker.

2. An instrument in the form of a note payable to the maker's order is not a note within the meaning of this section, unless it is endorsed by the maker.

Pledge. Validity.

3. A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof. 53 V., c. 33, s. 82. [Eng. s. 83. Cf. N.I.L. ss. 1, 5 and 184.]

Unconditional.

See notes to sec. 17 under this heading.

A note cannot be made conditionally, but a bill may be accepted conditionally (sec. 38).

It is permitted by sub-sec. 3 to insert in a note a pledge of collateral security with authority to sell or dispose thereof. The Negotiable Instruments Law, sec. 5 (1),—applicable to bills as well as notes—enacts that the negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes the sale of collateral securities in case the instrument be not paid at maturity.

Note must be unconditional.

Prior to the act it was held that a note with the words "this note to be held as collateral security" upon it was not negotiable (Hall v. Merrick, 1877, 40 U.C.R. 566 and cases cited; Sutherland v. Patterson, 1884, 4 O.R. 565), but a memorandum that the maker had deposited collateral security with the payee was held not to invalidate an instrument as a note. Chesney v. St. John, 1879, 4 O.A.R. at p. 156. These cases do not appear to be affected by the act. In each of the two first mentioned cases the note was not payable absolutely, but only subject to the conditions to which all collateral security is subject. In the third case the memorandum did not render the promise conditional.

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Note must be unconditional.

Sub-sec. 3 is not exclusive. It authorizes a particular addition to the ordinary form of a note, but does not exclude other additions which do not qualify the promise to pay. An instrument may be a promissory note although it provides for payment by instalments, the whole to become due on default in payment of any one instalment, and contains in addition the following clause: "No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party." Kirkwood v. Carroll, [1903] 1 K.B. 531, C.A.; overruling Kirkwood v. Smith, [1896] 1 Q.B. 582, and approving Yates v. Evans, 1892, 61 L.J.Q.B. 446.

An instrument in the form of a promissory note, given for part of the price of an article, with the added condition "that the title and right to the possession of the property for which this note is given shall remain in [the vendors] until this note is paid" is not a negotiable instrument, and the holder takes it subject to any defence available to the maker against the vendors. Dominion Bank v. Wiggins, 1894, 21 O.A.R. 275. To the same effect see Prescott v. Garland, 1897, 34 N.B.R. 291; Bank of Hamilton v. Gillies, 1899, 12 Man. R. 495; Frank v. Gazelle Live Stock Association, 1906, 6 Terr. L.R. 392, 5 W.L.R. 573. One of the grounds upon which the judgments in these three cases are based, namely that sub-sec. 3 impliedly negatives any addition to a note except the one therein mentioned, is, however, untenable in view of the decision in Kirkwood v. Carroll, *supra*. The true ground is that the addition renders the promise conditional. Cf. Brannan, pp. 6, 224-5.

Promise....engaging to pay.

A document running "Due James Gray or bearer $482.... payable in 14 days after date" is a promissory note. Gray v. Worden, 1870, 29 U.C.R. 535.(*a*) There is no difference between *payable* and *to be paid* or *to pay*, all being words of promise. *Ibid.* But the words, "I have this day borrowed of A.B. £300 at £4 per hundred payable yearly" were held not to be a promissory note, because the document was only an acknowledgment of the £300, with a promise to pay the interest.

(*a*) As to the other question involved in this case, whether a document payable "in Canada bills" was a note, see notes to sec. 17 under the heading "In money."

Cory v. Davis, 1863, 14 C.B.N.S. 370; cf. Taylor v. Steel, 1847, 16 M. & W. 665, 1 Ames 10. Sec. 176.

An I.O.U. containing a promise to pay is a promissory note, *e.g.* "I.O.U. £20, to be paid on the 22nd. instant." Brooks v. Elkins, 1836, 2 M. & W. 74, 1 Ames 8. But not a document in the form "I.O.U. £20 for value received" (Gould v. Coombs 1845, 1 C.B. 543) or "Good to A.B. for $850 on demand." Palmer v. McLennan, 1873, 22 U.C.C.P. 565. In Quebec an I.O.U. or *bon* has usually been considered as a promissory note without additional words importing a promise to pay. See, *e.g.* Beaudry v. Laflamme, 1862, 6 L.C.J. 307; Désy v. Daly, 1897, Q.R. 12 S.C. 183. It is submitted, however, that under the act there must be a uniform rule as to the wording requisite for a promissory note, and that in Quebec words importing a promise to pay are now essential. Note must contain a promise to pay.

In Ellis v. Mason, 1834, 7 Dowl. 598, 1 Ames 9, the document was: "John Mason, 14th Feb. 1836, borrowed of Mary Ann Mason, his sister, the sum of £14 in cash as per loan, in promise of payment of which I am truly thankful for, and shall never be forgotten by me, John Mason, your affectionate brother. £14." Notwithstanding the argument that the undertaking, if any, was to pay in thanks, the court held that the document was a promissory note.

In La Forest v. Babineau, 1906, 37 S.C.R. 521, it was held that a document acknowledging receipt of $1200 "for which I am responsible with interest at the rate of 7 p.c. per annum, upon production of this receipt, and after 3 months' notice" was a promissory note. This decision is very justly criticized on principle by Russell (p. 52), the promise to be "responsible for" being fairly within the decision in Horne v. Redfearn, 1838, 4 Bing. N.C. 433, 1 Ames 40, that a document acknowledging receipt of £20 "which I have borrowed of you, and I have to be accountable for the said sum with legal interest" was not a promissory note. Cf. cases in Byles, p. 12 note (*n*). See also notes to sec. 95 of the Bank Act under the heading "Negotiability of Deposit Receipts."

In writing.

See notes to sec. 2, *supra.*

Made by one person to another.

Cf. notes to sec. 17 under the heading "addressed by one person to another."

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An instrument addressed to A.B. undertaking to pay C.D. although it complies literally with the section, only enures to the benefit of C.D. C.D. cannot sue on it as a promissory note, although it may be evidence of a contract to pay money to C.D. Trimble v. Miller, 1892, 22 O.R. 500.

Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note (sec. 26).

Where an instrument is so ambiguously worded that it is doubtful whether it was intended for a bill or for a note, the holder may treat it at his option as either. See notes immediately preceding sec. 27.

An instrument in the form of a note with a blank left for the payee's name is not a completed note (Reg. v. Cormack, 1891, 21 O.R. 213); but see secs. 31 and 32 as to the right to fill up blanks.

Signed by the maker.

As to signature, see sec. 4 and notes.

As to a simple signature on a blank paper delivered by the signer in order that it may be converted into a note, see sec. 31.

As to the contract entered into by the maker, see sec. 185.

On demand.

As to when a note is payable on demand, see sec. 23.

At a fixed or determinable future time.

As to when a note is payable at a determinable future time, see sec. 24. Cf. notes to sec. 17 under this heading.

A note must not be expressed to be payable on a contingency (sec. 18).

A sum certain in money.

Cf. notes to sec. 17 under this heading.

A promise to pay out of a particular fund, is not a note (sec. 17.)

Specified person or bearer.

Cf. notes to sec. 17 under this heading.

Payable to the maker's order.

The provision of the English act corresponding to sub-sec. 2 reads "unless and until it is indorsed by the maker."

B. makes a note payable to his own order, and endorses it in blank. This is a valid note payable to bearer. Hopper v. Williams, 1848, 2 Ex. 13; Masters v. Baretto, 1849, 8 C.B. 433. B. makes a note payable to his own order, and endorses it to C. This is a valid note payable to C. or order. Gay v. Lander, 1848, 17 L.J.C.P. 286.

Pledge of collateral security with authority to sell.

See notes under "Unconditional," *supra*.

As to collateral security generally, see notes to sec. 76 of the Bank Act, *supra*.

Inland note.

177. A note which is, or on the face of it purports to be, both made and payable within Canada, is an inland note.

Foreign note

2. Any other note is a foreign note. 53 V., c. 33, s. 82. [Eng. s. 83.]

Cf. sec. 25 and notes, as to inland and foreign bills.

Where a foreign note is dishonoured, protest thereof is unnecessary, except for the preservation of the liabilities of endorsers (sec. 187).

Delivery.

178. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer. 53 V., c. 33, s. 83. [Eng. s. 84.]

By sec. 2, delivery means transfer of possession, actual or constructive, from one person to another. Cf. sec. 39.

Joint and several note.

179. A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.

Individual promise.

2. Where a note runs 'I promise to pay,' and is signed by two or more persons, it is deemed to be their joint and several note. 53 V., c. 33, s. 84. [Eng. s. 85. Cf. N.I.L. s. 17 (7).]

Conversely a note which runs "we promise to pay," and is signed by two or more persons, is deemed to be a joint note

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only. Perhaps if a note runs "I, John Brown, promise to pay," and is signed by Smith as well as Brown, Smith would only be liable as an endorser under sec. 131, and not as a co-maker. Chalmers, p. 298.

Joint or joint and several liability.

The act has introduced in Quebec the English rule that two or more makers of a note may be liable jointly, or jointly and severally, according to the tenor of the note. Noble v. Forgrave, 1899, Q.R. 17 S.C. 234. But when the question whether the liability is joint or joint and several has been decided, then the appropriate provincial law determines the consequences of such liability, which may be different from the liability at common law. Cook v. Dodds, 1903, 6 O.L.R. 608. Cf. notes to sec. 10. As to the difference between the law of Quebec and that of the other provinces with reference to joint obligations, see the valuable note in Russell, pp. 447-8, quoting from Maclaren's notes to sec. 179.

By English law, judgment, without satisfaction, against one of the makers of a joint note is a bar to proceedings against the other maker (King v. Hoare, 1844, 13 M. & W. 494; Kendall v. Hamilton, 1879, 4 App. Cas. 504); not so if the note be joint and several. *Ibid.;* Re Davison, 1884, 13 Q.B.D. at p. 53; cf. Wegg Prosser v. Evans, [1898] 1 Q.B. 108. Payment or satisfaction by one of the makers of a joint and several note discharges it. Nicholson v. Revill, 1836, 4 A. & E. 675; Beaumont v. Greathead, 1846, 2 C.B. 494; Thorne v. Smith, 1851, 20 L.J.C.P. 71; cf. Simpson v. Henning, 1875, L.R. 10 Q.B. 406. Chalmers, pp. 297-8.

A note may not be made by two persons in the alternative (Ferris v. Bond, 1821, 4 B. & Ald. 679), but a note may be payable to persons in the alternative (sec. 19).

B. C. and D. make a joint and several note payable to C. and D. or order. This is a valid note. C. and D. may sue B. on his several liability. Beecham v. Smith, 1858, E. B. & E. 442.

The acceptors of a bill can be liable only jointly, not jointly and severally. A new maker cannot be added to a joint and several note after its issue (Gardner v. Walsh, 1855, 5 E. & B. 83), and there cannot be two or more makers liable severally, and not jointly and severally.

A partner, as such, cannot bind his co-partners severally, but by a joint and several note he may bind the firm jointly

(Maclae v. Sutherland, 1854, 3 E. & B. 1), and himself severally. Penkivil v. Connell, 1850, 5 Ex. 381. But as to the several liability, see Ex parte Buckley, 1845, 14 M. & W. at p. 475. Sec. 179.

180. Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement. Demand note presentment.

2. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case. 53 V., c. 33, s. 85. [Eng. s. 86 (1)(2). Cf. N.I.L. ss. 71 and 193.] Reasonable time.

Subject to the proviso to sec. 181, failure to present for payment within a reasonable time releases the endorser.

As to when a demand note is deemed to be overdue for the purpose of affecting a holder with defects of title of which he had no notice, see sec. 182.

Regard must be had to the nature of a promissory note payable on demand as a continuing security (see notes to sec. 182) in determining what is a reasonable time. Ten months may not be an unreasonable time. Chartered Bank v. Dickson, 1871, L.R. 3 P.C. 574, at pp. 579, 584). Cf. secs. 77 and 86 as to reasonable time in the case of bills. See also Byles, p. 223.

As to presentment for payment generally, see notes to secs. 183 and 184.

181. If a promissory note payable on demand, which has been endorsed is not presented for payment within a reasonable time the endorser is discharged; Provided that if it has, with the assent of the endorser, been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security. 53 V., c. 33, s. 85. [Cf. Eng. s. 86. (1)(2).] Endorser discharged. Security.

The proviso to this section is not in the English act.

Before the endorsee of a note can bring an action against the endorser, he must shew a demand or due diligence to get the money from the acceptor,—just as the payee of a bill must shew a demand or due diligence to get the money from the acceptor

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before he brings an action against the drawer. Heylyn v. Adamson, 1758, 2 Burr. at p. 676, 4 R.C. at p. 452.

As to reasonable time, see sec. 180.

Not deemed overdue.

182. Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. 53 V., c. 33, s. 85. [Eng. s. 86 (3). Cf. N.I.L. s. 53.]

A promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a bill payable on demand or cheque, which is intended to be presented speedily. Brooks v. Mitchell, 1841, 9 M. & W., 15, 4 R.C. 398.

Negotiation of demand note after lapse of a reasonable time.

Hence such a note cannot be treated as overdue, so as to affect the holder with a defect of title of which he had no notice on the ground that an unreasonable time for presenting it for payment had elapsed since the date of its issue. Glasscock v. Balls, 1889, 24 Q.B.D. 13, 4 R.C. 401. The act is not referred to in Glasscock v. Balls, but the court must have been of opinion that the act has made no change in the law as expounded in the earlier cases, namely that a promissory note payable on demand is not to be considered as overdue without some evidence of payment having been demanded and refused. Sec. 182 was enacted for the purpose of continuing the distinction between bills and notes in this respect, and thus forms an exception to sec. 70, applicable to demand bills. Northern Crown Bank v. International Electric Co., 1910, 22 O.L.R. 339, 24 O.L.R. 57. The Negotiable Instruments Law, sec. 53, does not preserve this distinction between bills and notes.

A different rule also applies to the presentment of a note in order to charge an endorser, and for that purpose presentment within a reasonable time must be shewn (sec. 181).

Present-ment, where.

183. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

Liability of maker.

2. In such case the maker is not discharged by the omission to present the note for payment on the day that it matures;

but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the court. Sec. 183.

3. If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable. 53 V., c. 33, s. 86. [Cf. Eng. s. 87. Cf. N.I.L. s. 70] Note payable generally.

The Negotiable Instruments Law contains no corresponding provision specially applicable to promissory notes. But sec. 70 provides: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

As to presentment to charge an endorser, see sec. 184.

Sub-sec. 1 of sec. 87 of the English act reads: "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable." By virtue of sec. 52 (2) of the English act [quoted in the notes to sec. 93 *supra*] where a note is payable on a day certain, the maker will not be discharged because the note is not presented on that day. Chalmers, p. 300. Presentment of note payable at a particular place before action against the maker.

The provisions of the English act just referred to are declaratory of the common law, as interpreted in Rhodes v. Gent, 1821, 5 B. & Ald. 244, and Anderson v. Cleveland, 1769, 13 East, 430, namely that the presentment at the place named before action is essential, if a note is made payable at a particular place, although the maker is not discharged by any delay in such presentment short of the period fixed by the statute of limitations; but in the case of a note payable generally no presentment or request for payment is necessary to charge the maker of a note; he is bound to pay it at maturity, and to find out the holder for that purpose. Walton v. Mascall, 1844, 13 M. & W. at p. 458, 4 R.C. at p. 488.

It has been held that the omission of the words "in order to

Sec. 183. Present-ment of note payable at a particular place before action against the maker.

render the maker liable" from the Canadian act have not the effect of making it unnecessary to shew presentment as against the maker and that presentment at the proper place or facts excusing such presentment must be averred and proved. Croft v. Hamlin, 1893, 2 B.C.R. 333. There has been, however, great diversity of opinion in regard to the meaning and effect of the latter part of sub-sec. 2. This clause, which was added to the bill in the Senate, is immediately preceded by words which excuse presentment on the day of payment but not presentment at the place of payment. It refers to a suit or action before presentment, and yet does not provide for such a case in unambiguous terms. If it means that an action may be successfully brought before presentment, it makes a distinct change in the law. In Croft v. Hamlin, *supra*, a divisional court held that the clause had not effected such a change. The same conclusion was reached by the Supreme Court of Nova Scotia, which laid stress upon the peremptory terms of sub-sec. 1. Warner v. Symon-Kaye, 1894, 27 N.S.R. 340; followed by Newlands, J. in Jones v. England, 1906, 5 W.L.R. 83.

According to the view adopted in these cases a note payable at a particular place must be there presented before action brought. As against the endorser it must be presented on the day it falls due. As against the maker it may be presented at any time before action brought, but presentment at some time before the commencement of the action must be proved or the action fails. The provision as to costs means that if the maker succeeds, on the ground that no presentment is proved, the court may deprive him of the costs usually given to a successful suitor. Russell, p. 299, calls this explanation of the provision as to costs "ingenious, but far-fetched." One may perhaps agree with him in regard to this remark and yet find it difficult to believe that the legislature has effected an important change in the law by the insertion of words of such profound obscurity. It is not easy to see why the legislature did not express itself more clearly if it intended to do away with the necessity for the presentment which is so clearly directed in sub-sec. 1. On the whole it is as easy to accept the explanation above indicated as to the costs as it is to reconcile sub-sec. 1 with the view that the maker may be sued although no presentment before action takes place.

A different view of the meaning of the section has been taken in some of the cases.

Sec. 183. Presentment of note payable at a particular place before action against the maker.

In Merchants Bank v. Henderson, 1897, 28 O.R., 360, a note payable at a particular place was presented for payment only some time after its maturity and a few days before action brought against the maker. A judgment for the plaintiff with costs was affirmed by a divisional court with costs, on the ground that it was the maker's duty to have the money to meet the note at the particular place and to keep it there from the maturity of the note until presentment. Armour, C.J. at p. 364 pointed out what the law was in England prior to the passing of the act and that in Ontario, by virtue of the Upper Canadian statute 7 W. 4, c. 5, a note payable at a particular place without further expression in that respect was to be deemed and taken as a promise to pay generally, At p. 365 he expressed the opinion that under the present act an action might have been brought against the maker without any presentment at the particular place, the plaintiff, in such case running the risk of having to pay the costs of the action in case the maker should shew that he had the money at the particular place to answer the note at maturity and thereafter; "but," he added, "it may be that the effect of this provision is that as far as the maker of such a promissory note is concerned, the promissory note is to be deemed and taken to be a promise by him to pay generally; but it is unnecessary to determine the effect of this provision in determining this case." This *obiter dictum* of Armour, C.J. was adopted by Riddell, J. in Freeman v. Canadian Guardian Life Ins. Co., 1908, 17 O.L.R. 296, at p. 302.

With a similar result, in Sinclair v. Deacon, 1909, 7 E.L.R. 222, the judgment of the Supreme Court of Prince Edward Island was delivered by Fitzgerald, J., who gives an interesting analysis of the section, and construes it as follows: "You must present the note at the particular place it is made payable, not necessarily—as against the maker—on the day of its maturity, nor indeed, before suit; but if presentment is not made before suit, the costs being in the discretion of the court, the maker will be protected from costs should—for instance—the funds to meet the note have been duly placed by him at the place named." This view of the section recognizes that it was intended to change the law in one particular only, namely

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as to presentment before suit, but at the same time so protecting the maker that at most he would be required to pay the debt without costs, if there was no default on his part. See also Union Bank v. MacCullough, 1912, 4 A.L.R. 371.

The question has also recently come before the Court of Appeal in Manitoba in Robertson v. Northwestern Register Co., 1910, 19 Man. R. 402, without conclusive result, Richards, J.A. holding that the action failed because of non-presentment before action, Cameron, J.A. holding that presentment was not essential, and Perdue, J.A. holding that presentment was sufficiently proved in fact.

A note payable to the order of the maker and by him endorsed in blank may be treated as a note payable to bearer, notwithstanding that there is a memorandum at the foot of the note indicating a particular place of payment. Masters v. Baretts, 1849, 8 C.B. 433. But if in the body of a note it is made payable "to the order of A. at H." it must be presented there. Cunard v. Symon-Kaye, 1894, 27 N.S.R. 340.

A note dated at St. John, N.B., payable at the Bank of Montreal is payable at the bank's St. John branch. Canada Paper Co. v. Gazette, 1893, 32 N.B.R. 685, 689; Commercial Bank v. Bissett, 1891, 7 Man. R. 586.

As to endorser.

184. Presentment for payment is necessary in order to render the endorser of a note liable.

Place where.

2. Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an endorser liable.

What sufficient.

3. When a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the endorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice. 53 V., c. 33, s. 86. [Eng. s. 87.]

By virtue of sec. 186, the rules applicable to presentment for payment of a bill (see sec. 85 and notes) apply also to presentment for payment of a note, except in so far as special provision is made as to notes by secs. 180 to 184.

Maker. Engagement

185. The maker of a promissory note, by making it,—

(*a*) engages that he will pay it according to its tenor;

(*b*) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse. 53 V., c. 33, s. 87. [Eng. s. 88. Cf. N.I.L. s. 60.] Estoppel.

The maker of a note, like the acceptor of a bill, is the principal debtor on the instrument (Gibb v. Mather, 1832, 2 Cr. & J. at p. 263, 4 R.C. at p. 474), and in the application to notes of the provisions of the act relating to bills, the maker is deemed to correspond with the acceptor (sec. 186). As to the contract of the acceptor, see secs. 128 and 129. Liability of maker.

The distinctions that exist between maker and acceptor arise from the fact that the acceptor is not the creator of the bill, his contract being supplementary, while the maker of a note originates the instrument. A note must be unconditional (sec. 176), while an acceptance may be conditional (sec. 38). Maker and payee are immediate parties in direct relation with each other, while acceptor and payee, except in the case of a bill payable to drawer's order, are remote parties. Cf. Bishop v. Young, 1800, 2 B. & P. 78 at p. 83, 2 Ames 532, at p. 537.

Any number of persons may become bound as promisors along with the original maker of a note, whereas there cannot be an acceptor of a bill other than the drawee or one who accepts as his agent (see notes to sec. 35).

186. Subject to the provisions of this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. Application of Act to notes.

2. In the application of such provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. Terms corresponding.

3. The provisions of this Act as to bills relating to,— Provisions inapplicable.

(*a*) presentment for acceptance;

(*b*) acceptance;

(*c*) acceptance *supra* protest;

(*d*) bills in a set;

do not apply to notes. 53 V., c. 33, s. 88. [Eng. s. 89.]

Sec. 186.

The "provisions of this Part" referred to in this section are contained in sec. 176 (definition of a note), sec. 177 (inland and foreign notes), sec. 178 (delivery), sec. 179 (joint and several notes), secs. 180 and 181 (time of presentment of a demand note), sec. 182 (when demand note deemed overdue), secs. 183 and 184 (presentment for payment of a note), sec. 185 (contract of maker), sec. 187 (protest of foreign notes). See notes at the beginning of this chapter.

Protest of foreign notes.

187. Where a foreign note is dishonoured, protest thereof is unnecessary except for the preservation of the liabilities of endorsers. 53 V., c. 33, s. 88. [Cf. Eng. s. 89.]

The words "except for the preservation of the liabilities of endorsers" are not in the English act. As to the necessity for protest of inland bills and notes, see secs. 113 and 114. Cf. sec. 112, as to protest of a foreign bill.

A note which does not on the face of it purport to be both made and payable in Canada is a foreign note (sec. 177).

If a note is dishonoured out of Canada the necessity for or sufficiency of a protest or notice of dishonour is determined by the law of the place where the bill is dishonoured (sec. 162).

CHAPTER LIV.

Schedule to the Bills of Exchange Act.

The forms in this schedule may be used in noting or protesting any bill and in giving notice thereof. A copy of the bill or note and endorsement may be included in the forms, or the original bill or note may be annexed and the necessary changes in that behalf made in the forms (sec. 125). It is not necessary under the act that a protest should be in duplicate.

SCHEDULE.

Form A.

NOTING FOR NON-ACCEPTANCE.

(*Copy of Bill and Endorsements.*)

On the 19 , the above bill was, by me, at the request of presented for acceptance to E. F., the drawee, personally (*or*, at his residence, office or usual place of business), in the city (town *or* village) of and I received for answer: ' ';
The said bill is therefore noted for non-acceptance.

A. B.,
Notary Public.

(*Date and place.*) 19 .

Due notice of the above was by me served upon {A. B.,} {C. D.,} the {drawer,} {endorser} personally, on the day of (*or*, at his residence, office or usual place of business) in , on the day of (*or*, by depositing such notice, directed to him at in His Majesty's

post office in the city, [town *or* village], on the day of , and prepaying the postage thereon).

A. B.,
Notary Public.

(*Date and place.*). 19 .

53 V., c. 33, sch., form A.

FORM B.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE GENERALLY.

(*Copy of Bill and Endorsements.*)

On this day of , in the year 19 , I, A. B., notary public for the province of , dwelling at , in the province of , at the request of , did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the {drawee / acceptor} thereof personally (*or*, at his residence, office *or* usual place of business) in , and, speaking to himself (*or* his wife, his clerk, *or* his servant, &c.,) did demand {acceptance / payment} thereof; unto which demand {he / she} answered: ' .'

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and endorsers (*or* drawer and endorsers) of the said bill, and other parties thereto or therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of {acceptance / payment} of the said bill.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
Notary Public.

53 V., c. 33, sch., form B.

FORM C.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE AT A STATED PLACE.

(*Copy of Bill and Endorsements.*)

On this day of in the year 19 , I, A. B., notary public for the province of , dwelling at , in the province of , at the request of , did exhibit the original bill of exchange whereof, a true copy is above written unto E. F. the {drawee / acceptor} thereof, at , being the stated place where the said bill is payable, and there speaking to did demand {acceptance / payment} of the said bill; unto which demand he answered: ' .'

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and endorsers (*or* drawer and endorsers) of the said bill and all other parties thereto or therein concerned, for all exchange, re-exchange, costs, damages and interest, present and to come for want of {acceptance / payment} of the said bill.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
Notary Public.

53 V., c. 33, sch., form C.

FORM D.

PROTEST FOR NON-PAYMENT OF A BILL NOTED, BUT NOT PROTESTED FOR NON-ACCEPTANCE.

If the protest is made by the same notary who noted the bill, it should immediately follow the act of noting and memorandum

of service thereof, and begin with the words 'and afterwards on, etc.,' *continuing as in the last preceding form, but introducing between the words* 'did' and 'exhibit' *the word* 'again,' *and in a parenthesis, between the words* 'written' *and* 'unto' *the words:* 'and which bill was by me duly noted for non-acceptance on the day of .'

But if the protest is not made by the same notary, then it should follow a copy of the original bill and endorsements and noting marked on the bill—and then in the protest introduce, in a parenthesis, between the words 'written' *and* 'unto,' *the words,* 'and which bill was on the day of , by , notary public for the province of noted for non-acceptance, as appears by his note thereof marked on the said bill.'

53 V., c. 33, sch., form D.

FORM E.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE GENERALLY.

(*Copy of Note and Endorsements.*)

On this day of , in the year 19 , I, A. B., notary public for the province of , dwelling at , in the province of , at the request of , did exhibit the original promissory note, whereof a true copy is above written, unto the promisor, personally (*or*, at his residence, office *or* usual place of business), in , and speaking to himself (*or* his wife, his clerk *or* his servant, etc.), did demand payment thereof; unto which demand { he / she } answered: ' .'

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and endorsers of the said note, and all other parties thereto or

therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
Notary Public.

53 V., c. 33, sch., form E.

FORM F.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE AT A STATED PLACE.

(*Copy of Note and Endorsements.*)

On this day of , in the year 19 , I, A. B., notary public for the province of , dwelling at , in the province of , at the request of , did exhibit the original promissory note, whereof a true copy is above written, unto the promisor, at , being the stated place where the said note is payable, and there, speaking to did demand payment of the said note, unto which demand he answered: ' .'

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and endorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
Notary Public.

53 V., c. 33, sch., form F.

FORM G.

NOTARIAL NOTICE OF A NOTING, OR OF A PROTEST FOR NON-ACCEPTANCE, OR OF A PROTEST FOR NON-PAYMENT OF A BILL.

(*Place and Date of Noting or of Protest.*)

1st.

To P. Q. (*the drawer*)

at

Sir,

Your bill of exchange for $, dated at the day of , upon E. F., in favour of C. D., payable days after {sight / date} was this day, at the request of

duly {noted / protested} by me for {non-acceptance / non-payment}

A. B.,
Notary Public.

(*Place and date of Noting or of Protest.*)

2nd.

To C. D. (*endorser*)
(*or* F. G.)

at

Sir,

Mr. P. Q.'s bill of exchange for $, dated at the day of , upon E. F., in your favour (or in favour of C. D.,) payable days after {sight, / date,} and by you endorsed, was this day at the request of duly {noted / protested} by me for {non-acceptance / non-payment}

A. B.,
Notary Public.

53 V., c. 33, sch., form G.

FORM H.

NOTARIAL NOTICE OF PROTEST FOR NON-PAYMENT OF A NOTE.

(*Place and Date of Protest.*)

To

at

Sir,

Mr. P. Q.'s promissory note for $, dated at , the day of payable { days / months / on — } after date to { you / E.F. } or order, and endorsed by you, was this day, at the request of , duly protested by me for non-payment.

A. B.,
Notary Public.

53 V., c. 33, sch., form H.

FORM I.

NOTARIAL SERVICE OF NOTICE OF A PROTEST FOR NON-ACCEPTANCE OR NON-PAYMENT OF A BILL, OR NOTE.

(*to be subjoined to the Protest.*)

And afterwards, I, the aforesaid protesting notary public, did serve due notice, in the form prescribed by law, of the foregoing protest for { non-acceptance / non-payment } of the { bill / note } thereby protested upon { P.Q., / C.D., } the { drawers / endorsers } personally, on the day of (*or*, at his residence, office *or* usual place of business) in , on the day of ; (*or*, by depositing such notice, directed

to the said {P.Q. / C.D.} at , in His Majesty's post office in on the day of , and prepaying the postage thereon).

In testimony whereof, I have, on the last mentioned day and year, at aforesaid, signed these presents.

A. B.,
Notary Public.

53 V., c. 33, sch., form I.

FORM J.

PROTEST BY A JUSTICE OF THE PEACE (WHERE THERE IS NO NOTARY) FOR NON-ACCEPTANCE OF A BILL, OR NON-PAYMENT OF A BILL OR NOTE.

(*Copy of Bill or Note and Endorsements.*)

On this day of , in the year 19 , I, N. O., one of His Majesty's justices of the peace for the district (*or* county, etc.), of , in the province of , dwelling at (*or* near) the village of , in the said district, there being no practising notary public at or near the said village (*or any other legal cause*), did, at the request of and in the presence of well known unto me, exhibit the original {bill / note} whereof a true copy is above written unto P.Q., the {drawer / acceptor / promisor} thereof, personally (*or* at his residence, office *or* usual place of business) in and speaking to himself (his wife, his clerk *or* his servant, etc.,) did demand {acceptance / payment} thereof, unto which demand {he / she} answered:

Wherefore I, the said justice of the peace, at the request aforesaid, have protested, and by these presents do protest

against the { drawer and endorsers / promisor and endorsers / acceptor, drawer and endorsers } of the said { bill / note } and all other parties thereto and therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of { acceptance / payment } of the said { bill / note }

All of which is by these presents attested by the signature of the said (*the witness*) and by my hand and seal.

(Protested in duplicate.)

(*Signature of the witness*)

(*Signature and seal of the J.P.*)

53 V., c. 33, sch., form J.

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