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THE LAW OF BANKING.

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THE LAW OF BANKING

BY

SIR JOHN R. PAGET, BART., K.C.,

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TO

ARTHUR COHEN, ESQUIRE, K.C.,

WITH GRATITUDE AND SINCERE REGARD.

PREFACE TO FIRST EDITION.

THE process of settlement by legislation or decision seems slow with regard to banking law. The number of points still open to question must be my excuse for the argumentative character of portions of this book, and for some prominence of personal views.

I desire to acknowledge the valuable help given me by my friend, Mr. L. Horton-Smith, of Lincoln's Inn, in preparing the Index and Tables of Statutes and Cases.

J. R. P.

4, PAPER BUILDINGS, TEMPLE,
February, 1904.

INTRODUCTORY NOTE TO REPRINTED EDITION.

The Government have again withdrawn the Bills of Exchange Act (1882) Amendment Bill, designed to counteract the effect of the *Gordon* decision. There has been a dearth of cases directly affecting banking law since this book was published last March. In this reprint the original text has been adhered to as far as possible, necessary additions being interpolated or appended as footnotes, without disturbing the paging. The case most calling for notice is the judgment of Bigham, J., in *Akrokerri (Atlantic) Mines, L^d.* v. *Economic Bank* [1904] 2 K. B. 465. It goes to show that agreement between banker and customer that cheques shall not be drawn against till cleared may constitute a differentiation from the facts of the *Gordon Case*, and that a collecting banker may be a "holder" under sect. 77, with power to cross. It contains some useful *dicta* on the question of "account payee," and is, further, some authority for the extension of sect. 82 to both banks when collection is delegated by one to the other. The other new cases introduced are *Hambro* v. *Burnand* [1904] 2 K. B. 10, as to ostensible authority of agents; *Continental Caoutchouc, &c., Co.* v. *Kleinwort*, 20 Times L. R. 403, as to payment by mistake

and the protection of agents; and *Embiricos* v. *Anglo-Austrian Bank*, The Times, August 11th, 1904, as to forged indorsements abroad passing title under the *lex loci*. None of these cases has necessitated any modification of the views previously expressed in these pages; they will be found referred to under the appropriate headings, and also in the Table of Cases Cited.

J. R. P.

4, Paper Buildings, Temple,
September, 1904.

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THE LAW OF BANKING.

CHAPTER I.

RELATION OF BANKER AND CUSTOMER. THE CURRENT ACCOUNT.

THE relation of banker and customer is primarily that of debtor and creditor, the respective positions being determined by the existing state of the account. (*Foley* v. *Hill*, 2 H. of L. Cases, 28.)

Expressions such as those of Jessel, M.R., in *Re Hallett's Estate*, 13 Ch. D., at p. 727, which appear for some purposes to recognise the continued identity of money paid in, do not affect the general principle. The banker is in no sense a trustee for the customer in respect of money paid in, or responsible to him for the use he makes of it. (*Foley* v. *Hill*, *ubi sup.*; *In re Agra Bank*, 36 L. J., Ch. 151.)

The debt due from the banker on current account is repayable on demand, and the drawing of a cheque is not a condition precedent. (*Foley* v. *Hill*, 2 H. of L. Cases, at pp. 36 and 43; *Pott* v. *Clegg*, 16 M. & W. 321; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; *Atkinson* v. *Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377; *In re Tidd* [1893] 3 Ch. 154.) This is further deducible from the cases in which a garnishee order has been held to attach a customer's balance, such as *Rogers* v. *Whiteley* [1892] A. C. 118.

The credit balance on current account can therefore be

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assigned as a debt under sect. 25, sub-sect. 6 of the Judicature Act, 1873. (*Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.) But apparently only in its entirety and not piecemeal by assignments to different persons. (*Durham* v. *Robertson* [1898] 1 Q. B. 765.)

So, again, the Statute of Limitations has the same effect between banker and customer as between any other debtor and creditor. (*Pott* v. *Clegg*, 16 M. & W. 321; *Atkinson* v. *Bradford Third Equitable Building Society*, 25 Q. B. D. 377.) The customer's claim to a credit balance on current account left untouched for six years may be barred by the statute. (*Pott* v. *Clegg*, *ubi sup.*) And conversely the banker's claim to payment of an overdraft would be barred after six years if there had been no sufficient acknowledgment or payment of interest in the interval.

Unless the account is absolutely dormant, the Statute of Limitations is, however, generally excluded by the system of appropriation of payments. In the absence of appropriation express or implied, the earlier drawings on an unbroken current account are attributed to the earlier payments in, in order of date. (*Clayton's Case*, 1 Merivale, 572, at p. 608.) But the right of appropriation, even where there is a current account, remains in the creditor till he has finally exercised it; even accounts stated are only rebuttable evidence of such exercise. (*Cory Brothers* v. *Owners of Steamship Mecca* [1897] A. C., at p. 295; *Smith* v. *Betty* [1903] 2 K. B. 317.) There are exceptions to the rule in *Clayton's Case*. Where a trustee or other person in a fiduciary capacity has paid trust money into his own current account, there is a presumption that monies drawn out for his own use are drawn from his own rather than the trust money, and any balance is available to answer the trust. (*Re Hallett's Estate*, 13 Ch. D. 696.) Where, however, the monies of several persons have been so wrongfully mixed with a current account, the rights of such persons with regard to any balance will be adjusted in accordance with

the rule in *Clayton's Case*, above referred to. (*In re Stenning* [1895] 2 Ch. 433.)

A bank is not entitled to split an account guaranteed to a limited extent, during the continuance of the guarantee, and attribute all payments in to the unguaranteed balance. (*In re Sherry*, 25 Ch. D. 692.)

But payments in may be attributed to any other specific account not covered by the guarantee, and, on determination of the guarantee, the guaranteed account may be closed, another opened, and all payments in attributed to the new account. (*In re Sherry, ubi sup.*)

In the absence of agreement express or implied, a bank may combine two or more accounts of a customer either at the same bank or at different branches thereof. Notice of trust, course of business, or the fact that the accounts are kept in different capacities, is sufficient to establish an agreement not to combine but keep the accounts independent of one another. (*In re European Bank*, L. R., 8 Ch., at p. 44; *Garnett* v. *M'Kewan*, L. R., 8 Ex. 10; *Buckingham* v. *London and Midland Bank*, 12 Times L. R. 70 (course of business precluding blending); *Union Bank of Australia* v. *Murray Aynsley* [1898] A. C. 693.) Where a bank have a loan account and also a current account with a customer, and hold security for his ultimate balance, they cannot appropriate the proceeds of the security to the loan account, independent of a credit balance on current account, but must treat the two as one account. (*Mutton* v. *Peat* [1900] 2 Ch. 79.)

The customer has not the corresponding right to combine accounts kept at different branches so as to draw cheques indiscriminately. (*Woodland* v. *Fear*, 26 L. J., Q. B. 202; *Garnett* v. *M'Kewan*, L. R., 8 Ex. 10.)

Monies paid into a bank to current account are subject to the banker's lien, unless paid in and received for a specific purpose, as, for instance, to meet a particular bill. (*Misa* v. *Currie*, 1 A. C., at p. 569.)

The doctrine of lien is not, as a rule, applicable to a debt, though the same result is attainable by means of set-off or counterclaim. But the House of Lords, in the above case of *Currie* v. *Misa*, distinctly speak of a banker's lien over all monies paid in.

A banker cannot arbitrarily close a current account without reasonable notice. He must provide for outstanding cheques. The ordinary method of referring cheques to another bank is not sufficient, as it involves technical dishonour. (*Buckingham* v. *London and Midland Bank*, 12 Times L. R. 70.)

Whether the customer's account be in credit or overdrawn, the banker is morally, and probably legally, bound to secrecy as to the state thereof, except on reasonable and proper occasion, or under compulsion of law. (*Hardy* v. *Veasey*, L. R., 3 Ex. 107.)

A banker is not obliged to let his customer overdraw unless he has agreed to do so or such agreement can be inferred from course of business. (*Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*, 9 A. C., at p. 864; *Cumming* v. *Shand*, 29 L. J., Ex. 129 (course of business).)

The drawing a cheque or accepting a bill payable at the bank, when there are not funds sufficient to meet it, is presumably a request for an overdraft. (*Eaton* v. *Bell*, 5 B. & Ald. 34; *Forster* v. *Clements*, 2 Camp. 17; *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*, 9 A. C., at p. 864.) But see *London Chartered Bank of Australia* v. *M'Millan* [1892] A. C. 292, where the overdraft arose through the unauthorised act of an agent and there were facts which should have put the bank on enquiry.

There is no common law right to charge even simple interest on an overdraft. The claim could, however, be supported on the ground of universal custom of bankers. Where the customer has acquiesced in the system under which the interest is charged, that also would justify the

claim. (*Gwyn* v. *Godby*, 4 Taunt. 346; *Crosskill* v. *Bower*, 32 L. J., Ch. 540.) Such acquiescence will justify the charging compound interest or interest with periodical rests, so long as the relation of banker and customer exists, and is not, for instance, altered into that of mortgagee and mortgagor. (*Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121; *Williamson* v. *Williamson*, L. R., 7 Eq. 542; *London Chartered Bank of Australia* v. *White*, 4 A. C., at p. 424.) The taking a mortgage to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to preclude compound interest. (*National Bank of Australasia* v. *United Hand in Hand Co.*, 4 A. C. 409.)

Effect of garnishee order on current account.

The fact that the credit balance on a customer's current account is really only a debt due from the banker to him, subjects such balance to other legal incidents affecting debts.

A garnishee order *nisi* in the usual form, based on a judgment against a customer and served on his banker, ties up the whole of that customer's credit balance on current account at date of service, as being a debt due to the customer, irrespective of the relative amounts of the judgment debt and the balance; and the account cannot be operated on even by cheques issued before service of the order. (*Rogers* v. *Whiteley* [1892] A. C. 118; *Yates* v. *Terry* [1901] 1 Q. B. 102 (county court order).)

The *dictum* of Brett, L.J., in *Schroeder* v. *Central Bank*, 34 L. T., N. S. 735, that in the case of a current account there is no debt until demand, is not of sufficient authority, in face of the other cases, to exempt the balance on current account from the operation of a garnishee order.

Course to be pursued.

The best course for a bank to pursue in such circumstances is to open a new account, to which cheques presented for payment should be debited and the monies paid in credited. Such payments in are not affected by the garnishee order, inasmuch as the debt they constitute from the banker to the customer was not due or accruing

due at the date of the service of the order. The bank should communicate with the customer, stating what has been done and asking for instructions, and should also appear in accordance with the order.

If the banker has any lien on or set-off against the monies attached, which existed at the date of service of the order, this should be represented to the court, and would probably prevail against the garnishee order. (See *Tapp* v. *Jones*, L. R., 10 Q. B. 591; *Stamore* v. *Campbell* [1892] 1 Q. B. 314.)

Attempts have been made to get hold by garnishee order of monies alleged to be due to the judgment debtor, though standing to an account in another name. This practice is calculated to put the banker in considerable difficulties. Although a banker has in one case been held not to be estopped from alleging or admitting that monies paid in by a customer do not really belong to that customer (see the judgment of the Privy Council in *Healey* v. *Bank of New South Wales*, November 28th, 1900, not reported), still it is a salutary rule of banking practice that the banker should not question the title of the customer or be bound to look beyond him; and in *Gray* v. *Johnston*, L. R., 3 H. of L. 1, at p. 12, Lord Westbury expressly denies the right of a banker to set up a *jus tertii* against the order of the customer or to refuse to honour his draft on any other ground than some sufficient one resulting from an act of the customer himself. On the other hand, it would be altogether improper that a man should be able to put money beyond the reach of his creditors by merely banking it under an assumed name, with or without the concurrence of the banker. For the purposes of the Bankers' Books Evidence Act, the courts have gone behind the ostensible heading of an account where it was shown to be in reality the account of another person. (*South Staffordshire Tramway Co.* v. *Ebbsmith* [1895] 2 Q. B. 420.)

In the case of a garnishee order, each case would

probably have to depend on its own facts, and the ostensible ownership of the account would not be gone behind in the absence of cogent evidence that it really was only a blind. Cf. *Pollock* v. *Garle* [1898] 1 Ch. 1.

Bankruptcy of customer.

The current account, as being a debt, is affected by the bankruptcy of the customer. The property of a bankrupt divisible among his creditors includes "choses in action," which term covers debts. (Bankruptcy Act, 1883, s. 168.) On adjudication, the title of the trustee relates back to the act of bankruptcy on which the receiving order was made, or, if there are more acts of bankruptcy than one, then to the earliest of those acts within three months preceding the petition. As from that date, therefore, the customer's credit balance, if any, belongs to the trustee in bankruptcy, and, under sect. 50 of the Bankruptcy Act, 1883, the banker can be summarily compelled to pay it over to him.

Sect. 49 of the Bankruptcy Act, which protects *bonâ fide* transactions without notice, contains no very apt words to meet the case of a banker paying away money on the cheque of a customer who has committed an available act of bankruptcy, of which the banker has no notice, but on which a receiving order is subsequently made and adjudication follows.

Presumably, however, the banker would be protected in such case. Any such payment made after the date of the receiving order, even if the banker was unaware of such order having been made, or after notice of an available act of bankruptcy, would, on adjudication, have to be made good by the banker to the trustee. The receiving order is in law deemed to have been made on the first moment of the day of its date, so that it covers all payments made that day. (*In re Pollard* [1903] 2 K. B., at p. 45.)

Possibly money paid on cheques in ignorance of the fact that a receiving order has been made could be

recovered as money paid by mistake; but this could hardly apply to payments made the same day as, but prior to, the actual making of the order. In such case ignorance of an available act of bankruptcy would have to be relied on. Notice of an intention to commit an act of bankruptcy has no effect. (*In re Wright*, 3 Ch. D. 70; *Trustee of Property of Lord Hill* v. *Rowlands* [1896] 2 Q. B. 124; cf. *Crook* v. *Morley* [1891] A. C. 316.)

The banker would be entitled to satisfy his lien out of any balance standing to the bankrupt's credit before parting with it to the trustee.

rust ccounts.

A banker will not be allowed to exercise his lien over any account which he knows to be a trust account, whether specifically so described or not. (*Union Bank of Australia* v. *Murray Aynsley* [1898] A. C. 693; *Bank of New South Wales* v. *Goulburn Valley Butter Co.* [1902] A. C. 543.)

It is not the banker's business to enquire into or obstruct any operations on an account which he holds as, or knows to be, a trust account, even though he may suspect that a breach of trust is contemplated. (*Gray* v. *Johnston*, L. R., 3 H. of L. 1, at p. 14; *Bank of New South Wales* v. *Goulburn Valley Butter Co.*, *ubi sup.*)

A banker will not be permitted to benefit by any wrongful dealing with a trust fund where he is technically party or privy to the fraud. (*Gray* v. *Johnston*, *ubi sup.*)

Decisions have somewhat differed as to what condition of circumstances will constitute the banker technically privy to the fraud, and so deprive him of the benefit of a transfer of trust funds to a private account. In *Foxton* v. *Manchester and Liverpool District Banking Co.*, 44 L. T., N. S. 406, Fry, J., laid down that a bank could not retain the benefit of a cheque drawn on a trust fund known to be such and paid into an overdrawn private account. He said: "It appears to be plain that the bank

could not derive the benefit which they did from that payment, knowing it to be drawn from a trust fund, unless they were prepared to show that the payment was a legitimate and proper one, having reference to the terms of the trust. It is said that they did not know what the trust was at that time. That appears to me to be immaterial, because those who know that a fund is a trust fund cannot take possession of that fund for their private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money."

In *Coleman* v. *The Bucks and Oxon Union Bank* [1897] 2 Ch. 243, Byrne, J., carefully reviews this case in the light of *Gray* v. *Johnston*, L. R., 3 H. of L. 1. He quotes (see pp. 248—249) significant passages from that case, in which Lord Cairns and Lord Westbury distinctly imply that the banker is not to be held privy to the fraud merely because, in the ordinary course of business, the cheque was carried to the private account and diminished an overdraft, which, if a balance had been struck, would have been found to exist; but that to deprive the banker of the benefit, it must be one "designed or stipulated for," as, for instance, where a balance has been struck and the customer pressed for payment or reduction of the ascertained overdraft on the private account. With regard to *Foxton's Case*, he says: "That was a case depending on the evidence. I need not go into all the circumstances, but there was a benefit designed for the bank, who had been calling on the parties having private accounts to reduce their overdrafts, and they did it with the intention of reducing their indebtedness." He then quotes the remarks of Fry, J., reproduced above, and continues (p. 253): "I am asked to say that that amounts to a decision to this effect: that wherever there is an account which upon the face of it is a trust account, and the customer draws a cheque upon that account and pays in

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the cheque to the credit of his private account, the bankers are bound to see and enquire (that is how I understand the proposition is put) that the customer is in point of fact entitled to the money which he so transfers from one account to another. I do not think that that was the meaning of the learned judge in that case. If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further enquiry into the matter." But he held that the fact that in point of law the money must, in the case before him, be regarded as having been applied at the moment in reduction of an overdraft, did not render the bankers liable to refund it, although they knew the money was derived from some trust.

A comparison of the three cases will show that the view of Byrne, J., is more consonant with the rules laid down in *Gray* v. *Johnston* than is that of Fry, J., and the correct conclusion would seem to be that the banker is only liable to refund where the benefit has been designed or stipulated for by him, not necessarily in express terms, or with any suggestion on his part that the customer should utilise the trust funds, but deducible from the striking a balance, ascertaining the overdraft and pressing the customer to pay or reduce it.

Impersonal customers.

Attempts have sometimes been made to foist off on bankers a sort of impersonal customer to whom the banker is supposed to look for payment of overdrafts.

The committee or board of management of a fund, raised to meet some national or local emergency, of a charitable or scientific institution or a proposed exhibition, open an account, and cheques are drawn on it by authorised members of the committee or board, usually countersigned by the

secretary. In the case of a mere fund there can be, and in the other cases there may be, no corporate body or legal entity; the committee or board are only administering certain monies coming to their hands. There is no particular danger so long as the account continues in credit. But such accounts have a tendency to become overdrawn, and it then behoves the banker to see that he obtains and retains the personal liability of those who draw the cheques, and that they are persons of financial responsibility. If the account be opened and headed in the name of the fund or undertaking, if the cheques bear its name, and if the signatures purport to be on its behalf, or in a form indicating that the signatories act as mere scribes, it might be alleged with some plausibility that the banker honoured the cheques and advanced the money in reliance on and looking to the monies accruing to the undertaking or institution, and not on the personal responsibility of the drawers. The doctrine of *Kelner* v. *Baxter*, L. R., 2 C. P. 174, that a person who contracts on behalf of a non-existent principal is himself liable, or of *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360, that a procuration signature imports a warranty of an existing principal and authority from him to sign, would be of doubtful application in such a case, and it is far better to avoid all questions by a definite understanding at the outset. Institutions such as those above referred to sometimes become incorporated, either by royal charter, or else under the Companies Acts, omitting the word "limited" by leave of the Board of Trade. Opportunity may be taken of this to assert a transference of liability from the individuals to the new corporation by way of novation, as was attempted in *Coutts & Co.* v. *The Irish Exhibition in London*, 7 Times L. R. 313. The banker may, if he chooses, accept such a corporation as his debtor for past or future advances, or as his customer in the first instance; in any case he should bear in mind that members of a corporation cannot be personally sued

for its debts, that their liability arises only on a winding-up and is then limited by the terms of the incorporating instrument; that a royal charter rarely imposes any liability whatever on members, and that the Board of Trade minimum for the liability of members of a non-trading society is practically a nominal figure.

Mr. Chalmers has raised a question whether a non-trading corporation can in the absence of authority expressed in, or directly deducible from, its incorporating instrument, issue valid cheques. (Bills of Exchange, 6th edit., p. 65.) It can hardly be suggested that a railway or gas company, both of which are technically non-trading, is constrained to pay all its outgoings in bank notes or cash. *Serrell* v. *Derbyshire, etc. Ry. Co.*, 9 C. B. 811, and *Bateman* v. *Mid-Wales Ry. Co.*, L. R., 1 C. P. at p. 506, seem to recognise a distinction between bills and cheques in this respect.

It is submitted that the power to issue cheques for ordinary payments is impliedly inherent in all corporations.

Overdraft is borrowing, and so stands on a different footing, being dependent on the borrowing powers of the corporation.

CHAPTER II.

CURRENT ACCOUNT WITH A MINOR.

THIS has been the subject of considerable discussion. Arguments against the possibility of opening or keeping a current account with an infant have been based on:—

1. The alleged incapacity of an infant to give an effective discharge for a debt.

2. The alleged incapacity of an infant to draw a valid cheque.

Such arguments are, it is conceived, based on fallacies.

"The disability of infancy goes no further than is necessary for the protection of the infant." (*Per* Pearson, J., in *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D., at p. 424.)

No doubt an infant cannot give an effective discharge for an unperformed obligation; he cannot, even by deed, release an unpaid debt. But where the discharge is merely the recognition of the performance of the obligation, such as a receipt, there is no rational ground for importing the disability.

The case usually quoted in support of the proposition that an infant cannot give a valid discharge, *Ledward* v. *Hassells*, 2 K. & J. 370, possessed exceptional features, turning as it did on the express words of a will, which made the payment of a legacy to an infant conditional on his ability to give a valid discharge, so that, in a sense, such discharge would have had to be given (if at all) for a legacy as yet unpaid.

The capacity of an infant to give a discharge for fulfilled obligations in ordinary cases appears to be recognised by James, L.J., in *In re Brocklebank*, 6 Ch. D. 358, where he

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said: "Cannot an infant give a receipt for wages or any salary due to him in respect of his personal labour?"

Moreover, it is difficult to see how the question is of practical importance. The only circumstances in which the efficacy of a discharge could arise, would be if the infant were trying to recover from the banker money already paid to him or on his cheques, and such a claim, as shown hereafter, is absolutely untenable.

As to the alleged incapacity of an infant to draw a valid cheque.

The Bills of Exchange Act, 1882, s. 22, sub-s. 1, distinctly limits the infant's incapacity to the assumption of liability. Sub-sect. 2 of the same section enacts that where a bill is drawn or indorsed by an infant the drawing or indorsement entitles the holder to receive payment of the bill and enforce it against any party thereto; that is, any party other than the infant.

A cheque is a bill of exchange drawn on a banker payable on demand. (Bills of Exchange Act, 1882, s. 73.) It is difficult, therefore, to see why a cheque drawn by an infant does not possess all the characteristics of a cheque drawn by a person of full age, save in so far as relates to the liability thereon of the drawer.

An argument against keeping an account with a minor has been formulated as follows:—

To constitute a cheque or to entitle the banker to the protection of sect. 60 in respect of a bill drawn on him, the relation of banker and customer must exist. That relation has been held to subsist although the banker has, by reason of overdraft, become the creditor instead of the debtor. (*Hardy* v. *Veasey*, L. R., 3 Ex. 107; *Clarke* v. *London and County Bank* [1897] 1 Q. B. 552.)

Therefore the complete relation cannot exist where the customer could never be a debtor.

Therefore a banker paying a cheque drawn on him by an infant is not entitled to the same protection against forged indorsements or under the crossed cheques sections as he would be in the case of an ordinary cheque.

Such an argument would, however, infallibly be rejected by a court as fantastic and far-fetched.

The primary and natural relation of banker and customer, as contemplated in all the earlier cases, is that the banker is debtor, the customer creditor. Where these conditions exist, as they perfectly well may in the case of an infant customer, it is irrelevant to import non-existent and supposititious circumstances as having any bearing on the position. Cf. *Nottingham Permanent Benefit Building Society* v. *Thurstan* [1903] A. C. 6, where it was said an infant might perfectly well be a member of a building society though incapacitated from borrowing like the adult members.

Moreover, as will be hereafter pointed out (Cheques, p. 24, *post*), the Act does not specifically require that a cheque be drawn by a customer; and the inference that it must be is considerably weakened by the judgment in *London, City and Midland Bank* v. *Gordon* [1903] A. C. 240.

Infant reclaiming money paid.

Another suggested danger is that the minor, after drawing out the whole of his current account, might, either before or on attaining majority, claim the money over again from the banker, on the ground of his own inability to give a valid discharge during infancy. Persons advancing this view have adduced in support the special provisions of Savings Banks and other Acts constituting an infant's receipt a discharge for his deposit.

This suggested danger is purely imaginary. Whatever may be the law where it is sought to enforce a contract against an infant or make him pay for goods purchased or repay money lent, when the positions are reversed and the infant is himself the moving party, the ordinary rules of justice and equity prevail.

"If an infant was to buy a thing, not being necessaries, he could not be compelled to pay for it, but having done so, he could not recover back the money." (*Per* Lord Kenyon, in *Wilson* v. *Krause*, 2 Peake, 196.) "If an infant

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receives rents, he cannot demand them again when of age." (*Per* Lord Mansfield, in *Earl of Buckinghamshire* v. *Drury*, 2 Eden, at p. 72.) *Valentini* v. *Canali*, 24 Q. B. D. 166, is a late and strong authority to the same effect.

The cases of *Hedgley* v. *Holt*, 4 C. & P. 104, and *Rawley* v. *Rawley*, 1 Q. B. D. 460, which at first sight might seem to justify the opposite view, are, as shown by the latter, explainable by the fact that they were cases of set-off, that the obligation set up against the infant was prior to and wholly independent of the obligation sought to be enforced by him, and that the technical rule requiring a set-off to be a recoverable debt precluded the court from entertaining as such the claim set up against the infant.

With regard to money paid on the cheques of the infant there are in addition the provisions of sect. 22, sub-sect. 2 of the Bills of Exchange Act, before referred to: they expressly affirm the right of the holder of a bill drawn by an infant to receive the money for it.

This absolutely involves the discharge of the drawee from his obligation to the drawer in respect of an equivalent amount of the funds in his hands against which the bill is drawn.

The provisions in the Savings Banks and other Acts as to discharges by minors must be regarded as inserted to meet exceptional cases or *ex majore cautelâ*. If the account has been opened by a father or guardian paying in money to be drawn on by the infant, the banker can incur no risk by applying the money according to directions, any more than does a trustee in paying money to an infant by way of allowance under the terms of a trust.

Overdraft by infant.

Overdrafts are money lent (*Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*, 9 A. C. 857), and as such could never be recovered against an infant customer. Any security given by an infant for such overdraft would be void. (*Nottingham Permanent Benefit Building Society* v. *Thurstan* [1903] A. C. 6.)

CHAPTER III.

DEPOSIT ACCOUNTS.

DEPOSIT accounts may be of three classes:—

1. Repayable at call or on demand. 2. Withdrawable on specified notice. 3. For a fixed period.

The customer has no right to draw cheques against a deposit account of class 2 or 3, probably not against a deposit account of class 1 (*a*).

Where the deposit is at call, notice should first be given to transfer to current account. Where it is withdrawable on notice, due notice should first be given, together with a request to transfer to current account at the expiration thereof.

In practice, where a customer who has a deposit account draws a cheque which his current account is not sufficient to meet, it is not unusual for the banker to honour the cheque, relying on his lien or set-off against the deposit account, and the practice seems free from danger.

Where a form of cheque is indorsed on a deposit receipt, as in *In re Dillon*, 44 Ch. D. 76, it must be taken that the bank agree to honour that particular cheque against the deposit account, or treat that account at once as transferred to current account.

Money paid in on deposit account is a loan to the banker, not a specific fund held by him in a fiduciary capacity. (*Pearce* v. *Creswick*, 2 Hare, 286; *In re Head* [1893] 3 Ch. 426; *In re Head* (No. 2) [1894] 2 Ch. 236.)

The remarks of North, J., in *In re Tidd* [1893] 3 Ch. 154, as reported, are somewhat ambiguous, but are clearly insufficient to establish any fiduciary relation.

(*a*) In *Hopkins* v. *Abbott*, L. R., 19 Eq. 222, Malins, V.-C., seems to have thought a banker was bound to honour cheques against a deposit account of class 1. But apart from notice or effluxion of time there are distinctions between current and deposit account which render this doubtful. Cf. *In re Head* (No. 2), *ubi supra*.

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The expressions of Lord Esher, M.R., in *Atkinson* v. *Bradford Third Equitable, &c.*, hereafter referred to, cannot be interpreted as suggesting any such fiduciary relation with regard to deposit account.

Money on deposit account, of whatever class, may therefore be assigned as a whole under sect. 25, sub-sect. 6, of the Judicature Act, 1873. It is also subject to the banker's lien. Being a debt, it is within the operation of the process for attachment of debts and the Statute of Limitations, subject to such modifications as arise from the terms of the deposit. Whether a particular deposit account is liable to garnishee process depends on whether it is "a debt due or accruing due" at the time of service of the order.

Effect of garnishee order on deposit account.

If return of the deposit receipt is a condition precedent to withdrawal of the amount, the deposit account, even if repayable on demand, would not be affected by service of a garnishee order prior to return of the receipt. "The debt so attached must be a debt owing by the garnishee, a debt of which the judgment debtor could have compelled payment if he desired to do so." (*Chatterton* v. *Watney*, 16 Ch. D., at p. 383.)

In *Atkinson* v. *Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377, the question was whether the return to the society of a loan pass book issued by it was a condition precedent to repayment of the loan. Lord Esher, M.R., said of and in that case: "It has no analogy to the cases cited where money is deposited in a bank to provide for a current account. The case of money paid in on a deposit account would be very different, and we shall know how to deal with it when it comes before us."

In the connection in which these words occur they obviously infer a distinction between current account and deposit account based on the return of the receipt.

In *In re Tidd* [1893] 3 Ch. 154, North, J., seems to understand Lord Esher's remarks in this sense, namely, as

pointing to the necessity of the return of the receipt before the deposit can be withdrawn.

It appears to be really a question of the contract between the parties, as evidenced by the receipt.

If the receipt is merely an acknowledgment by the banker of having received the money, it is probably only evidence of that fact, and its return is not a condition precedent.

If its return is made a condition of repayment or withdrawal, then no debt arises until its return. (See *Atkinson* v. *Bradford Third Equitable, &c., ubi sup.; In re Dillon*, 44 Ch. D., *per* Cotton, L.J., at p. 81.)

The fact that a bank could not refuse to pay in the event of the receipt being lost, alluded to in *In re Dillon*, does not affect the question, being merely part of the equitable jurisdiction with respect to lost instruments. (See *Pearce* v. *Creswick*, 2 Hare, 286.)

Apart from any question of the return of the receipt, the position seems to be as follows:—

I. A deposit account withdrawable on demand or at call would probably be attached by a garnishee order, on the analogy of other debts payable on demand, which are recoverable without previous actual demand.

II. A deposit account repayable on specified notice, with respect to which no such notice has been given at the time of the service of the order, is not affected by the order.

It is not at that time a debt due, for which the depositor could have immediately and effectually sued.

It is not at that time a debt accruing due. There is no direct decision on this point. The accepted definition of a "debt accruing due" is that given by the Court of Appeal in *Webb* v. *Stenton*, 11 Q. B. D. 518, viz., "*debitum in præsenti solvendum in futuro*."

The examples given in *Jones* v. *Thompson*, 27 L. J., Q. B. 234, and the fair interpretation of "accruing due" and of the above definition, show that the debt must be one payable at a definite fixed future date, which is not the

case with a deposit withdrawable only on specified notice, where no such notice has been given.

III. Where due notice of withdrawal has been given prior to the service of the garnishee order *nisi*, then, subject to any question of the return of the receipt, the deposit account is attached, because it is then a debt due or accruing due, according as the notice has expired or is still running.

IV. A deposit account repayable at a fixed date is attached by a garnishee order, subject to any question as to return of the receipt, because it is a debt accruing due.

As in the case of current account, where a garnishee order takes effect on a deposit account, the whole is attached, irrespective of the amount for which the judgment has been entered.

Effect of Statute of Limitations on deposit account.

The Statute of Limitations is not likely ever to have effective operation on deposit accounts, as it would be barred by payment of interest.

It was with immediate reference to this statute that Lord Esher made the observations in *Athinson* v. *Bradford Third Equitable, &c.*, above quoted. If the return of the deposit receipt be a condition precedent to repayment or recovery of the money, its return fixes the starting point of the statute.

The best test as to when the statute begins to run is that laid down by Willes, J., in *Garden* v. *Bruce*, L. R., 3 C. P., at p. 301: "The six years must be six years on every day of which the plaintiff could have sued out a writ against the defendant."

The conditions before laid down concerning the application of a garnishee order *nisi* to a deposit account are therefore equally applicable for ascertaining the time at which the Statute of Limitations begins to run.

Deposit receipt.

A deposit receipt is not a negotiable instrument, and the transfer thereof confers no right to the deposit account. (*In re Dillon*, 44 Ch. D. 76.)

A deposit receipt payable to bearer on demand would

probably constitute an infringement of the Bank Charter Act, 1844.

Some banks issue a form of deposit receipt with a cheque form at the back. This cheque form being filled up by the depositor, either for the whole or a part of the money deposited, and notice given if required by the terms of the deposit, the cheque is paid by the bank to the holder as an ordinary cheque. (See a form set out in *In re Dillon*, 44 Ch. D. 76, and *In re Mead*, 15 Ch. D. 651.)

The legal significance and effect of such documents seems open to argument.

In *In re Dillon* the Court of Appeal regarded the cheque part as not inconsistent with the general character of the document as a deposit receipt, treating it more in the light of a device of the bank to insure a receipt for the money when withdrawn.

On the other hand, in *In re Mead*, a similar document, emanating from the same bank, was, when filled up for part only of the deposit, treated by Fry, J., purely as a cheque; and this case is not displaced, but recognised, by *In re Dillon*.

No doubt the existence of the signed cheque would be some evidence of payment, as an ordinary paid cheque retained by the banker as a voucher is.

But the primary object of a cheque is as a means of obtaining money, not of showing it has been paid, and when one finds the cheque form adopted, the natural conclusion is that the primary object is intended.

Whether the cheque form be used for the whole or part of the deposit account cannot vitally affect its import; if its use be restricted to the withdrawal of the full amount at one time, it may somewhat favour the receipt theory.

It has been further suggested that the document when filled in and notice in writing given to the bank constitutes a valid assignment of the debt within sect. 25, sub-sect. 6, of the Judicature Act, 1873.

The cases of *Hopkinson* v. *Forster*, L. R., 19 Eq. 74, and

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Schroeder v. *Central Bank*, 34 L. T., N. S. 735, are, however, fatal to any such contention. If not a cheque, it is only instructions to the bankers.

On the whole, the form would seem designed as a cheque, with a view to securing the transferability of the deposit account.

The bank must be regarded as undertaking, either at any time or on expiration of the stipulated notice, to transfer the whole or part of the deposit, or treat it as transferred, to a drawing account and honour the cheque against that. (See *In re Mead*, *ubi sup.*)

There is no legal objection to a cheque being drawn on the back of another document, say a visiting or playing card.

The only difficulties in the way of treating this particular form of cheque as a good negotiable cheque for all purposes arise from two considerations:—

(1) Is it for a sum certain?

(2) Is it payable only out of a particular fund?

The answer of course depends on the wording of the cheque form.

If no sum is inserted, the amount payable being defined by reference to the deposit, the document errs in both respects.

If the cheque is simply completed by the insertion of a specific sum, the mere existence of the deposit receipt, on the reverse side, would not restrict the payment to that particular fund; at most it would indicate the particular fund whence the drawees were to reimburse themselves, which is no obstacle to the validity of a cheque. (Bills of Exchange Act, s. 3, sub-s. 3 (*a*).

Question as to stamp duty.

Deposit receipts are exempt from stamp duty. (Stamp Act, 1891, s. 103, exemption 1.)

The Inland Revenue have sought to tax as promissory notes not payable on demand bankers' receipts for deposits for fixed periods, which specified the date at which the deposit would be repayable and the rate of interest allowed. Alternatively they have sought to charge them with stamp duty as agreements.

Neither claim can be supported:—

(*a*) The provision as to repayment does not render such documents promissory notes within sect. 33 of the Stamp Act, 1891, as containing a promise to pay a sum of money. The primary purpose of the document is something different; and the promise to pay, if any, is only the recognition of a legal obligation resulting from the contract of loan. (See *per* Lord M'Laren, in *Thomson* v. *Bell*, 22 Court of Sessions Cases, 4th series, p. 18.)

See also *Horne* v. *Redfearn*, 4 Bing. N. C. 433, where it was held that the document would have been exempt as a deposit receipt if given by a banker; and *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue*, 21 Q. B. D. 352.

Nor does the provision as to payment of interest take the document out of the exemption.

In 1813, in *Bank of Scotland* v. *Watson*, 1 Dow's House of Lords Cases, 40, the House of Lords declined to decide whether, under the then existing stamp laws, a proviso for payment of interest deprived the document of the character of a receipt. Consequent on this case, the Stamp Act of 1815 (55 Geo. III. c. 184) expressly enacted that "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited, shall be deemed and taken to be promissory notes."

The repeal of that Act and the total omission of any such provision in the Stamp Act of 1891 show the intention of the Legislature that the inclusion of interest should not for the future preclude such document from exemption as a receipt.

(*b*) Such a document is not chargeable with stamp duty as an agreement. See *Horne* v. *Redfearn*, 4 Bing. N. C. 433, where the Court expressly stated that the document, which they held to be an agreement, would, under the Stamp Act, 1815, have been exempt as a deposit receipt if given by a banker.

CHAPTER IV.

CHEQUES GENERALLY.

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Definition.

"A cheque is a bill of exchange drawn on a banker payable on demand." (Bills of Exchange Act, 1882, s. 73.)

Mr. Chalmers says (Bills of Exchange, 6th ed., p. 248): "It is no part of the definition that a cheque should be an inland bill, or that it should be drawn by a *customer* upon his banker."

It is somewhat difficult to contemplate a cheque not drawn by a customer, and there are expressions in the other cheque sections which it is not easy to reconcile with the existence of any other class of cheque. Moreover, until the recent decision in *London City and Midland Bank* v. *Gordon*, in the House of Lords [1903] A. C. 240, there was a canon of construction that where an Act of Parliament speaks of a banker, it means a banker acting in his capacity as such, in correlation with a customer. There was also the canon of construction, expressly recognised by the Court of Appeal in the *Gordon Case* [1902] 1 K. B. 242, and in *Charles* v. *Blackwell*, 2 C. P. D. 151, that all statutory provisions for the protection of the banker are designed to counteract some risk imposed on him directly or indirectly by legislation in the interest of the community, and must not be extended beyond the limits required for that purpose. These two eminently reasonable rules overlap with regard to the matter in hand; they are accordingly treated together here.

In the *Gordon Case* some of the documents involved were bankers' drafts, drawn by the A. branch of a bank upon its head office, payable to G. and M. or order.

These were issued by the A. branch to a customer who forwarded them to G. and M. They were intercepted by J., who forged the indorsement of G. and M. and paid them uncrossed into his own account at the B. branch of the same bank.

The House of Lords held that these documents were not cheques or bills within sect. 3 of the Bills of Exchange Act, there being no separate drawer and drawee, and that the power given by sect. 5, sub-s. 2, to treat as a bill a document in which drawer and drawee are the same person is confined to the holder, as, indeed, it is in terms.

They therefore held that the bank were not protected by sect. 60 of the Bills of Exchange Act.

But they did hold that the bank, as paying bank, was protected by sect. 19 of the Stamp Act, 1853, which is as follows :—

"Any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was, or is, made payable, either by the drawer or any indorser thereof."

Now one would have said that the wording of this section was expressly designed to confine its operation to drafts or orders drawn on a banker *quâ* banker, that is, by a customer.

There is first the use of the word "banker," which, as before suggested, seems to imply the relation to a customer. (And see *Halifax Union* v. *Wheelwright*, L. R., 10 Ex., at p. 193.)

"Shall be a sufficient authority." In their ordinary

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acceptation these words point to the relation of banker and customer. A man wants no authority to pay a bill drawn on him as a principal; a banker does want authority to pay away his customer's money. (Cf. sect. 75 of the Bills of Exchange Act.) But in *Charles* v. *Blackwell*, 2 C. P. D., at p. 159, the Court, in order to secure to the banker protection against the true owner, as well as the customer, read these words as implying a statutory authority derived from the section. This interpretation seems somewhat forced, but justified by the necessities of the situation.

"It shall not be incumbent on such banker to prove that such indorsement," &c. These words are unintelligible, except with relation to a customer's drafts. An ordinary drawee or acceptor pays a bill on his own account; there is no one to whom he looks for reimbursement, no one he can debit. If he pays on a forged indorsement, he has to bear the loss himself unless he can recover the money as paid under mistake of fact from the person he paid it to. There is no conceivable state of circumstances in which there is any duty from him to anybody, rendering it incumbent on him to prove an indorsement to be genuine. Even where he is sued by the true owner for conversion of the bill, it is incumbent on the true owner to prove that his signature was forged, not on the drawee or acceptor to prove it genuine. The words can only therefore apply to a state of facts in which, but for this section, it would be incumbent on the banker, as drawee, to justify his conduct by proving an indorsement to be genuine. That state of facts is where he has paid a customer's draft out of that customer's money. To entitle him to debit the customer, it would be incumbent on him to show that he had paid with the customer's authority, in accordance with his mandate. If the customer said, "Pay A. or order," and the banker had paid someone purporting to hold under A.'s indorsement, it would be incumbent on the banker

to prove to his customer that that person fulfilled the character of A.'s order; in other words, to prove the genuineness of A.'s indorsement.

No doubt, in the *Gordon Case*, these drafts were in a sense drawn on a banker as such, and were issued to a customer; but they were issued by the branch to its customer and paid by the head office, where he was not a customer and had no account which could be debited. No point, moreover, was made of this in the judgment, which would be equally applicable had the drafts been sold to a perfect stranger.

There is nothing in the definition of "banker" in sect. 2 of the Bills of Exchange Act sufficient to differentiate its meaning in that Act. It must therefore be recognised that this decision affects that Act as well, and that it can no longer be asserted that "banker" either in the Bills of Exchange Act, or the Stamp Act, 1853, necessarily means a banker *quâ* banker in relation to a customer.

Again, this decision militates against the other canon of construction referred to, viz., that all statutory protection to a banker is based on, and must be confined to, the counteracting some additional risk directly or indirectly thrust upon him by the Legislature in the interest of the community at large.

The section in question, like sects. 60 and 82 of the Bills of Exchange Act, has always been regarded as a leading example of this principle and interpreted on those lines.

Lord Lindley, in *Gordon's Case*, and the Court of Appeal in *Charles* v. *Blackwell*, 2 C. P. D. 151, set forth the facts relating to its introduction. It was inserted in the Stamp Act, 1853, because that Act first authorised the issue of "draft or order for the payment of any sum of money to the bearer or to order," with a 1*d.* stamp, that rate of stamp duty having previously been confined to such documents when payable to bearer, not to order. As the court say

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in *Charles* v. *Blackwell*, at p. 156, with reference to this very section :—

"Now the purpose of the enactment we are dealing with was, when cheques payable to order were expected to become general, to protect bankers against the possibility of forged indorsements. The only reason why cheques had not been drawn payable to order before being the expense of the stamp, when the Stamp Act of 16 & 17 Vict. included these cheques among those which should be subject to the 1*d.* stamp, it was, of course, foreseen that the great convenience arising from the use of such cheques would make them of constant recurrence. It was equally certain that the use of cheques drawn to order would expose bankers to serious danger from forged indorsements, payment upon which, as the law then stood, would have been to their own loss. It was against this danger that the 19th section of the Act was intended to protect them. It was not unreasonable that while the customer obtained the advantage of being able to draw cheques payable to order, the possibility of forged indorsements should be, as between him and the banker, at his risk."

Here not only is the section treated as applying solely to the case of cheques drawn by a customer on his banker, but the protection is limited to such cases, and the reason for such limitation assigned on the basis above stated. And the main principle is recognised in the judgments in *Gordon's Case* in the House of Lords with reference to sect. 77, sub-sect. 6, and sect. 82.

But by extending the protection to drafts drawn by a branch office of a bank on the head office, the House of Lords would appear to have disregarded this correlation of risk and protection.

It was not and could not be suggested that the Stamp Act of 1853 produced or was likely to produce a large increase in the number of such drafts issued by banks.

But there is a far stronger consideration. On the passing of that Act, the payment of an order cheque drawn on a banker by his customer, with a 1*d.* stamp, became a legal obligation on the banker, provided he had available and sufficient funds in his hands.

He was responsible to the customer in substantial damages if he did not pay it. This duty was the foundation of the risk and the limit of the protection. But the issue of a draft such as that in question, even to a customer, remained, and remains, a matter entirely at the option of the banker. The customer cannot draw it himself, or insist on the banker's giving it him. The superadded obligation is confined to paying regular cheques. Therefore such drafts, being purely voluntary and optional on the part of the banker, are altogether outside the reason of the protection against forged indorsement.

It is most unfortunate that, on facts involving only £32 15*s.* 9*d.*, so salutary a canon of interpretation should have been impugned by the House of Lords.

Their decision taken as a whole would seem to involve the result that if a "draft or order payable to order on demand," as distinguished from a bill or cheque, were drawn on a banker in his private capacity for the price of a horse sold to him, and he paid it on a forged indorsement, he must be taken to have paid for the horse.

The full effect of the decision cannot be directly imported into sect. 60, if only for the reason that the latter requires the payment by the banker to be "in the ordinary course of business," words not to be found in sect. 19 of the Stamp Act, 1853. Indeed, the rule as to correlation of risk and protection may probably be regarded as still obtaining, except with regard to this particular section of the Stamp Act, 1853, since, as above stated, it was distinctly affirmed by the House of Lords with regard to certain sections of the Bills of Exchange Act in the same judgments.

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The position resulting is somewhat difficult to justify on logical grounds.

Requisites in form of a cheque.

A cheque must conform to the requisites laid down by the Act to constitute a bill. Sect. 19 of the Stamp Act, 1853 (16 & 17 Vict. c. 59), affords the protection previously mentioned to a banker paying any draft or order drawn upon him for a sum of money payable to order on demand; and the Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17, applies the crossed cheques sections of the Bills of Exchange Act to "any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document." As to these documents, see *Bavins, jun., and Sims* v. *London and South-Western Bank* [1900] 1 Q. B. 270; *Capital and Counties Bank* v. *Gordon* [1903] A. C. 240. The crossed cheques sections are also extended to dividend warrants by sect. 95 of the Bills of Exchange Act.

Allowing for these exceptions, which will be dealt with under the provisions applicable to them, a document to be a cheque must possess the characteristics of a bill, defined by sect. 3 as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer." For the general interpretation of this section see Chalmers' Bills of Exchange.

The following are the points which specially affect bankers:—

I. Unconditional. The documents which require as a condition of payment the signing a particular form of receipt are, therefore, not cheques. (See *Bavins, jun., and Sims* v. *London and South-Western Bank* [1900] 1 Q. B. 270; *Capital and Counties Bank* v. *Gordon* [1903] A. C. 240.)

The crossed cheques sections apply to these documents under the Revenue Act, 1883, s. 17, as before stated. But it must be noted that that section expressly provides that "nothing in this Act shall be deemed to render any such document a negotiable instrument." Negotiable is clearly here used in the sense of "transferable" (as in sect. 8, sub-sect. 1, of the Bills of Exchange Act), not in the artificial sense of the word imported by the interpretation of the not-negotiable crossing. This view is strengthened by the description of the document in the section as one "issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document," the wording clearly pointing to the limitation of payment to the named payee.

Moreover, as the receipt has to be signed by the named payee, if the document were payable to a third party, the incongruous result would accrue that the bank would be paying to B. money which A. had already stated to have been paid to him in accordance with the order. It can make no difference that the document on the face of it professes to be payable to order. If it does not so profess, sect. 8 of the Act, which treats as payable to order a bill payable to a particular person, and not containing words prohibiting transfer, is not one of the crossed cheques sections. The inclusion of sect. 77, as to "not negotiable" crossings, among the sections extended to these documents, might afford some ground for asserting their inherent or implied negotiability. It might be argued that, inasmuch as power is conferred to restrain their negotiability by crossing them "not negotiable," they either are or are made negotiable, or at least transferable, when not so crossed. It is, however, submitted that this implication is not sufficient to override the express words of the Revenue Act, 1883. The incorporation is by the Act, and

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the proviso therefore rules the incorporated section as much as if it had been set out therein.

This point of non-transferability appears to have escaped the Court of Appeal in *Bavins, jun., and Sims* v. *London and South-Western Bank*, where the document was collected for a person other than the payee.

It would further appear that these documents do not come within the definition of a "draft or order drawn upon a banker for a sum of money payable to order on demand" within sect. 19 of the Stamp Act, 1853 (16 & 17 Vict. c. 59), not being payable to order and not being capable of indorsement, against forgery of which that section is a protection of the banker.

The only case in which a banker would seem to be protected with regard to such documents is where he pays one, being crossed, to another banker, the document bearing no evidence of indorsement or of being collected for any one but the specified payee, or where, being crossed, he collects one for the specified payee.

Many of these documents contain a notice that they will only be paid if presented within a specified time. The point has not been before the courts, but this would appear to constitute a condition.

It would also appear to preclude the document from being treated as payable on demand. A bill is not, strictly speaking, payable on demand where the demand is limited to a period less than that prescribed by the Statute of Limitations. It ought to be payable at any time, subject to that limitation.

The Revenue Act, 1883, s. 17, does not confine its operation to documents which enable the payee to obtain payment on demand. The limitation of time for payment would, therefore, not seem to be material under that section.

To be unconditional a cheque must not be made payable out of a particular fund. (Sect. 8, sub-sect. 3.) As to the bearing

of this provision on cheques indorsed on deposit receipts, see "Deposit Receipt" (*ante*, p. 22).

II. A cheque must be an order. As Mr. Chalmers puts it, it must be imperative in its terms, not precative, though the insertion of mere terms of courtesy will not make it precative. (Bills of Exchange, 6th ed., p. 11.)

III. A cheque must be addressed by one person to another.

There must be one person as drawer, another as drawee. (*Vagliano* v. *Bank of England*, in the C. A., 23 Q. B. D., at p. 248; *London City and Midland Bank* v. *Gordon* [1903] A. C. 240.)

The head office and branches of a bank constitute for general purposes only one concern or legal entity. (*Prince* v. *Oriental Bank Corporation*, 3 A. C. 325.) It is for this reason that drafts drawn by one branch of a bank on another branch or the head office are not cheques or bills drawn on a banker so far as the bank is concerned. (*London City and Midland Bank* v. *Gordon* [1903] A. C. 240.)

But they are "drafts or orders drawn on a banker" within sect. 19 of the Stamp Act, 1853, if payable to order on demand. (*London City and Midland Bank* v. *Gordon*, *ubi sup.*, though, as before stated, this decision seems open to criticism.)

Sect. 5, sub-sect. 2, of the Bills of Exchange Act, which enacts that "where in a bill drawer and drawee are the same person, the holder may treat the instrument at his option as a bill of exchange or promissory note," and in a minor degree sect. 50, sub-sect. 2 (c), certainly appear to contemplate the possibility of a bill in which drawer and drawee are the same person. The true interpretation of those sections is, however, that though such a document is not really a bill, the holder may treat it as such, but even then need not give notice of dishonour to the drawer. The right to do so is, in any event, confined to the holder, and cannot help the bank. (*London City and Midland Bank* v. *Gordon* [1903] A. C. 240.)

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IV. A cheque must be payable on demand.

On demand.

As to documents payable on demand within a specified period only, see p. 32, *ante*.

The omission of the words "on demand" in the ordinary cheque form is justified by sect. 10 of the Bills of Exchange Act, which provides that "a bill is payable on demand (*a*) which is expressed to be payable on demand, or at sight, or on presentation, or (*b*) in which no time for payment is expressed."

Post-dated cheques.

Post-dated cheques are not strictly payable on demand. They are delivered before the ostensible date, but if presented before that date, will not be paid.

They are exceptional instruments, inasmuch as by their use the effect of a bill at a future date is attained without corresponding benefit to the revenue.

Whether designedly or not, they are beyond question validated by sect. 13, sub-sect. 2, of the Bills of Exchange Act, which enacts that a bill is not invalid by reason of being post-dated.

A post-dated cheque is not open to objection on the ground of insufficient stamp, since all stamp objections must be determined by the conditions existing when the question is raised, which would naturally not be until after the ostensible date had arrived. (*Royal Bank of Scotland* v. *Tottenham* [1894] 2 Q. B. 715.)

Very possibly the drawer of such a cheque is liable to a penalty under sect. 5 of the Stamp Act, 1891, for executing an instrument not truly and fully setting forth facts and circumstances affecting the liability thereof to duty; but that cannot render the document illegal in face of the express words of the Bills of Exchange Act.

In 1868, in *Emanuel* v. *Robarts*, 9 B. & S. 121, a post-dated cheque was presented for payment before the ostensible date; payment was refused and the cheque marked "Post-dated." It was presented again on the ostensible date and payment again refused. In an action by the

customer for damage to his credit, the bank were held justified by virtue of a custom of London bankers to refuse payment in such circumstances, namely, where they knew a cheque to have been post-dated. The custom was recognised as reasonable on the ground of the then existing doubts as to the legality of post-dated cheques. In face of their distinct recognition by the Bills of Exchange Act and later decisions, such custom could hardly be supported now, and a banker is probably bound to pay a post-dated cheque presented on or after its ostensible date, even though he may have refused payment of the same cheque and marked it "Post-dated" when presented before that date.

"To or to the order of a specified person or bearer."

V. A cheque must be payable to or to the order of a specified person or to bearer.

Sect. 7, sub-sect. 1, "Where a bill is not payable to bearer, the payee must be named or indicated therein with reasonable certainty."

The normal cheque is one in which there is a drawer, a drawee banker, and a payee, or no payee but bearer. Some exceptions are introduced by the Act, notably the fictitious payee under sect. 7, sub-sect. 3. Further latitude has been allowed by decision. In *Chamberlain* v. *Young* [1893] 2 Q. B. 206, a bill, "Pay order," was held good as being equivalent to "Pay to my order." In *Dann and Valentin* v. *Sherwood*, 11 Times L. R. 211, Kennedy, J., held that a promissory note in which no payee was named and which contained neither the word "order" or "bearer" was good and payable to bearer, but this decision seems very doubtful.

A cheque payable to "A. B. or order" is, of course, payable to A. B. personally, the "order" being secondary and alternative.

The payee is, as the term imports, the person to whom the drawer primarily intends and directs payment to be made. It rests entirely with the payee whether he will present or negotiate the cheque. If a man presents a

cheque payable to "A. B. or order" unindorsed, the legal presumption is that he is A. B. The bank must pay or refuse payment. They may tender a stamped receipt for signature, but cannot otherwise demand any receipt, certainly not one in any particular form.

Whether protection acquired by obtaining signature of professing payee.

The common practice of paying bankers to refuse payment unless the ostensible payee signs on the back of the cheque seems therefore without justification. It is understood that at least one object of demanding such signature is to get the protection of sect. 60 should the person presenting the cheque not be the real payee. Whether this result would be attained appears doubtful. The reasons for such doubt are as follows:—

In *Keane* v. *Beard*, 8 C. B., N. S., at p. 382, Byles, J., held that the payee's signature so obtained was not an indorsement, but a receipt. Cf. Finance Act, 1895, s. 9, where such signature is treated as a receipt.

The Bills of Exchange Act, s. 2, defines indorsement thus: "Indorsement means an indorsement completed by delivery"; and the important words in sect. 60 are that it is not incumbent on the banker to show that the indorsement was "made" by or under the authority of the person whose indorsement it purports to be, the word "made" being more apt to include delivery than "forged," which occurs later in the section.

It is clear that in the case supposed there could, to the knowledge of the banker, be nothing like delivery by the payee.

It may be objected that where the payee first indorses the cheque and then himself presents it for payment, there is equally no delivery. This objection is met by the consideration that in such case the banker is, under sect. 8, sub-sect. 3, entitled to treat the cheque as payable to bearer, the only or last ostensible indorsement being one in blank, and that he pays the holder as bearer, not as payee, delivery being presumed under sect. 21, sub-sect. 3.

Sect. 60 then relieves the banker from the defect of forged or unauthorised indorsement. That section does not contemplate any casual knowledge he may have that the payee is the person actually presenting the cheque, and such knowledge could not be imported into the question.

The words of the section which refer to "the indorsement of the payee or any subsequent indorsement" appear to point to the indorsement being for negotiation or at least collection.

So also the form of the protection that it shall "not be incumbent on the banker to show that the indorsement was made by or under the authority of the person whose indorsement it purports to be," seems inconsistent with a case where the signature is affixed in the presence and at the instance of the banker.

The reference in sect. 60 to the banker's being deemed to have paid the bill in due course, notwithstanding the indorsement was forged, points distinctly to the protected payment being one made under the professed sanction of the indorsement, that is, to a holder under it, not to a payee as such.

Sect. 19 of the Stamp Act, 1853, specifically limits the protection to drafts or orders which on presentment for payment purport to be indorsed by the payee, and it might well be argued that the same effect was contemplated in sect. 60, which replaces it with regard to cheques.

It would further be open to question, whether a banker paid such cheque "in good faith and in the ordinary course of business" when he exacted the indorsement merely for his own supposed protection.

Ogden v. *Benas*, L. R., 9 C. P. 513, affords no authority, since it was at the instance of the collecting, not the paying bank, that the person claiming to be payee indorsed the cheque.

In *Charles* v. *Blackwell*, 2 C. P. D. 151, the cheque was already indorsed when presented; but Cockburn, C.J., does say, on p. 157: "By making a cheque payable

to order, the drawer obtained the advantage that if the cheque be stolen or lost before it reaches the payee, it cannot be paid without a forged indorsement, the risk of which many persons who would not scruple to present a cheque payable to bearer, in fraud of the true owner, and pocket the proceeds, might yet be unwilling to run." This might be cited as showing that, even when obtained as suggested, the signature constituted a forged indorsement, but apparently what was in the mind of Cockburn, C.J., was an indorsement before presentation with the view of making the cheque equivalent to one payable to bearer, especially as the Stamp Act, 1853, s. 19, on which that case was decided, contains the words, "which shall, when presented for payment, purport to be indorsed, &c."

It would be interesting to see what view a competent court took of this matter, should it ever arise.

Fictitious or non-existing person.

One of the main exceptions to the necessity of an actual payee is introduced by sect. 7, sub-sect. 3, which enacts that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

This sub-sect. 3 and the question of a fictitious or non-existent person as payee are fully and authoritatively dealt with in *Vagliano's Case* [1891] A. C. 107, and *Clutton* v. *Attenborough* [1897] A. C. 90.

Amongst other things these cases decide the following points:—

(1) That the question of fictitious or non-existing payee is independent of any knowledge on the part of the person to be charged of the fictitious or non-existing character of such payee.

(2) That a person having a real existence may be fictitious or non-existing so far as the bill or cheque is concerned.

(3) That the power to treat the bill or cheque as payable to bearer is not confined to a holder, but extends to anyone who is interested in so treating it; for instance, to

a banker who has paid a domiciled bill on a forged indorsement of the fictitious or non-existing payee.

(4) That a cheque is within the rule.

"Wages or order." "Petty cash or order."

Cheques made payable to "wages or order," "petty cash or order," or in analogous forms, with an impersonal payee, are frequently presented for payment and are usually treated as payable to bearer.

The practice seems a doubtful one. Sect. 7, sub-sect. 3, only authorises such a course where the payee is a fictitious or non-existing "person."

Sect. 2, among other definitions, enacts, "Person includes a body of persons whether incorporated or not."

The natural meaning of "person" excludes inanimate things. The inclusion, by the definition, of entities not usually classed as persons excludes any further extension of the term where used in the Act. The obvious reference of sub-sect. 3 is to persons who, but for their being fictitious or non-existing, would be in a position to indorse.

In *Vagliano's Case* ([1891] A. C., at p. 129), Lord Selborne said: "The difficulty, to my mind, arises out of the fact that the Legislature has here described "a person" as fictitious or non-existing, instead of saying "where the payee is fictitious or non-existing," clearly recognising the distinction.

It should be stated, however, that Lord Herschell, at p. 153, regarded the distinction as not involving any serious difference; but he seems to be referring rather to the argument (see p. 112), that Petridi & Co., being existing persons, could not be "fictitious or non-existing persons." For he says, at p. 145, "Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. Where the payee is a fictitious or non-existent person means surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee." This could hardly apply to an impersonal payee.

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In the old case of *Grant* v. *Vaughan*, 3 Burr. 1516, where a draft on a banker was made payable to "Ship *Fortune* or bearer," Lord Mansfield said "there was no person originally named as the payee; it runs 'Pay to ship *Fortune* or bearer.' Wilmot, J., said: "No person at all is named, it is 'Pay to ship *Fortune* or bearer.'"

A banker paying bearer on such a cheque might fairly contend that the customer must have intended him to pay bearer, as the cheque was obviously not capable of indorsement; but there seems no good reason why the banker's position should be complicated or imperilled by the use of documents in this ambiguous and unreasonable form (*a*).

A cheque payable to "Wages or bearer," "Petty cash or bearer," or in any such form where "bearer" is used instead of "order," is, of course, payable to bearer.

Cheque to specified person.

A cheque, "Pay A. B.," without the addition of the words "or order" or "or bearer" is, of course, negotiable by indorsement of A. B. under sect. 8, sub-sect. 4, of the Bills of Exchange Act.

If it is desired to draw a cheque payable to a specified person only, distinct words prohibiting transfer or indicating an intention that it should not be transferable must be used. (Sect. 8, sub-sect. 4; *Meyer & Co.* v. *Decroix, Verley & Co.* [1891] A. C. 520; *National Bank* v. *Silke* [1891] 1 Q. B. 435.) The words "order" or "bearer" should be erased and initialled by the drawer, and the cheque made payable to "A. B. only," and the words "Not transferable" should be prominently written horizontally on the cheque, not transversely, so as to be confused with a crossing, and initialled by drawer.

A cheque payable to the order of A. B. is payable to him or his order at his option. (Sect. 8, sub-sect. 5.)

The common form of cheque "Pay self or order" is justified by sect. 5, sub-sect. 1, "a bill may be drawn payable to or to the order of the drawer."

Cheques with no payee.

A cheque drawn "Pay order," indorsed by the

(a) The Council of the Institute of Bankers have now decided that such cheques cannot safely be regarded as payable to bearer. See question and answer No. 1938, Journal of the Institute, March, 1904.

drawer, would be a good cheque, the words being interpreted as equivalent to "Pay to my order." (*Chamberlain* v. *Young* [1893] 2 Q. B. 206.)

A cheque payable to " or order" is a far more dubious instrument.

In 1811, in *R.* v. *Randall*, Russ. & Ry. 195, the whole of the judges, except Lawrence, J., sitting as a court for crown cases reserved, held that such a document was not a bill of exchange, inasmuch as there was no payee.

The question as to the effect of such a document was raised, but not decided, in *Chamberlain* v. *Young*, *ubi sup.*

Even if the decision of Kennedy, J., in *Dann and Valentin* v. *Sherwood*, 11 Times L. R. 211 (*ante*, p. 35) be correct, it does not cover this case, because the use of the words "or order" negative the idea of the cheque being payable to bearer.

In a case decided in the Scotch Court of Session (December 2nd, 1902), *Henderson* v. *Wallace and Pennell*, 5 Court of Session Cases, 166, a document in the form of a cheque, payable to " or order" was given by three signatories to the bank on which it purported to be drawn. None of them had any account at the bank. The bank, by previous arrangement, gave two of them the amount of the cheque, and opened an account in which all three were debited with that sum. The court held that all three signatories were severally liable to the bank for the amount of the cheque. The Lord Justice-Clerk said that the fact that the cheque was not filled in with the name of a payee made no difference, as the bank paying the money to the two signatories were, as holders of the cheque, entitled to fill in their own name. Lord Trayner said that the signatories were rather in the position of makers of a promissory note. Each undertook payment to the payee or his order. The bank who advanced the money were the payee, and to that payee, being also the holder, payment must be made by each and all the makers of it.

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This decision is not very clear, but was probably justifiable in the circumstances. Under sect. 20 the bank, being in possession of the cheque which was wanting in a material particular, had a *primâ facie* authority, which on the facts was a real one, to fill up the omission in any way they thought fit. Under sect. 5 a bill may be drawn payable to, or to the order of, the drawee, and the bank might within reasonable time have inserted their own name as payee, when the cheque would have become payable to themselves. It does not appear, however, that they did so.

Anyway, the case does not cover that of a banker to whom a document in this form is presented for payment. He would probably act wisely in declining to pay it. Nor could he better his position by requesting the holder to fill in his own name in the blank. The authority to fill up a blank bill given by sect. 20 is only a *primâ facie* one; and to make the instrument enforceable against any person who became a party to it prior to its completion, it must be filled up in strict conformity with the authority given. It is only a holder in due course, who takes the bill ostensibly complete on the face of it, who is protected against a filling up in excess of the authority. (*Hardman* v. *Wheeler* [1902] 1 K. B. 361.)

The paying banker would not be entitled to that protection. If the blank were filled up at his suggestion, and he then paid, he would be taking his chance of the filling up being by the right person, and in all other respects as authorised by the drawer. If, however, the blank were filled up before the cheque was presented, and it was otherwise in order, the banker in paying would probably be protected on the ground that he had been misled by the customer, or that the customer was estopped as against him from setting up any excess of authority in filling up the cheque.

Notice of dishonour of a cheque.

A cheque being a bill, the drawer is entitled to notice of dishonour, and if this is not given, or excused by

circumstances, he is discharged from liability, both on the cheque and on the consideration for which it was given. (Bills of Exchange Act, s. 48; *Peacock* v. *Pursell*, 14 C. B., N. S. 728; *May* v. *Chidley* [1894] 1 Q. B. 451.)

It is anomalous that the drawer of a cheque should be entitled to notice of dishonour, seeing he is the party primarily liable, and has no remedy over against anyone.

In most cases, however, it would be excused. The dishonour of a cheque is generally caused either by there being insufficient funds to meet it, or by payment having been stopped. In both of these cases sect. 50, subsect. 2 (c) dispenses with notice of dishonour.

As to notice of dishonour by collecting banker, see "Collecting Banker," p. 227, *post*.

Stamping unstamped cheques.

It is a common fallacy that, if a cheque is issued unstamped, any holder may affix and cancel an adhesive 1*d*. stamp. Sect. 34 of the Stamp Act, 1891, provides that the duty may be denoted by an adhesive stamp, which, when the cheque is drawn in the United Kingdom, is to be cancelled by the person by whom the cheque is signed, before he delivers it out of his hands, custody, or power. The proviso to sect. 38 entitles the banker to whom an unstamped cheque is presented for payment to affix and cancel a 1*d*. adhesive stamp, as if he had been the drawer, and either charge the duty against the drawer or deduct it from the sum paid.

There is no power given anywhere to intermediate holders, and the wording of these sections excludes the implication of any such power.

In *Hobbs* v. *Cathie*, 6 Times L. R. 292, it was expressly held that a cheque which was issued unstamped and stamped by an intermediate holder was improperly stamped, and could not be recovered on, even by an innocent person who subsequently took it for value without notice of the defect.

CHAPTER V.

CROSSED CHEQUES.

CHAP. V.

FOR forms of, and general law as to, crossed cheques, see Bills of Exchange Act, 1882, ss. 76—82, and Chalmers' Bills of Exchange, 6th ed.

Effect of crossing.

Apart from the non-negotiable crossing, none of the authorised forms of crossing has any effect whatever on the negotiability of the cheque. There is a common superstition that the fact of a cheque being crossed generally or specially, in some way puts a person taking it on notice of possible defects of title in his transferor, that there is some difference in the position of a holder in due course where the instrument is a crossed cheque.

Possibly the error is in part traceable to the language attributed to Lindley, J., in *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7.

The learned judge is there made to say, at p. 16: "The customer of the bank gets no better title than his transferor, not only when the cheque is marked 'Not negotiable,' but when it is not so marked, if it is not an open but a crossed cheque, the bank in either case deals with the proceeds. If the bank has the cheque, it may be stopped in their hands. The customer has no better title than the person from whom he took it."

Now what his lordship was dealing with was a cheque marked "Not negotiable," which he had just described as a new-fashioned cheque altogether, and the proceeds of such a cheque.

Reference to the errata at the beginning of the volume (5 C. P. D.) will show at once that the passage should read

thus: "The customer of the bank gets no better title than his transferor. Not only when the cheque is marked "Not negotiable," but when it is not so marked, if it is not an open but a crossed cheque, the bank in either case deals with the proceeds. If the bank has the cheque it may be stopped in their hands. The customer has no better title than the person from whom he took it."

His lordship's statement obviously, therefore, only applies to the "Not negotiable" crossing.

In *Smith* v. *Union Bank of London*, 1 Q. B. D. 31, the Court of Appeal (Lord Cairns, C., Lord Coleridge, C.J., Bramwell and Brett, JJ.) say, with regard to a crossed cheque under stat. 19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79: "The Legislature might have enacted that anyone taking a crossed cheque should take it at his peril and get no better title than his transferor had. It has not done so. We cannot say that it has by implication restrained the negotiability of the cheque." Again, they say "Have the statutes restrained the negotiability of the cheque? It is impossible to hold they have. There is not a word in them to that effect."

The Crossed Cheques Act, 1876, was passed the year after this judgment, and introduced the "Not negotiable" crossing.

The Bills of Exchange Act, 1882, repealed and re-enacted all the above mentioned Acts; and, as the Court of Appeal said with regard to the earlier statutes, there is not a word in it affecting the full negotiability of a cheque crossed but not bearing the words "Not negotiable."

The introduction of the "Not negotiable" crossing is the strongest possible evidence that the other crossings have not the same or any analogous effect.

Apart from the "Not negotiable" crossing, the whole purview and scope of the crossed cheques sections are for and against bankers and bankers only, affording through them a safer method of drawing cheques for the public.

The "Not negotiable" crossing.

The "not negotiable" crossing is often misunderstood, many people believing that a cheque so crossed is not transferable, but payable only to the payee through his banker. Even Lindley, L.J., in *National Bank* v. *Silke* [1891] 1 Q. B. 435, uses words which might be so interpreted. "Not negotiable" usually does mean not transferable (see sect. 8, sub-sect. 1); and it is only by reference to sect. 81 that the true effect of the crossing is arrived at. That effect is that the cheque remains transferable, but is deprived of the full character of negotiability. However honestly and for value a transferee may take it, he cannot acquire any better title to the cheque or its proceeds, or any better right against any prior party to it, than his transferor had. So long as there is no defect of title, the cheque may pass from hand to hand just as if it was an open cheque, and each successive holder acquires full rights and title thereon. A cheque crossed "Not negotiable" is, in fact, as Mr. Chalmers says, "on much the same footing as an overdue bill." Its status is defined on the above lines by Vaughan Williams, L.J., in *Great Western Railway Company* v. *London and County Bank* [1900] 2 Q. B., at p. 474; and the House of Lords, though reversing the decision of the Court of Appeal on other grounds, take the same view on this point. ([1901] A. C. 414.)

The crossing operates equally whether a holder is suing on the cheque, or whether the true owner is suing a transferee for conversion and money had and received.

Prior to, and in, this case of *Great Western Railway Co.* v. *London and County Bank*, it was sought to establish a distinction between the cheque and its proceeds. It was contended that sect. 81 in terms only affected the title to the cheque, and that, therefore, if an innocent holder of such a cheque obtained the proceeds he could hold them as against the true owner of the cheque.

The House of Lords, however, put the rational interpretation on the section:

"The supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me to be absolutely illusory. The language of the statute seems to me to be clear enough. It would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money." (Lord Halsbury, C., [1901] A. C., at p. 418.)

"Everyone who takes a cheque marked "Not negotiable," takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself." (Lord Lindley, *Ib.*, at p. 424.)

Nor does it matter whether the defect of title be such as to render the cheque void or merely voidable.

"Whether the cheque was void or only voidable appears to me really immaterial. Be it void or be it voidable it was not negotiable, and, by sect. 81 of the Bills of Exchange Act, 1882, Huggins was not capable of giving a better title to the cheque than he had himself." (*Per* Lord Lindley, *Ib.*, at p. 424.) When the holder is suing on the cheque, this is clear. But Lord Lindley was dealing with a case where the true owner was suing a virtual transferee for value of the cheque for conversion of it and money had and received, and the holding this crossing destructive in such case of all distinction between void and voidable settles a previously doubtful point.

Where a fully negotiable instrument, such as a bill, is, by reason, say, of the circumstances under which it has been obtained, voidable but not void, even the person who has obtained it has a temporary revocable property in it. If, prior to its revocation or repudiation, an innocent third party takes the instrument as holder for value, or even without value, subsequent revocation or repudiation cannot affect his rights or fix any liability upon him. (*Tate* v. *Wilts and Dorset Bank*, reported only in Journal of the Institute of Bankers, vol. xx., p. 376.

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As to the respective states of circumstances which render a negotiable instrument void or only voidable, see *post*, p. 137.

Voidable cheque crossed "Not negotiable."

But where the voidable instrument is a cheque crossed "Not negotiable," this distinction between void and voidable is swept away. The revocation and repudiation relate back, so to speak, to the date at which the true owner temporarily parted with the property.

However many hands the cheque may have passed through, the ultimate transferee, even if otherwise a holder in due course, cannot, as against the true owner, assert any right or title to it or the proceeds, or defend any action for conversion or money had and received. The true owner, on revocation, is put in precisely the same position with regard to him as if he had never parted with the property. Whether, and, if so, how far, this doctrine extends to others than transferees; whether it renders liable for conversion or money had and received all persons who have dealt with the cheque or its proceeds in the interval prior to revocation in the case of a voidable cheque, is a question which will be dealt with under the head of "Conversion—Money had and received" (*post*, p. 141).

"Not negotiable" must be combined with crossing.

The words "Not negotiable" have no statutory effect unless combined with one of the other specified crossings. (See Bills of Exchange Act, 1882, ss. 76 and 77.)

If written by themselves alone across a cheque it is doubtful whether they would have any efficacy whatever.

Apart from these sections, "Not negotiable" usually means not transferable, but if used so as to suggest an attempted crossing, the words would probably be held insufficient to indicate an intention that the cheque should not be transferable, within sect. 8, sub-sect. 4, especially if the words "order" or "bearer" remained on the cheque. (See *Meyer & Co.* v. *Decroix, Verley & Co.* [1891] A. C. 520; *National Bank* v. *Silke* [1891] 1 Q. B. 435.)

Question of effect, if any, of "Not negotiable" crossing on collecting banker.

It was suggested by Lord Brampton, in *Great Western Railway Co.* v. *London and County Bank* [1901] A. C. at p. 422, that the fact of a cheque being marked "Not negotiable" deprived a banker collecting it for a customer of the protection of sect. 82, or at least imposed some additional duty or precaution on him. There seems no ground whatever for the suggestion, nor was it adopted in *Gordon* v. *Capital and Counties Bank* [1902] 1 K. B., at p. 275.

This question is more fully dealt with hereafter under the head of "Collecting Banker," p. 222, *post*.

Account payee.

Words such as "account payee," "account of A. B.," are frequently added to the crossing of a cheque.

Crossing to a particular account.

They are in no way authorised or recognised by the Bills of Exchange Act. Indeed, where, as is usual, they are included within the transverse lines and incorporated with the crossing, it has been suggested that they invalidate the cheque, or the crossing, or are at least illegal under sect. 78, which enacts "a crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing."

This view is probably exaggerated; certainly it has never been accepted.

National Bank v. *Silke* [1891] 1 Q. B. 435, shows that such a crossing does not prevent the cheque from being transferable. In the judgments in that case the terms transferable and negotiable are, unfortunately, used somewhat indiscriminately, and no direct authority can be deduced as to the effect, if any, of such words on the negotiability of the cheque. It may be noticed, however, that the defence was based on the allegation that the cheque had been obtained by false representations and that the plaintiffs were not holders for value in due course. The defendant who, it is to be assumed, proved the false representations, would have been entitled thereon to

judgment equally whether the cheque was not transferable or only not fully negotiable; and from the fact that the Court of Appeal affirmed the judgment in favour of the plaintiffs, it may be presumed that they did not consider the full negotiability of the cheque to have been in any way affected.

Another ground for holding this to be the correct view is that, if such words had the effect of limiting the negotiability of the cheque, the result attained by their use would be precisely equivalent to that of the "Not negotiable" crossing, and it is not permissible to attribute to one set of words the effect attached by statute to another set exclusively. Again, the principle that a cheque must not be an embarrassing document, recognised in *National Bank* v. *Silke*, *ubi sup.*, militates strongly against giving effect to ambiguous words not prescribed or elucidated by statute.

It has been suggested that, short of restraining the negotiability of the cheque, an addition of this nature puts the transferee on enquiry as to the title of his transferor. It would be a deplorable innovation if this effect had to be recognised. It would mean the introduction of the doctrine of constructive notice with regard to negotiable instruments, which Lord Herschell so strongly deprecated in *Vagliano's Case*. It would complicate and contravene the simple tests of a holder in due course laid down by the Bills of Exchange Act. The rule ought to be rigidly upheld that if a man takes for value a bill or cheque which is on the face of it complete in its recognised essentials, before it is overdue, and takes it honestly, without knowledge or suspicion of any extrinsic facts invalidating or throwing doubt upon the title of the transferor, he obtains an absolute and indefeasible title.

If judicial sanction were ever accorded to the contention that a memorandum of this sort had the effect suggested, the bad habit would be extended and the

commercial world flooded with mongrel instruments, to the confusion of business and the serious detriment of the cheque as part of the circulating medium.

As to the bearing of these unauthorised additions to the crossing on the paying and collecting banker respectively, see under the headings "Paying Crossed Cheques," *post*, p. 111, and "The Collecting Banker," *post*, p. 197.

It may, however, be briefly stated here that, subject to the possible question of the duty of the paying banker where these words are found together with obviously inconsistent indorsements, they probably only constitute memoranda, addressed to the collecting banker, warning him to exercise caution if the cheque is paid in for collection to an account other than that specified. The collecting banker is the only person who is competent to deal with or concerned with any particular account, and the words are, therefore, presumably addressed to him only.

It is anomalous that this power should be in the hands of a person such as the drawer, or a previous holder, who is in no manner of relation to the collecting banker, and the exercise of which is counterbalanced by no correlative safeguard to the collecting banker, as in the case of an ordinary crossing.

It is curious that, though this crossing has now been in use for a good many years, *National Bank* v. *Silke* should be the only direct case on the point. *Dicta* in the above sense will, however, be found in *Akrokerri* (*Atlantic*) *Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465.

For the question whether a crossing put on by a person not authorised by the Act constitutes the instrument, for any purpose, a crossed cheque, see "Paying Crossed Cheques," *post*, p. 101. As to crossing drafts or orders within the Stamp Act, 1853, s. 19, see *post*, p. 98.

CHAPTER VI.

CROSSING BY COLLECTING BANKER.

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THIS is dealt with by the Bills of Exchange Act, s. 77, sub-ss. 5, 6.

Sub-sect. 5. Where a cheque is crossed specially the banker to whom it is crossed may again cross it specially to another banker for collection.

Sub-sect. 6. Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

The addition of the name of a banker across the face of a cheque constitutes a special crossing; transverse lines are not required. (Sect. 76, sub-sect. 2.)

Sect. 77, sub-sect. 5, is designed to facilitate collection of cheques without infringing the rule laid down in sect. 79, that in ordinary cases a banker must not pay a cheque which is crossed specially to more than one banker.

It is not uncommon for cheques to be presented for payment crossed to two branches, or a branch and the head office, of the same bank, the cheque having been transmitted from one to the other for convenience of collection. The second crossing does not seem to fall exactly within either sub-section. It is hardly a crossing "to another banker," because for most purposes the head office and all branches constitute only one bank; and it cannot be justified under sub-sect. 6, inasmuch as the cheque was not, in the first instance, "uncrossed or crossed generally," but specially.

But the objection seems to be met by the consideration that if sub-sect. 5 does not apply, sect. 79 must be read in the same sense, and the paying bank, in paying

such a cheque, would not be paying it crossed to two bankers, but only one.

Conversely, if the bankers are to be treated as two under sect. 79, the second crossing is to another banker for collection within sub-sect. 5.

One bank employing another for collection.

The system of one bank employing another for collecting purposes, recognised by this sub-sect. 5, suggests some curious questions:—

Suppose a cheque, crossed specially to bank A. is paid into that bank for collection by a customer who has no title to it, payee's indorsement having been forged.

Bank A. specially cross it again to bank B. for collection.

Bank B. collect it and transmit the proceeds to Bank A.

Bank A. is protected as against the true owner under sect. 82.

The true owner gets hold of the paid cheque, and discovers from the second crossing that it was presented by bank B.

Bank B. are at least equally guilty with bank A. of conversion of the cheque; and it is difficult to see how they are entitled to protection under sect. 82, inasmuch as they did not receive payment for a customer, the customer being bank A.'s, not theirs, and the *quasi* obligation to collect, which is the foundation of protection, not applying in their case.

Sect. 82 only contemplates and provides for the simple case of one bank receiving a crossed cheque for collection from a customer and collecting the proceeds directly itself. (See *Gordon's Case* [1902] 1 K. B., at p. 262; [1903] A. C., at p. 246.) Sect. 77, sub-sect. 5, on the contrary, does contemplate employing another bank as agent for collection. Bank B. would in all probability be entitled to indemnity from bank A., either on the ground that it was acting as agent of the latter, or on the ground that it had done an act lawful in itself at the request of bank A., whereby it had suffered loss, or that bank A. had represented the title to the document as good or agreed to

indemnify bank B. if it were not. Sect. 82 only protects bank A. against the true owner, not anybody else.

In the example supposed, a second special crossing has been introduced, but this does not affect the main question; and the same difficulty might arise in every case where the collection of a crossed cheque is delegated by one bank to another.

It may be presumed there is some answer to the suggested danger, as it appears unreasonable that a bank, by availing itself of a necessary and recognised course of business, should indirectly incur liabilities equivalent to those it was the object of sect. 82 to remove, or that the bank, whose employment seems recognised by sect. 77, sub-sect. 5, should not be directly protected against the true owner; but the answer is not at present obvious. Possibly it lies in extending the term "customer" to bank A., by a liberal interpretation of the term, assisted by the use of the word "collection" in sect. 77, sub-sect. 5, and the account which would necessarily exist between banks A. and B. (*a*).

The case of a bank transmitting a crossed cheque to another branch or the head office is not open to the same objections. There the whole system would be treated as one bank, and the protection of sect. 82 would enure through all stages of the operation of collection.

Banker crossing a cheque to himself under sect. 77, sub-sect. 6.

"Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself." (Sect. 77, sub-sect. 6.)

It has been contended that this section enables a banker by crossing a cheque sent to him uncrossed for collection to obtain the protection of sect. 82.

It has been stated on good authority that the sub-section was specially introduced into the Act for this purpose. (See the Institute of Bankers' "Questions on Banking Practice," 5th ed., question 469, and Journal of the Institute of Bankers, vol. vi., p. 168.)

(*a*) In *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465, protection was accorded to the bank, notwithstanding it had so delegated collection.

It has been suggested that the word "sent" pointed to this being the true interpretation, as, in cases where the cheque was "brought" by the customer, the banker could get him to cross it, which he could not do when it was sent, and he was therefore allowed to do it himself.

But this view of the sub-section cannot be maintained.

It was denied recognition in *Bissell* v. *Fox*, 51 L. T. N. S. 663, and conclusively rejected in *Gordon* v. *London, City and Midland Bank* [1902], 1 K. B. 273; [1903] A. C. 240.

Whatever may have been the intention of the Legislature, it would seem impossible to construe the sub-section as affording such protection.

Though, on another point, as stated in Chap. IV., the House of Lords, in the *Gordon Case*, ignored the rule of limiting statutory protection of bankers to risks imposed on them directly or indirectly by legislation, they recognise that the whole system of protection for bankers under the crossed cheques sections must be regarded as confined to the risks imposed upon them by the introduction of crossed cheques. Such cheques necessitated recourse to a banker for collection and the consequent obligation on a banker to collect them. There is no such necessity in the case of an uncrossed cheque, and the banker's intervention for its collection is purely voluntary for the convenience of the customer, stands exactly on the same footing as it did prior to any of the Crossed Cheques Acts, and is entirely outside the scope of either those enactments, or the crossed cheques sections of the Bills of Exchange Act. (See *per* Collins, M.R., in *Gordon* v. *London, City and Midland Bank* [1902], 1 K. B., at p. 263; *per* Stirling, L.J., at p. 280; *per* Lord Macnaghten [1903] A. C., at p. 246).

This view is strengthened by the sub-section embracing not only uncrossed cheques but cheques crossed generally, as to which the banker can need no additional protection.

In the *Gordon Case* [1902], 1 K. B., at p. 272, Collins,

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M.R., held there was no protection, on the further ground that, by taking the cheques from a wrongful holder, the bank dealt with them in a manner amounting to conversion before crossing them, and could not purge their conversion by subsequently crossing them to themselves; but this view is somewhat inconsistent with the judgment of the House of Lords, whose affirmance of the broad proposition that sect. 82 only applies to cheques already crossed when paid in, altogether deprives it of importance.

What is effect of sect. 77, sub-sect. 6?

What the sub-section really means or does may be very doubtful. Mr. Chalmers suggests (Bills of Exchange, 6th ed., p. 259), in a note to it: "This is new. It may protect the banker from possible frauds by his clerks." Collins, M.R., says, in *Gordon's Case* [1902], 1 K. B., at p. 272: "This is a facility given for the purpose of affording additional protection during the process of collection after the crossing of the cheque." In the same case, Stirling, L.J., at p. 280, says: "Where a banker simply acts as agent for the collection of a cheque, he may protect himself from dishonesty by crossing the cheque specially to himself." In the same case, Lord Lindley says the sub-section might be useful if an indorsement were forged after a crossing ([1903], A. C., at p. 250).

Taking first the view suggested by Stirling, L.J., and Mr. Chalmers, that the object of the crossing is to protect the banker himself against dishonesty, it is not very clear what the danger is or how it is in any way met by the crossing.

If the cheque itself were stolen by one of the banker's clerks, or by a stranger, the banker would presumably not be liable, unless it were stolen by the clerk, and the banker had previous reason to suspect him. (Cf. *post*, p. 181.)

If the money were received in the ordinary course of business, and then embezzled by an *employé* of the banker, the banker would probably be liable (*Mackersy* v.

Ramsays, 9 Cl. & Fin. *per* Lord Cottenham, at p. 848); but this liability would attach just the same, or even more distinctly, if the cheque were paid in strict conformity with the crossing.

Next, in no event whatever could the crossing banker have any remedy against the paying banker for paying in contravention of the crossing. The crossing banker, as *ex hypothesi* only collecting the cheque, is in no sense the true owner, to whom alone the remedy is given by sect. 79.

Collins, M.R., does not in terms state that the supposed protection is for the banker himself. It is conceivable that he had in view protection of the true owner. Probably the true owner would have a remedy against the paying banker, if he paid in contravention of such crossing, for any loss thereby sustained.

It seems somewhat far-fetched that the banker should take the trouble thus to afford the true owner, even if he be his customer, a protection the true owner has not thought fit to take for himself. If the danger suggested by Stirling, L.J., and Mr. Chalmers exists, it must emanate from the true owner, and it would be entirely optional with him which banker he went against. Combining the three views, the curious result accrues that the collecting banker gives the true owner an alternative remedy against the paying banker if he pay contrary to the crossing, but gets nothing at all himself by this operation, since, as shown above, he acquires no claim or remedy over against the paying banker. With respect to Lord Lindley's *dictum*, it is difficult to see what inducement there could be to anyone to forge a further indorsement on a cheque already in order for collection.

There would not even seem to be any particular need for any special power authorising the banker to cross specially to himself. He is a holder, being in possession of a bill payable or become payable to bearer within sect. 2, although he is only holder for collection; and, as

such holder, has a right to cross it specially under sect. 77 (*a*). It cannot make any difference that the banker's name is that of his own bank.

So far as the collecting banker is concerned, the probable summary of the position seems to be as follows: The sub-section declares his right to cross specially to himself, which he apparently had independent of it. If he do so cross the cheque, he renders it very improbable that it will be paid otherwise than in accordance with the crossing, because (a) the paying banker would not know who crossed it; (b) the comity existing between bankers would prevent a banker paying a cheque crossed specially to another banker otherwise than to that banker; (c) the paying banker might possibly be liable to the true owner. But in no event has the collecting banker any remedy against the paying banker if he does pay in contravention of such crossing.

When once the idea of the collecting banker getting by means of this sub-section any protection under sect. 82 is exploded, there can be no ground for suggesting any distinction between cheques "sent" or "brought" for collection; and, by virtue of the sub-section or his right as holder, the banker must be entitled to cross them specially to himself, by whatever means they reach his hands.

(*a*) So held *per* Bigham, J., in *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465.

CHAPTER VII.

MARKING CHEQUES.

Marking at instance of customer.

THE object and effect of a banker's marking cheques at the instance of the customer has been stated by the Privy Council to be to further the ready acceptance of the instrument by affording evidence on the face of it that it is drawn in good faith, and that there are funds sufficient and available to meet it, and as adding the credit of the drawee bank to that of the drawer. (*Gaden* v. *Newfoundland Savings Bank* [1899] A. C. 281; *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 49.)

But it must be remembered that both of these cases were appeals from colonies, where the law as to marking or certification of cheques cannot be assumed to be the same as in this country. (See an article, "Certification of Cheques," in the Journal of the Canadian Bankers' Association, vol. ix., p. 323.)

It may be taken that the marking of a cheque at the instance of the customer does not, in this country, involve any direct or immediate liability on the part of the banker to the payee or any subsequent holder of the cheque. The marking does not possess the requisite characteristics of an acceptance, required by the Bills of Exchange Act. In *Keane* v. *Beard*, 8 C. B., N. S. 372, it was suggested that there was nothing to prevent a banker accepting a cheque if so disposed, but it is never done; and in any event marking is, neither in form nor effect, an acceptance of which the payee or a holder can avail himself.

Nor does such marking, at the instance of the customer,

render the banker liable to the payee or holder for money received to his use.

To constitute such liability several conditions must concur. First, the money sought to be recovered must have been actually received by the defendant, or something must have occurred which is equivalent to the receipt of money. (*Prince* v. *Oriental Bank Corporation*, 3 A. C., at p. 328.) In view of the fact that a cheque is not an assignment of any specific funds (p. 71, *post*), and of the limited interpretation put upon the process of marking in the cases above quoted, it may be strongly doubted whether the request to mark, and the banker's compliance with that request, amount even to anything equivalent to the receipt of money for the specific purpose of meeting the cheque. But, assuming it does, the second condition must be fulfilled. There must be an acknowledgment to, if not a contract with, the specific person who is plaintiff in the action, that the money has been received for his use or is held at his disposal. "There are many cases which establish that no action for money had and received will lie against a banker or agent in respect of funds which his principal has ordered him to pay to any person, at the suit of the person in whose favour the order is made, where the banker or agent has not assented to the order and communicated his assent to the plaintiff." (*Per* Tindal, C.J., in *Warwick* v. *Rogers*, 5 M. & G. 340, at p. 374; see also *Malcolm* v. *Scott*, 5 Ex. 601.)

The intimation, if any, conveyed by the marking of a cheque is far too vague and indeterminate to operate as such admission.

In so far as any representation is involved in the matter, it might be a question whether it were not made by the customer in handing over the cheque rather than by the banker in marking it. It might fairly be argued that the banker only certifies, as between himself and his customer, to an existing fact bearing on the state of accounts

between them, viz. that the cheque is drawn in good faith, on funds at that time sufficient to meet it; much in the same way as a customer might get his bank book made up to date in order to afford evidence of the balance at his disposal. Following this, it might be contended that the representation to the payee or subsequent holder lies in the use made by the customer of the intimation conveyed by the marking, when he issues the cheque; as if at the same time he showed his pass book as evidence of the balance to his credit.

The stronger argument, however, is that the admission or acknowledgment, if any, is not made to any definite ascertained person, so as to qualify him for plaintiff in the action. The cheque may be negotiated by the payee; even if, at the time of marking, it purported to be payable to him only, it would still be within the power of the drawer to remove this restriction before issue. The case falls, therefore, altogether outside the principles above laid down.

Besides all this, there is the weighty consideration that if such effect were accorded to the marking of a cheque, it would make it tantamount to an acceptance by the banker, a character from which, as above stated, it is debarred.

It is therefore conceived that the expression "adding the credit of the bank to that of the drawer," used by the Privy Council in the cases referred to, if applicable at all in English law, must not be understood to import any liability on the part of the banker to the holder of a marked cheque. There certainly appears to be no instance of a holder having recovered against a banker on a marked cheque in this country.

If the marked cheque were brought to the bank by the payee or a holder, and the bank were to undertake to pay the specific person who brought it, or admit that they held the money for his use, such admission or promise would seem to be sufficient to bind the bank and obviate any

difficulty arising from the want of appropriation of a definite sum to the cheque. (See *Prince* v. *Oriental Bank Corporation*, 3 A. C., at p. 331.)

Marking as between banker and banker.

But, as between banker and banker, such marking is unquestionably recognised as importing a promise or undertaking to pay, not analogous to acceptance, but based on custom. "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." (*Goodwin* v. *Roberts*, L. R., 10 Ex., at p. 352.)

As early as 1810, in *Rolaon* v. *Bennett*, 2 Taunt. 388, the court held that one banker rendered himself liable to another by marking a cheque presented after 4 p.m. No doubt that case proceeded partly on the basis of such marking being equivalent to acceptance, the rules as to which were then far laxer and admitting of even oral acceptance. But, as shown above, the custom has been recognised at later date, and it may be safely asserted that it has developed to the extent of binding one banker to another, apart from question of the time of presentation. No banker would consider himself justified in refusing payment of a cheque he had marked, if it was presented by or through another banker, who might have altered his position in reliance on the promise or undertaking implied from the marking.

Countermanding payment of marked cheques.

This raises the question of the customer's right to countermand payment of a cheque which the banker has marked at his request. The prevailing view among bankers is that the customer has no such power, and this is probably correct. True, the Bills of Exchange Act does not recognise, in sect. 75, any exception to the rule there laid down that the authority of a banker to pay a cheque is determined by countermand of payment; and it might happen that between the date of the marking of the cheque and the countermand, and before presentation, the

customer became aware of some fraud or other circumstance which, but for the marking, would fully justify him in stopping the cheque. It is also true that an order to a banker to pay money is executory and revocable until something definite has been done by the banker binding him to the person to be benefited, as by crediting him or admitting that he holds the money to his use. (*Gibson* v. *Minet*, 2 Bing. 7.) But, as against this, it is to be said that, though the banker has incurred no direct legal liability to the payee or holder, he has, at the request and for the benefit of the customer, undertaken a moral and professional obligation, founded on recognised custom, towards any other banker who may present the cheque for payment. The banker is really in the position of an agent whose agency is coupled with an interest, or at least in as strong a position as the betting agent in *Read* v. *Anderson*, 13 Q. B. D. 779.

Either of these positions is sufficient to preclude the customer from withdrawing the authority and stopping payment of the cheque to the detriment of the banker.

The customer could not be heard to say he did not know of the object of the marking, inasmuch as he got the cheque marked in order to obtain the benefit of the banker's support. Nor would it make any difference that the cheque was an open one and might never pass into another banker's hands; because, if refused payment when presented by the payee or holder, it would be open to him to present again through a banker. The case for the banker would naturally be even stronger if the cheque were a crossed one when marked.

One reason assigned by bankers why a cheque marked by a banker at the request of a customer cannot be stopped is that, having been so marked and debited to the customer, it has technically been paid.

In this, as in some other similar cases, the banking conception of payment does not coincide with the legal. A

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court would infallibly decline to recognise as payment an operation expressly designed to give currency to a cheque and performed before its issue.

Cheque marked at instance of holder.

It would seem that in England the practice, common in America, of the payee or holder bringing a cheque to the drawee bank and getting it marked is practically unknown. If in any case it were adopted, the results would seem to be as follows :—It would not amount to an acceptance, so the banker could not be sued on the cheque. There has been no payment in by the customer to meet the particular cheque nor any appropriation equivalent thereto, but possibly the marking might be held to amount to a representation that monies had been lodged to meet the cheque. There is no distinct admission to any determinate specific person, unless it be the holder, that any money is held for his use. But seeing that the action is the banker's own, without any intervention of the customer, it might well be that a court would interpret the transaction somewhat strongly against the banker, and would hold that there was in effect a sufficient representation and admission to the holder to entitle him to sue the banker for money received to his use. And it would seem clear that, as against another banker who presented the cheque, the banker who marked it would be bound by the implied undertaking or promise to pay. The banker into whose hands it came could have no means of telling at whose instance it was marked, nor indeed does the question concern him in any way ; all he looks to is the fact that it is marked by a banker.

But, unlike the case where the cheque is marked at the instance of the customer, there could be no question but that the customer could effectually countermand payment of the cheque and refuse to be debited with it if paid contrary to his orders. The customer has done nothing to curtail his right to countermand payment under sect. 75, and any obligation undertaken by the banker is on his own initiative, not that of the customer.

The customer might even contend with considerable show of plausibility that his liability on the cheque to the holder was discharged by the latter's having accepted the liability of the banker in lieu thereof by way of novation, a view which has obtained a large measure of support in America.

American decisions on the point would, however, have little or no weight in an English case, owing to the laxer rules as to acceptance obtaining in that country and the consequently greater importance and efficacy attaching there to the certification of a cheque.

CHAPTER VIII.

THE PAYING BANKER.

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THE expression "the paying banker" is a convenient one to denote the banker in his relation to cheques drawn on him by the customer, more especially when it is desired to consider his position as compared with that of the "collecting banker," hereinafter dealt with.

The expression is also applicable to the banker with regard to bills domiciled with him by the customer for payment, usually by their being accepted payable at the bank.

Paying cheques.

With regard to cheques, the paying banker's main obligation is that he is bound to pay cheques drawn on him by a customer in legal form, provided he has in his hands at the time funds of the customer sufficient and available for the purpose.

Such funds are in reality only represented by the unincumbered debt from the banker to the customer, otherwise the ascertainable credit balance on current account; but it would be hypercritical to vary the accepted formula for the sake of such technical accuracy.

The obligation to pay cheques is usually spoken of as an obligation superadded in the case of a banker to the relation of debtor and creditor. (*Foley* v. *Hill*, 2 H. of L. Ca. 28.)

Whether as the foundation, the concomitant, or the result of this obligation, the position of the banker with regard to the customer, so far as the payment of cheques is concerned, involves some at least of the incidents of agent and principal.

With regard to domiciled bills, the relation is obviously

and purely that of principal and agent; the banker is no party whatever to the bills, he pays them simply as agent of and under the instructions of the customer, either receiving specific remittances for the purpose or charging them in account. (See *Vagliano's Case* [1891] A. C. 107, *passim*.)

With regard to cheques, the relation is not so obvious, because, both in form and under the Act, the banker is a party to the bill as drawee. He is indebted to the drawer and has undertaken to pay bills at sight drawn upon him. All these conditions equally exist in the case of an ordinary drawee not a banker, when no relation of principal and agent or analogous thereto could be suggested.

Nevertheless, with regard to cheques as well as domiciled bills, the relation of principal and agent, or an equivalent relation, unquestionably does obtain. No other interpretation can be put on the expressions of the House of Lords, with reference to the case of *Young* v. *Grote*, 4 Bing. 253, in *Scholfield* v. *Londesborough* [1896] A. C. 514. In the latter case, Lord Macnaghten, at p. 546, Lord Watson, at p. 536, and Lord Davey, at p. 554, define the relation as that of mandant and mandatory, that of one party who has the right to command, the other who is bound to obey, only differing in phraseology from that of principal and agent and involving the same rights and liabilities.

The Bills of Exchange Act, s. 75, apparently recognises the relation when it speaks of "the duty and authority of the banker to pay cheques drawn by a customer" being revoked by death or countermand of payment.

The importance of this to bankers can hardly be overrated.

The recognition of the relationship lets in all the immunities, reciprocal duties and indemnities to which an agent is entitled as against his principal.

It constitutes the basis for the banker's right to require that cheques be drawn with due care, so as not to expose

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him to the risk of paying one which has been fraudulently altered to a higher face value; it justifies him in acting on a reasonable interpretation of ambiguous instructions, such as an irregular cheque. (*Ireland* v. *Livingston*, L. R., 5 H. of L. 395.)

Duty to pay cheques.

Whether as agent or from the superadded obligation, the primary duty of the paying banker is to honour his customer's cheques, provided the state of the account warrants his doing so, and there is no legal reason or excuse to the contrary.

Apart from mere contractual obligation, the paying banker must remember that his customer's credit is seriously injured by the return of one of his cheques dishonoured, and the smaller the cheque the greater the damage to credit. (*Marzetti* v. *Williams*, 1 B. & Ad. 415.) Substantial damages may be given against the banker without proof of actual loss to the customer. (*Rolin* v. *Steward*, 23 L. J., C. P. 148.)

The banker is bound, as before stated, to pay a cheque drawn on him, provided certain conditions exist.

The first of such conditions is that the cheque be a legal one.

This condition is laid down by *Emanuel* v. *Robarts*, 9 B. & S. 121.

Abnormal cheques.

One might fairly go somewhat further and say that a banker is not compelled to pay a cheque unless it is obviously a legal one in form; that, whether he be regarded as agent or drawee, it is no part of his duty to enter into legal questions as to whether a certain document, couched in abnormal terms, does or does not comply with the definition of a cheque under the Act.

Doubtless he may be protected if he pays it on a reasonable interpretation of its ambiguous meaning, and there is always the presumption that the customer intended it for a cheque; but it seems part of the relation or implied contract that the customer shall not impose and the banker

not incur any extraordinary risks, but that business between them shall be conducted on recognised ordinary lines; and a breach of this understanding on the part of the customer would seem to justify the banker in refusing payment of a particular cheque, provided the answer he gives shows his refusal to be based on the irregular character of the cheque and implies no aspersion on the customer's credit.

Emanuel v. *Robarts*, 9 B. & S. 121, and *Vagliano's Case* [1891] A. C. 107, appear to support the above contention.

"Wages or order."

As a type of cheque which a customer is not entitled to draw, that payable to "Wages or order" might be adduced, for the reasons before stated. (See *ante*, p. 39.)

Only, with respect to this particular form of divergence, the measure of recognition it has received would render it unwise to object to it without previous notice to a customer who had been in the habit of utilising it, especially as he might set up course of business as authorising it.

Payment must be made or refused at once.

Must pay or refuse at once

The banker is not entitled to time to investigate matters as to which he may be in doubt. The *dictum* of Maule, J., in *Robarts* v. *Tucker*, 16 Q. B. 560, that a banker might defer payment until he had satisfied himself that the indorsements on a bill were genuine, was expressly disapproved by the House of Lords in *Vagliano's Case* (*ubi sup.*, at p. 157), Lord Macnaghten laying down that a banker must pay offhand, and as a matter of course, bills presented for payment, duly accepted and regular and complete on the face of them; and this doctrine applies with at least equal force to cheques presented for payment.

When a cheque is refused payment with a request to present again, it lies entirely with the holder whether he will do so, or at once treat the cheque as dishonoured.

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The only bearing of such modification of the refusal would be on the question of the damages recoverable by the customer if the refusal were not justifiable in the first instance.

Nor, as before stated, can a banker discharge his obligations to the customer by referring outstanding cheques to another bank, except where the account has been closed by the customer or by arrangement with him.

The rules of the Clearing House require that a country bank dishonouring a cheque presented through it shall return the cheque by first post to the bank into which it was paid. (*Parr's Bank* v. *Ashby*, 14 Times L. R. 563.) It must be returned direct, not through the London office.

Where these rules apply, a bank neglecting to adopt this course will be taken to have undertaken to pay the cheque. (*Parr's Bank* v. *Ashby*, *ubi sup.*)

Where a cheque is refused payment, the answer thereon should, so far as consistent with truth, be framed in the form least calculated to damage the customer's credit. "Refer to drawer," where possible, seems preferable to the naked abruptness of N/A or N/S.

rder of ayment.

Cheques should, as far as possible, be paid in the order in which they are presented, if there be any question as to the sufficiency of the balance to cover them all; but, of course, the fact that one cheque has been refused on the ground that it overtops the available balance, would in no wise justify the banker in refusing payment of a subsequently presented cheque for an amount within the balance.

The question of the banker's right to refuse payment of an order cheque to a person who presents it unindorsed in the character of payee, unless he consents to write his name on the back, is dealt with before, at p. 36.

uestion of dentity.

It has been suggested that the banker is at any rate entitled to call for some evidence of identity in such cases. It is somewhat difficult to see how such a claim is consistent with the peremptory rule laid down in *Vagliano's*

Case, that a bill must be paid or dishonoured at once. Possession of an unindorsed bill to order is *primâ facie* evidence that the person in possession of it is in fact the payee. (Cf. *per* Bayley, J., in *Bulkeley* v. *Butler*, 2 B. & C., at p. 441.) At the same time, it is an obvious hardship on the banker if he has to pay on this mere rebuttable presumption, which may or may not represent the true facts, and there would be nothing to protect him should the payment prove wrong, since he did not pay bearer or on a forged indorsement. If the holder refused to sign, and the banker refused to pay, the question might have to be fought out between the latter and his customer in an action for damage to credit. The customer has done absolutely nothing except draw a cheque in the most ordinary form, so that no question of estoppel, negligence, or breach of implied duty or contract could be raised against him; and the banker's only defence would be that, by the custom of bankers, he was entitled to refuse payment of an order cheque presented by the payee, unless the latter furnished evidence of identity or signed his name on the back, with a view to giving, and in fact and in law giving, the banker the protection of sect. 60; and that the refusal, being expressly based on this, and involving no aspersion on the customer's credit, damages, if any, should be nominal.

Holder no remedy against banker.

It is probably unnecessary to point out that neither in this, nor in any other ordinary case of dishonour of a cheque, has the holder any right of action against the banker.

A cheque was not, before the Act, an assignment of funds in the banker's hands (*Hopkinson* v. *Forster*, L. R., 19 Eq. 74); and the Bills of Exchange Act, s. 53, sub-s. 1, expressly provides that in England it shall not be so.

No privity of contract between banker and holder.

There is no privity of contract between the banker and the holder. The banker is in the position of drawee, not acceptor, inasmuch as he has not accepted the draft. Apart from the Bank Charter Acts, there appears no valid

reason why a banker should not accept a cheque if the holder presented it for that purpose and the banker chose to do so; but of course, as a matter of fact, it is never done, presentment for acceptance being unnecessary in case of bills at sight, and such bills being usually only presented once, viz., for payment.

As to marking a cheque, see "Marking Cheques," *ante*, p. 59.

The holder's only remedy, when a cheque is dishonoured, is to give notice of dishonour to the drawer and indorsers, if any, and sue them.

If money was paid in or specifically appropriated by the customer to meet a particular cheque, and the banker acknowledged to the holder that he held such money at his disposal on presentation of the cheque, the banker would then be liable to the holder; but not on the cheque or in his character as holder, but simply for money had and received to his use. (*Warwick* v. *Rogers*, 5 M. & G. 374.)

No payment of part of a cheque.

It is to this principle of a cheque not being an assignment of funds that is generally attributed the undoubted fact that in England a banker is not bound to pay part of a cheque, when he has funds in hand, but not sufficient to pay the whole amount.

It is somewhat difficult to see how, in any event, the assignment of one specific sum or debt could operate as an assignment of any lesser sum or debt which happens to be due. It is probably more correct to base the banker's right to altogether refuse payment on the fact that his only contract with, or duty to, the customer is to pay a cheque when he has the equivalent or a larger sum in hand, and that part payment is not contemplated by or included in such contract or duty. Part of the amount of a cheque is obviously not "sufficient funds to meet it." (*Carew* v. *Duckworth*, L. R., 4 Ex. 313.)

It has sometimes been asked whether the holder of a cheque larger in amount than the available funds is

entitled to pay in the difference to the customer's account, and then withdraw the whole on the cheque. It is difficult to see how the holder should be acquainted with the state of the account, unless through the customer, in which case the customer's drawing the cheque for the larger amount seems unaccountable; and though no absolute legal principle appears opposed to it, the general opinion seems to regard such a proceeding as suspicious and illegitimate.

Refusing payment of cheques out of date.

It is the custom of bankers not to pay cheques which are presented after a certain period has elapsed since their ostensible date of issue. With some banks the period is six months, with others twelve.

The justification for this course is not very obvious. The difference, above alluded to, between the practice of various banks makes it difficult to set up a custom of bankers. Such a custom must be universal and uniform among at least the bankers of a particular locality; there cannot, for instance, be one custom of bankers in the City and another in the West End. Nor does the custom of a particular bank bind even a customer until it develops into a course of business.

The practice may owe its origin to the impression that the drawer of a cheque is discharged from liability if it is not presented within a reasonable time after issue.

The Bills of Exchange Act is certainly not very explicit on the point. Sect. 45 provides that, subject to the provisions of the Act, a bill must be duly presented for payment, otherwise the drawer and indorsers shall be discharged. Sub-sect. 2 enacts: "Where a bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable."

It is only by inference from sect. 74 and by virtue of the words "subject to the provisions of this Act" in sect. 45, that cheques are, in ordinary cases, exempted from the operation of the latter section.

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Sect. 74 in effect provides that where a cheque is not presented within a reasonable time after issue, and the drawer had, at the time it ought to have been presented, a right as between him and his banker to have the cheque paid, and is injured by the delay through his bankers having failed in the interval, he is discharged to the extent of such damage.

This infers that, in the absence of such damage, the drawer is not discharged by the cheque not being presented within a reasonable time; and, as before stated, takes cheques, so far as the drawer is concerned, out of the operation of sect. 45.

Save under the conditions defined in sect. 74, the drawer therefore remains liable on the cheque till the Statute of Limitations has run, namely, for the period of six years from its issue. (*Laws* v. *Rand*, 3 C. B., N. S. 442, where this was laid down as the law, before the Act.)

The banker, who of course knows he has not failed in the interval, would be justified in paying the cheque at any period within such six years.

Stale cheques.

Bankers frequently call such cheques "stale," a term more properly applied with relation to a cheque which is negotiated after being, on the face of it, an unreasonable time in circulation, and so is assimilated to an overdue bill by sect. 36, sub-sect. 3. As to when a cheque so becomes stale or overdue, see *London and County Bank* v. *Groome*, 8 Q. B. D. 288. In the absence of special circumstances, ten days or so would probably be held the limit.

Bankers might possibly assign the above-mentioned practice to the principle, recognised in several cases, that a cheque is intended for speedy presentation, not for prolonged negotiation. But in view of the continued liability of the drawer, this principle has no legitimate application beyond that of limiting the period of negotiability.

Funds sufficient and available.

The obligation of the banker to pay cheques drawn on him by his customer is also subject to the condition

that there are in his hands funds sufficient and available for the purpose. (See *per* Parke, J., in *Whitaker* v. *Bank of England*, 1 C. M. & R., at pp. 749, 750; *Marzetti* v. *Williams*, 1 B. & Ad. 415.)

The funds must be sufficient. As before stated (*ante*, p. 72), there is, in England, no obligation to pay part of a cheque.

They must be available for the purpose. As before suggested (*ante*, p. 6), it might be deducible from the case of *Healey* v. *Bank of New South Wales* [J. C. of P. C., November 28th, 1900, not reported], that a banker is not absolutely estopped from disputing the right of his customer to money paid in to his account. On the other hand, in *Gray* v. *Johnston*, L. R., 3 H. of L. 1, at p. 12, Lord Westbury protests against the idea of a banker being entitled to set up the rights of a third person as against those of the customer from whom he has received the money. *Healey* v. *Bank of New South Wales* was an exceptional case, the money paid in being shown to be the immediate proceeds of gross frauds committed by the customer, for which he was convicted and punished; and the reasonable and salutary rule is that a banker is neither bound nor entitled to question the customer's right or title to any money paid in.

To be available, the money must be unincumbered and absolutely due to the customer.

Service of a garnishee order, founded on a judgment against the customer, ties up the whole balance on current account, irrespective of the relative amounts of the judgment and the balance. (See *ante*, p. 5, and *Rogers* v. *Whiteley* [1892] A. C. 118.)

Monies which, by virtue of the Statute of Limitations, are not recoverable as a debt would not be available.

The banker's lien might entitle him to treat funds in hand as not available.

He would be entitled to retain funds to meet a cheque

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which he had marked at the instance of the customer. (See "Marking Cheques," *ante*, p. 62.)

Unless precluded by agreement or course of business from so doing, the banker would be entitled to combine different accounts kept by the customer in his own right or accounts kept at different branches, and treat only the ultimate balance, if any, as available for drawing purposes. (*Garnett* v. *M'Kewan*, L. R., 8 Ex. 10; *Buckingham* v. *London and Midland Bank*, 12 Times L. R. 70.)

Retaining balance to meet bills discounted.

Save, possibly, in the event of the customer's bankruptcy, the banker is not entitled to retain money standing to current account, to meet contingent liabilities of the customer to him.

In *Bolland* v. *Bygrave*, Ryan & Moody, 271, Abbott, L.C.J., sitting at *Nisi Prius*, appears to have thought the banker's lien attached to securities of the customer when the banker had discounted bills for, or accepted bills for the accommodation of, the customer. He says: "It appears that, at this time, the bankrupts had discounted bills for T. to a large amount, which were still unpaid; that they had also accepted a bill for his accommodation to a large amount, not then due; and I think that a banker who stands in this relation to a customer has a lien upon any securities of that customer which may for any purpose be placed in his hands, and he has a right to retain them to countervail the liabilities he has so incurred on his behalf till those liabilities have ceased." As the banker's lien extends to money (*Misa* v. *Currie*, 1 A. C., at p. 569), this has been cited as an authority that bankers are entitled to retain monies to meet liabilities of this sort, and treat such monies as not available for drawing against.

This case was quoted to the Exchequer Chamber in *Barnett* v. *Brandao*, 6 M. & G., at p. 654, when Lord Denman, C.J., said of it: "Some of the cases arising out of Marsh's bankruptcy (of which it was one) are not

correctly reported"; and Parke, B., said: "The whole of that case depends upon what is meant by depositing for safe custody." It was again quoted in argument in the same case in the House of Lords, 12 Cl. & Fin., at p. 798, but no special remark made upon it.

In *Agra and Masterman's Bank* v. *Hoffman*, 34 L.J., Ch. 285, Stuart, V.-C., granted an injunction restraining a customer from suing his bankers at law for damages for dishonouring his cheques, the bank contending that they had rightly retained the funds to answer the liability which might fall on them in respect of bills discounted by them for the customer, but not yet due. The injunction was granted mainly on the ground that there was a question to be tried in equity, and is not conclusive of the right; moreover, as appears from a foot-note, the matter was subsequently compromised on terms which included the payment by the bank of the customer's costs of the action at law and the suit in equity, as between solicitor and client, which is, at least, significant.

In *Jeffryes* v. *Agra and Masterman's Bank*, L. R., 2 Eq. 674, the last-mentioned case was cited to Sir W. Page Wood, V.-C. In his judgment he said: "The bankers say, further, that there were very heavy liabilities outstanding, and that they would have retained when they became due these balances as against those outstanding bills. I apprehend they never could do that in any court of law, and of course there is no equity of the kind; you cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time."

The matter was, however, finally set at rest in 1874 by the case of *Bowen* v. *Foreign and Colonial Gas Company*, 22 W. R. 740.

There the customer had a credit balance on current account of £751. The bank had discounted bills for him, not yet due, for £500. A garnishee order having been

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served on the bank, based on a judgment against the customer, the bank claimed to retain £500 of the current account against the liability on the bills, alleging that they had a lien to that extent. The court held they had not. Lord Coleridge, C.J., said that here there was a cash balance; and the fact that the bankers had discounted bills for their customer which were still running was no ground for an implied agreement for a lien on the balance, indeed it would be contrary to the object of such advances.

Brett, J., said that there was no evidence of custom or anything from which the court could imply an agreement. It would be quite contrary to the regular course of such advances to adopt the view of the bank. A customer asks for discount in order to increase his drawing account. It was said the bank had a lien on the cash balance. If that was the case, there would be no use in discounting the bills.

Grove, J., said there was a great difference between the case of securities, as in the authorities cited (which included *Bolland* v. *Bygrave*), and a drawing account.

It may therefore be taken as conclusively settled that the fact of a banker's having discounted for a customer bills still maturing gives him no right to retain any of the current account to answer the contingent liability on those bills, and on that ground dishonour cheques drawn against such current account.

It is possibly different where the customer becomes bankrupt.

The liability of an indorser on a current bill is a provable debt in his bankruptcy, and any provable debt may be utilised for set-off as a mutual dealing or credit under sect. 38 of the Bankruptcy Act, 1883. The holder is not obliged to value his security, except for purposes of voting under schedule 1, rule 11, of the same Act. The liability appears just on the limit of what is sufficient to establish a mutual dealing or credit, but apparently falls within the boundary; and the banker would, on bankruptcy

of the customer, be entitled to retain the whole or a portion of the current account equivalent to the amount of the bill. But the result is by virtue of the Act, not of lien. (Cf. *Alsager* v. *Currie*, 12 M. & W. 751.)

Money is not available immediately it is paid in.

When money is available.

Even in the case of notes or gold, a sufficient period must be allowed to elapse, before drawing against it, to enable the bank to carry out the necessary book-keeping operations. (*Marzetti* v. *Williams*, 1 B. & Ad. 415.) But as soon as it is definitely credited, it is available. (See *per* Lord Lindley, as hereafter mentioned.)

With regard to cheques, the rule used, at any rate, to be that they were not available until, in addition to the interval reasonably required for book-keeping entries, the necessary period had elapsed for the cheques to be cleared, according to their respective nature, whether town or country.

Where the old practice of entering cheques as such, and of distinguishing between town and country cheques, is maintained, or where the customer is notified, by memorandum in his pass book or paying-in slip, that cheques will not be available until cleared or until the expiration of fixed periods, the old rule probably holds good; and in the absence of any course of business entitling a particular customer to draw against uncleared cheques, cheques so drawn might be returned with the answer "Effects not cleared."

Where the cheques have at once been credited as cash, and where there are no counteracting stipulations affecting the customer, the right to return cheques on the ground that the assets have not been cleared is, in the light of the judgment of the House of Lords in *Gordon's Case* ([1903] A. C. 240), more than doubtful.

Lord Lindley says, at p. 249: "It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

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It is obvious from the context and the whole tenor of the judgment that this *dictum* includes the crediting of uncleared cheques as cash, to which indeed it was primarily directed.

The right of the customer to draw against cheques so credited is, in fact, only the logical consequence of the position of holders for value which the bank acquires by such crediting. The value cannot consist in the mere entry in the bank books; it lies in the right thereby conferred to immediately draw against the amount; in the fact that the credit is an actual, available one. The customer is entitled to the full benefit of the consideration for which he parted with the cheque.

CHAPTER IX.

PAYING BEARER CHEQUES.

"A BILL is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." (Bills of Exchange Act, s. 3, sub-s. 3.)

By sect. 2, "Bearer" is defined as "the person in possession of a bill or note which is payable to bearer," and "Holder" includes the bearer of a bill or note.

Sect. 59 provides that a bill is discharged by payment in due course by or on behalf of the drawee or acceptor, and defines payment in due course as 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.

It is somewhat curious that these last words do not specifically include the case of no title as well as defective title in the holder, as, for instance, is the case in sect. 82. Possibly they are unnecessary; notice that a man had no title would include notice of a defective title, on the principle of the greater including the less; whereas there is good reason for specifying both in sect. 82. The case cited by Mr. Chalmers (Bills of Exchange, 6th ed., p. 205), as authority that payment of a stolen bearer bill to the thief is a good discharge (*Smith* v. *Sheppard*, cited Chitty on Bills, 11th ed., p. 278, *n.*), is not a satisfactory one, the case being nowhere reported, the facts being that the bill was lost not stolen, and the reason assigned being that it was the owner's fault that he lost it.

As shown above, however, the definition of holder in

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the Act merely requires "possession," without in any way limiting it to lawful possession, or involving any question of title, and therefore payment to the person in possession, even though he be the actual thief, operates as a discharge of the bill. Mr. Chalmers (6th ed., p. 124), says that "a defective title must be distinguished from entire absence of title. A person who claims under a forgery has no title and can give none. He is not the 'holder' of the instrument." It is submitted that these words only apply to the specific case of forged indorsement, which is matter of special enactment under sect. 24. It would not be true to say that a person who has no title cannot be the "holder." Even where there is a forged indorsement, a man may be, for some purposes, a holder in due course. See sect. 55, sub-sect. 2 (b).

With regard to bearer cheques, the matter is made quite clear by the judgment in *Charles* v. *Blackwell*, 2 C. P. D., at p. 158. Speaking of lost or stolen bearer cheques, the court say: "The matter is equally clear on principle, for where the banker paid the bearer of such a cheque, he obeyed the mandate of his customer, the drawer, and could charge him accordingly; while, on the other hand, the customer was protected, and this even though the bearer so paid had no property in the cheque, but was himself a thief who had stolen it. The drawer was entitled to say to the payee, 'I gave you an instrument which you were willing to take in satisfaction of your debt if the drawee paid the amount to the bearer, and this the drawee has done.'"

Thus payment in good faith by the banker of an uncrossed bearer cheque to anyone presenting it discharges not only the banker, but, if the cheque had reached the payee, discharges the drawer, both as to cheque and consideration.

Question of true owner maintaining conversion.

The question has sometimes been suggested whether, notwithstanding the discharge of the cheque, the true owner could not, in this and similar cases, maintain an action against the banker for trover or conversion. A

thief cannot acquire property in the cheque by stealing it; no one can acquire a valid title under a forged indorsement. The bank who pay a cheque to such a holder have dealt with the property in a way inconsistent with the rights of the true owner in whom the property and right of possession remain vested. Further it is said that the bank cannot set up, that, being discharged, the cheque is a valueless article and the damages nominal, inasmuch as it was their own act that made it so.

But in *Charles* v. *Blackwell*, 1 C. P. D. 548, the Divisional Court (Lord Coleridge, C.J., Brett and Lindley, JJ.) distinctly held that if the cheque was properly paid, neither trover nor conversion would lie against the banker; and the Court of Appeal, 2 C. P. D. 151, adopted this view (see p. 163), taking the additional ground that on payment the property vested in the banker.

It may be taken, then, that wherever a banker pays a cheque without contravening any statutory enactment, and in such a manner that, either at common law or by virtue of any statute, that payment, though made to an unlawful holder, operates as a discharge of the cheque, he is under no liability to the true owner for conversion or trover.

If he pays contrary to statutory enactment, if, for instance, he pays a crossed cheque contrary to the crossing, or a cheque with a forged indorsement contrary to the ordinary course of business, then his liability to the true owner remains, apart even from any express right given to the true owner by statute; and it would seem that the liability would be the full face value of the cheque, notwithstanding it might have been discharged, as by payment to a wrongful holder of a bearer cheque. See *per* Blackburn, J., in *Smith* v. *Union Bank of London*, L. R., 10 Q. B. 291, at which date [1875] there was no statutory right given to the true owner of a crossed cheque against a banker paying it in contravention of the crossing; while

sect. 19 of the Stamp Act, 1853, contained no provision limiting the protection for payment on forged indorsement to payment in the ordinary course of business, as does sect. 60 of the Bills of Exchange Act, 1882.

The remarks of Blackburn, J., are couched in wide terms, but they must be confined to cases where the payment is made in contravention of some statutory provision, or in such a manner as to preclude it from being a statutory discharge. (See *Smith* v. *Union Bank of London*, in Court of Appeal, 1 Q. B. D., at p. 35.)

The protection referred to above only extends to the paying banker, not to the collecting banker. As to the liabilities of the latter, see "Collecting Banker," *post*, pp. 188 *sqq*.

CHAPTER X.

PAYING ORDER CHEQUES.

THE principle to be borne in mind in dealing with this subject is that, in ordinary cases, the banker cannot charge his customer with any money with which he has parted without that customer's authority. If the customer says "Pay bearer," and the banker pays the bearer, that is a good payment as against the customer, though the bearer was not himself entitled to receive the money. But when the customer says "Pay A. B. or order," the mandate is only fulfilled by paying either A. B. or some person to whom A. B. has transferred his rights in manner authorised by the drawer, namely by a genuine indorsement. The Bills of Exchange Act, s. 24, precludes the possibility of anyone acquiring title to the bill or its proceeds, or giving a valid discharge, where a forged indorsement intervenes. On both grounds, that of having paid contrary to instructions, and having paid a person not entitled to give a discharge, the banker, apart from statutory protection or estoppel, is not in a position to debit his customer with money paid on a cheque with a forged indorsement.

The statutory protection with regard to cheques is under sect. 60 of the Bills of Exchange Act, 1882; with regard to drafts and orders drawn on a banker, not strictly falling within the definition of cheques, it is under sect. 19 of the Stamp Act, 1853 (16 & 17 Vict. c. 59).

As to the history of the latter enactment, and the effect thereon of the decision of the House of Lords in *Gordon* v. *London, City and Midland Bank* [1903] A. C. 240, see under "Cheques," *ante*, p. 24.

Mr. Chalmers suggests (Bills of Exchange, 6th ed., p. 341) that so far as bills and cheques are concerned, sect. 19 of the Stamp Act, 1853, is impliedly repealed by sect. 24 of the Bills of Exchange Act. This view appears correct, and has been followed in formulating the protection in the above terms, and in dealing generally with the matter in question.

Protection to the banker.

Reading the two enactments together, as far as possible, the protection to the banker is subject to the following conditions:—

The instrument must be a bill, draft or order drawn on a banker, payable to order on demand.

The document must be a bill, draft or order.

The latitude of interpretation involved in the decision in *Gordon's Case* renders it difficult to fix any definite limitations on the documents which may fall within the extended scope of this definition.

A document may not be a cheque or bill, for want of some essential element, but the words "draft or order," of which there is no authoritative definition, are there to supply the deficiency.

Must be drawn on banker.

The document must be drawn on a banker. By the decision in *Gordon's Case* this does not necessarily involve its being drawn by a customer. It may be drawn by a branch of a bank on another branch or the head office. This condition, however, absolutely excludes bills accepted payable at a banker's or domiciled with him. Such bills, even if payable on demand and to order, are not drawn on a banker.

Must be payable to order and negotiable.

The document must be payable to order. This seems to involve the necessity of the document being negotiable. A document cannot be payable to order unless any indorsee has a right to sue on it by virtue of his own independent title, which is the essence of negotiability.

This is further emphasized by the reference to the indorsement of the payee and subsequent indorsers, if any,

which occurs in both enactments, words only applicable to an instrument negotiable by indorsement.

The instrument in *Gordon's Case*, though not a bill, because drawer and drawee were the same person, was yet one which, both at common law (*Miller* v. *Thomson*, 3 M. & G. 576) and under the Bills of Exchange Act, s. 5, sub-s. 2, must be treated as negotiable, either as a bill of exchange or as a promissory note.

The *Gordon* decision, therefore, does not militate against the restriction that the instrument must be negotiable.

Anything which would be fatal to the character of a document as a bill in the hands of a holder in due course is sufficient to exclude it from protection under either section.

The instrument must, therefore, be unconditional, in the sense in which the term is used in the Bills of Exchange Act, which, in this respect, merely reproduces pre-existing law.

Documents excluded.

This requirement would exclude all documents requiring the signature of a specific receipt as a condition of payment, the sort of documents covered by sect. 17 of the Revenue Act, 1883; apart from the special provision in that section that such documents are not negotiable instruments. (See *ante*, p. 30.)

It would exclude all instruments ordering payment out of a particular fund. (Bills of Exchange Act, s. 3, sub-s. 3.

The requirement that the document shall be payable to order has another result.

If it is a bill within the Bills of Exchange Act, it is sufficient if it be expressed to be payable to order of a specified person, or to him or his order, or to him, without words prohibiting transfer. (Sect. 8.)

But if protection has to be sought under sect. 19 of the Stamp Act, 1853, it can only be obtained where the draft or order is expressly made payable to the order of a specified person or to him or his order.

Sect. 8 of the Bills of Exchange Act only applies to documents which are bills within its meaning, leaving

other drafts and orders still regulated by the pre-existing law, which required the express addition of the word "order" to render the instrument transferable or payable to order.

Must be payable on demand.

The document must be payable on demand.

This would, apart from any question of negotiability, presumably exclude all documents which, though stated to be payable on demand, contained a restriction that they would only be paid if presented within a specified period, as to which see *ante*, p. 32.

It would not exclude a post-dated cheque, though known to be such, if presented on or after the ostensible date; the legality of such instruments being fully established by the Bills of Exchange Act, s. 13, sub-s. 2, they must clearly be treated as payable on demand.

Divergence of the statutory enactments.

In treating further of the protection of the paying banker against forged indorsements, it becomes necessary to deal separately with sect. 60 of the Bills of Exchange Act and sect. 19 of the Stamp Act, 1853, by reason of the divergence of their terms.

Take sect. 60, first, as of the more general application. It must be borne in mind that this section only refers to documents which are properly bills or cheques within the meaning of the Bills of Exchange Act. It provides that, to entitle him to its protection, the banker must pay the cheque "in good faith and in the ordinary course of business."

Definition of payment.

Payment need not be by the absolute transfer of money or money's worth to the holder. The word "payment" in the Act is largely interpreted. (See *Glasscock* v. *Balls*, 24 Q. B. D., at p. 16.)

Where a cheque drawn on one branch of a bank was paid in at another and appeared as an item in balancing the accounts between the two branches, the branch on which it was drawn was held to have paid it within the meaning of sect. 60. (*Bissell* v. *Fox*, 53 L. T., N. S. 193;

Gordon v. *London, City and Midland Bank* [1902] 1 K. B. 242.)

But it may be safely asserted that the intimation that the cheque would be paid, known as notifying its fate, in answer to an inquiry by another banker, would not be treated as payment, though often regarded as equivalent thereto by bankers. If, after giving such answer, the paying banker became cognisant of facts tending to throw doubt on the genuineness of the indorsement, he would subsequently pay the cheque at his peril. The only light in which courts regard the question and answer as to the fate of a cheque is that of a precaution taken by the collecting banker exclusively in his own interest and for his own benefit. (See, *e.g.*, *Bissell* v. *Fox*, 51 L. T., N. S. 663; 53 L. T., N. S. 193; *Ogden* v. *Benas*, L. R., 9 C. P., at p. 516.)

Must be in good faith and ordinary course of business.

The payment must be "in good faith and in the ordinary course of business." (Bills of Exchange Act, s. 60.)

As to payment where the cheque is presented by a person in the character of payee, who writes the payee's name on the back at the request of the bank, see *ante*, p. 37.

It is to be noticed that this sect. 60 does not, as does sect. 80, with regard to a banker paying, and sect. 82 with regard to the banker collecting, a crossed cheque, make the absence of negligence a condition of the protection. Negligence is not incompatible with good faith. Bills of Exchange Act, s. 90: "A thing is done in good faith within the Act if it is done honestly, whether it be done negligently or not." This sect. 90 was presumably inserted to set at rest doubts which were at one time entertained as to whether negligence on the part of the transferee of a negotiable instrument was sufficient to affect him with equities thereon; but it is general in its terms, and the banker is entitled to any benefit derivable from it, save in so far as its effect is cut down by the other requisite

qualification, viz., that the payment must be in the ordinary course of business. (Sect. 60.)

Negligence may of course be so gross as to be evidence of want of good faith, but that is not a principle likely to be applicable in the case of a banker.

In many cases a negligent payment would also be one not in the usual course of business, but in others the distinction might be material. A banker might fairly contend that, being compelled, under the rule laid down in *Vagliano's Case*, to pay or dishonour at once, *ante*, p. 69, he is acting in the ordinary course of business when he adopts the former course, and that it is not open to the customer or true owner to raise any question of negligence. Lord Halsbury's remarks, quoted *post*, p. 92, cannot, in face of that rule, to which he had practically assented, imply that it is the ordinary course of business for a banker to withhold payment pending inquiry. As the context shows, Lord Halsbury was dealing with the contention that the bank, by paying large bills over the counter, had acted in an unusual and therefore negligent manner, and his dictum really refers to what bankers were likely to do, on their own responsibility and at their own risk, in extreme cases.

The usual course of business is a matter on which bankers are best qualified to judge, and courts would be largely influenced by the evidence of persons experienced in banking on such questions. Some, of course, a court would decide on statutory grounds alone. Payment of a crossed cheque in contravention of the crossing is not a payment in the usual course of business as regulated by the Act, and a banker so paying it could not claim the protection of this section if the indorsement were forged, apart altogether from the ground of the payment being contrary to the mandate of the customer.

"Ordinary course of business" must be the recognised or customary course of business of the banking community at large, not of any particular bank or group of banks; and

a court while according weight to the evidence of bankers, might well reject anything which savoured of rashness or indifference to the customer's interests. The court might either decline to believe it to be the usual course of business or would import into the section that the course of business must be not only usual but reasonable. For instance, a court might decline to hold that a payment on special clearing, viz., to another bank direct, instead of through the Clearing House, where the only reason was the urgency of the person seeking payment, was a payment in the usual course of business, though the question is not likely to arise. If an order cheque was presented unindorsed by a person posing as the payee, who at the request of the bank wrote the payee's name on the back, a court might hold that the subsequent payment was not one in the usual course of business within the section. (See further as to this, *ante*, p. 37.)

The cheque must purport to be indorsed by or under the authority of the proper person.

Correctness of indorsement.

Some banks seem to entertain very broad views as to the correspondence of the indorsement with the designation of the payee. Of some of the indorsements passed it would be impossible to say that they "purport to be" the indorsement of the payee; others may so purport, but in such form that payment thereon is hardly in the ordinary course of business. Other banks seem over-scrupulous in returning cheques on account of utterly immaterial variations or omissions. It would be futile to endeavour to deal here with specific instances. A large collection of examples will be found in "Questions on Banking Practice," published by the Institute of Bankers, 5th ed., with the opinion of the Council of the Institute on each.

There is one form of indorsement which must, however, be referred to, because it is not uncommonly passed, and can only be justified by the comity of bankers. A cheque payable to A. B. or order is presented for payment without

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any indorsement by A. B., the only indorsement being "Placed to account of payee," or words to that effect, signed by or on behalf of a banker. This does not even purport to be the indorsement of the payee, and payment thereon cannot be in the ordinary course of business.

The following quotation though, as before stated, it cannot give the banker a legal right to postpone payment, seems to indicate that, in extreme cases, ordinary course of business might vary according to circumstances. In *Vagliano's Case* [1891] A. C., Lord Halsbury, at p. 117, referring to the fact that domiciled bills of large amount had been paid across the counter without inquiry, says: "I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion. I can well imagine that on a person presenting himself, whose appearance and demeanour was calculated to raise a suspicion that he was not likely to be entrusted with a valuable document for which he was to receive payment in cash, I should think it would be extremely probable that, whether the document were a cheque payable to bearer for a large amount or a bill, the counter clerk and banker alike would hesitate very much before making payment."

"Per procuration" indorsements.

The protection of sect. 60 extends to an unauthorised indorsement "per pro.," as well as to an ordinary forged signature by way of indorsement. It was so decided with reference to sect. 19 of the Stamp Act, 1853, in *Charles* v. *Blackwell*, 2 C. P. D. 151; and the words of sect. 60 clearly embody this decision.

Drawer's signature forged.

It is probably unnecessary to say that sect. 60 affords no protection whatever to the banker where the customer's signature as drawer is forged. A document purporting

to be a cheque, but to which the drawer's signature is forged, is not a cheque at all, is not drawn on a banker (*Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 49), and is outside the section altogether. (See also *Vagliano's Case* [1891] A. C. 107; *Orr* v. *Union Bank of Scotland*, 1 Macq., H. of L. Ca. 513.)

A banker is generally assumed to know his customer's signature, while it is impossible for him to know that of all persons who may indorse order cheques drawn by that customer. The latter consideration has been cited as the foundation of all the protection given to the banker against forged indorsement, and has obviously no bearing on the question of the customer's signature. (See *Charles* v. *Blackwell*, 2 C. P. D. 151.)

Banker's double risk.

In any case where a banker, in paying an order cheque with a forged indorsement, so acts as to deprive himself of the protection of sect. 60, he would appear to stand to lose the money twice.

He is not entitled to charge his customer with the money paid on the forged indorsement, so he loses that.

Then he would seem to be liable to the true owner, if, as he probably would be, he is a person other than the customer, in trover or conversion for wrongfully dealing with the cheque, the damages for which would seem to be its full face value.

Neither the property nor the right of possession is divested out of the true owner by the forgery of his indorsement.

The payment, therefore, was to an unlawful holder, and, unless protected or operating as a discharge of the cheque, constitutes a conversion. (See *Smith* v. *Union Bank of London*, L. R., 10 Q. B., *per* Blackburn, J., at p. 296, and 1 Q. B. D., at p. 35, *per* Lord Cairns.)

It is true that where a cheque is duly paid or discharged, conversion will not lie against the banker. (*Charles* v. *Blackwell*, 1 C. P. D. 553—555.) But to constitute payment

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When payment on forged indorsement a discharge.

on a forged indorsement payment or discharge under sect. 60, it must be made strictly in accordance with the terms of that section.

In any case the discharge is a purely technical and exceptional one.

Sect. 59 provides that "a bill is discharged by payment in due course by or on behalf of the drawee or acceptor. 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 is defective."

By sect. 2 "holder" is defined as "the payee or indorsee of a bill, or note, who is in possession of it, or the bearer thereof."

Sect. 24 declares the total inefficiency of a forged indorsement to convey any title or the right to give a discharge.

The person in possession under a forged indorsement is, therefore, neither payee, indorsee or bearer; payment to him can never be payment in due course, or operate as a discharge or a valid payment, except where sect. 60 takes effect, and the banker is deemed to have paid the cheque in due course. "Deemed" in this connection must be read as importing the equivalent of the actual fact, and as putting matters on precisely the same basis as if the payment had been made in the manner in which it is deemed to have been made, such construction being necessary for the efficacy of the section. (Cf. *Hill* v. *East and West India Dock Co.*, 9 A. C. 448.)

The apparent possibility of an exception to the absolute inefficiency of a forged indorsement to constitute a holder, arising from the application of the words "holder in due course," in sect. 55, sub-sect. 2 (b), to a person in possession of a bill in the course of negotiation of which there is, *ex hypothesi*, at least one forged indorsement, is explainable, and does not touch the general principle.

The term is there only used to denote the character in which a person must have taken the bill, namely, in good faith and for value, and before it was overdue, in order to enable him to maintain a right of recourse by estoppel against an indorser subsequent to the forged indorsement. Such subsequent indorser is precluded from denying to such person in possession the status of holder, so far as claiming against himself on the dishonoured or unpaid bill is concerned; but this does not touch the main question or imply that payment to such a person by drawee or acceptor would be a valid discharge of the bill.

Therefore, it remains that, save where strictly in accordance with sect. 60, payment of a cheque with a forged indorsement does not constitute payment or discharge of the instrument, or relieve the banker from liability to conversion at the suit of the true owner.

Crossed cheque with forged indorsement.

In the case of a crossed cheque bearing a forged indorsement, the banker is protected, in proper cases, both by sect. 80 and by sect. 60, equally against his own customer and against the true owner; but inasmuch as sect. 80 limits the protection by the requirement of good faith and the absence of negligence on the part of the banker, it is obvious that conduct amounting to a violation of the ordinary course of business, within sect. 60, would, as negligence, equally debar the banker from the benefit of sect. 80. Nor could the banker, who paid a cheque with a forged indorsement, contrary to the ordinary course of business, set up against the true owner the line of defence suggested by *Charles* v. *Blackwell*, 2 C. P. D. 151, namely, that the document, if recovered, would be valueless, inasmuch as its subsequent non-payment on presentation would not be dishonour, such non-payment being on the ground only of previous payment, effective by statute, though to the wrong person, and that, therefore, there was no right of recourse against the drawer or any previous indorser.

The cheque is not discharged, because the payment was

not in accordance with the section, but the true owner could not sue any party, either on it or on the consideration, until the cheque has been presented and dishonoured. The true owner cannot present it, because the bankers have got it, or had and parted with it; therefore he is entitled to sue them in damages for its conversion. And if they had to pay its face value as such damages, there seems no legal ground on which they could charge the amount against the customer. It would not be in law payment of the cheque, or payment on the cheque; but merely damages for a wrong of the banker's own, in its nature as separated from any question of the drawer's relation to the cheque as if it had been an assault.

Charles v. *Blackwell*, 2 C. P. D. 151, seems to contemplate the possibility of the banker's returning the cheque to the true owner as a means of escaping liability for conversion. If the banker still had it, he might do this; the cancellation of the drawer's signature might be shown to have been made under mistake (sect. 63, sub-sect. 3), and the cheque might be paid on re-presentation, unless stopped meantime. If it had been stopped and payment were refused, the true owner might recover against the drawer. Possibly thus the banker might escape the second loss, but the combination of circumstances is so improbable that it hardly seems worth while to follow the point into further stages.

Protected payment discharges drawer.

Where the payment, although on a forged indorsement, is strictly in accordance with sect. 60, and, if the cheque is crossed, with sect. 80, the payment, though, as before stated, only technically a payment in due course, not only discharges the banker, but if the cheque had actually or constructively reached the payee, discharges the drawer from liability not only on the cheque, but also on the consideration given for it. This is well illustrated in *Charles* v. *Blackwell*, 5 C. P. D. 151.

The payee cannot sue, either on the cheque or the consideration, until the cheque is dishonoured. If he had it and presented it, true it would not be paid; but only, as before stated, on the ground that it had been previously paid, which is not dishonour. The payee says, "Yes, but to the wrong person." The drawer says "You were content to take for your debt a document which would be discharged if the banker paid it in accordance with existing law, and this he has done, and you cannot complain." The same reasoning would lie in the mouth of any indorser.

Documents within the Stamp Act, 1853, s. 19.

Turning now to sect. 19 of the Stamp Act, 1853, which regulates the protection of the banker with regard to drafts or orders, not being cheques or bills within the Bills of Exchange Act, that section does not contain any words requiring the payment to be made in good faith or in the ordinary course of business. It simply provides that if the draft or order shall, when presented for payment, purport to be indorsed by the person to whom it is drawn payable, it shall be a sufficient authority to the banker to pay the amount to the bearer, and it shall not be incumbent on the banker to prove that any indorsement was made by, or with the authority of, the payee or subsequent indorsers.

It is, at any rate, clear that the payment must be made in good faith. The banker could never be allowed to take advantage of his own wrong, and the necessity of good faith is distinctly postulated in *Hare* v. *Copland*, 13 Ir. C. L. R., at p. 433, and by Blackburn, J., in *Smith* v. *Union Bank of London*, L. R., 10 Q. B., at p. 296.

As to ordinary course of business, the question is not so clear. No condition to this effect is included by Mr. Chalmers in his "Digest of the Law relating to Bills, Notes and Cheques," published before the passing of the Bills of Exchange Act, or insisted on by Blackburn, J., in the passage above referred to. Nor is it referred to in *Charles* v. *Blackwell*, 1 C. P. D. 548; 2 C. P. D. 151. The

document in the *Gordon Case* [1903, A. C. 240] was a draft drawn by a branch bank on the head office, not, as stated in some of the judgments and the head note, on another branch. The issue of such drafts is a recognised means of transmitting funds from abroad, and is not uncommon in England. The subsequent payment might, therefore, be fairly regarded as being in the ordinary course of business, but the point was not raised or discussed.

Are they susceptible of crossing?

From 1856 to 1882, that is, before the Bills of Exchange Act and while the Crossed Cheques Acts were successively in force, payment of a draft or order contrary to the crossing deprived the banker of the protection of sect. 19 of the Stamp Act, 1853. (*Smith* v. *Union Bank of London*, L. R., 10 Q. B., at p. 296; 1 Q. B. D., at p. 35.) Each of the Crossed Cheques Acts was applicable to drafts and orders; in fact, "draft or order on a banker" is the definition of "cheque" in the Crossed Cheques Act, 1876.

That Act, which repealed the earlier ones, is itself repealed by the Bills of Exchange Act and re-enacted with reference to cheques, with the definition (sect. 73) that "a cheque is a bill of exchange drawn on a banker payable on demand."

The crossed cheques sections (76—82) are made applicable to dividend warrants by sect. 95, and the Revenue Act of 1883, s. 17, extends them to certain classes of orders on bankers issued by a customer.

The doubt suggested by Lord Lindley in *Gordon's Case* (1903, A. C. at p. 250), whether any draft or order on a banker being neither a cheque, a dividend warrant, or of the class comprised in sect. 17 of the Revenue Act, 1883, can be effectively crossed, accordingly appears to be well founded.

Does the section apply to other than inland drafts?

In the same case (at p. 251), Lord Lindley referred to the doubt expressed in several of the text-books whether this sect. 19 of the Stamp Act, 1853, applies to any except inland drafts or orders. Foreign bills, it is said, were not subjected to any stamp duty until the following year, 1854, and the section, occurring as a proviso in a Stamp Act, can

only be treated as applicable to documents chargeable with stamps under the Act containing it.

It is conceived that this is not so, and that the protection extends to all documents falling within its terms at the present day. The point is somewhat important; *Gordon's Case* having established that inland drafts issued by one branch of a bank on another, or the head office, fall within those terms, it is desirable that the protection should extend to the commoner case of such drafts drawn abroad on the head office in England.

The reasons for holding it does so extend are as follows:—

(*a*) The fact that the section occurs in a Stamp Act is immaterial, it being perfectly general and self-contained in its terms.

(*b*) The fact that it is couched in the form of a proviso in no way prevents its being a substantive enactment. (See *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7.)

(*c*) The fact that on the passing of the Bills of Exchange Act it was intentionally left unrepealed, of which judicial notice was taken in the *Gordon Case*, implies that it is applicable to drafts and orders in use at the present time, whether originally subject to stamp duty or not.

(*d*) If, as stated by Lord Lindley in *Gordon's Case*, the object of the enactment was to protect bankers against the increased use of order drafts on them occasioned by the reduction of the stamp duty, and if these documents fall within the definition, the protection would appear all the more necessary in the case of foreign drafts, which required, at the time, no stamp at all.

(*e*) Statutes are not to be confined to conditions existing at the date of their passing, if the wording is wide enough to include subsequent developments. (*A.-G.* v. *London Edison Telephone Co.*, 6 Q. B. D. 244.)

(*f*) In *Brown & Co.* v. *National Bank of England*, 18 Times L. R. 669, Bigham, J., in the case of a draft of this

sort drawn in Madras on London, expressly stated that, but for the then existing ruling of the Court of Appeal in *Gordon's Case*, subsequently reversed, he should have held the document to be within this sect. 19 of the Stamp Act, 1853. The House of Lords, in *Gordon's Case*, referring to this decision, do not express dissent on the ground of the draft being foreign, but the question was not relevant to the drafts before them, which were inland.

(*g*) Stat. 35 & 36 Vict. c. 44, s. 11, refers to this section, and states that it "relates to the indorsement of drafts or orders drawn upon bankers for the payment of money" without any limitation as to their being inland drafts only.

Discharge under this section.

Sect. 19 of the Stamp Act, 1853, does not, as does sect. 60 of the Bills of Exchange Act, specifically provide that the banker who acts within its conditions shall be deemed to have paid the bill in due course, notwithstanding the forged or unauthorised indorsement.

In such cases, however, the section does operate as a discharge of the draft or order (*Halifax Union* v. *Wheelwright*, L. R., 10 Ex., at p. 194), with the same results as are enumerated under sect. 60, *ante*, p. 96.

The section has full effect though the indorsement is "per pro." (*Charles* v. *Blackwell*, 1 C. P. D. 548; 2 C. P. D. 151.)

CHAPTER XI.

PAYING CROSSED CHEQUES.

Statutory provisions.

SECT. 79 of the Bills of Exchange Act prohibits a banker from paying—

(*a*) A cheque crossed specially to more than one banker, except when crossed to an agent for collection being a banker, under sect. 77, sub-sect. 5, as to which see *ante*, p. 52.

(*b*) A cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker.

It is incumbent on the paying banker to satisfy himself that the second banker is the accredited agent of the first.

This section gives a remedy to the true owner against the banker for any loss he may have sustained owing to the cheque having been paid contrary to the provisions of the section.

Sect. 80 provides that, where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it in accordance with the terms of the preceding section, he shall be entitled to the same rights and placed in the same position as if payment of the cheque had been made to the true owner thereof.

Who may cross a cheque.

A question arises under these sections, probably, however, not affecting the paying banker so much as the collecting banker, as to what, *quoad* the banker, constitutes a crossed cheque.

Sect. 76 provides that "where a cheque bears across its face an addition of" certain things, "that addition

constitutes a crossing, and the cheque is crossed" specially or generally, as the case may be.

Sect. 77 provides that a cheque may be crossed generally or specially by the drawer, or crossed or the crossing added to by the holder.

Sect. 78 provides that a crossing authorised by the Act is a material part of the cheque, and that it shall not be lawful for any person to obliterate, or, except as authorised by the Act, to add to or alter the crossing.

A holder is defined by sect. 2 as the payee or indorsee of a bill who is in possession thereof, or the bearer thereof.

The question is whether, so far as the banker is concerned, a cheque is a crossed cheque where it ostensibly bears on its face a crossing when it reaches the banker, but that crossing has been put on by someone who was not drawer or holder.

For instance, the person innocently in possession of an open order cheque under a forged indorsement might in form cross it, but he would not be within the authorisation of the Act, being neither drawer nor holder, not being, in fact, indorsee.

The arguments in favour of the broad construction, viz., that, so far as the banker is concerned, any cheque is a crossed cheque which, when it comes to him, purports to be crossed, seem to be as follows:—

(*a*) The words in sect. 76, "bears across its face," are consistent with, and designed to include, a merely ostensible crossing.

(*b*) It is obviously impossible for the banker to know by whom a crossing is put on.

(*c*) On any other construction, the anomaly would ensue that a thief in possession of a bearer cheque could effectively cross it, while an innocent person in possession under a forged indorsement could not.

(*d*) That the prohibitions of sect. 78, and the corresponding criminal section, Forgery Act, 1861, 24 & 25

Vict. c. 98, s. 25, are confined to alteration of or addition to an existing crossing.

The opposite argument, viz., that the crossing must be by the drawer or a holder would be as follows:—

(a) The contiguity of sects. 76 and 77 requires that they be read together, and the whole scheme of the sections is based on the crossing being authorised by the Act.

(b) On any other construction sect. 77 has no meaning.

(c) Any other construction enables a mandate to be imposed on the paying banker by a person not having authority as customer, or derived from the customer by virtue of the statute.

(d) Any other construction legitimises a material alteration by a stranger, which would otherwise invalidate the cheque. This would be extraordinary in the case of the not-negotiable crossing, as there the essential character of the cheque is affected. The words in sect. 81, "bears on it," are equivalent to those used in sect. 76 (*a*).

Position of paying banker.

Though sect. 80 affects to protect the banker in paying crossed cheques, he does not seem to need such protection, and so this question does not vitally concern the paying banker. So long as he does not contravene an ostensible crossing, he could claim protection either under sect. 60 or as having properly paid a bearer cheque. The question could only arise in case of his having paid, in contravention of the ostensible crossing, a cheque crossed by an unauthorised person, a most improbable combination of circumstances.

For the bearing of this question on the liability of the Collecting Banker, see under that heading, *post*, p. 221.

If we confine "holder" to the persons defined by sect. 2, it makes no difference to the paying banker whether the crossing has been put on in whole or in part by the drawer, who is his customer, or by some subsequent holder, under the powers of sect. 77.

The banker has no means of judging by whom the

(*a*) In *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465, Bigham, J., treated the bank as holders with power to cross. It does not appear to have been suggested that the payees were fictitious, the case being dealt with on the basis of forged indorsement. But the point above discussed was not raised or decided, the judgment only declaring that the power to cross is not confined to a holder for value.

crossing was put on, except in the case of one bank crossing to another for collection; and the statutory powers render the crossing by a subsequent holder as effectual as if made by the drawer.

Effect of authorised crossing.

Apart from any question of true owner, the crossing, whether put on by the drawer, the payee, or any subsequent holder under the powers of the Act, becomes part of the mandate of the customer to his banker.

Those statutory powers have the effect of a delegation of power by the customer to each successive holder to cross the cheque or supplement the crossing in any legitimate way on his, the customer's, behalf, and thereby affect the banker.

Paying contrary to crossing.

If, therefore, a banker pays in contravention of the crossing, whether as put on by his customer or as put on or supplemented by the payee or a subsequent holder, he is not entitled to debit his customer with the amount, even though the cheque was paid to the right person, the true owner. This appears somewhat unreasonable, but the authorities are conclusive. In *Smith* v. *Union Bank of London*, 1 Q. B. D. 31, the customer gave the plaintiff an open cheque payable to his order, in payment of a debt. The plaintiff indorsed it, and crossed it to the London and County Bank. While his servant was taking it to that bank, it was stolen from him, and ultimately found its way to a customer of the London and Westminster Bank, who took it *bonâ fide* and for value. He paid it into the London and Westminster Bank, they presented it to the defendant bank, who paid it to them in contravention of the crossing. It was held by the Court of Appeal that the plaintiff was not entitled to recover, as, there being no question of forged indorsement, the customer of the London and Westminster Bank, who took the cheque in good faith and for value, was the true owner, and not the plaintiff, and that the cheque had in effect been paid to the right person, though through the wrong channel. In the

judgment of the court (Lord Cairns, C., Lord Coleridge, C.J., Bramwell, B., and Brett, J.), it is said, at p. 35: "What, then, is the effect of the statute in enabling the payee to cross the cheque? We think the answer is easy; it imposes caution at least on the bankers. But, further, by its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it, if paid contrary to his altered direction." And at p. 36: "The drawers might refuse to be debited with it as having been paid contrary to their mandate as altered by the statute."

So again, in *Bobbett* v. *Pinkett*, 1 Ex. D., at p. 373, Bramwell, B., says: "The other difficulty in the defendant's way was that the cheque had across it the name of the London and County Bank, so that the defendant could only effectually present it through that bank. And if, as was the case, it was presented through another, the drawees might have refused to pay it; and, if they did pay, the plaintiff (the customer) might have refused to recognise that payment."

Amphlett, B., on p. 374, says: "It cannot be denied that the crossing operated as a mandate to the drawees to pay the cheque to the bankers named, and to no one else, and that consequently the plaintiff might, if he was so minded, have declined to allow his account to be debited with the amount so paid contrary to his orders."

In this latter case, there was a forged indorsement, but the rule is enunciated in general terms, without reference to that particular incident. It may be further noted that the proviso to sect. 79, enacting, as it does, that in certain cases a payment contrary to the crossing shall not be questioned, implies that, save in those specified cases, it may be. Payment to the true owner is not included in those cases.

Question as to effect of sec. 79.

How far sect. 79 imposes any new burden on the banker or confers any fresh rights on the true owner may be questioned.

Mr. Chalmers (6th ed., p. 258), after quoting the above case of *Smith* v. *Union Bank of London*, proceeds: "The court held that the true owner had no remedy against the paying bankers, because the negotiability of the cheque was not affected by the crossing. To meet this difficulty, the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), was passed. That enactment introduced the "Not negotiable" crossing, and gave a remedy to the true owner of a crossed cheque, if it was paid contrary to the crossing. (See now sects. 79 (2) and 81)." Again, at p. 261, in the note to sect. 79, after referring to the case of *Bobbett* v. *Pinkett*, 1 Ex. D. 368, in which a cheque was stolen from the payee, his indorsement forged, and the cheque was paid to a person who took it in good faith and for value, but paid contrary to the crossing, he says: "If the cheque had been payable to bearer, or had been indorsed in blank by the payee before it was stolen, there would be no remedy apart from this section." And, in a foot-note, he refers to *Smith* v. *Union Bank of London*, and adds "unless the cheque was crossed 'Not negotiable.'"

Smith v. *Union Bank of London* was decided in 1875, and it was, no doubt, in view of that case that the Act of 1876, repealed and reproduced by the Bills of Exchange Act, was passed. But the conclusion inferred by Mr. Chalmers, that, given a case with the same facts as *Smith* v. *Union Bank of London*, viz., a bearer cheque, or an order cheque with genuine indorsements, paid contrary to the crossing but to a holder in due course, the statute gives some person other than such holder, and whom he calls the true owner, rights he did not before possess, seems erroneous.

The only person to whom any remedy is given by sect. 79 is "the true owner"; neither the 1876 Act or the Bills of Exchange Act gives any definition of "true owner"; the marginal note to the section in the 1876 Act is: "Banker paying cheque contrary to provisions of Act, to be liable to lawful owner." There cannot, at the same

time, be two true or lawful owners of the same cheque. As shown by *Smith* v. *Union Bank of London*, the holder in due course of the cheque, in that case, was the lawful owner, the true owner. Lord Cairns, delivering the judgment of the court, says, at p. 34: "We must say that the holder of the cheque, who presented it to the defendants, was the lawful holder, entitled to retain it against the plaintiff and all the world." The person from whom the cheque was originally stolen ceased, therefore, to be the true owner when the cheque was negotiated to the holder in due course, and could have maintained no action against the banker under the Act, any more than before it.

How the 1876 Act really obviated the difficulty raised by *Smith* v. *Union Bank of London* was by the introduction of the "Not negotiable" crossing. Of course, that crossing did not exist at the date of *Smith* v. *Union Bank of London*, though the contrary might be inferred from Mr. Chalmers' foot-note; its introduction, preventing any person from acquiring a better title to the cheque than the person from whom he took it, obviated the recurrence of the state of affairs existent in *Smith* v. *Union Bank of London*, provided the cheque was so marked; and secured to the person from whom the cheque was stolen, or wrongfully obtained, the position of sole true owner, notwithstanding it had been negotiated to a *bonâ fide* holder for value.

In all probability this statutory effect of the "Not negotiable" crossing, combined with the prohibition to the banker to pay cheques contrary to the crossing, would have been sufficient to entitle the true owner to sue the banker paying contrary to the crossing, without the special right conferred by sect. 79, reproducing sect. 10 of the Crossed Cheques Act of 1876; on the principle, before laid down, that a banker is only protected against conversion, apart from statutory protection, when he pays in a legal and proper manner, infringing no statutory prohibition or injunction.

No fresh remedy to true owner.

Nor does sect. 79 operate to give the true owner any fresh remedy against the banker in other cases. If the banker pay, contrary to the crossing, a cheque with a forged indorsement, he loses the protection of sect. 60, because he pays, not in the ordinary course of business, and he is liable to the true owner, apart from this section. If he pays a bearer cheque to a wrongful holder, contrary to the crossing, he is liable to the true owner, apart from this section, because the cheque has not been duly or properly paid. (See *Charles* v. *Blackwell*, 1 C. P. D. 548; 2 C. P. D., at p. 163.)

Section 79, being thus really only declaratory, cannot be read so as to enlarge the rights of the true owner. He must, therefore, have been the true owner, that is, entitled to the property in and possession of the cheque, at the date of its payment. If a cheque were issued or negotiated in circumstances making it voidable, but not void, and paid contrary to the crossing, prior to revocation, it is conceived that the person entitled to revoke could not utilise this section against the banker. (See, as to true owner, p. 134, and as to void and voidable contracts, p. 136, *post*.)

It might be different if the cheque were marked "Not negotiable." By the reference back of repudiation in such cases, the payment might be regarded as having been made to a person who had no title, and the person entitled to revoke as having been, in law, true owner at the date of payment. (Cf. *Great Western Railway* v. *London and County Bank* [1901] A. C. 414.) Mr. Chalmers' reference to the non-negotiable crossing, in this connection (Bills of Exchange, 6th ed., p. 261, *n*. 2), does not cover the case of voidable title, the cheque in the instance quoted by him having been stolen.

Proviso to sect. 79.

The proviso to sect. 79 is difficult of interpretation owing to its involved and infelicitous language.

It runs, "Provided that where a cheque is presented for payment which does not at the time of presentment

appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to, or altered otherwise than as authorised by this Act," &c.

The intention of the proviso is, presumably, to protect the banker who pays in conformity with the ostensible crossing or absence of crossing, from liability under the section to which it is the proviso.

Reference to sect. 78, and the limitation of the protection in the proviso under the words, "by reason of," &c., show beyond question that it is the crossing, not the cheque, which is really the subject of the words, "have been added to or altered." As the proviso stands, the words, "or to have been added to or altered," apply primarily, if not exclusively, to the cheque rather than the crossing.

The proviso ought to run thus: "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 bear any addition to, or alteration of a crossing otherwise than as authorised by this Act."

A shorter form, following the terms of the protection, would be "to have had a crossing which has been obliterated, or added to, or altered otherwise than as authorised by this Act"; but this does not grammatically include the case of a real crossing still existent, but unjustifiably added to or altered, and it would have been better if both the condition and the protection had been framed in more accurate terms.

As the protection is limited to non-appearance, obliteration or alteration of or addition to a genuine crossing, it would not cover the case of an entire crossing put on by some person not authorised to do so by the Act; but, as shown before, this is not essential to the paying banker.

The proviso enacts that in the excepted cases the payment shall not be questioned. This, as before stated, implies that the customer may, save in these excepted cases,

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question a payment on the ground of contravention of crossing; in other words, refuse to be debited with it.

The words in the proviso to sect. 79 "to have been added to or altered otherwise than in accordance with the Act" are adapted from sect. 78. They must probably be taken to refer only to what would be effective additions or alterations if carried out under the authority of the Act. They would not include an addition which was merely in substance a memorandum, though locally incorporated with the regular crossing. If the view be adopted that such additions as "account payee," "account A. B.," &c., are substantially only memoranda addressed to the collecting banker (see *ante*, p. 51), it may be taken that the paying banker is not bound under this proviso to regard them as additions within its terms.

Sect. 80.

Sect. 80 is in the main a declaratory section so far as concerns the banker. It provides that where the banker on whom a crossed cheque is drawn pays it, in good faith and without negligence, in accordance with the crossing, he shall 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. It is barely more than a reversed statement of the effect of sect. 79.

The introduction of the words, "in good faith and without negligence," precludes the utilisation of sect. 80 for general protection where specific protection under other sections fails. If, for instance, a banker paid a crossed cheque in accordance with the crossing, but in some other respect not in the ordinary course of business, so as to lose the protection of sect. 60, the same fact would be held negligence, disentitling him to the benefit of sect. 80.

Nor can this sect. 80 be stretched to cover every case in which a banker pays what purports to be a crossed cheque in accordance with its ostensible crossing. It would not entitle a banker to debit his customer with a cheque to which that customer's signature as drawer was forged,

although such document purported to be crossed. It might not be negligence in the banker not to detect the forgery, if skilfully done, and the payment would be in good faith, but the document would not be a cheque drawn on him (see *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 49), and so would not come within these provisions.

So, again, if it be held that a cheque cannot be a crossed cheque unless the crossing be put on by someone authorised under the Act, this section would not protect the paying banker in the case of an ostensibly crossed cheque, on which the crossing had been put by an unauthorised person. But the banker, if paying in the usual course of business, would be protected either by sect. 60 or as having duly paid a bearer cheque.

The usual phrase that, apart from statutory protection, the paying banker is only justified in paying to a person who can give a good discharge, is, as already shown under "Paying Bearer Cheques," *ante*, p. 82, not strictly accurate in point of law. Apart from any question of crossing, a banker would probably be protected in paying to a wrongful holder an instrument drawn by his customer and possessing the attributes of a cheque crossed "Not negotiable." Inasmuch, however, as the words, "Not negotiable," can only be used in conjunction with one of the authorised crossings, this section removes all doubts; and the paying banker, paying in accordance with the crossing, is in no wise affected by the addition of the words, "Not negotiable."

"Account payee."

With respect to cheques crossed "account payee," or "account A. B.," some little consideration is necessary.

It may be assumed, for present purposes, that neither the transferability or the negotiability of the cheque is limited by the addition of any such words to the crossing. (See *ante*, p. 49.)

It may further be assumed that disregard on the part

of the paying banker of any intimation conveyed by the words can give no direct remedy against him to the true owner, under sect. 79. The cases in which such remedy accrues are limited by that section, and include no reference to this unauthorised addition. There is no general term such as "in accordance with the crossing," in the section.

It may further be assumed that the drawer's mandate to his banker cannot be affected by the addition of such words as "account payee" or "account A. B." by any holder.

The implied delegation of the drawer's authority, with respect to crossings, derived from the statute, extends only to crossings contemplated and authorised by the statute.

A bearer cheque, an order cheque crossed "account payee," or equivalent words, and indorsed by the payee alone, or a cheque crossed to an account other than that of the payee, offers no difficulty whatever.

It is obviously impossible for the paying banker to see to the disposition of the proceeds in the hands of the collecting banker, and he fully discharges his duty when he pays in accordance with the crossing, apart from the unauthorised addition.

"Account payee" and subsequent indorsements.

The only case which raises any question is that of an order cheque, crossed "account payee," and bearing, when presented, indorsements subsequent to that of the payee, showing that it has been negotiated by him, and raising the inference that the proceeds will not go into his account. If it be assumed that the words "account payee" were put on by the drawer, it might be contended that they formed part of his mandate to the banker; equivalent to his saying: "You are not to pay this cheque if, when it reaches you, it shows signs of having passed out of the possession of the payee."

But, as against this, there is the argument that the banker has no means whatever of knowing whether the words were put on by the drawer, by the payee himself, or by some other person, and further that the drawer, even if he

himself put them on, has nevertheless issued an instrument negotiable *ad infinitum* by indorsement, with nothing which in law tends to limit that negotiability, or, at any rate, the transferability of the cheque. So far, therefore, as disregard of the mandate is concerned, it would seem that the banker incurs no liability; the mandate, in any case, being contradictory and ambiguous, and the banker therefore entitled to act upon a reasonable construction of it. The only way the question could arise would be if one of the indorsements were forged. The true owner might then contend that the paying banker was not protected by sect. 60, as not having paid the cheque "in good faith and in the ordinary course of business," nor by sect. 80, as not having paid it "without negligence"; and the drawer might object to be debited on the same grounds.

The true owner is entitled to take advantage of the "without negligence" exception, the duty to him being statutory, and a counter-balance to the protection afforded the banker by sect. 80.

The case and opinion, published in "Questions on Banking Practice," 5th ed., question 443, proceed entirely on the facts submitted, which concerned only bearer cheques. Should the matter ever come up for decision, a court would, in all probability, not be disposed to give much effect to an unauthorised addition of this sort, as against the paying banker; they would probably take the line that it constituted only a memorandum addressed to the collecting banker; and, if properly fortified by the evidence of bankers, would hold that the payment was not out of the ordinary course of business, and that the banker was therefore protected, both against his customer and the true owner, by sect. 60, or by sect. 80, inasmuch as no negligence was attributable to him. Cf. *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465.

The extension of the crossed cheques sections, by sect. 17 Revenue Act, 1883, s. 17.

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of the Revenue Act, 1883, to documents issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document (see as to these, *ante*, p. 31), raises somewhat the same point. The same section provides that it shall not be deemed to render any such document a negotiable instrument. As previously pointed out, this clearly means that such documents are not legally transferable, and the paying banker must be taken to know this.

If, therefore, he pays one of them which bears evidence of having been transferred, such as indorsement other than that of the payee by way of receipt or for collection, the banker might, although paying in accordance with the crossing, lose the protection of sect. 80, on the ground of negligence.

CHAPTER XII.

THE PASS BOOK.

THE present position of the pass book is perhaps the most unsatisfactory thing in the whole region of English banking law. Its proper function is to constitute a conclusive, unquestionable, record of the transactions between banker and customer, and it should be recognised as such. After full opportunity of examination on the part of the customer, all entries, at least to his debit, ought to be final and not liable to be subsequently re-opened, at any rate not to the detriment of the banker.

It would be dangerous, however, to assume that such is the present effect of the pass book.

Decisions as to pass book.

In *Devaynes* v. *Noble*, 1 Merivale, 530, 535, in 1816, the Court of Chancery directed an inquiry into the nature and effect of the pass book, and the report of the master is set out at length in the case.

Therein it is stated that on delivery of the pass book to the customer, he "examines it, and if there appears any error or omission, brings or sends it back to be rectified; or, if not, his silence is regarded as an admission that the entries are correct."

The case itself, however, affords little legal authority as to the effect of the transaction.

In *Skyring* v. *Greenwood*, 4 B. & C. 281, decided in 1825, a firm of bankers credited a military customer with certain sums of money to which they supposed him to be entitled, but to which he was not really entitled, and which were never received by the bankers, who had, moreover, been officially informed of their mistake. They so credited him

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for five years, and communicated the credit to him by statements of account analogous to a pass book. On discovery of their error, they sought to retain from subsequent monies coming to their hands for his credit an amount equivalent to that credited by mistake, which the customer had drawn out. It was held that they were not entitled to do this, the entries to credit being a representation that the money had been received for the customer's use, and the customer having, in reliance thereon, altered his position by spending more than he would otherwise have done. This case goes to show that a credit entry may be regarded as a representation binding the bank, if the customer can show he has altered his position in reliance thereon.

Rectification of errors.

In the absence of any change of position, the mistake may, however, be rectified within reasonable time. In *Commercial Bank of Scotland* v. *Rhind*, 3 Macq. H. of L. 643, Lord Campbell, L.C., said: "It would indeed be a reproach to the law of Scotland, if, there being satisfactory evidence that, by the mistake of a clerk, there had been in the pass book a double entry of the same sum to the credit of the respondent, the mistake could in no way be shown by the bank, and if he were entitled fraudulently to extort from them £80 beyond the amount of what is justly due to him." And the reverse case must hold good. No amount of acquiescence on the part of the customer could justify a bank in withholding from him money really received for his credit, but omitted in the credit items of the pass book. The credit items are peculiarly within the knowledge and control of the banker, the debits within that of the customer. In *Commercial Bank of Scotland* v. *Rhind*, Lord Campbell seems to imply that the bearing of the pass book may almost be divided in this way, that the items to the customer's credit bind the banker, those to his debit the customer. He says: "On proof of the pass book having been in the custody of the customer, and

returned by him to the bankers without objection being made to any of the entries by which the bankers are credited, such entries may be *primâ facie* evidence for the bankers as those on the other side are *primâ facie* evidence against them."

In the same case the Chancellor said, at p. 651: "These entries in the pass book, whether on the debtor or creditor side, are merely items in an account current afterwards to be examined, adjusted and 'fitted.' According to the mode of operating proposed, the customer might take a pair of scissors, and, cutting off all the items in which the bankers take credit for payments, give in evidence the other side of the account, and so make a *primâ facie* case against the bankers to recover the full amount of all his payments into their hands."

In that case it was the customer's own contention that the whole pass book, or, at any rate, the items since the last making up, which items included the double entry in question, constituted only a current account, and the House appear to have utilised this contention for rejecting his somewhat preposterous claim. They presumably did not mean to imply that the pass book, however many times it has been in the customer's hands in the interval between periodical making up of accounts, remains throughout that period a mere account current.

As a stated account.

Anyway, later cases tend to establish it as a stated or settled account, not only after a yearly or half-yearly balance has been struck, but on each occasion when it is had out with the balance, debtor or creditor, pencilled in, and returned by the customer without comment or objection. Unless it can be elevated to that position, it affords little protection to the banker. In *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch. D., at pp. 71, 72, in the Court of Appeal, Lord Selborne, delivering the judgment of the court said: "Nor can they (the bankers) have the benefit of the doctrine that a

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pass book passing to and fro is evidence of a stated and settled account; because, if the directors of this society could not borrow money, they could not ratify an illegal borrowing simply by returning a pass book." The doctrine of the pass book being a stated and settled account is here treated as acknowledged and unquestionable.

Vagliano's Case, 23 Q. B. D. 243; [1891] A. C. 107, is probably the most favourable of the English cases to the banker's side of the question, especially as it indicates the means by which bankers may establish and fortify their position, and neutralise the effect of the adverse decision to be presently referred to, namely, *Chatterton* v. *London and County Bank*. In *Vagliano's Case*, in the Court of Appeal, 23 Q. B. D., at p. 245, it was contended as follows: "The plaintiff received his pass book half-yearly, containing entries debiting the payments made for him, for which the paid bills were retained as vouchers. These bills were retained by the plaintiff and the pass books returned by him without objection. This amounted to a settlement of account which cannot now be re-opened, especially considering the negligence of the plaintiff with regard to the examination of these vouchers." In the judgment of the five concurring Lords Justices, they say (at p. 263) with regard to this contention: "There is another point to be considered. The plaintiff from time to time received from the bank his pass book, with entries debiting the payments made, for which the bank sent the bills as vouchers, which were retained by the plaintiff when he returned, without objection, the pass books. It was contended that this was a settlement of account between him and the bank, and that he had been guilty of such negligence, with respect to the examination of the vouchers, as would have prevented him from being relieved from the settlement of account. But there is no evidence to show what, as between a customer and his banker, is the implied contract as to the settlement of account by such a

dealing with the pass book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of duty to the bank or negligence on his part."

It is true that the decision of the Court of Appeal was reversed by the House of Lords, [1891] A. C. 107, but it was so on grounds not affecting this part of the judgment. There are, indeed, passages in the judgments in the House of Lords which seem to recognise, as a matter of law and common sense, that the pass book must have some effect, and the customer some duty and obligation with regard to it and returned cheques and bills.

Lord Halsbury, in enumerating the circumstances which influenced the bank, says (p. 115): "The false documents were paid, duly debited to the customer, and duly entered in his pass book, and, so far as the banker could know or conjecture, brought to his knowledge on every occasion upon which the payment was made and the bills returned." Again, he says (p. 116): "Was not the customer bound to know the contents of his own pass book?" Lord Selborne (at p. 128) speaks of the dealings with the pass book as calculated to disarm suspicion on the part of the bank.

As matter of evidence.

The main value of the judgment of the Court of Appeal is the intimation that the effect of the pass book, and the duty of the customer with regard to it and the returned cheques and bills, are matters of evidence showing what is the implied contract between banker and customer, based on the custom of bankers. For their own protection, bankers should co-operate to formulate such custom, establishing the status of the pass book as a settled account, and affirming the duty of the customer to examine and compare it and the returned cheques and bills, and notify the bank of any errors therein appearing. It really seems little more than recognising and consolidating what one would have said was the common understanding on the subject; and it would be matter for sincere regret if the

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evidence suggested by the Court of Appeal were not forthcoming on a future occasion.

The decision further recognises the principle that if the pass book be regarded as a settled account, and there be a duty on the part of the customer with regard to it and the returned documents, the omission of that duty will constitute negligence, sufficient to estop the customer from re-opening the account to the detriment of the bank.

In the meantime, and until evidence of the nature suggested by the Court of Appeal is forthcoming, but little reliance can be placed on the pass book as precluding a customer from disputing debits which have appeared in the book both when delivered to him and returned by him without objection, or from denying the genuineness of his signature to cheques which represent such debits, and have been returned paid with the book and retained by the customer without comment.

Adverse decision.

If the case of *Chatterton* v. *London and County Bank* is to be accepted as laying down the law on the subject, it is difficult to see what is the object of the pass book from the banker's point of view, seeing that its effect is therein reduced to a minimum, and any duty on the part of the customer expressly negatived.

That case, in all its stages, is fully reported in *The Miller* newspaper, and there only.

The plaintiff banked with the defendant bank. Between September, 1887, and August, 1888, cheques were presented to the defendants, and paid, purporting to have been drawn by the plaintiff's authority and signed by him. The plaintiff called, or sent, for his pass book every week, and it was given to him made up to date, with the cheques paid in the interval in the pocket. He usually compared the entries in the pass book with the bank account in his ledger, and ticked off the items in the former before returning it to the bank.

In or about August, 1888, the plaintiff discovered that

to twenty-five of these cheques his signature as drawer had been forged, and he claimed to have the amount of them replaced to his credit at the defendant bank. At the first trial, the jury found (1) the cheques were not forged; (2) the plaintiff's conduct contributed to the loss. (*The Miller,* May 5th, 1890, p. 100.) Judgment was therefore entered for the bank. A Divisional Court granted a new trial. (*The Miller*, July 7th, 1890, p. 177; *The Times*, June 27th, 1890, p. 3.)

There is nothing of particular importance in the Divisional Court proceedings, the new trial being granted mainly on the ground that the trial below was unsatisfactory. The bank appealed. The Court of Appeal dismissed the appeal. (*The Miller*, November 3rd, 1890, p. 394, where the proceedings are reported *verbatim*.) Counsel for the bank said that the plaintiff usually in person took the paid cheques and the pass book away from the bank, and his ticking off the items authorised the bank to go on paying, admitted to the bank that the signatures were his. Lord Esher, M.R., expressed dissent and said: "It is a hundred to one that they never looked at the pass book. Why should they look to see whether or no he made ticks against the cheques?"

It is to be noticed that the main contention on behalf of the bank in this case was that, by recognising the payment of past forged cheques, the plaintiff authorised or induced the bank to pay the subsequent forged cheques. That contention does not seem a strong one. The bank pay each specific cheque because they believe the signature to be genuine, and preceding transactions have little or nothing to do with succeeding ones. Even the conscious payment of a bill to which the payer's signature has been forged does not estop him from setting up that a subsequent bill is forged by the same hand, unless a course of business is established amounting to authority to use the name. (*Morris* v. *Bethell,* L. R., 5 C. P. 47.) The stronger line, that of settled account, which the customer is, by his

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negligence and the resultant damage to the bank, estopped from re-opening, does not seem to have been put forward, at any rate prominently.

But the subsequent remarks of Lord Esher militate quite as much against this contention. If there is no duty on the part of the customer to examine and compare the pass book and paid documents, there can be no negligence in his not doing so, and so no ground of estoppel could arise, even admitting the pass book to constitute a settled account. The following is the material part of the argument. Counsel for the bank said he relied on the plaintiff's receipt of the cheques week by week, and his ticking the pass book opposite the bank's payments, as indicating that things were correct. Lord Esher: "Suppose he never looked at the pass book?" Lopes, L.J.: "What is the object of the book?" Counsel: "That he may examine it and see the state of his account." Lord Esher: "That may be. But supposing he does not do what he has a right not to do, how can that be relied on?" Counsel: "The plaintiff might have been entitled to say, 'I decline to give you any assistance; if it is my signature, pay; if not, you will not be authorised in paying.' But if he does not take up a merely negative position; if he says to the bank, either by language or conduct, 'That is my signature—" Lord Esher, interrupting: "Is everybody at liberty to send for his bank book week by week?" Counsel: "Yes; and, in the ordinary course of business, he does this in order to see that it is right." Lord Esher: "I do not know that he does." Counsel: "In any event, the point is a matter for the jury." Lord Esher: "But you must not put a burden on people the law never placed on them; you are putting on them the burden of saying, 'Look through the pass book.'" Lopes, L.J.: "I cannot help thinking the pass book is sent for the purpose of examining it." Lord Esher: "But he is not bound to look at it." Counsel: "If he sends for it week by week,

Lord Esher's views.

the bank are reasonably justified in coming to the conclusion that it is examined, and that they are checked in their payments." Lord Esher: "I do not know that they are. That is putting a burden on the bank [*sic* in *The Miller* report, but clearly must be, as before, 'on people,' or 'on the customer'], which you have no right to do, and which would interfere with business all over the country. If the mere fact is to give the bank any right at all, we are putting a burden on the customer, which I feel very much disinclined to do." Counsel: "He goes for it himself." Lord Esher: "But has the bank a right to infer anything from it? A hundred things may happen to prevent him from looking into it when he has got it, and what right has the bank to infer that he has looked into it?"

No formal judgment was given, the appeal being simply dismissed.

On the new trial (*The Times*, January 21st, 1891; *The Miller*, February 2nd, 1891), Mr. Justice Mathew, in summing up to the jury, told them that the questions were, whether the cheques were forgeries and whether the bank were misled by the plaintiff's conduct, and had the plaintiff, by his conduct, disentitled himself to recover from the bank. He said there was no contract between the bank and the customer with regard to the pass book. If the bank had proved they were misled, and they had not done so, could it be said that the plaintiff had done anything wrong because he conducted his business in his own way? People in business were not always guarding against fraud, but against mistakes. Supposing the plaintiff had told the clerk, who, it was suggested, had forged the cheques, to examine the pass book and compare the returned cheques with it and the counterfoils, would the bank have any right to complain? And yet, in that case, the frauds would not have been discovered any sooner in the ordinary course of events.

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The jury found all the questions in favour of the plaintiff, and judgment was given against the bank.

Here, again, the settled account aspect of the pass book does not seem to have been put forward, but the remarks of Mathew, J., like those of Lord Esher, would be equally fatal to any contention based on that ground.

The point introduced by Mathew, J., as to the right of the customer to absolutely delegate all examination of the book and returned documents to another, thereby escaping all liability, is no doubt productive of some difficulty. A certain amount of delegation is essential in business, and in ordinary cases, a man is perhaps not expected to anticipate fraud and forgery on the part of those he has no reason to suspect. Recognition of the right to delegate the examination to a subordinate, free from any supervision, is, however, so destructive of any protection to the banker that the more reasonable view would seem to be that, as in the case of filling up cheques, it is part of the customer's duty to his banker not to leave this matter to the uncontrolled management even of a confidential clerk. In formulating the custom and evidence hereinbefore referred to, this matter should be borne in mind, and the customer's obligation defined as, either to himself examine the pass book and the returned articles, or, if he delegate the duty, to exercise such supervision over the person performing it as to render the combined operation equivalent to a personal investigation.

American decisions.

American decisions are far in advance of those of our own courts on the subject of the pass book, and ought to be helpful in putting matters on a proper basis.

Leather Manufacturers' Bank v. *Morgan*, in 1885, is a decision of the Supreme Court of the United States, reported 117 U. S. 96. In that case the amount of genuine cheques was fraudulently raised by a confidential clerk. The frauds covered about six months, during which the customer had back his pass book and paid cheques three times.

The customer made some examination of his cheque book and counterfoils, with a view to roughly checking his bank balance, but he does not seem to have, in any real sense, examined his pass book or the returned cheques; and the clerk, by manipulating the addition of the counterfoils, a duty entrusted to him, evaded, for a time, discovery of the fraud. The customer admitted that if, on any of the three occasions, he had compared the pass book with the counterfoils, he must have discovered that his account had been charged with the raised cheques. The judge of first instance decided against the bank on the ground that the customer was under no duty whatever to the bank to examine his pass book and the vouchers returned with it, in order to ascertain whether his account was correctly kept.

The Supreme Court held that this view of the customer's obligation was not consistent with the relations of the parties or with principles of justice. They said that the sending of the pass book by the customer to be written up and returned with the vouchers is a demand on his part to know what the bank claims to be the state of his 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 depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. The court then quote the report to the English Court of Chancery in *Devaynes* v. *Noble* (*ante*, p. 115), and say that that report, made in 1816, is equally applicable now, both in England and America, and continue: "The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book." Later on the court say: "Without impugning the general rule that an account rendered, which has become an account

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stated, is open to correction for mistake or fraud, other principles come into operation where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith by another for him; by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection, which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness." The court further indicate another respect in which the position of the bank might be regarded as altered and prejudiced by the non-discovery and non-communication of the frauds. They say: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps by the arrest of the criminal or by an attachment of his property or other form of proceeding to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. . . . An inquiry as to the damages in money actually sustained by the bank, by reason of the neglect of the depositor to give notice of the forgeries, might be proper if this was an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defence it is that the depositor has, by his conduct, ratified or adopted the payment of the cheques, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration was, in itself, a valuable

one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and, it may be, effectively exercising it."

This view is strengthened by the fact that much the same consequences have affected English decisions as to what alteration in the position of a bank would fix a customer with adoption of a forged cheque or bill, when, having knowledge thereof, he failed to communicate such knowledge to the bank. (*Ogilvie* v. *West Australian, &c., Co.* [1896] A. C., at p. 270; *M'Kenzie* v. *British Linen Company*, 6 A. C. 82. (See *post*, p. 149, "Forgeries.")

The same standard of alteration of position seems at least as applicable where it is sought to re-open a settled account.

Duty of customer recognised by American courts.

The main point to be noticed up to this stage is the unqualified manner in which the Supreme Court of the United States affirm that duty of the customer with regard to the pass book which was denied by Lord Esher.

To the same effect is the judgment in *Critten* v. *Chemical National Bank of New York*, a decision of the Supreme Court of New York in 1902, reported 171 New York Reports, 219. The court there say: "If the depositor has, by his negligence in failing to detect forgeries in his cheques and give notice thereof, caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default."

They particularly dwell upon the duty of the customer to utilise his counterfoils, saying: "Considering that the only certain test of the genuineness of the paid cheques may be the record made by the depositor of the cheques he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record."

The duty of the customer with regard to the pass book

is further emphasised by the Supreme Court of the United States in the *Leather Manufacturers' Bank Case, ubi sup.*, by the way in which they treat neglect on his part of the means of knowledge afforded by the pass book and the returned documents as equivalent to actual knowledge on his part, in order to fix him with adoption of the forged cheques.

After quoting Lord Campbell's decision in *Cairncross* v. *Lorimer*, 3 Macq., at p. 830, which enunciates the principle of adoption, but predicates full notice of the act which is adopted, they say: "This, however, could not be if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance and notify it of errors therein in order that it might correct them, and, if necessary, take steps for its protection by compelling restitution by the forger. But if the evidence showed that the depositor intentionally remained silent after discovering the forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered and infer previous authority to make the cheques, and yet forbid the application of the same principle where the depositor was guilty of neglect of duty in failing to do that in reference to the account which he admits would have readily discovered the same fraud? It seems to the court that the simple statement of this proposition suggests a negative answer."

It may be admitted that English courts do not seem to have carried the doctrine of adoption further than cases where actual knowledge existed, and in *Critten* v. *Chemical National Bank of New York* (*ubi sup.*), the Supreme Court of New York, referring to the passage above quoted, say: "While we hold that this duty rests upon the depositor, we are not disposed to accept the doctrine asserted in some of the cases that by negligence in its discharge, or by failure to discover and notify the bank, the depositor either adopts the cheques as genuine or estops himself from asserting that they are forgeries."

If, however, this imputed knowledge is not to be deemed tantamount to actual knowledge in connection with adoption, it does not seem unreasonable to put it forward, as do both American courts, as ground, like negligence, for refusing relief to the customer, when the re-opening of the account would involve loss to the bank.

Delegation of duty of customer.

The somewhat difficult question of delegation is fully dealt with by both American courts, though on somewhat differing lines.

The Supreme Court of the United States say: "Where the agent committed the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, without, at least, showing that he exercised reasonable diligence in supervising the conduct while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily on the principal cannot be deemed the equivalent of performance by the latter."

This seems a fair and reasonable view. If a man has a duty to perform, not absolutely necessitating its entire fulfilment by himself personally, he may delegate it to another, but subject to its being satisfactorily and properly carried to a conclusion; and for the accomplishment of this he remains ultimately responsible. The mere telling another to do a thing cannot be regarded as the equivalent of doing it. If the duty is to make reasonable examination of the pass book and returned documents, the labour may be divided by relegating the mechanical part to a subordinate, subject to efficient supervision on the part of the principal; their united work being fairly considered as tantamount to the unaided efforts of the principal. Without such supervision this

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is obviously not the case. The *dicta* which seem to imply that lack of supervision is not attributable as negligence must be referred to cases where there is no imperative personal duty primarily resting on the principal.

In *Critten* v. *Chemical National Bank, ubi sup.*, the court enunciated a very ingenious doctrine on this question of delegation.

They say: "Of course the knowledge of the forgeries which Davis (the fraudulent clerk to whom the duty of examination had been entrusted by the customer) possessed, from the fact that he was himself the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the cheques with the cheque book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they entrusted the examination to Davis instead of a third person, but they can be no better off on that account. If they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have discovered the frauds."

It may be doubtful whether an English court would adopt this idea of, so to speak, filtering the knowledge of the fraudulent subordinate; it has at present no counterpart in English law. The simpler method seems to be to adhere to the principle of the pass book being a settled account, to insist on the duty of the customer to examine and compare it with the returned cheques and counterfoils, or to have that duty performed under effective supervision, and treat the omission of such duty as constituting negligence, estopping the customer from re-opening the account if the bank were shown to have been prejudiced thereby, such prejudice consisting in the deprivation of

opportunity of self-protection or the loss of any remedy, civil or criminal, against the offender, it being immaterial whether the civil remedy would have been likely to produce satisfactory results or not.

The difficulty in the way of establishing this position lies mainly in the *dicta* of Lord Esher and Mathew, J., in *Chatterton* v. *London and County Bank*. To overcome this, the banker must rely upon the expressions of the five Lords Justices in *Vagliano's Case*, supplemented by evidence of the nature specified in those expressions, and utilising, at least by way of argument, the conclusions of the American courts.

It must not be forgotten that if Lord Esher's view is correct, and there is no obligation whatever on the customer to look at his pass book, this would be fatal to the assumptions of acquiescence in course of business, charges for interest and commission, and the like, which have been hitherto deduced from the return, without comment, of the pass book in which such items figure. The judicial recognition of such deductions affords further ground for questioning the soundness of Lord Esher's views. (See, *ante*, "Relation of Banker and Customer," p. 4.)

Degree of care requirable from customer.

As to the degree of care in examining the pass book and vouchers which may be reasonably expected from the customer, he clearly cannot be required to take such minute precautions as to exclude all possibility of forgery or fraud. He is not bound to resort to microscopical or chemical tests. In inspecting the pass book he would probably at once recognise the majority of the debits as representing cheques he recollected drawing, or periodical payments he had directed the banker to make; in case of an item he could not at once identify he should refer to the returned cheque, and if that failed to recall the transaction, to the counterfoil; if that, too, failed to suggest the occasion, he should examine the cheque narrowly, and if any suspicion remains, which he cannot

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satisfy by inquiry, he should communicate the matter to his banker.

This seems a rough outline of what a reasonable man would do if his own interests were involved, the test to be applied when the performance of a duty to another to take reasonable care is in question.

CHAPTER XIII.

CONVERSION—MONEY HAD AND RECEIVED. VOID AND VOIDABLE INSTRUMENTS.

Conversion defined.

A CONVERSION is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession. To constitute this injury, there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it. (Bullen & Leake, 5th ed., p. 382.)

Intention is no element in conversion. "Any person who, however innocently, obtains possession of goods the property of another, who has been fraudulently deprived of the possession of them, and disposes of them, whether for his own benefit or that of another person, is guilty of a conversion." (Bullen & Leake, *ubi sup.* *Hollins* v. *Fowler*, L. R., 7 H. of L., at p. 795.)

A bill, note or cheque, or the paper it is written on, is "goods" within the above definition. Where it is a negotiable instrument, the damages are its face value. Even in the case of a non-negotiable instrument, it would seem that the person who has obtained money by means of it is estopped from alleging that its value is not the amount he has obtained by its means. (See *Bavins, jun., and Sims* v. *London and South Western Bank* [1900] 1 Q. B. 270.)

When action maintainable.

It is to this action that, subject to statutory protection, a banker is liable who—

(*a*) Pays a cheque on a forged indorsement. (*Smith* v. *Union Bank of London*, L. R., 10 Q. B. 293, 295; 1 Q. B. D., at p. 35.)

(*b*) Collects a bill, note or cheque with a forged indorsement, or to which the customer has no title. (*Bissell* v. *Fox*, 53 L. T., N. S. 193; *Fine Art Society* v. *Union Bank of London*, 17 Q. B. D. 705; *Kleinwort* v. *Comptoir National D'Escompte* [1894] 2 Q. B. 157; *Great Western Railway Co.* v. *London and County Bank* [1899] 2 Q. B. 172; [1901] A. C. 414; *Capital and Counties Bank* v. *Gordon* [1903] A. C. 240.)

(*c*) Pays a bill accepted payable at his bank to a person who holds it under a forged indorsement. In this case there is, of course, no statutory protection, even if the bill were one payable on demand, inasmuch as it is not drawn on the banker.

(*d*) Delivers goods entrusted to him for safe custody to the wrong person. (See "Goods for Safe Custody," *post*, p. 178.)

(*e*) Takes as holder for value a bill or cheque with a forged indorsement, or a cheque marked "Not negotiable," to which the title is void or defective. (*Great Western Railway Co.* v. *London and County Bank* [1901] A. C. 414; *Capital and Counties Bank* v. *Gordon* [1903] A. C. 240.)

In all cases involving payment of money, the liability for conversion is quite independent of any question of the right to debit the customer. The banker may be liable in conversion, and disentitled to debit his customer at the same time, and so stand to lose the money twice.

Who may sue for conversion. The true owner.

The person to whom this remedy is given, or against whom the banker is protected, is frequently termed in the Bills of Exchange Act, "the true owner," but no definition is given in the Act. The term also constantly occurs in judgments, but again without definition. The matter is complicated by this: Where a cheque or bill has been wrongfully taken or detained from a man, or dealt with in a manner inconsistent with his rights, and prejudicial to him, his only remedy is, clumsily enough, by an action

for conversion, trover or detinue of the paper on which the cheque or bill is written. There is no other form of action available but this, and this form of action is confined to dealings with chattels. But the chattel part of a negotiable instrument, while it brings it within the range of conversion, is the subordinate element of its entity. The contractual part, of which the chattel is merely evidence, involving as it does negotiability, governs the passing of the property in and right of possession to the piece of paper, and may divert or suspend both of them to quarters or in ways which would be impossible in the case of anything which was a mere chattel without any contractual element, such as a horse or a book. For instance, a *bonâ fide* holder for value may acquire a title to the chattel part of a cheque, which he could not sustain with regard to any other chattel, even if purchased in market overt. In *Smith* v. *Union Bank of London*, 1 Q. B. D. 31, a cheque become payable to bearer was stolen and negotiated to a holder in due course. It was held that he, and not the person from whom it was stolen, was the "true owner." So, on the other hand, a forged indorsement or the "Not negotiable" crossing may preclude the passing of the property in the paper in circumstances otherwise sufficient to transfer it.

Possibly the addition of the otherwise superfluous word "true" in the descriptive title "true owner" is designed to point this. For the "true owner," in the sense of the person who can support conversion for a bill, note or cheque, is the person who, taking into consideration the provisions of the Bills of Exchange Act, and recognising that the negotiable character of the instrument overrides the mere property in the chattel, is on that basis entitled to the property in and possession of the piece of paper.

It is generally laid down, in stating the position requisite for a plaintiff in conversion, that he must be entitled to the property in and possession of the chattel at the date of

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the conversion. (See *White* v. *Teal*, 12 A. & E., at p. 115.)

After-acquired title.

It has been said that a man cannot sue for conversion by virtue of a subsequently acquired title to the chattel converted. In *Bristol and West of England Bank* v. *Midland Railway Co.* [1891] 2 Q. B. 653, the question was dealt with by the Court of Appeal, and the previous authorities reviewed. The court held that when the rightful owner demanded the goods, refusal, of itself, constituted a conversion; that it was no answer to the demand to say that the goods had been parted with prior to the accrual of that owner's title, if the parting with them was a wrongful act against the person to whose title the plaintiff had subsequently succeeded.

But the case must be distinguished from those where the goods have in the interim been parted with, not wrongfully, but rightfully, as by delivery to a person having a revocable title before revocation or notice thereof, or have been dealt with on his behalf during the same period. It is abundantly clear that no conversion will lie for such acts either at the suit of the original owner or anyone deriving title from him.

And this latter principle will probably be found to exclude the former one in all cases connected with bills, notes and cheques, by reason of their negotiable character and the governing element of contract involved in them.

When the property in a bill passes. Void and voidable contracts.

If a bill, note or cheque, is delivered as a contract, the property in the chattel passes, it may be only temporarily, if the contract is revocable; if there is no contract, the property never passes. Whether there is a contract or not depends on the existence or absence of a contracting mind. Where there is a contract, then the result of that contract and its negotiable incidents is, that third persons may acquire rights which subsequent revocation will not be permitted to prejudice or affect.

The distinction is almost invariably brought forward by and in cases of fraud.

A man is induced by false representations as to the nature of the document, or by the substitution of one document for another, to put his hand to what is in form a negotiable instrument. There is no contracting mind, the document is null and void; and the property in, and right to possession of the chattel, the piece of paper, remain absolutely vested in the person deceived. (*Foster* v. *M'Kinnon*, L. R., 4 C. P. 704; *Lewis* v. *Clay*, 67 L. J., Q. B. 214.)

If a man is fraudulently deceived into issuing a negotiable instrument in favour of one specific person in the belief that he is another specific person an essential element of contract is lacking, and the results are the same. (*Lindsay* v. *Cundy*, 3 A. C. 459; *Tate* v. *Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376.)

A man is induced by fraud to execute and issue a negotiable instrument, knowing its character, and there being no substitution of one specific person for another. The contract is not void, but voidable. The property and right of possession in and to the chattel are divested; but, on repudiation of the contract, revert to the defrauded person, subject to any right acquired by third parties in the interval. (*Clutton* v. *Attenborough* [1897] A. C. 90; *Tate* v. *Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376; cf. *Cahn* v. *Pockett's Bristol, &c., Co.* [1899] 1 Q. B. 643.)

The distinction is, as suggested by Lord Penzance in *Lindsay* v. *Cundy*, 3 A. C., at p. 461, between a man who, being deceived, enters into no contract, and a man who, being also deceived, does enter into a contract. The doctrine of this case was held distinctly applicable to negotiable instruments by Lord Davey, in *Great Western Railway Co.* v. *London and County Bank* [1901] A. C. 414, and by the Court in *Tate* v. *Wilts and Dorset Bank*, *ubi sup.*

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Rights of third parties.

The rights of third parties which hold good against subsequent repudiation of a voidable contract, and preclude the action of conversion, are of various kinds and degrees.

Of course, a holder in due course of a bill, cheque or note, which he has taken in the interval, is fully protected. (*Clutton* v. *Attenborough* [1897] A. C. 90.)

But a smaller right in the instrument than that of a holder in due course would seem to be sufficient. In *Tate* v. *Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376, Channell, J., says: "I take it the bankers were the holders of the cheque (whether they were holders for value does not matter), and that they got payment of it in the regular way. It is admitted, if that was so, there was a fresh disposition of the cheque, and that thereupon the transaction could not be avoided so as to make the bank liable."

"Fresh disposition" is a very wide term, and would cover almost any legitimate dealing with a negotiable instrument. As exemplified in this case of *Tate* v. *Wilts and Dorset Bank*, the doctrine protects the banker who has collected an uncrossed cheque for a customer, where that customer holds it under a voidable title.

Voidable contracts and the "Not negotiable" crossing.

But no rights countervailing repudiation of a voidable contract can be acquired through a cheque marked "Not negotiable," except where statute affords protection.

The effect of such marking is to put each holder on precisely the same footing. On repudiation or revocation of a voidable contract affecting such cheque, the title of the true owner relates back to the date of the fraud or other circumstance which entitles him to repudiate. Every person who has taken or dealt with the cheque does so on the basis that his position is subject to possible revocation, and can therefore set up no rights acquired during the interval, either to the cheque or its proceeds. (*Great Western Ry. Co.* v. *London and County Bank* [1901] A. C. 414.) Any one of the successive holders could be sued for

conversion, it being no defence that he has parted with the article converted. The document stands on a lower level than an ordinary chattel, to which an innocent third party can acquire a good title by purchase from one who holds it under a voidable contract. (*White* v. *Garden*, 10 C. B. 919.) And, in questions of conversion, the liability of an agent being dependent on the title of his principal, it would follow that any person dealing with the cheque, as a banker in collecting it, would on revocation be liable in conversion to the true owner, unless protected by sect. 82 of the Bills of Exchange Act.

Money had and received.

Wherever conversion lies, and money has been received for the goods or negotiable instrument converted, the true owner is entitled to waive the wrong and sue for money had and received to his use. The claims are usually joined in the alternative, and this is the form in which the action is couched against, for instance, a banker who has collected a cheque with a forged indorsement.

Not merely alternative.

The action for money had and received is not, however, merely an alternative to the action for conversion. It is an independent form of claim; and lies in many cases where conversion would not. It is applicable wherever the defendant has received money which, in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff. Both conditions must be fulfilled to entitle the plaintiff to recover, but in many cases the receipt to the use of the plaintiff is deduced from purely legal considerations, the actual receipt being in no ordinary sense to his use.

Thus, money paid by mistake of fact to the innocent holder of a bill or cheque with a forged signature or a forged indorsement, is in his hands money had and received to the use of the person paying it (*Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 49), though other considerations may impede its recovery as such.

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Then the money must, in justice and equity, belong to the plaintiff. The proposition might, perhaps, be more accurately stated by saying that the action lies where it is just and equitable that the defendant should pay the money to the plaintiff. The plaintiff may be entitled to it as against someone else, but not as against the defendant. This is essentially the case where the defendant has only dealt with the money as an agent.

If his agency has involved him in a conversion, or if he has knowingly assisted in a wrongful receipt, it is consistent with justice and equity that he should pay the money, even though he may have parted with it to his principal.

So, again, if the money is still in the hands of the agent, and the principal has no claim to it, there is nothing unjust or inequitable in making the agent pay it over to the true owner.

Protection of agent.

But there is a well-settled series of cases which show that where an agent has innocently received money paid him for his principal, and has handed it over to that principal, or irrevocably altered his position with regard to it, the money cannot be recovered from him, either by the person who paid it or by the person entitled to it. (*Oates* v. *Hudson*, 6 Ex. 348; *Holland* v. *Russell*, 4 B. & S. 14; *Tate* v. *Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376; *Barnes, jun. and Sims* v. *London and South Western Bank* [1900] 1 Q. B. 270) (*a*). The case of *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 47, does not militate against the rule. There the defendant bank had allowed the customer to draw out the money before they had themselves received it.

Here again, the distinction between a void and voidable contract affecting a cheque or bill plays an important part. There being no conversion by the dealing with a voidable instrument pending repudiation, the true owner can only recover money received upon it and parted with during

(*a*) As to the strict limitation of these cases to agency pure and simple, see *Continental Caoutchouc, &c. Co.* v. *Kleinwort*, 20 Times L. R. 403.

the interval, if it is just and fair that he should do so; if the position of the party from whom he claims would not be prejudiced by his having to repay.

On this principle, a banker is protected if he has collected a cheque or bill for one who has a voidable title to it, and has paid the money over, without the means of recovering it, before he has received notice of revocation. (See *Bavins, jun. and Sims* v. *London and South Western Bank, ubi sup.*) In this case the fact that the bank had credited the customer's account with the proceeds of the cheque, and that amounts had been drawn out which, on the ordinary system of appropriation, exhausted those proceeds, was held not to preclude the true owner from recovering as money had and received, inasmuch as the state of the account was such as admitted of the bank debiting the amount to the customer, and therefore the bank were not, in fact, prejudiced, and had not irrevocably altered their position. Presumably the same rule would obtain, even in cases within *Capital and Counties Bank* v. *Gordon* [1903] A. C. 240, inasmuch as the right of a banker to debit the customer with a returned cheque, or money credited thereon seems, in that case, to have been held consistent with the banker's having been holder for value of the cheque.

In some cases it seems to have been suggested that negligence might deprive the agent of the protection above referred to; but it will be noticed that in *Bavins, jun. and Sims* v. *London and South Western Bank*, the Court of Appeal found that the bank had acted negligently, and yet were prepared to extend to them the protection, had the facts warranted or necessitated it.

It is not material to consider whether the fact of the money having been received by the banker on a cheque marked "Not negotiable" would operate directly to deprive the banker of the protection accorded to an agent. Sect. 81 only deals with "title" to the cheque, and inferentially with that to the proceeds. But, as above shown, the

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banker would, unless protected by sect. 82, be liable for conversion of a negotiable instrument, and so the question would not arise. It might also be contended that the reference back of the true owner's title rendered the receipt of the money by the banker wrongful in the first instance, in which case the protection as an agent would not apply.

CHAPTER XIV.

FORGERIES.

UNDER sect. 24 of the Bills of Exchange Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or give a discharge therefor, or enforce payment thereof against any party thereto, can be acquired through or under that signature (*a*).

The section is subject to the provisions of the Act, and also to exception in cases where the party against whom it is sought to retain or enforce payment of the bill is estopped from setting up the forgery or want of authority.

Protection of bankers against forgeries.

The provisions of the Act protecting bankers from the effects of this section are: Sect. 60, paying cheques on forged indorsement; sect. 80, paying crossed cheques in conformity with the crossing; and sect. 82, collecting crossed cheques for a customer; which are herein dealt with under the appropriate headings.

The main dangers to which the paying banker is left exposed are the following:—

1. Forgery of his customer's signature as drawer of cheques.
2. Fraudulent alteration of the amount of cheques presented for payment.
3. Forged indorsement on bills accepted payable at his bank.

Forgery of customer's signature as drawer.

Apart from adoption or estoppel, there is no right in the banker to debit to the customer the amount of a cheque which he has paid, to which the drawer's signature is a

(*a*) This section does not touch the case of negotiation abroad under a forged signature if by the *lex loci* the transferee has acquired a good title. *Embiricos* v. *Anglo-Austrian Bank*, The Times, August 11th, 1904.

forgery. The money has been paid without authority. It is not really a question of the banker's being bound to know his customer's signature or of whether he was negligent or not in not detecting the forgery, but simply a legal obligation placed upon him.

A cheque to which the drawer's signature is forged is a mere piece of paper, not a cheque at all, unless it be adopted by the drawer or become valid by estoppel as against an indorser. (See *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 49.)

The banker's only chance of being able to charge the customer with the amount of such cheque is where the conduct of the customer establishes an estoppel or amounts to adoption of the cheque.

Estoppel. Duty of customer.

The basis both of estoppel and adoption in such cases is the duty owed by the customer to his banker arising from the mutual relation. The definition of that relationship as that of debtor and creditor obviously does not cover the whole of its incidents. The payment of cheques is, in itself, a superadded obligation, with respect to which, whether the cheques are crossed or uncrossed, the relation of mandant and mandatory has been legally recognised. (Cf. *Scholfield* v. *Londesborough* [1896] A. C. 514.)

The collection of cheques, especially since *Gordon's Case*, must be regarded as agency pure and simple.

And, outside these recognised relationships, there are obligations on the customer referable to the established course of business between him and his banker; and even beyond those there is the general understanding between business men in a business relation, that matters shall be conducted with a due regard to the interests of both parties.

Attributable, probably, to the relationship of mandant and mandatory, but supported by the other obligations referred to, there unquestionably appear to be duties incumbent on the customer, constraining him not to prejudice the banker's position by any wilful act or

omission or by neglecting any precaution which a reasonable man would take in his own interest.

The case of *Scholfield* v. *Londesborough* [1896] A. C. 514, has a more direct bearing on the second heading of the forgeries likely to affect the paying banker, namely, fraudulent alteration of cheques; but the judgments, in distinguishing that case from *Young* v. *Grote*, and doing so mainly on the ground that *Young* v. *Grote* was a case of banker and customer, distinctly affirm the existence of a duty on the part of the customer of the nature above described, particularly with reference to the filling-up and issue of cheques.

Apart from *Young* v. *Grote*, the principle had been previously recognised, notably by Lord Cranworth, in *Orr* v. *Union Bank of Scotland*, 1 Macq., H. of L. Cases, 513, where he said: "The principle is a sound one, that where a customer's neglect of due precaution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." (See, also, *per* Lord Cranworth, in *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H. L. C. 389.)

Referring to these *dicta*, in *Scholfield* v. *Londesborough*, *ubi sup.*, Lord Halsbury, C., at p. 523, says: "If, to use Lord Cranworth's phraseology, the customer by any act of his has induced the banker to act upon the document, by his act or neglect of some act usual in the course of dealing 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."

And there are passages in the other judgments, particularly those of Lord Shand, Lord Davey, and Lord Macnaghten, which distinctly recognise the existence of the duty of the customer not wantonly to imperil the interests of the banker, arising out of the contractual

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relation between the parties, and also recognising the responsibility of the customer for any loss accruing to the banker from the breach of such duty, notwithstanding the intervention of forgery or fraud. *Per* Lord Watson, at p. 537: "The duty of the customer arises directly out of the contractual relation between him and the banker, who is his mandatory." Lord Macnaghten, referring to *Young* v. *Grote*, says at p. 545: "It is obvious that the court went very much on the authority of the doctrine laid down by Pothier, that in cases of mandate generally, and particularly in the case of banker and customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable." *Per* Lord Shand, at p. 548: "The case of *Young* v. *Grote*, between a banker and his customer, was one in which there was the relation of parties contracting with each other. It appears to me that the ground of decision, as reported, was in conformity with the limited doctrine of Pothier, that this relation inferred, if not expressly, at least by implication, the duty and obligation on the customer's part in issuing cheques on his banker to third parties, to take care that these cheques were not in such a form as to give the means of enlarging their amount without this being readily detected." *Per* Lord Davey, at p. 550: "The doctrine of *Young* v. *Grote* was one arising out of the relation of mandant and mandatory."

Young v. *Grote*, 4 Bing. 253, was a case in which the amount of a cheque was fraudulently raised. The above expressions clearly indicate that, as between banker and customer, the intervention of crime does not exonerate the customer by whose default such crime was facilitated. The reason appears that suggested by Lord Watson, in *Scholfield* v. *Londesborough*, *ubi sup.*, at p. 537, namely, that reasonable precaution against crime is part of the customer's implied obligation to his banker. Crime,

especially forgery, being the main source of danger to the banker in connection with cheques, it must be taken to have been in the contemplation of the parties in the formation of their implied contract. The usual rule about its non-contemplation is thus excluded; and loss thereby, if facilitated by breach of duty on the part of the customer, may be set up by the banker as an estoppel, or as a ground for damages, which are not too remote, being within the purview of the contract. The remarks of the House of Lords in *Farquharson* v. *King* [1902] A. C. 325, as to *Scholfield* v. *Londesborough* in this connection, are directed only to the cases in which all contractual duty is wanting. The duty further binds the customer not to withhold from the banker information in his possession which may put the banker on his guard against forged instruments, enable him to protect himself against being misled into paying them, or furnish him with the means and opportunity of taking proceedings, criminal or civil, against the forger. (See *Ogilvie* v. *West Australian, &c., Co.* [1896] A. C. 270; *M'Kenzie* v. *British Linen Company*, 6 A. C. 82.)

It is this branch of the duty which constitutes the basis of the doctrine of the adoption of forged cheques hereinafter referred to. As to duty to examine, see under heading "Pass Book," *ante*, pp. 115, *sqq.*

Apart from adoption, it is not, perhaps, easy to define where estoppel as to the absolute forgery of the customer's signature comes in.

Mere carelessness in keeping the cheque book is, of course, no use. In fact it is generally adduced as the *reductio ad absurdum* of the contentions as to estoppel by negligence. (See, for instance, *per* Lord Halsbury, in *Scholfield* v. *Londesborough* [1896] A. C., at p. 531; *Farquharson* v. *King* [1902] A. C., at p. 336.)

The entrusting the occasional drawing of cheques to an agent, who subsequently draws others without authority,

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would come rather under the head of holding out than of estoppel by breach of duty.

The lack of supervision over an agent, who might have access to the cheque book and facilities for concealing forgeries committed by him, is probably too remote in this connection. (See *Vagliano's Case* [1891] A. C., at p. 115; *Farquharson* v. *King* [1902] A. C. 325.)

Fraudulent raising of cheques. *Young* v. *Grote*.

With regard to the second form of forgery, the fraudulent raising of the amount of a cheque, the question of the customer's duty arose in the case of *Young* v. *Grote*, 4 Bing. 253. No case has probably been more discussed and criticised; but it is confidently submitted that the quotations from *Scholfield* v. *Londesborough*, above given, with reference to it, rehabilitate its authority as between banker and customer, on the ground of duty owing from the latter to the former. That duty is, in issuing cheques, not to leave blank spaces or afford obvious facilities for alteration. If, through neglect of this duty, an evil-disposed person is enabled to raise the amount of the cheque in such a manner as not to excite suspicion, and the banker innocently pays the higher amount, he will be entitled to debit his customer therewith. *Marcussen* v. *Birkbeck Bank*, 5 Times L. R. 179, 463, 646, is in point, but not very satisfactory; as the Divisional Court and Court of Appeal only ordered a new trial on the ground that the banker's defence on this ground had not been properly put to the jury, without expressing any definite opinion. On the new trial (Journal of the Institute of Bankers, vol. xi., p. 403), Mathew, J., told the jury that the law on the subject was that if a cheque was so carelessly drawn as to expose a banker, using reasonable care, to the risk of paying what was not intended, then the banker was not liable. The drawer must take reasonable care in drawing the cheque. The jury found a verdict for the bank, and judgment was entered for them.

With regard to both classes of forgery, the customer

would be estopped if it could be shown that he had actively misled the bank into payment of the particular document, in any of the ways exemplified in *Vagliano's Case*. But the circumstances involving such estoppel, save in so far as they relate to the pass book, would seem practically confined to bills accepted payable at the banker's.

A man who consciously pays a bill to which his name has been forged is not estopped from disputing a subsequent forgery by the same hand, unless the repetition of such payment establish a course of business authorising the use of the name. (*Morris* v. *Bethell*, L. R., 5 C. P. 47.)

Adoption of forged cheques or bills.

Although it is said that a forgery cannot be ratified, it is quite clear that a man may, by his conduct, be estopped from denying his signature, or held to have adopted the forged instrument.

If a man knows that his signature has been forged to a cheque, and that it is about or likely to be presented for payment to his bankers, he is bound to warn his bankers of the fact. If he does not, and the bank's position is thereby altered, he adopts the cheque. (*M'Kenzie* v. *British Linen Company*, 6 A. C. 82, see at pp. 91, 109; *Ogilvie* v. *West Australian, &c., Co.* [1896] A. C. 257, at p. 270.)

Mere silence, without resulting injury to the bank, does not work an estoppel. (*M'Kenzie* v. *British Linen Company, ubi sup.*, at pp. 109, 111, 112.)

The prejudice or injury to the bank, resulting from the customer's silence, and estopping him from disputing his signature, is not confined to the payment of the cheque. The bank may have paid such cheque before the discovery of the forgery by the customer.

The customer will be equally estopped if, by his silence, the bank are precluded from the opportunity of protecting themselves against subsequent forgeries, if any, by the same person, or lose the chance of taking proceedings, civil or criminal, against the forger, as by his escaping out

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of the jurisdiction in the interval. And it is immaterial whether civil proceedings against the forger would have been likely to result in getting money back or not. (*Ogilvie* v. *West Australian, &c., Co.* [1896] A. C., at p. 270: cf. *Knights* v. *Wiffen*, L. R., 5 Q. B. 660; and the Scotch cases quoted in *M'Kenzie* v. *British Linen Company*, 6 A. C., at p. 110.)

An expression, apparently to the contrary, in *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C., at p. 57, is not of sufficient weight to stand against these authorities.

This principle is particularly valuable to the banker, inasmuch as, where it can be put in force, it affects all cheques previously forged by the same person, though the customer may have only discovered the fraud in relation to the last of the series.

This doctrine has been fully recognised by the Supreme Court of the United States, in *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S., 96.

Question of implied knowledge.

In this latter case, the court held that actual knowledge of the forgery on the part of the customer, was not essential; that he must be treated as having possessed such knowledge, as, but for his own negligence, he would have acquired, and on this basis they fixed the defendant with adoption of the forged cheques. This view was, however, disputed by the Supreme Court of New York, in the later case of *Critten* v. *Chemical National Bank*, 171 N. Y. 219. As to the bearing of these cases on the pass book, see "The Pass Book," *ante*, p. 128.

All the English cases, above referred to, seem to treat actual knowledge of the forgery as a necessary element of adoption. The nearest thing is the *dictum* of Lord Watson, in *Scholfield* v. *Londesborough* [1896] A. C., at p. 543. Speaking of sect. 64 of the Bills of Exchange Act, he says: "That clause admits an action for the altered amount of the bill, when the acceptor has authorised the

alteration. Accordingly, on the supposition already made, if it had been shown that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorise the frauds committed by Scott Sanders. That estoppel by negligence would, in my opinion, have been sufficient to establish that the respondent had 'authorised' the fraudulent alteration within the meaning of sect. 64."

It might be argued that authorising implies knowledge, and that breach of duty is thus equivalent to imputed knowledge; but it is not easy to extract a general principle from expressions directed to a particular enactment, and sect. 64 is primarily, at any rate, designed for the benefit of holders only.

The *dictum* might fairly, however, be utilised in the case of a cheque with the amount altered, which the customer ought to have discovered.

Forged indorsement on domiciled bills.

Another class of forgery productive of danger to the banker is that of forged indorsement on bills domiciled or accepted payable at the bank.

With regard to these, there is, of course, no statutory protection whatever. Neither sect. 60 of the Bills of Exchange Act nor sect. 19 of the Stamp Act of 1853 has any bearing on the question; inasmuch as the bills, even if payable on demand, are not drawn on the banker. The payment is made to the wrong person, who cannot give a discharge, and the banker is, therefore, not entitled to debit his customer. (*Robarts* v. *Tucker*, 16 Q. B. 560; *Vagliano's Case* [1891] A. C. 107.)

The banker's line of defence against the customer in such cases depends on other considerations.

If the payee is a fictitious or non-existent person, the banker is discharged and can debit the customer as having paid the bearer within sect. 7, sub-s. 3.

It is absolutely immaterial whether the acceptor knew or did not know that the payee was a fictitious or non-existent

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person. A real person may be a fictitious or non-existent payee, if he has not, and never could have, any relation or connection with the bill, his name being used only as part of the fraud and with a view to disarming suspicion. (*Vagliano's Case* [1891] A. C. 107.)

If the customer has by his act accredited the bill with the forged indorsement to the bank, or put upon the bank a risk greater than that involved by the possibility of a forged indorsement on a genuine bill, the customer must bear the loss.

In *Vagliano's Case, ubi sup.*, the drawer's name, as well as that of the supposed payee, was the work of the forger, and the documents were not really bills at all. The House of Lords held that Vagliano, by writing an acceptance on such documents, represented to the bank that, up to that stage at least, they were genuine bills, involving none but the ordinary risk; and that this representation being in fact untrue, the bank were entitled to be indemnified. (See, specially, *per* Lord Macnaghten, at pp. 158, 159; *per* Lord Halsbury, at p. 114.)

So, again, the inclusion of these spurious documents in letters of advice to the bank of bills coming forward for payment was an act of the customer directly tending to mislead the bank, though such letters could not be read as guaranteeing any indorsement.

There are references to the customer's duty with respect to the pass book in this case which have been dealt with under that heading. (See *ante*, pp. 118, 119.)

The salient feature in the case is the assertion of the right of bankers, acting as agents for the payment of domiciled bills, to all the protection, consideration and indemnities to which an ordinary agent is entitled as against his principal. "A principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done." (Lord Halsbury, at

p. 114.) "It is not disputed that there might, as between banker and customer, be circumstances which would be an answer to the *primâ facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *primâ facie* case. If the bank acted upon such a representation in good faith and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer and not the bank ought to bear." (Lord Selborne, at p. 124.)

Of course, in *Vagliano's Case* there was the special feature of drawer and payee both being really absent from the bill, so that Vagliano vouched as a genuine bill what, save for his signature, was mere waste paper; a material point, if not leading so directly to the payment as the forged indorsement; and an element not existing in the case of a forged indorsement to a genuine bill (see *per* Lord Macnaghten, at p. 159); but the rules laid down above are of general application, and form the test of the customer's responsibility in all cases.

The negligence on the part of the customer spoken of by Lord Selborne must, however, be understood as limited to negligence directly leading to the loss, or "enabling" it, in the legal sense of the phrase, to be committed. (*Farquharson* v. *King* [1902] A. C. 325; *Vagliano's Case* [1891] A. C., at p. 115.)

Liability to true owner.

Apart from any question between himself and his

customer, the banker who pays a bill domiciled with him on a forged indorsement is liable to the true owner for conversion of it, the payment being to an unlawful possessor, incapable of giving a discharge (*Smith* v. *Union Bank of London*, L. R., 10 Q. B., at p. 295; 1 Q. B. D., at p. 35); there being no protection to the banker answering that of sect. 60 with regard to cheques.

The banker would, of course, have a theoretical remedy against the person who received the money, if he were the forger or a party to the fraud.

As to the banker's position where the money has been paid to a person who took the bill *bonâ fide* and for value without notice of the forgery, see "Money Paid by Mistake," *post*, pp. 156, *sqq*.

CHAPTER XV.

MONEY PAID BY MISTAKE.

MONEY paid under a mistake of fact is recoverable as money had and received, unless circumstances exist which make it unfair and inequitable that it should be recovered by the party who paid it against the party who received it; as, for instance, where it has been innocently received by an agent and paid over to his principal before any notice of the contending claim. (See "Conversion—Money Had and Received," *ante*, p. 140; and *Jacobs* v. *Morris* [1902] 1 Ch., at p. 833.)

What mistake renders money recoverable.

The mistake must be one of fact, not general law, and it must be a mistake between the party paying and the party receiving. It is not sufficient that the party paying should be under a misapprehension as to some fact, and that, but for that misapprehension, he would not have paid the money; the mistake must touch the actual transaction.

In *Chambers* v. *Miller*, 13 C. B., N. S. 125, a bank paid a cheque on presentation, but immediately afterwards discovered that their customer, the drawer, had no assets to meet it. It was held that the payment was irrevocable, and the money not recoverable; on the ground that the mistake was not between the bank and the person who received the payment, but between the bank and their customer.

The same case shows that the property in money given in payment of a cheque passes as soon as the money is placed on the bank counter.

But it has been held that a mistake of fact which is between the parties may support an action for money had

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and received, although the party paying had means of knowledge of the real facts, of which he did not avail himself, provided he pay honestly. (*Kelly* v. *Solari*, 9 M. & W. 58; *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C., at p. 56.)

Forged signatures.

The existence of a forged signature, whether that of drawer, acceptor, or indorser, on a bill or cheque, is a mistake of fact between the person who pays and the person who presents the instrument and receives payment in ignorance of the defect. (*Cocks* v. *Masterman*, 9 B. & C. 902; *London and River Plate Bank* v. *Bank of Liverpool* [1896] 1 Q. B. 7; *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 49.) Both parties believe the document to be authentic in all respects, whereas it may in some cases not be a negotiable instrument at all, while in others a material element, supposed genuine, is only a sham.

Importation of question of negotiability.

The judgment of Mathew, J., in the above *London and River Plate Bank Case*, raised much controversy, by reason of the doctrine there enunciated that the exigencies of negotiability rendered money paid on a negotiable instrument to an innocent, though wrongful, possessor practically irrecoverable.

The Privy Council, in the *Imperial Bank of Canada Case*, also mentioned above, considered the propositions laid down by Mathew, J., too sweeping, and imposed certain limitations inconsistent with that judge's views.

The question involves the rights of bankers who pay on domiciled bills to which one or more signatures are forged, or on a cheque to which the customer's signature is forged, and is, therefore, of considerable importance.

Where the person receiving the money receives it with a knowledge of the facts or *malâ fide*, it can, of course, be recovered from him. (*Kendal* v. *Wood*, L. R., 6 Ex. 243.)

The difficulty arises where the person presenting the instrument has taken it in good faith and for value, in

ignorance of any previous forgery; and the banker pays him and subsequently discovers the forgery. Can the banker in any and what circumstances recover the money from the person who has innocently received it?

The following are the leading authorities on the point:—

In *Smith* v. *Mercer*, 6 Taunt. 76, an innocent holder took a bill to the bankers' where it purported to be accepted payable by a customer. The bankers paid it. Seven days afterwards, they discovered that the acceptance was a forgery, and claimed the money back. Held that they could not recover, on the grounds; first, that the bankers were bound to know their customer's signature, and negligent in not detecting the forgery; second, that by the lapse of seven days, the holder had lost the opportunity of giving notice of dishonour to prior parties.

In *Wilkinson* v. *Johnson*, 3 B. & C. 428, bills, purporting to bear the indorsement of H. & Co., having been refused payment, were taken to the London agents of H. & Co., who took them up for their honour, and paid the money to the holder, who was an innocent party and had given value. The same morning, the London agents discovered that the indorsement of H. & Co. was a forgery, as were also the names of the drawer and acceptor. They immediately gave notice to the holder, to whom they had paid the money; such notice being in time for the post, so that the holder could have given due notice of dishonour to other indorsers. Held that the money could be recovered back, on the grounds; first, that the plaintiffs were not the drawees or acceptors, nor the agents of the supposed acceptor; second, that they discovered the mistake, and gave notice thereof to the holder, in time for him to give due notice of dishonour to prior parties; third, that the fault was not wholly that of the plaintiffs, inasmuch as the calling upon them to pay for the honour of an indorser implied a representation that that indorser's name was really on the bill.

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Cocks v. *Masterman*, 9 B. & C. 902, was for long the leading case on the point. There, a bill purporting to have been accepted payable at a bank by a customer was presented to that bank by an innocent holder on the due date and paid. The next day the bank discovered that the supposed acceptance was a forgery. They at once gave notice to the person they had paid, and reclaimed the money. Held that they could not recover. The court gave no opinion as to whether the bank might have recovered the money if notice of the forgery had been given on the very day the money was paid, and proceed: "We are all of opinion 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 receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled so to do, if he thinks fit; and the parties who pay the bill ought not, by their negligence, to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due."

In *Mather* v. *Maidstone*, 18 C. B., at p. 294, it was suggested that the person who had in effect been paid had sustained no prejudice by the mistake; but Cresswell, J., said: "The law does not permit any inquiry as to that in the case of negotiable instruments; and it is highly expedient that that should be so." Jervis, C.J., said: "As a general rule, the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity, and when the bill is presented, if the acceptor pays it, the money cannot be recovered back,

if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery."

In *Bobbett* v. *Pinkett*, 1 Ex. D. 368, a bank paid a cheque drawn on them, contrary to the crossing, but to a person who had taken it for value and in ignorance of the fact that the payee's indorsement was forged. Bramwell, B., at p. 372, said that the customer might have refused to allow the bank to debit his account with the amount of the cheque; and, had he done so, and the bankers brought an action against the holder to recover back the money they had paid him, they could have maintained that action. In this case the bank had no knowledge or notice of the mistake until four days after payment. It should be stated, however, that the point was not a material one in this case, inasmuch as the drawer had sent the payee another cheque, and was himself suing the person who had received the money for the first.

Still, the *dictum* appears at variance with the other cases.

As will be seen, the judgment in *Cocks* v. *Masterman* may be read as laying down an absolute rule barring the recovery of the money; at any rate, unless reclaimed the same day; but there are subsequent references to negligence or the obligation to know the drawer's or acceptor's signature which might lead to the conclusion that the broad rule was limited to such cases; and if so, payment on a forged indorsement of a signature which could not possibly be known to the payor would not fall within its operation. Mr. Chalmers seems to incline to this view. (Bills of Exchange, 6th ed., p. 211.)

But in the much criticised case of *London and River Plate Bank* v. *Bank of Liverpool* [1896] 1 Q. B. 7, Mathew, J., lays down the law to be derived from *Cocks* v. *Masterman* in terms even broader than the general proposition contained in that judgment. He held that the ruling principle was,

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not negligence or the banker's knowledge or means of knowledge, but the right of a holder of a bill to an immediate and conclusive answer as to its fate, on the due date, which was an element essential to the negotiability of the instrument and imperatively demanded by the exigencies of business.

In the *London and River Plate Bank Case* a bill drawn on the plaintiffs on which indorsements were forged was presented to, and paid by, them to the defendants on August 19th, 1893, and some months later the forgeries were discovered and the action brought to recover the money as paid under a mistake of fact.

Mathew, J., held it was not recoverable, and gave judgment for the defendants. It was agreed that there was no evidence of negligence on the part of the plaintiffs and that the defendants had acted throughout in perfect good faith.

After reviewing the cases prior to *Cocks* v. *Masterman* and expressing his opinion that the question of negligence was not, and could not be, the foundation of the judgment in any of them, Mathew, J., proceeds: "In *Cocks* v. *Masterman* the simple rule was laid down in clear language for the first time that, when a bill becomes due and is presented for payment, the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be that the money can be recovered back; but if it be not, and the money is paid in good faith and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back.

It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonour to the other parties to the bill; but even in such a case it is manifest that the position of a man of business may be most seriously compromised, even by the delay of a day. Now that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as it seems to me, is unimpeachable."

The main point in this judgment is that it lays down that, where the payment is on a negotiable instrument, neither the loss of the opportunity of giving notice of dishonour nor any actual prejudice or damage to the innocent holder is necessary to entitle him to hold the money. If he has had the money for such interval that his position may have, not necessarily has, been affected, he can keep it. The judgment further strongly discountenances the view that the banker's duty to know his customer's signature or negligence on the banker's part was the true principle of any of the earlier decisions.

In 1902, the case of *Imperial Bank of Canada* v. *Bank of Hamilton* [1903] A. C. 49, came before the Privy Council. In that case one Bauer drew a cheque for five dollars on the Bank of Hamilton, leaving a considerable space after the word "five." He got it marked by the Bank of Hamilton and then wrote in the word "hundred" after the "five." He took the altered cheque to the Imperial Bank of Canada, opened an account with it, and forthwith drew out the amount by cheques. The Bank of Hamilton paid the altered amount to the Imperial Bank of Canada on the morning of January 27th, 1897.

The Bank of Hamilton discovered the fraud the next morning, and immediately gave notice to the Imperial Bank of Canada, demanding repayment of 495 dollars.

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The Privy Council held the money was recoverable, affirming the decision of the Canadian courts.

After stating that the Imperial Bank was not in fact prejudiced in any way by want of notice on the day of payment, the Privy Council say that it appeared to them that the stringent rule laid down in *Cocks* v. *Masterman* did not really apply to the case, and proceed: "The cheque, as drawn and certified, *i.e.*, for five dollars, was never dishonoured, and no question arises as to that. The cheque for the larger amount was a simple forgery; and Bauer, the drawer and forger, was not entitled to any notice of dishonour by non-payment. There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in *Cocks* v. *Masterman*, and recently re-asserted in even wider language by Mathew, J., in *London and River Plate Bank* v. *Bank of Liverpool*, has reference to negotiable instruments on the dishonour of which notice has to be given to someone who would be discharged from liability unless such notice were given in proper time. Their lordships are not aware of any authority for applying so stringent a rule to any 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."

Decisions of the Privy Council are not binding authorities on the High Court of Justice (*Dulieu* v. *White* [1901] 2 K. B., at p. 677), but they are treated as entitled to great weight.

Consideration of the last two cases.

It is exceedingly difficult to extract from these authorities general rules governing all cases where a banker has paid money on a forged signature to an innocent person.

Two classes of cases at once present themselves for possible differentiation:—

First, where the document is not really a negotiable instrument at all.

Second, where the forged signature is that of the banker's own customer.

Where the document is not really a negotiable instrument, the following considerations apply.

Mathew, J.'s, judgment being founded partially on the exigencies of negotiability, its effect must be limited to negotiable instruments. The Privy Council do not dissent from the principle of that judgment, subject to certain limitations; while their judgment clearly involves the exclusion of documents other than negotiable instruments from the operation of the principle.

The exigencies of negotiability.

So far, then, as the matter is governed by considerations based on the exigencies of negotiability or Mr. Justice Mathew's judgment, one must presumably exclude all documents on which all the operative signatures are forged; for instance, the principle would not affect a cheque on which the drawer's ostensible signature was a forgery, and which had not been negotiated by indorsement. If the cheque in the *Bank of Canada Case* was not, *quoad* the raised amount, a negotiable instrument, but a mere sham, as the Privy Council held, a cheque, on which the only professingly operative signature is forged, cannot be a negotiable instrument, but must be a sham *in toto*.

In the same way, Lord Halsbury, speaking of the documents in *Vagliano's Case*, said: "I have designedly avoided calling these documents bills of exchange. They were nothing of the sort."

It cannot be suggested that the exigencies of negotiability require that a bogus instrument should be treated as a real one for any possible purpose. That would be as much contrary to reason and public policy as to hold a man entitled to retain the change he had, possibly innocently, obtained for a counterfeit sovereign.

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The Privy Council lend no countenance to any such suggestion.

But a document, sham in its inception, may, by the addition of a genuine operative signature, become a negotiable instrument, at any rate by estoppel. A document is fairly termed a negotiable instrument when a person, or a succession of persons, can acquire rights upon it, independent of previous forgeries or equities. A genuine acceptance of a forged drawing, a genuine indorsement where either drawing, acceptance, or prior indorsement was or all of them were forged, a genuine indorsement of a cheque with a forged drawing: any of these would give a person taking the document in good faith and for value a remedy on the document against the person who had so affixed his signature. True, the remedy is by estoppel only, but, as will be shown hereafter, it is none the less on the instrument; it enures for the benefit of every subsequent person who takes the bill or cheque *bonâ fide* and for value, and this is the essence of negotiability.

The above view is borne out by the reference, in the *Bank of Canada Case*, to the absence of indorsers. That implies that if the cheque, sham as it was, had once been genuinely indorsed, it would have come within the rules applicable to negotiable instruments, whatever those rules might be.

Mere transfer by delivery of an instrument professedly payable to bearer, but really only a sham, would not impart a negotiable character to it. The obligations arising from such a transaction, are merely those of warranty attaching to the chattel character of the bill or whatever it purports to be.

Payment on forgery of customer's signature.

The second question for preliminary consideration is, what is the peculiar effect, if any, of the fact that the banker pays on the forgery of his customer's signature? This factor may enter alike into cases where the document

is altogether a sham, as a cheque with a forged drawing and nothing else, or where the instrument is a negotiable one, as where that cheque has been genuinely indorsed, or where drawer and indorsers to a bill are genuine, but the customer's acceptance has been forged. Take the simple case of a bearer cheque with drawer's name forged. Assume it is not a negotiable instrument; that therefore the exigencies of negotiability do not apply. Does the fact that the banker has paid it on the forged signature of his customer preclude him from recovering the money from an innocent bearer?

Question of negligence.

It would be idle to deny that in well nigh all the earlier cases, judges do talk about the banker being bound to know his customer's signature and about negligence on the banker's part.

Mathew, J.'s, judgment has sometimes been read as laying down that negligence had nothing whatever to do with the question. That is hardly so. His lordship declined to recognise it as the ruling principle of any of the previous cases, as was contended on behalf of the plaintiff bank. The case was one of forged indorsement, as to which no duty of recognition could be alleged, and it was admitted the plaintiff bank had not been negligent. In all the previous cases, as in the one before him, the document had possessed negotiability; and Mathew, J., held that the real ground of those earlier decisions was the same as that of his own, namely, the maintenance of negotiability. (See *ante*, p. 161.)

That would reduce the expressions of the earlier judges, as to duty and negligence on the banker's part, to *obiter dicta;* but they are so strong and numerous that they cannot be altogether ignored.

It is a common phrase that "a banker is bound to know his customer's signature"; but it is a misleading and an inaccurate statement. There can be no such legal obligation. The real position is that if the banker pays

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away his customer's money in reliance on a signature's being his customer's, which is not so, he cannot charge the customer with that payment.

Even if it were a duty to know the customer's signature, it could only be a duty to the customer; it could not possibly extend to third persons, such as the payee of a cheque. So with the suggested negligence; there is no duty to the payee or holder to take care, and without such a duty there can in law be no negligence.

There would not appear in any of the earlier cases to have been any definite finding by a jury of negligence against the banker. The term is invariably used, by those judges who employ it, in close connection with the supposed duty of the banker to know his customer's signature.

The supposed negligence really seems the outcome of defective evolution. The duty of the banker to know the customer's signature is assumed. There is no indication of the stages by which that absolute duty is transformed into a duty to take care, and the correlative right to have care taken transferred from the customer to the payee or holder. There is nothing to show the breach of that duty. As Mathew, J., pointed out, if the forgery was cleverly executed, the banker might not be able, by any amount of care, to ascertain whether the signature was or was not a forgery. So the breach is assumed or its necessity ignored; and the failure of the banker to fulfil his supposed absolute duty to his customer to know that customer's signature finally emerges in the form of a breach of duty to a third person to take care, in other words, negligence of which that third person is entitled to avail himself.

It is of course conceivable that there might be cases of real carelessness on the part of the banker. The signature might present glaring dissimilarity to the customer's ordinary one. And in such a case it might be suggested that though, by reason of the absence of duty, there was no negligence in the legal sense, there was a recklessness, a

departure from ordinary business habits, which, in a contest between two innocent parties, made it inequitable that the money should be recovered from the man who was absolutely powerless to prevent the loss by the one who might have done so. The words of Bayley, J., in *East India Company* v. *Tritton*, 3 B. & C., at p. 289, might be quoted: "The most favourable view of this case for the plaintiffs is to say that both parties are innocent and free from blame: but even then the maxim, '*Potior est conditio possidentis*' applies." Reference might also be made to remarks in *Jacobs* v. *Morris* [1902] 1 Ch. at p. 833, as to the effect of a disregard of business habits in precluding a man from recovering money he has paid by mistake; and to the unqualified statement by Bramwell, B., in *Hart* v. *Frontino, &c., Company*, L. R., 5 Ex., at p. 115, as to a banker paying on a forged cheque not being able to recover the money.

On the other hand, there is the authority of *Kelly* v. *Solari*, 9 M. & W. 58, that neglect of means of knowledge does not prevent recovery if the payment was made honestly, and that case was upheld in the *Bank of Canada Case*. A case and opinion given in 1882, the latter entitled to very great weight, are published in "Questions on Banking Practice," 5th ed., question 613. There the question was put directly; whether the banker who has paid a cheque with his customer's signature as drawer forged, or a bill with his customer's signature as acceptor forged, can recover the money from the innocent holder? And the opinion given was that, though the law was in an unsatisfactory state on the point, the true view apparently was that negligence on the part of the payer was immaterial, and that in both cases the banker could recover the money, if he gave notice to the person he had paid before the latter's position had been altered.

What view a court would take were the question directly before them, must be doubtful. Unquestionably they would reject the idea of a banker's supposed duty to know

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his customer's signature affording any advantage to a third party.

But it is conceivable that if they found that there had been real carelessness or neglect of ordinary business precautions on the part of the bank, not merely the omission to avail itself of sources of information, they might hold that this turned the scale, making it inequitable that the money should be recovered.

And there is always present the idea, based, perhaps, on no distinctly assignable ground, that in some way or another, possibly on the basis of representation implied by payment, a court would be astute to debar a banker from recovering money he had paid an innocent person on a forgery of his own customer's signature.

As to notice of dishonour.

Leaving this element of the forgery being that of the customer's signature to be settled, as it only can be, by a court, the points of coincidence and divergence of the two latest cases have now to be considered. They concur in attaching special incidents to payment by mistake on a negotiable instrument. They diverge mainly on the question whether the loss of opportunity of giving notice of dishonour is the test as to the money being recoverable or not. Mathew, J., holds that where the money has once been paid, it cannot be recovered if such an interval has elapsed that the position of the innocent receiver may conceivably have been prejudiced, apart from any question of notice of dishonour or the loss of remedy against prior parties. The Privy Council decline to follow him in this, and confine the prohibition of recovery to cases where the delay involves the loss of the opportunity of giving notice of dishonour and the consequent discharge of some prior party.

Both tribunals recognise *Cocks* v. *Masterman* as the leading authority, and it is noticeable that in that case, as pointed out by Mathew, J., the court, while recognising that the holder of a dishonoured bill is not bound to give notice of dishonour until the following day, uphold his

right to be in a position to give it on the day of dishonour, as he would be if he got a definite and final answer. In form the court refer to the holder's right to "take steps" against the other parties to the bill the same day as it is dishonoured. This must mean the right to give notice; as no action could or can be maintained until after the expiration of the day for payment. The right of recourse arising on dishonour is not the right of action. (*Kennedy* v. *Thomas* [1894] 2 Q. B. 759.) The insistence on the holder's right to be in a position to give notice on the actual day of dishonour is distinctly in favour of Mathew, J.'s, view that the court in *Cocks* v. *Masterman* did not regard the loss of the opportunity of giving notice as the only or true test.

The time for giving notice of dishonour is regulated by sect. 49 of the Bills of Exchange Act. It may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.

It has been assumed in all the cases, including the *River Plate* and the *Bank of Canada Cases*, that if the money paid were recovered from the holder later than the day after he received it, his right of giving notice of dishonour would be irrevocably lost, and with it his right of recourse or action against prior parties.

Such a consensus of authority renders it almost certain that such is the case. At the same time, there were rules of law existing before the Bills of Exchange Act, and there are now provisions in that Act, which one might otherwise have thought applied to this situation, and reserved to the holder the right to give notice at a later date, even as late as that when the money was reclaimed.

It is clear the holder could not give notice of dishonour when the bill was paid.

Payment is not dishonour. As Gibbs, C.J., said in *Smith* v. *Mercer*, 6 Taunt., at p. 86: "The defendants, while the bill continued paid, could not have given notice to the indorser, for the bill was not dishonoured."

If, then, there is any dishonour of which notice has to be given, it would seem as if it took place when the money was reclaimed rather than when it was paid, and that the notice might effectively be given then.

Delay in giving notice might be excused.

But if, by some process of relation back, the dishonour be regarded as occurring on the date of presentation and payment, sect. 50 sub-sect. (1) of the Bills of Exchange Act provides as follows: "Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving it, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence."

The sub-section appears distinctly calculated to cover the case of a person who has received payment of a bill or cheque on presentation, and remained in total ignorance of anything to affect his rights until the money is reclaimed on the ground of forgery or mistake. The delay is caused by circumstances beyond his control, and there is no default, misconduct or negligence on his part to which the delay is referable.

If this view be accepted, the curious result follows that, according to the test laid down by the Privy Council in the *Bank of Canada Case*, and their interpretation of the earlier authorities, there could be no condition of circumstances precluding the bank or other payer from recovering the money paid on a forgery; as the right to give notice would never be lost unless it were by the fault of the person paid, in not giving it within a reasonable time after notice of the mistake and claim.

No doubt the position of prior parties might have altered meanwhile, and the remedy against them prove not so effective, but they would not be discharged for want of notice, and that is the only test laid down by the Privy Council. Moreover, as Cresswell, J., said in *Mather* v. *Maidstone*, 18 C. B., at p. 294, with regard to the alteration

of position of prior parties: "The law does not permit any inquiry as to that, in the case of negotiable instruments, and it is highly expedient that that should be so."

No doubt that was said in answer to a contention that the holder was not injured by being deprived of the opportunity of giving notice, but it would seem equally applicable where the notice, though delayed, was given in time according to law.

Again, if the above suggestion is accepted, it leaves Mr. Justice Mathew's test, or some slightly modified form thereof, the only alternative to recovery in every case. The exigencies of negotiability, recognised and upheld by him as deducible from *Cocks* v. *Masterman*, unquestionably would require that money paid to any innocent person on a negotiable instrument should not be taken from him in every and any case, irrespective of the prejudice to him. The burden of showing such prejudice should certainly not be cast upon him. The earlier cases, such as *Cocks* v. *Masterman*, seem to point to notice of the mistake if given the same day being sufficient to justify recovery. Mr. Justice Mathew points out, cogently enough, that prejudice may easily occur within the space of a working day. In a matter of this sort, involving the credit of negotiable instruments, the stricter rule is probably the safer and wiser.

But it must be admitted that the difference of opinion manifested in the two latest cases has not tended to make the state of the law on the point more satisfactory than it was when the opinion above referred to was given.

Criticisms on the judgment of Mathew, J., answered.

A very specious criticism has been passed on the judgment of Mathew, J., which, if just, might have results beyond its immediate purview.

It is contended that, admitting the exigencies of negotiability may justify the stringent rule laid down by the learned judge, with regard to persons who are legal and commercial holders, there is no ground for applying that rule, where, as in the *River Plate Bank Case*, the

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But, so far, at any rate, as Mr. Justice Mathew's judgment is concerned, the criticism is not justified.

In the *River Plate Bank Case*, and indeed in all the cases which preceded it, the defect in the holder's title was a forged indorsement succeeded by one or more genuine ones. As previously stated, it may be admitted that such a holder is not strictly entitled to the status of a holder of the bill. He has in no event recourse against any party prior to the forgery, and his rights, being limited to subsequent indorsers and based only on the artificial doctrine of estoppel, are insufficient to warrant his posing as the ordinary holder of an ordinary bill, an instrument which requires a regulation number of actual parties.

At the same time, he is, both for practical purposes and is recognised by the Act as, a holder, and not only a holder but a holder in due course.

Under sect. 2, no doubt, he is not a holder, he is not the indorsee of the whole bill, he has no recourse against parties prior to the forged indorsement.

But sect. 55 provides that an indorser is precluded from denying certain things; to whom? To a "holder in due course." What is he precluded from denying? "The

genuineness of the drawer's signature and all previous indorsements."

That embraces the case of one or more previous forged indorsements.

It is true that the term is probably used, if intentionally used at all, as merely designating the class of person who is entitled to avail himself of the estoppel thereby created; as synonymous with "a person who has taken the bill in good faith, before it was overdue, and for value," but there is the technical word "holder," which imports the definition of sect. 2, through sect. 29, and that in the teeth of one or more presumed forged indorsements. And the holder of such a bill or cheque, that is, the holder under one or more genuine indorsements following one or more forged indorsements, is just as much within the reasoning of the judgment either of Mathew, J., or of the Privy Council, as is the holder in due course of a bill or cheque on which every signature is genuine.

Take it on the basis of the judgment of Mathew, J. The man is perfectly innocent, he is the holder of a negotiable instrument, recognised as such, and as a holder in due course, by the Act; he would be just as much injured if the money were recovered against him as if the bill had been perfectly regular throughout.

Take it on the basis of the Privy Council judgment. Again he is innocent, again he is holder in due course of a negotiable instrument, and he would be within their rule if he lost his opportunity of giving notice of dishonour, and a previous party were thereby discharged. And, assuming the position adopted by the Privy Council, this would be the inevitable consequence if the money were recoverable against him.

Remedy by estoppel is on the bill.

This point has been misunderstood. It has been contended that the remedy against an indorser subsequent to a forged indorsement is on the ground of warranty, and so independent of notice of dishonour. This is not so. The

only person who warrants anything with regard to a bill is a transferor by delivery. Under sect. 58 he "warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless."

The distinction between him and an indorser is emphasised by the same section defining him as the holder of a bill payable to bearer, who negotiates it by delivery without indorsing it, and by enacting that "a transferor by delivery is not liable on the instrument."

An indorser warrants nothing, and, whether he indorses after a forged indorsement or otherwise, he is liable on the instrument. In the case where he indorses after a forged indorsement, the processes of his liability on the bill are as follows:—

Under sect. 55, sub-s. 2 (a), by his indorsement he "engages that on due presentment it shall be accepted and paid according to its tenour, and that, if it be dishonoured, he will compensate the holder, provided that the requisite proceedings on dishonour be duly taken."

Where the person in whose hands the bill has been dishonoured applies to the indorser subsequent to the forged indorsement for compensation, suppose that indorser says: "I never undertook to compensate you; you are not the holder, as there was a forged indorsement prior to mine." Answer: "I took the bill for value, and in good faith. Sect. 55, sub-s. 2 (b) says: 'The indorser of a bill is precluded from denying to a holder in due course the genuineness of the drawer's signature and all previous indorsements.' That presupposes a previous forgery, but as against me you cannot set it up. Although not really a holder, I am, *quoad* you, a holder, and in due course." If the indorser could truly say: "Very well; but I only undertook to compensate the holder, provided the requisite proceedings on dishonour were duly taken, as stated in

sect. 55, sub-s. 2 (a), and you have given me no notice of dishonour ;" that would be a good answer.

The operation is by preclusion of denial, in other words, by estoppel, not by warranty ; the indorser is, as implied in the statement of what the transferor by delivery is not, liable on the instrument, and it is a condition of that liability that notice of dishonour shall be given unless waived or excused.

Probable outcome of the two decisions.

In the case, then, of a person innocently and for value holding a bill or cheque bearing a genuine indorsement, after one or more forged indorsements or other signatures, the judgment of the Privy Council would preclude recovery of the money paid to him if he had lost the opportunity of giving notice of dishonour to the genuine indorsers. The judgment of Mathew, J., would prevent such recovery if the position of such person might have been altered in the interval, as the instrument was negotiable.

The case of the man who has innocently obtained payment of a real cheque or bill which he has taken *bonâ fide* and for value, but on which the only or last indorsement is a forgery, presents more difficulty.

It is a negotiable instrument. The person who has been paid is not a holder, even by estoppel against anybody. He has no right to give notice to anyone, and he has no remedy against anyone.

Under the Privy Council judgment, the money could be recovered from him ; not because it was not a negotiable instrument, but because no remedy could be lost and no opportunity of giving notice of dishonour taken away, seeing no right to give it existed.

Under the judgment of Mathew, J., in the *River Plate Bank Case*, presumably the money would not be recoverable. Mathew, J., there seems to use the term "holder," not in its technical sense, but as signifying any innocent person in possession of a negotiable instrument, or at least as including such person.

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The persons who presented the bill in that case were not technically holders, and Mathew, J. makes no distinction on the ground of their being so, by estoppel, with regard to some indorsers. Again, his not attaching any importance to the question whether notice of dishonour could or could not be given, tends to show that the element of loss of remedy was, in his opinion, immaterial. The words he uses (1896, 1 Q. B. at p. 11), "Payment made on a forged indorsement to the holder of it in good faith," would seem to include the case; "the holder under a forged indorsement" being the common, if inaccurate, expression to denote a person who is in possession of a bill on which the only or last indorsement is forged.

The commercial necessity of the payment or dishonour of a bill being final equally applies to this latter case.

It is true that the person who presented the bill could never have given notice of dishonour or had recourse against anybody on it, but he was perfectly innocent, the commercial necessity is based on the exigencies of preserving the credit of negotiable instruments, not on any question of the rights of action which may accrue under them, and, in one sense, the necessity applies all the more where there is no possibility of recourse against anyone.

It might be suggested that in both the cases supposed it was the more imperative to apply Mr. Justice Mathew's rule, because in the first case, if the power of giving notice of dishonour was lost, and in the second, in any event, the innocent person might lose the money more than once. He would have paid it once, either in cash or in value, when he took the bill; then he would pay it to the bank; and, again, he might have to pay it to the true owner as damages for conversion, or money had and received. There is no obvious fallacy in this suggestion, but there must be some method of avoiding the anomaly which would leave the amount of the bill ultimately either with the person really liable for it or with the bank. Probably,

repayment to the bank might be treated as in trust for the true owner, payment to the true owner as on behalf of the bank.

It should be added that payment of a cheque on a forged indorsement would not, in ordinary cases, oblige the banker to seek repayment of the money, as he could debit his customer with the amount, by virtue of sect. 60.

CHAPTER XVI.

VALUABLES FOR SAFE CUSTODY.

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IT has become customary for bankers to assume the charge of plate chests, securities, and other valuables belonging to customers, for the convenience of the latter. No charge is usually made for such accommodation.

In common phraseology, the goods are said to be delivered to the banker for "safe custody," and in acknowledgments and receipts these words, "for safe custody," sometimes occur.

No additional liability by reason of words "for safe custody."

It appears clear that the use of these words does not affect the measure of liability of the banker; does not make him an insurer. Some of the early cases on the point are difficult to reconcile. They are all studiously reviewed in *Ross* v. *Hill*, 2 C. B. 877, where the court arrived at the conclusion that an undertaking in such terms must be interpreted in the light of the legal consequences arising from the relation between the parties, and that the express contract did not extend the liability.

The first question, therefore, is; what is the relation between banker and customer where the goods are received by the former; whether the banker is a bailee for reward with the liabilities attaching to that position, or a gratuitous bailee with only the liabilities of such?

It has been contended that the custom of bankers taking charge of their customers' valuables is so common that it is an implied part of the contract when a man opens an account, that the banker will, if required, receive his valuables to a reasonable extent and for a reasonable time; that the opening the account affords consideration

for this undertaking, as well as for the ordinary duty to repay the money and to honour cheques. It would, of course, be open to the customer, when opening the account, to make express stipulation as to such accommodation, in which case there would be sufficient consideration to place the banker in the position of a bailee for reward.

Banker usually gratuitous bailee.

But in the ordinary state of affairs, where nothing is said at the time of opening the account, and where there is no payment for the accommodation, the position of the banker is that of a gratuitous bailee. It was so held in *Giblin* v. *M'Mullen*, L. R., 2 P. C. 318; *Re United Service Company*, L. R., 6 Ch. 212; and *Leese* v. *Martin*, L. R., 17 Eq. 235. It is true that in *Brandao* v. *Barnett*, 12 Cl. & Fin., at p. 809, Lord Campbell, speaking of the custom of bankers to receive the interest on exchequer bills for their customers, says: "I think that the transaction is very much like the deposit of plate in locked chests at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade as such, to receive such deposits from their customers, but I do not think that from that finding a general lien could be claimed on the plate chests. In both cases, a charge might be made by the bankers, if they were not otherwise remunerated for their trouble."

This *dictum* is, however, too vague and indirect to stand against the authorities on the other side.

In consequence of the apprehension excited among bankers by the case of *Langtry* v. *Union Bank of London*, in 1896, the committee of the Central Association of Bankers, after taking legal advice, issued a report on the whole question, which is published in the Journal of the Institute of Bankers, vol. xvii., p. 455, in which they say: "The better opinion seems to be that when a banker takes charge of a locked box, supposed to contain valuables (the contents of which, however, are not known to the

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banker, and to which he has no access), he would be held to be a gratuitous bailee."

Degree of care required from gratuitous bailee.

The degree of care which a gratuitous bailee is bound to take of property entrusted to him is defined in *Giblin* v. *M'Mullen* thus: "He is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description" (L. R., 2 P. C., at p. 339).

The employment of the facilities at the banker's disposal, such as safes, strong-rooms, &c., must, it is submitted, be included in the care a banker must take of his customers' valuables. The utilisation of available means of securing safety is an ingredient in the reasonable care a prudent man would take of his own valuables.

It has been contended that this is not fair on the banker; that it is raising him, who receives nothing, to the same level as a bailee for hire, whose obligation is to put himself in a position to take the highest degree of care possible, to adopt all precautions and means of ensuring safety known to contemporary science; and that it is unreasonable that the strong-rooms and safes, which a banker happens to have for his own purposes, should be gratuitously at the service of the customer, who could nowhere else get the same convenience without paying for it. But the rule as above laid down holds good. The distinction is really this: the gratuitous bailee must do his best with what he has got, he must use all facilities of which he is possessed, but he is not bound to do more. He is not bound to provide at his own expense the means of ensuring a higher degree of security for the articles deposited with him; whereas the bailee for hire is bound, as before stated, to adopt at his own expense all appliances and safeguards procurable.

Banks being generally provided with such appliances and safeguards, the question as to whether the banker is

a gratuitous bailee or a bailee for reward becomes practically an academic one in estimating the degree of care to which he is bound.

Knowledge of nature of articles.

It does not seem that the banker's knowledge or ignorance of the nature of the goods entrusted to him affects the question of his liability.

The rule was laid down in *Giblin* v. *M'Mullen* in the form given, without any qualification as to knowledge or ignorance; and the facts of that case go very strongly to show that in that instance the bank had no knowledge or means of knowledge of the nature of the goods. Damages for negligence are such as are supposed to have been in the contemplation of the parties at the date of the contract, and if the goods are taken without inquiry, such contemplation would seem to embrace the value of the goods, whatever it might prove to be. If a customer brings a box for safe custody, there is a presumption that it contains articles of value. If however, he mislead the banker in any way as to the value, he would infallibly be held bound by his representations, and could hold the banker to no greater liability, either as to degree of care or amount of compensation, than was commensurate with goods of the character represented by him; if indeed that.

Apart from negligence facilitating such an act, a bank is not liable for the loss of a customer's goods by the fraud or felony of members of its own staff. In *Foster* v. *Essex Bank*, 17 Massachusetts *Reports*, 478 (approved in *Giblin* v. *M'Mullen*), the cashier and chief clerk of the bank fraudulently took, and absconded with, specie deposited by a customer. The court held that the bank was not responsible for their fraud or felony, as, when they abstracted the customer's gold from the cask in which it was contained, they were not acting within the scope of their employment; and added: "The bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid

CHAP. XVI. it upon the desk while he was transacting some business at the bank."

Misdelivery. The case of *Langtry* v. *Union Bank of London* (Journal of the Institute of Bankers, vol. xvii., p. 338), which was settled by judgment for the plaintiff by consent for £10,000, arose out of the delivery of the goods to an unauthorised person, on a forged order.

The bank's counsel, in announcing the settlement in court, said that the bank would not have submitted to any judgment implying negligence on the part of their officials, without the fullest investigation of the law and the facts.

What right of action apart from negligence. The question naturally arose as to what, if any, right of action accrued to a customer in like circumstances, apart from negligence; and legal opinion was somewhat divided on the point.

The Central Association of Bankers went fully into the matter, and in their memorandum, previously alluded to, they say: "It is necessary to distinguish between cases in which valuables are by mistake delivered to the wrong person (as in Mrs. Langtry's case) and cases in which they are destroyed, lost, stolen, or fraudulently abstracted, whether by an officer of the bank or by some other person. The best legal opinion appears to be that, in the former case, the question of the negligence of a bailee does not arise; that the case is one of wrongful conversion of the goods, and that the bank is liable for this wrongful conversion, apart from any question of negligence."

Those who support this view do so on the basis of the distinction between commission and omission, between the active interference with the property, involved in the voluntary handing over of the goods to a person not entitled to receive them, and the mere passive neglect of duty which may result in their loss. The former, if induced by specious fraud, may be in no wise blameworthy, but conversion is independent of any such consideration.

Authority for this position is not wanting. The cases have usually been those of carriers who have delivered goods to the wrong person. The earlier authorities are summarised in *Stephenson* v. *Hart*, 4 Bing. 475, Parke, J., saying: "From the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong person. In *Ross* v. *Johnson* a distinction was taken between misfeasance and nonfeasance, and it was holden that trover would not lie where a carrier had lost goods by a robbery or theft, Lord Mansfield and Aston, J., considering that a case of mere omission. But in *Youl* v. *Harbottle*, Lord Kenyon, referring to *Ross* v. *Johnson*, said that where the carrier was actor and delivered the goods to a wrong person he was liable in trover." Gaselee, J., dissented, on the ground that the goods had in fact been delivered to the person for whom they were intended, although that person had procured their consignment by fraud; but he says: "For delivery to a wrong person a carrier is no doubt responsible in trover." In *M'Kean* v. *M'Ivor*, L. R., 6 Ex. 36, Bramwell, B., in referring to this case said: "There were circumstances there to excite suspicion; but I think the reasoning of Gaselee, J., who dissented from the judgment of the court, is right. There was nothing to show that it was not W. who received the box; it may rather be collected that it was." But he does not impugn the law as there laid down; in fact he says (p. 41), "I assume that a misdelivery would have been a conversion."

Duff v. *Budd*, 3 B. & B. 177, was a case of misdelivery under circumstances of gross negligence, and the judgments are based on that negligence; but it is submitted that the importation of negligence is accounted for by the fact that the defendant's position was that of involuntary bailee, the contract of carriage having come to an end (see at p. 181), with the consequent liabilities hereafter appearing.

In *Heugh* v. *London and North-Western Railway*, L. R., 5 Ex. 51, both *Stephenson* v. *Hart* and *Duff* v. *Budd* were quoted. In that case, the goods had been tendered by the defendants at the place to which they were addressed, but the person in charge of the premises refused to receive them. The defendants deposited the goods in safety and sent an advice note to the consignees, requesting instructions for delivery, and further, that on sending for them the advice note should be produced. The advice note was presented a few days after by a person who demanded delivery on behalf of the consignees, and the goods were delivered to him.

The court held that the defendants' character as carriers was at an end when the goods were refused, through no default of their own; and that they thereupon became involuntary bailees, with no obligation except to act reasonably in the circumstances.

In his judgment, Kelly, C.B., refers to this position of the defendants as involuntary bailees, and asks whether as such they became subject to an absolute duty to deliver to the proper person, so as to be liable for a misdelivery, though without negligence, and says: "The only authorities in the courts of this country cited in support of that proposition are *Stephenson* v. *Hart* and *Duff* v. *Budd*; but in neither case was it held or even contended that the misdelivery amounted as a matter of law to a conversion, but in both cases it was admitted to be a question for the jury, and the question was in fact left to them, whether, under all the circumstances, the defendants had acted with reasonable care. It is plain then, on the authority of those cases, that misdelivery under such circumstances is not, as a matter of law, a conversion, but that it is a question of fact for the jury whether the defendants have exercised reasonable and proper care and caution."

It is to be noticed that in both the cases quoted in this judgment there had been a previous refusal to accept the goods or a failure to discover the consignee; so that in them,

as in this latter case, the defendants were really in the position of involuntary bailees. It would seem, therefore, that these remarks of Kelly, C.B., must be confined to the case of involuntary bailees, especially as he says at p. 56: "It is true that a misdelivery by a carrier has been held to amount to a conversion." The case is so explained by Bramwell, B., in *Hiort* v. *Bott*, L. R., 9 Ex., at p. 90, where he gives as the ground of its decision that an involuntary bailee has the implied authority of the real owner to deal with the goods in any reasonable manner.

In *Hiort* v. *London and North-Western Railway*, 4 Ex. D., at p. 194, Bramwell, L.J., says: "It is held that if a man disposes of property, and in law he did if he without authority delivered it to somebody not entitled to receive it, he might be charged with converting it to his own use. A misdelivery by a carrier was a conversion; I cannot see, therefore, why a misdelivery by a warehouseman is not a conversion."

Again, in *Glyn* v. *The East and West India Dock Company*, 6 Q. B. D., at p. 493, Bramwell, L.J., says: "If a carrier received goods to carry to A. and hold till called for by X., and Y. came and represented himself to be X., a delivery to Y. would be a misdelivery and a conversion according to the authorities." In *Bristol, &c., Bank* v. *Midland Railway Company* [1891] 2 Q. B., at p. 657, Lopes, L.J., says: "Delivery to a wrong person would be conversion."

There is nothing in the character of a carrier which makes him specially obnoxious to conversion: his liability as insurer is altogether irrelevant to this class of action, and cannot affect it one way or the other. The banker cannot assert the position of an involuntary bailee, and so claim the peculiar privileges of the man who finds goods left on his hands, and is only bound to do the best he can in the circumstances. He does voluntarily, though innocently, deliver the goods to a wrong person, thereby dealing with

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them in a manner inconsistent with the rights of the true owner, which is sufficient to found conversion.

Suggested implied contract.

Those who hold the view that the banker is relieved from liability for commission as well as omission, for misfeasance as well as nonfeasance, unless he is chargeable with negligence, rely mainly on an implied agreement between banker and customer to that effect. They presume a stipulation on the part of the banker that his obligation as to parting with the goods shall be as circumscribed as that with regard to keeping them; namely, that he shall exercise reasonable care and caution in so doing, and they presume an acquiescence by the customer in such stipulation.

But there seem no sufficient grounds for importing such implied contract into the legal relations arising from the deposit of the goods. The distinction between the legal consequences of loss and of misdelivery can hardly be supposed to have been in the contemplation of the parties; and "it is impossible to import a condition into a contract which the parties could have imported and have not done so," *per* Channell, J., in *Blakeley* v. *Muller & Co.* [1903] 2 K. B. 760, note, approved by Halsbury, C., in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* [1903] 2 K. B. at p. 764. The view adopted by the Central Association of Bankers seems therefore the true one.

Question of banker's contracting himself out of liability.

The question of the banker's expressly contracting himself out of liability for misdelivery has been raised; but the Central Association of Bankers, in the memorandum above referred to, came to the conclusion that, though in theory possible, such a course would be "generally impossible in practice, and where not impossible inadvisable."

Precautionary measures.

If the banker has suspicions as to the authority of the person who applies for the goods, or the genuineness of the order produced by him, he is clearly entitled to retain the goods for a reasonable time, in order to satisfy himself on

these points. Such retention is not a conversion, as it involves no disregard of or interference with the owner's title, and is excused, if not justified. (See *per* Blackburn, J., in *Hollins* v. *Fowler*, L. R., 7 H. of L., at p. 766.)

It is also conceived that, on the same grounds, the banker would be entitled to refuse to deliver the goods to the applicant, stating his intention of himself sending them to the owner, and doing so within reasonable time.

CHAPTER XVII.

THE COLLECTING BANKER.

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THE failure of the Government to procure the passing of "The Bills of Exchange Act Amendment Act, 1903," designed to rectify the state of affairs resulting from the decision of the House of Lords in *Capital and Counties Bank* v. *Gordon*, *London City and Midland Bank* v. *Gordon* [1903] A. C. 240, has left the collecting banker, at any rate for the present, in the position demonstrated by that decision. Principles of law and construction are enunciated in the judgments, independent of the particular facts; and the House of Lords itself has, on its own showing in the *London Tramways Case* [1898] A. C. 375, no power to review its own rulings on such matters. It may well be that the facts of these particular cases, hereafter referred to as the *Gordon Case*, would have warranted a decision against the banks without resort to the sweeping view adopted by the House of Lords; but the propositions referred to were general in terms and formed part of the *ratio decidendi*, and must therefore be accepted as true and conclusive statements of the law. Nor would it be reasonable to anticipate that, in any future case, the process of differentiation exemplified in *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201 would be repeated.

It therefore behoves bankers to consider their position as collecting bankers, in the light of the *Gordon Case*.

The source of danger.

The danger continually threatening the collecting banker is that of being sued for conversion and money had and

received by the true owner of a cheque which the banker has presented, and for which he has received the money on account of someone who has no title or a defective title thereto. His complete ignorance of anything wrong about the cheque is absolutely no defence.

Nor, save in cases where the true owner has to resort to money had and received, independent of conversion, can the banker set up his character of agent, supposing him to have merely acted in that capacity. (See "Conversion—Money Had and Received," *ante*, p. 140.)

Origin of legislation as to crossed cheques.

So long as any holder of a cheque could go and present it himself and get the money for it, the intervention of another banker was theoretically unnecessary; his undertaking the duty of collection was a mere voluntary act for the convenience of the customer, and the banker was, not unreasonably, left to bear the risks he had of his own accord assumed.

But when, for the protection and convenience of the public, the Legislature prohibited the payment of crossed cheques otherwise than to a banker, the intervention of another banker became an absolute necessity; and moral, if not statutory, compulsion was put upon every banker to undertake the office of collection for his customers.

It was only reasonable therefore that, in so far as increased risk was the direct outcome of an enactment designed for the public good and protection, the banker should receive equivalent safeguards. Whether it was that the Legislature considered it was granting adequate protection for legitimate business, or whether, as suggested by Lord Macnaghten in the *Gordon Case*, the bankers at that date asked for nothing more, the fact remains that the only protection afforded is that embodied in sect. 82 of the Bills of Exchange Act, reproducing the proviso to sect. 12 of the Crossed Cheques Act of 1876.

Its scope has been extended to dividend warrants by sect. 95 and to certain orders for payment by sect. 17 of the

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Sect. 82. The section is as follows:

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Unless the banker can bring himself within the conditions formulated by this section, he is left to his common law liability for conversion or money had and received, in the event of the person from whom he takes the cheque having no title or a defective title thereto.

Modification of section. One modification, and one only, must be engrafted on the section. If the receipt of the money is protected by the section, the protection covers all prior dealings with the cheque. True, the section specifically deals only with the receipt of the money, and it has been contended, and even held, that the taking of the cheque from a person who had no right to it, or some formal, preliminary act such as the banker stamping his name across it, was an independent conversion, against which the banker was not protected, though he ultimately brought himself strictly within the section by receiving payment only for the customer. The ineptitude of the wording must be supplemented by a common-sense reading in order to avoid a patent absurdity. As Lord Macnaghten says in the *Gordon Case*, *ubi sup.*, at p. 244: "The only question is, did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part, taken in view and anticipation of receiving payment. The section would be nugatory, it would be worse than nugatory, it would be a mere trap, if the immunity conferred in respect of receipt of payment, and

in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result."

But with this modification every clause of the section must be fulfilled in order to entitle the banker to the protection it confers.

In good faith and without negligence.

Taking the provisions of the section in the order in which they stand, the receipt of payment must be "in good faith and without negligence."

It is obviously necessary to apply to this provision the extended construction above referred to. The obligation and the protection are co-relative and co-extensive.

Moreover, negligence at any stage would naturally enure till, and affect the receipt of the money.

The whole transaction, then, from the taking of the cheque to the receipt and disposition of the money, must be in good faith and without negligence.

The question of good faith does not require consideration. Its existence on the part of the banker is presumed throughout these pages.

What constitutes negligence.

The transaction must be without negligence. The question of what constitutes legal negligence in matters of this sort is one on which lawyers and bankers are seldom agreed.

The banker maintains that the exigencies and pressure of business make it physically impossible to adopt all the precautionary measures which the law would seek to impose upon him.

The attitude of the law is that typified by Lord Bramwell, who used to say that he was constantly told that banking could not go on if particular conditions and obligations were imposed on bankers, but that he invariably found that banking did nevertheless go on and flourish.

Where a jury have to deal with the question, the natural tendency of each juryman is to view the matter as if he were himself the plaintiff, and it was his own money that

was at stake. So that in any case the banker must be prepared to find the standard of care required of him put somewhat higher than he might consider reasonable.

Negligence in this section is artificial.

It should be noticed that the importation of negligence at all into this section is, in a sense, an anomaly. There can be no negligence without a duty. (*Scholfield* v. *Londesborough* [1896] A. C. 514.) There is no contractual relation between the collecting banker and the true owner, giving rise to a duty on the part of the former to the latter. The banker's only contractual obligation is to his own customer; and conduct beneficial to the customer at the expense of the true owner is no breach of that duty.

Is breach of implied duty to true owner.

The true exposition of the matter is that given by Denman, J., and the Court of Appeal in *Bissell* v. *Fox*, 51 Law Times, N. S. 663; 53 Law Times, N. S. 193. The duty is a purely statutory one imposed on the banker in favour of the true owner, and the negligence consists in the disregard of his interests, apart from those of the customer.

The assumption of this duty and liability to a stranger must be regarded as part of the price paid by bankers for protection under section 82.

It is from the standpoint, then, of the true owner that all questions of negligence under this section must be viewed.

It would be futile to try and formulate particular conditions of circumstances which might or might not establish negligence in this connection. Broadly speaking, the banker must exercise the same care and forethought in the interest of the true owner, with regard to cheques paid in by the customer, as a reasonable business man would bring to bear on similar business of his own.

The peculiar difficulty lies in the divided duty of the banker towards the true owner and his own customer, and the possible clashing of their interests.

It might be an awkward matter for the banker to manifest suspicion of his own customer; but if he refrained from

acting on such suspicion, he might easily render himself liable to the true owner, as having neglected his duty to him.

Some phases of duty to the true owner have been established by decision.

Duty of collecting banker to verify indorsement.

It is a common superstition among bankers that the collecting banker is not concerned with the indorsement on an order cheque.

The omission, however, to see that such indorsement is in order, at least ostensibly, has been distinctly recognised as negligence on the part of the collecting banker. In *Bavins, jun., and Sims* v. *London and South-Western Bank* [1900] 1 Q. B. 270, the Court of Appeal held the collecting bank guilty of negligence in not detecting that an indorsement did not correspond with the name of the payee, though the discrepancy had apparently escaped notice even in the court below. In *Bissell* v. *Fox*, 51 L. T. N. S. 163 ; 53 *Ib.* 193, the court held that a "per pro." indorsement put the collecting bank on inquiry, which it could not do if they were not bound to look at the indorsement. And, apart from authority, verification of the indorsement of an order cheque paid in for collection would seem a proper matter of ordinary business routine, if only to avoid delay and the necessity of returning it if the indorsement had been casually omitted or made in irregular form. It is plainly a case where the plea of pressure of business should not be admitted.

Indorsements per procuration.

As incidentally stated above, the fact of an indorsement being "per pro." puts the collecting banker on inquiry as to the authority of the person so indorsing, and disregard of such intimation is accounted as negligence. (*Bissell* v. *Fox, ubi sup.*)

Sect. 25 of the Bills of Exchange Act enacts that "a signature by procuration operates as notice that the agent has but a limited authority to sign" ; and this proposition appears to be distinct from the rest of the section and of general application, being indeed only declaratory of

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pre-existing law. Any signature which purports to be put on by delegated authority is in effect a signature by procuration; the words "per pro." or their equivalent, "on behalf of" are not an essential element. (See *Balfour* v. *Ernest*, 28 L. J. C. P., at p. 176.)

Bills executed by companies.

It would seem that all executions of bills, notes, or cheques in the name of a joint stock company, should be regarded as signatures by procuration. Sect. 47 of the Companies Act, 1862, treats all such documents as made, accepted, or indorsed on behalf of the company, whether the execution be in the name of the company or expressly stated to be on its behalf or account. This view is somewhat supported by the legal fiction which affects all persons dealing with a company with implied notice of its constitution and powers.

A "per pro." signature puts the person taking it on inquiry as to the purposes for which the signatory is entitled to use the name of his principal. Sect. 24, which deals with forged and unauthorised signatures, presents considerable difficulty with regard to signatures authorised for one purpose but employed for another. Apart from actual forgery, the whole force of that section is concentrated on the signature, not the indorsement or the signature and delivery; and it is difficult to see how a signature which is authorised at the time it is affixed can become unauthorised afterwards by reason of being utilised for an unauthorised purpose.

In the case of a "per pro." signature, however, the wording of sect. 25 clearly casts upon anyone dealing with the instrument the duty of satisfying himself not only that the agent has authority to sign, but authority to utilise the signature in the way proposed.

"Limited authority to sign" must be read as meaning or including authority to sign for specified purposes only.

But a procuration signature does not oblige the collecting banker to inquire into matters collateral to the

authority to sign, or to see to the disposition of the proceeds of the cheque.

If the indorsement, though made under due authority, were subject to some condition which is unfulfilled, that cannot affect the collecting banker (cf. *Re Land Credit Company*, L. R., 4 Ch. 460); and so long as the signing and application are within the authority, the agent's motive or subsequent misappropriation of the proceeds is immaterial; in the absence of anything calculated to arouse suspicion. (*Bank of Bengal* v. *Macleod*, 7 Moore P. C. 35; *Bryant & Co.* v. *Quebec Bank* [1893] A. C. 170; *Hambro* v. *Burnand* [1904] 2 K. B. 10.)

Indorsement by secretary on behalf of company.

In *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.*, 16 Times L. R. 236, Mr. Justice Kennedy held it negligence in a bank to collect for their customer, one Montgomery, the secretary of the plaintiff company, a crossed cheque of which the company were payees, and which was indorsed "Hannan's Lake View Central, Ltd., H. Montgomery secretary." Montgomery had authority to indorse thus on behalf of the company, but only for the purpose of paying such cheques into the company's account, which, to the knowledge of the defendant bank, was kept at another London bank.

The decision was not based, as it might have been, on the indorsement being in effect a procuration one, but on the ground that it was apparent, on the face of the transaction, that Montgomery was using for himself a valuable document which bore evidence of having been created for the benefit of his employers, and being their property; that the whole course of business was opposed to the idea that the secretary of a company was likely to have been paid money due to him, as salary or otherwise, by the authorisation of the indorsement by himself to himself of a cheque payable to the order of the company; and that in accepting such a cheque so indorsed, for his private account, the defendants had failed in their statutory duty to the true owner, and lost the protection of sect. 82.

This decision was never appealed against, and seems unquestionably sound.

Does state of customer's account affect the question?

The question has more than once been raised how far the existing condition of a customer's account ought to influence the banker when that customer pays in a large cheque for collection. If a man with a habitually small account or an account on which the credit balance has gradually dwindled, or which is slightly overdrawn, pays in for collection a cheque for a large amount, is that a suspicious circumstance calculated or sufficient to put the bank on inquiry? Juries seem to have regarded it as such; and the view taken by one jury is some criterion as to the view likely to be taken by another on such a question. So far as can be ascertained, the majority of bankers and their legal advisers take the view that there is nothing in such a state of circumstances to arouse suspicion, or put the banker on inquiry. The customer may, they say, have been keeping his account low in anticipation of this very payment, which he knew was coming in. He may have drawn out all available funds to make an investment, of which this represents the realisation. The question is hardly one of law; but extreme states of fact might exist which would fairly warrant a judge or jury in holding that, in the interest of the true owner, the banker ought not to have taken in the cheque without some inquiry.

Inquiry as to fate of cheque.

Banks have sometimes put forward as evidence that they exercised due caution about the collection of a cheque the fact that, before crediting it, they inquired from the paying bank whether it would be paid on presentation. It is obvious that such a proceeding affords no safeguard to the true owner. The paying banker could have no means of knowing in whose hands the cheque might be, and the precaution, as pointed out in *Bissell* v. *Fox*, *ubi sup.*, and *Ogden* v. *Benas*, L. R., 9 C. P., at p. 516, is one taken by the collecting banker exclusively in his own interest and for his own benefit.

Not negotiable crossing.

As to the suggestion of Lord Brampton in *Great Western Railway* v. *London and County Bank* [1901] A. C., at p. 422, that the fact of a cheque being crossed "Not negotiable" has a bearing on this question of negligence on the part of the collecting banker, see *post*, p. 222.

Account payee.

It is probably in connection with this question of negligence on the part of the collecting banker that the "account payee" crossing becomes of practical importance. As previously stated, the most rational effect to be attributed to an addition of this sort is that it operates as a memorandum or warning to the collecting banker that he must exercise caution if he collect the cheque for any account other than that indicated; much the same sort of intimation as was conveyed to the paying banker by crossing a cheque before the first Act dealing with crossed cheques gave legislative sanction and effect to crossings.

Whatever the effect may be, it attaches, in the case of the collecting banker, equally whether the cheque be to payee or bearer, to payee or order, or to bearer only with the account specified. In each case the collecting banker has the intimation, for what it is worth, that cheque and proceeds are intended for one particular person's account.

As before pointed out, negligence under this section is the disregard of the statutory duty imposed on the banker to act with reasonable care in the interest of the true owner.

The matter, therefore, resolves itself into this: is it carelessness for a banker to collect such a cheque for an account other than that specified, without inquiry and satisfactory explanation? It cannot be denied that there is a pretty plain intimation which the collecting banker must take as addressed to him, and which must be presumed to have been put on the cheque by a person having a right to do so, and an object and interest in so doing.

The banker's contention would have to be that the addition was an unauthorised one, unknown to the law;

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that neither the transferability nor the negotiability of the cheque was affected thereby, and that negligence within the section means disregard of some suspicious circumstance extrinsic to the instrument itself. In the answer to question 443 in "Questions on Banking Practice," 5th edit., it was said: "Much would turn on the usages of bankers with respect to such crossings, whether cheques so crossed are generally regarded as being limited to the use of the payee or pass freely from hand to hand, and whether in ordinary practice they are collected as a matter of course for the customer presenting them, without regard to the words superadded."

That was written fifteen years ago, and the usage one way or the other ought to be established by this time. Considering the continued and increasing use of this addition, it is difficult to suppose it has been habitually disregarded by bankers; and it would now probably be almost impossible to get a consensus of banking opinion in favour of such disregard which would convince a jury. It is annoying and somewhat hazardous to have to arrive at any opinion with regard to a custom which is devoid of legislative or legal basis, and which never ought to have been allowed to get to the stage it has done; and the difficulty is enhanced because the question might ultimately depend on the view a jury might take.

On the whole, the probabilities seem to lie in the direction that a jury would regard the intimation as one that the collecting banker is not entitled to disregard; they would argue that the custom could not have gone on so long and become so general if there was nothing in it; they would attach great weight to what they would consider the bankers' tacit acquiescence in it; they would be influenced by the legitimate consideration that negligence may rest on slighter grounds than notice of defect of title; and they might draw some analogy between the case of a cheque bearing such an intimation and one which bore

marks of having been altered or partially cancelled, and so put anyone dealing with it on inquiry (*a*).

Receiving payment for a customer.

The words in sect. 82 next to be dealt with are the most important of all. Prior to the two final decisions hereafter mentioned, they gave rise to much litigation. The words are "receives payment for a customer."

These words must be read in connection with those at the end of the section: "The banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

As before pointed out, the protection, though in terms confined to the receipt of payment, extends to all preliminary steps leading up thereto; but the word "only" is important as emphasising the fact that such receipt of payment must be strictly and exclusively for the customer, as required by the earlier portion of the section. As Lord Lindley said in the *Gordon Case* (*ubi inf.*, at p. 247), a bank is not protected unless, first, it acts in good faith and without negligence; unless, secondly, it receives payment for a customer; and unless, thirdly, it only receives such payment: and he adds: "The last paragraph of the section shows that this last condition is as important as the first and second."

The two questions which arise on this part of the section are; first, in what circumstances does a bank only receive payment for a customer; second, who is a customer?

Both questions have been the subject of decisions in the House of Lords, the first in the *Gordon Case* [1903] A. C. 240, the second in *Great Western Railway Co.* v. *London and County Bank* [1901] A. C. 414.

Receiving payment for a customer.

Assuming, for the present, that the person from whom the bank receives the cheque is a customer, the question whether all that the bank does is to receive payment for him naturally depends on the way in which the bank

(*a*) In *Akrokerri* (*Atlantic*) *Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465, Bigham, J., regarded the addition as merely a direction to the receiving bank how the money is to be dealt with after receipt, but the question was not directly before him.

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has dealt with such cheque up to the time of receiving payment. That determines the character in which the bank receives payment. And the *Gordon Case* has finally laid down that to ensure protection the only character and only way in which a bank must deal with the cheque and receive the proceeds is as a mere agent for collection.

Lord Macnaghten says, at p. 245: "The protection conferred by sect. 82 is conferred only on a banker who receives payment for a customer, that is who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents, they are not within the protection of the section." And he subsequently describes the functions of a bank acting within the section as those of "a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer." It cannot be denied that the section, dispassionately read, indicates agency pure and simple. The history of the legislation on the point is in favour of the same view. (See *Mathiessen* v. *London and County Bank*, 5 C. P. D. 7, and the judgment of Collins, M.R., in the *Gordon Case* in the Court of Appeal [1902] 1 K. B. 242, expressly approved by Lord Macnaghten in the House of Lords.) There is absolutely nothing in the whole of the legislation affecting crossed cheques which in the remotest degree necessitates the intervention of the collecting banker in any capacity other than that of an agent pure and simple. And the House applied here the canon of construction which they ignored in the case of the draft issued by a branch on the head office, namely that the protection must be limited to the enhanced risks imposed by cotemporary legislation. Lord Macnaghten, at p. 246, quotes with approval the words of Collins, M.R., in the Court of Appeal: "The protection afforded by sect. 82 must be limited to that which is necessary for the performance of the duty which, by the legislation as to crossed cheques, was imposed on bankers."

It must therefore be taken that the banker who desires

the protection of sect. 82 must confine his dealings with the cheque to such as are strictly compatible with the character of an agent, and must receive the money in that capacity.

Must not be holder for value, at any rate as transferee.

And the main point dwelt on in the *Gordon Case* is that a man cannot hold a cheque and receive payment thereof as an agent, if he be himself the holder for value of it.

Lord Macnaghten, at p. 245, says : "It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value."

If this proposition be accepted in its broadest signification, it apparently raises a difficulty with regard to the banker's lien.

"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," Bills of Exchange Act, s. 27, sub-s. 3.

A banker has, by implication of law, a lien on all bills or cheques coming into his possession *quâ* banker, to the extent of all monies due from the customer. (See, *post*, "Securities for Advances," p. 239.)

Cheques for collection unquestionably come into the banker's possession in the course of his business as such.

If the customer is overdrawn at the time, the banker is, in the words of the sub-section, deemed to be a holder for value to the extent of such overdraft. But it is hardly to be supposed that Lord Macnaghten contemplated this state of circumstances as excluding the banker from the protection of sect. 82. If the position of a mere conduit pipe is insisted on, if the receipt must be only for the customer, and if the admixture of the smallest element of holder for value, even under this sub-section, is to destroy the protection, it would follow that the banker who took a thousand pound crossed cheque in the ordinary course for collection would be debarred from protection if the customer

were temporarily overdrawn a few pounds. The conclusion appears impossible. *Clarke* v. *London and County Bank* [1897] 1 Q. B. 552 *inf.*, p. 207), has never been overruled, and the observations of Romer, L.J., in *Great Western Railway Co.* v. *London and County Bank* [1900] 2 Q. B. 464, on the subject of the lien, seem perfectly justified if confined to a real case of lien. Again, the banker is under a practical obligation to the customer to receive and present the crossed cheque, the relation of banker and customer enuring notwithstanding the overdraft, and he is therefore in the position which warrants his claim to protection.

One explanation may be derived from the words "he is deemed." As shown by *Hill* v. *East and West India Dock Co.*, 9 A. C. 448, these words do not necessarily entail all the consequences which would ensue were the supposed state of facts actually existent; they must be interpreted according to the object of the enactment. This sub-sect. 3 of sect. 27 is one of the group dealing with consideration; its object is merely to establish the validity of an existing lien as consideration *pro tanto*. Its scope and purview relate only to cases where the party holding the bill is suing on it; and the limited character of holder for value involved may fairly be regarded as existing only for the purposes for which it is conferred. Lien, being the right to hold another man's property until a debt is paid, is not only no indication of property, but is absolutely inconsistent therewith. The ordinary holder for value is the person in whom the absolute property in the bill is vested. The use of the word "lien" in the sub-section points therefore to the artificial and restricted nature of the holdership for value therein referred to.

It may fairly be urged that it is optional with the banker whether he will claim or exercise his lien, that there is nothing to show when he takes the cheque or receives the money that the action is not solely on behalf of the customer; the banker may be relying on setting off the debt against

the money received for the customer, an equally efficacious remedy and one which presupposes the separate existence of the two amounts as debts. A far more definite and specific decision is necessary to overrule *Clarke* v. *London and County Bank*, and to sanction the startling proposition that a banker taking a crossed cheque in the ordinary course for collection is debarred from protection by the mere fact of the customer chancing to be slightly overdrawn.

What Lord Macnaghten was probably referring to was the case of a real holder for value in the ordinary sense of the term ; that is to say, a transferee, who takes the entire property in the instrument. That character is really incompatible with agency ; and where a banker has become holder for value as a transferee, where the absolute property has vested in him in his own right, apart from the question of lien, it is certainly difficult to see how, in any sense, he can only receive payment of the cheque for the customer, or for anyone but himself.

Interpreted in this sense, Lord Macnaghten's remarks are clearly well founded. The question, therefore, resolves itself into this : was the banker who claims protection under sect. 82 the transferee of the cheque, or did he hold it for the customer subject to his lien for the customer's indebtedness, if any, and if he chose to exercise that lien ?

When he is transferee.

If he has given cash for it over the counter, he becomes the transferee. (*Great Western Railway Company* v. *London and County Bank* [1901] A. C. 414.) If it is paid in for the express purpose of reducing an ascertained overdraft, the banker takes it as transferee, the consideration being the pre-existing debt. If it is paid in on the express understanding that it may be drawn against at once and is so drawn against, the banker becomes the transferee. Bowen, L.J., said in *National Bank* v. *Silke* [1891] 1 Q. B. 435, that it was plain from the discussion in the House of Lords in *McLean* v. *Clydesdale Banking Company*, 9 A. C. 95, and, indeed, was plain enough to commercial

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men before, that when a cheque was sent to a bank to be placed to the credit of a particular customer, and that bank placed the amount to his credit and allowed him to draw upon it, they were holders of the cheque for value and in due course. So again where, by course of business, an implied agreement is established to the effect that all cheques may be drawn against as soon as paid in, the banker presumably takes them as transferee, independent of their being actually drawn against. Such transactions really amount to the purchase of the cheque, analogous to the discounting a bill at a future date. As a financial operation it seems almost ridiculous to talk of purchasing or discounting a cheque, which is payable on demand and designed for speedy presentation, or to contemplate a bank gratuitously guaranteeing the payment thereof, to use the expression of the Privy Council in *Gaden* v. *Newfoundland Savings Bank* [1899] A. C. 281. At the same time a cheque is a bill, and if anyone gives a sum of money down for it or takes it on a promise express or implied to give some sum either in one payment or several payments as drawn against, all conditions exist to constitute him a transferee, whether he be a banker or not. There may be reasons, such as the desire to oblige the customer or the convenience of transmitting money, which render such proceedings on the part of a banker reasonable, or even expedient.

Crediting as cash.

In the *Gordon Case*, however, the House of Lords have fixed the banker with the character of holder for value or transferee, and excluded him from the protection of sect. 82, on the ground of transactions far less obviously leading to that result. In unequivocal terms, they lay down that if the banker credit the customer's account with cheques as cash before they are cleared or the money received for them, the mere fact of his doing so, altogether apart from the state of the account, makes him holder for value of those cheques, and precludes him from only receiving

payment of them for the customer, and consequently from the protection of the section.

Lord Macnaghten, at p. 246, says: "If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques, and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way, instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer, I think they are collecting the money, not merely for their customer, but chiefly for themselves, and therefore are not protected by sect. 82."

Lord Lindley treats the fact of placing the cheque to the customer's credit as equivalent to an advance to him of the amount of it; he points out that the amount, when received, would not be again placed to the customer's credit, because it was already there, and deduces the fact that the bank received payment for itself, and sums up, at p. 249, by saying: "Whether it is desirable to alter the wording of sect. 82 is not for your lordships to consider on the present appeal; but so long as that section stands in its present form bankers who desire its protection will have to be more cautious, and not place crossed cheques, paid in for collection, to the credit of their customers before such cheques are paid."

Result of decision.

It would be futile and dangerous to attempt to minimise the effect of this decision. It has been universally and rightly recognised as laying down the broad rule that crediting cheques as cash before clearing or receiving payment *ipso facto* deprives the banker of the protection of sect. 82. If the banker credits as cash before clearing (*a*) an order cheque crossed or open held by the customer, even innocently, under a forged indorsement, or (*b*) a cheque

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payable or become payable to bearer crossed not negotiable, to which the customer's title is, either by his own act or that of any previous holder, null or defective, the banker on receiving the money for such cheque is liable to the true owner for conversion or money had and received. Some misconception seems to exist with regard to bearer cheques or order cheques become payable to bearer by virtue of genuine indorsement. It has been supposed that the *Gordon Case* recognised the protection of the banker with regard to all bearer cheques. But the cheques in that case were not crossed "Not negotiable." In *Great Western Railway Company* v. *London and County Bank* [1901] A. C. 414, on the other hand, the cheques were crossed "Not negotiable," and the bank being in the position of holders for value, and the title to the cheques being bad, the bank were held liable in conversion or money had and received. Under the *Gordon* decision the position of a bank which had credited such cheques as cash would be identical.

Previous authorities.

Premonitions of the *Gordon* decision were not wanting. In *Ex parte Richdale*, 19 Ch. D. 409, it was held that, as soon as the customer's account was credited with the amount of a cheque, the banker became the holder for value and proprietor of the cheque, whether the account was overdrawn or in credit. The authority of that case as involving a general principle was at one time doubted. (See Chalmers on Bills, 5th ed., p. 82.) But in *Royal Bank of Scotland* v. *Tottenham* [1894] 2 Q. B. 715, the doctrine was upheld by the Court of Appeal. In that case two cheques, for £250 and £50, had been sent to a bank by a customer with just the ordinary instructions to put them to her credit, in these words: "I shall be much obliged if you will place the enclosed cheques for £250 and £50 to my credit." The cheques were entered "By cash £300" on the day they reached the bank, making the total credit balance £306. Before receiving the amount of the £250 cheque

the bank honoured a cheque drawn by the customer for £194. The £250 cheque was returned dishonoured. The bank debited the account with it and sued the drawer. They recovered the full amount of £250, and the Court of Appeal supported the judgment. Lord Esher said: "One defence in this case is that the bank gave no consideration for the cheque, but that point is determined against the defendant by the decision of the Court of Appeal in *Ex parte Richdale*. When the bank received the cheque from Mrs. Monson (the customer) they did so on an undertaking to give her credit to the amount of the cheque on her general account. This they did, and giving such credit is sufficient consideration as between a bank and a customer. Consequently the bank were holders for value."

Kay, L.J., said: "It was decided in *Ex parte Richdale* in this court, that where a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, and the bankers carry the amount to his credit accordingly, they become immediately holders of the cheque for value."

This decision, based as it was on what, to bankers, appeared the mere ordinary procedure with regard to a cheque sent for collection, raised misgivings in some quarters as to the effect of such crediting on the banker's position with regard to sect. 82, on the lines before suggested, namely, the incompatibility of the character of holder for value, apart from lien, with that of agent for collection.

Clarke v. *London and County Bank* [1897] 1 Q. B. 552, turned on sect. 82. In that case there was an existing overdraft of £13 9*s*., and the customer was allowed to draw another cheque for £5 8*s*. 6*d*. against one for £43 6*s*. paid in, before it was cleared.

Cave, J., said: "If the banker is not to incur liability to the true owner by reason only of having received such payment, what have the defendants done more in this case that is to make them liable? It is said that they have

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applied a portion of the sum received in repayment of the overdraft. I cannot see why that should create any liability. The mere placing of the money to their customer's account, with the result that a portion of it would, if the balance were struck, go towards clearing off the overdraft, cannot, in my judgment, render them liable. It is a mere matter of account between them and the customer. If putting it to the customer's account is not to make the bankers liable when the customer is in funds, it cannot make them liable when the customer happens not to be in funds." Lawrence, J., agreed; and the bank were held protected by sect. 82. This case is not very conclusive one way or the other on the point. It will be noticed that there is nothing to show that the cheque paid in was credited before it was cleared. Indeed, the judgment would seem to imply that such was not the case, inasmuch as it speaks of the money being credited, presumably when received. The case has been criticised, but never directly overruled. The usual explanation of it is that the judge who tried the case found, as a matter of fact, that it was a case of collection only, and the Divisional Court, rightly or wrongly, did not see their way to reversing that finding.

It might be objected to this view that the agreement as to honouring the further cheque is very suggestive of the bank taking as transferee the cheque paid in.

On the other hand, the relative amounts of the overdraft plus the further cheques and of the cheque paid in must be taken into consideration; and it does not seem unreasonable to regard the case as one in which the bank really acted as collecting agents, relying on their lien for a remedy against drawer and indorser if the cheque was not paid.

Gaden v. *The Newfoundland Savings Bank* [1899] A. C. 281, was calculated to reassure bankers, though it suffered under the disadvantage of being a Privy Council case. There a cheque paid in by a customer was, presumably, entered as cash. At any rate, it was so entered in

the customer's pass-book which was delivered to her, a matter to which more importance might not unreasonably be attached than to an uncommunicated entry in the bank's own books. It was contended that the bank by so treating the cheque had become proprietors of it, had taken it for better or worse, and could not set up against the customer the fact that it had been dishonoured. The cheque in that instance was drawn on another bank by the customer, but there is no reason why a bank should not become transferee of such a cheque. It was dishonoured through no fault of the customer's, and the Privy Council decided in favour of the defendant bank on independent grounds. That bank, they said, did not profess to be a discounting bank, so must not be assumed to have acted outside its ordinary course of business; and they commented, almost sarcastically, on the improbability of a bank's adopting a course which amounted to gratuitously guaranteeing the payment of the cheque; a comment at least as applicable to the crediting as cash before clearing.

In *Bavins, jun., and Sims* v. *London and South-Western Bank* [1900] 1 Q. B. 270, the customer had been credited with the amount of a document before the money for it was received from the bank on which it was drawn. The document was not a cheque, but one of the class to which the Revenue Act, 1883, s. 17, extends the provisions of the Crossed Cheques sections. It purported to have been transferred by the payee to the customer, but the court took no objection on this ground, and must therefore be taken to have regarded the document as negotiable; especially as they decided the case mainly with reference to the indorsement, a matter which would otherwise have been immaterial. The court treated the bank as agents for the customer, and held that the bank, having done nothing but credit their customer with the amount, that was merely a conditional credit, and there was no reason why the bank, on having to pay the value of the

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document to the true owner, by reason of negligence in collecting it depriving them of the protection of sect. 82, should not debit the customer's account therewith, notwithstanding that, following the ordinary rules of appropriation, the money had been drawn out. The court distinctly stated that such entries were conditional on the document proving to be genuine and in all respects in order, this conditional character, from the facts of the case, being held to continue up to any date at which the customer's title is successfully impugned, even long after the receipt of the money.

These last two cases were not unreasonably regarded as minimising the effect of the crediting as cash, so far as concerned the banker's position with regard to sect. 82. Bankers interpreted them as justifying the view they had always entertained that such entries were merely provisional for the convenience of book-keeping, and, being uncommunicated to the customer, could not alter the character in which the bank received the cheque from him.

Position assumed by bankers prior to decision.

The position adopted at this date by bankers who followed the system of crediting as cash certainly involved some incongruities. They claimed (1) that the crediting as cash constituted them holders for value, apart from the condition of the account; (2) that they were nevertheless within the protection of sect. 82 with regard to crossed cheques so credited; (3) that they had the right to debit the customer's account with the amount of a cheque so credited if dishonoured; (4) that they had the right, after so crediting a cheque, to return a cheque drawn against it by the customer, with the answer, "Effects not cleared." And, taken separately, there was authority for each proposition.

The *Gordon Case* has shown propositions 2 and 4 to be untenable. As already shown, the House of Lords hold crediting as cash to be equivalent to taking the cheque as a transferee, to purchasing or discounting it, and

therefore inconsistent with the character of an agent for collection, or with only receiving payment for the customer. And the fourth proposition really goes, along with the second. If the crediting is to constitute full value for the transfer of the cheque, it must, in reason, be an actual available credit, not a mere entry in the bank books, and the customer must be entitled to the immediate benefit of the consideration for which he parts with his cheque, just as much as a man is entitled to ride the horse for which he has given a cheque. Lord Lindley says in the *Gordon Case* [1903] A. C., at p. 249: "It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right." And the whole tenour of the judgment compels the construction that the placing of the cheque to credit has the same effect.

Debiting customer with returned cheque.

The *Gordon Case* recognises the third right claimed, viz., to debit the customer's account with a returned cheque, notwithstanding it has been credited as cash. Lord Lindley says, at p. 248: "It is, no doubt, true that if the cheque had been dishonoured, Jones (the customer) would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have to do whether any cheque, crossed or not, was placed to his credit and was afterwards dishonoured."

Adopting the view of the House of Lords, and regarding the banker who has credited a cheque as cash as the transferee or holder for value thereof, it is not very easy to see on what ground this right to debit the customer rests. If the customer has indorsed the cheque, there would be a remedy against him as indorser; but only on giving notice of dishonour, and by action at law in the usual manner. There seems no justification for the banker's usurping all legal functions and taking a summary remedy into his own

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hands. If the customer has not indorsed the cheque, the right is still more exceptional. A transferor by delivery is not liable on the instrument (sect. 58, sub-sect. 2), nor on the consideration, unless such consideration was an antecedent debt, or, possibly, if it be shown that the transfer was not intended to operate in full discharge of the liability. The proposition enunciated by Mr. Chalmers (Chalmers on Bills, 6th ed., p. 198) that if a man cashes a cheque payable to bearer, for the convenience of the holder, and it is dishonoured, he can recover the money, rests on very doubtful authority. Apart from Lord Lindley's ruling, the claim to debit such cheques would seem to rest only on the custom of bankers. That ruling, however, expressly recognises the right, notwithstanding the crediting as cash, and the words "any cheque" show that the customer's indorsing or not does not affect the question. The origin or justification of the right need not therefore be further discussed.

Special facts in *Gordon Case.*

It is not of much use to criticise a judgment of the House of Lords, it being final and irrevocable. One may, however, be pardoned for doubting whether there was any necessity for the House resorting to so broad a rule as they did in the *Gordon Case*.

There were a variety of circumstances in that case which might well have justified their lordships in fixing the banks with liability, apart from the mere crediting as cash. There was the fact, more prominent perhaps in the case of one bank than the other, that, though the forged indorsement of the payee made the cheques ostensibly payable to bearer, the indorsement of the customer was exacted, or at any rate taken, in addition. An extra indorsement may be added to strengthen security without involving transfer (see *Ex parte Schofield*, 12 Ch. D. 337), but strong evidence is necessary to rebut the presumption of transfer in such cases; no such evidence seems to have been forthcoming in the *Gordon Case*. Identification in case of dishonour was

not suggested as the reason; nor is indorsement a suitable method for that purpose, as it would be most unreasonable to return bearer cheques, or cheques become payable to bearer, to the customer to be indorsed; and such a course is unknown.

Again, there were very strong grounds for inferring either an express agreement, or one deducible from course of business, to the effect that the customer should be at liberty to draw against the cheques paid in, before they were cleared. It is stated in the report (p. 241) with regard to the Capital and Counties Bank: "The amounts were placed to his credit when he paid the cheques in, and he was allowed to draw upon his account increased by them, as above stated," and as to the London City and Midland, Lord Lindley says (p. 249): "He frequently availed himself of the credit given him for those cheques by drawing against such credit." It might therefore have been fairly held that these were exceptional circumstances bringing the case within previously recognised principles, such as that enunciated by Bowen, L.J., in *National Bank* v. *Silke* [1891] 1 Q. B. 435, that if a cheque is paid to a bank on the footing that the amount may at once be drawn upon, and it is drawn upon accordingly, the bank are holders of the cheque for value and in due course.

It would have probably been more beneficial to bankers in the end if the House had adopted this line. It may be some gain to have the authority of *Ex parte Richdale* and *Royal Bank of Scotland* v. *Tottenham* conclusively affirmed; but the position thus established is, for all practical purposes, equally secured by the utilisation of the banker's lien; while the exclusion of the banker from protection by the mere crediting as cash is a definite danger and obstacle to business.

Treating as cash.

One cannot resist the suspicion that the House of Lords were influenced by the assumption that placing a cheque

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to credit as cash was in all senses identical with what they term "treating it as cash." Lord Macnaghten uses the terms as interchangeable or synonymous; Lord Lindley implies the same when he speaks of such a credit being available for immediate drawing. Bankers, however, by no means admit that the mere book-keeping entry in any way involves the transmutation of the cheque into notes or gold; and the cases of *Bavins, jun. and Sims* v. *London and South-Western Bank* and *Gaden* v. *Newfoundland Savings Bank*, before referred to, certainly appear to support their contention.

Course to be adopted in view of decision.

A more pertinent and profitable inquiry is as to the course to be adopted by banks in view of this decision, pending remedial legislation.

As before stated, as things stand, any bank which credits as cash, before clearing, a crossed cheque with a forged indorsement, or any cheque, order or bearer, crossed "Not negotiable," to which the customer has no title or a defective title, is liable to the true owner in conversion or money had and received, just the same as if the cheque had been uncrossed.

The suggestion which obviously first presents itself is that the system of crediting as cash should be discontinued. Some banks have never adopted it. They follow a system of book-keeping which relegates cheques to a suspense account or an inner column, and excludes them from the regular credit account until they appear there in the form of cash actually received. The followers of this practice profess to see no difficulty or hardship in its universal adoption.

On the other hand, bankers who have adopted the entry as cash system uncompromisingly assert the utter impossibility of any alteration of or even any modification in it. Lord Macnaghten said, [1903] A. C., at p. 245: "It was urged with some force that practically the only result of upholding the decision under appeal will be to compel

some bankers to keep a double set of books where now one set only is required, and thus to impose upon bankers a good deal of extra and, perhaps, unnecessary trouble." But the bankers concerned say that not only a double set of books, but a double staff of clerks, would be required to follow out the suggested method. The question is one of the internal economy of a bank, with which bankers are more competent to deal than the present writer, and it is not therefore proposed to discuss it here.

Paying-in slips.

An alternative course is to utilise paying-in slips, and, by notice on these and in the pass-books, to apprise the customer that cheques, although, for convenience of book-keeping, entered as cash, are only taken for collection, and are not available for drawing purposes until cleared or the proceeds have been actually received. It has been suggested that agreement between the banker and customer cannot affect the rights of the true owner; that if in law the crediting as cash makes the banker holder for value, the undisclosed understanding between him and his customer would be a mere ineffectual subterfuge.

This does not seem to be the case. Whether the bank is agent or principal must depend on the basis of dealing with the customer. A man cannot constitute himself a holder for value against the will of the previous holder. The recognition of such an agreement is the only tenable ground for the judgment of Bigham, J., in *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465. Moreover, such an intimation cuts away what one cannot help seeing weighed heavily in the scale with the House of Lords in the *Gordon Case*, namely the impression that crediting as cash inevitably involves the right of the customer to draw against such credit. This result, at any rate, could not be attributed to the entry, in the face of its distinct renunciation by the customer.

Some such method is, in any event, necessary if bankers desire to retain the entering as cash plan, and at the same

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time to reserve the right to return a customer's cheque drawn against that nominal credit, with the answer, "Effects not cleared." In view of Lord Lindley's statement that "it must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right," the customer to whom a cheque had been so credited would, unless debarred by agreement or stipulation, be entitled to treat such credit as funds available for drawing purposes, and to claim damages if a cheque drawn against them were returned unpaid. This is a matter which, even if either of the Government Bills, or one which was privately drafted in 1903, had become law, would still have been left to arrangement between the parties. The introduction of any provisions on the point, even if desirable, would infallibly have raised comment and opposition, and seriously imperilled any chance the measure had of getting through both Houses within the session. It would always be open to the banker to relax the stringency of such restriction in approved or exceptional cases, just as he may waive notice of withdrawal on a deposit account; while the existence of the stipulation would protect him in returning the cheque on the ground of uncleared assets in ordinary cases or when such a course appeared advisable.

Who is a customer.

Next, sect. 82 requires that the crossed cheque be received from and payment thereof received for a person who is properly describable as a customer. The section gives no definition of customer. The term obviously implies a certain amount of use and habit. (See *Matthews* v. *Williams Brown & Co.*, 10 Times L. R. 386; *Great Western Railway Company* v. *London and County Bank* [1901] A. C. 414.) A single isolated transaction cannot constitute a man a customer; nor can a series of transactions, even if continued for a considerable period, if those transactions have no distinct relation to banking business, and are such as could be just as well undertaken by anyone

not a banker. In *Great Western Railway Company* v. *London and County Bank, ubi sup.*, a man had been for some years in the habit of getting crossed cheques exchanged for cash at a bank where he had no account, and which charged him nothing for the accommodation. Held by the House of Lords, reversing the judgment of the Court of Appeal, that he was not a customer.

The existence of a *bonâ fide* account is the safest indication of a customer, and it might not unfairly be conjectured that the original idea of the proviso to sect. 12 of the Crossed Cheques Act, 1876, the precursor of sect. 82, was that of a customer with a regular current account into which the proceeds of crossed cheques paid in for collection would naturally go. Indeed, the keeping of a current account has been judicially indicated as the true test of a customer. In *Lacave* v. *Credit Lyonnais* [1897] 1 Q. B. 148, Collins, J., said: "I am clearly of opinion that Ponce was not a customer of the bank. Sir Robert Reid contended that the section (82) could not be taken to limit the protection to the case of the cheque being collected for a customer in the ordinary sense, that is, a person who kept an account at the bank. He says 'the customer' must be used in a larger sense of the word, and practically, as far as I can see, must be taken to mean anyone. I cannot see any dividing line between a person who has no account and anyone who chooses to come with a cheque and ask the bank to collect it for him. Sir Robert Reid contended that it must have that larger meaning. He admitted that, if it had not that larger meaning, Ponce could not be brought within the definition of 'customer.' He called the attention of the court to a decision which undoubtedly decided that no one but a customer in the proper sense of the word, a person having an account at the bank, would be entitled to the benefit of the section. That is the case of *Matthews* v. *Brown & Co.*, decided in the year 1894. I do not think it would have required the authority of that decision

CHAP. XVII. to convince me that the Act means what it says, and that protection is only given, for obvious reasons, to a bank which does collect for a customer in the real sense, if he is a person who has an account at the bank, at all events if he is a person whose relations are much nearer and closer than those of Ponce in this case."

The words in the report are, "I cannot see any dividing line between a person who has an account and anyone who chooses," &c.; but the word "an" is obviously a mistake, and it should be, as above quoted, "no account." There are, however, *dicta* in the judgment of the House of Lords in *Great Western Railway Company* v. *London and County Bank* [1901] A. C. 414, which seem to involve the expansion of the test beyond the fact of keeping a current account; and the concluding words of the above-quoted judgment of Collins, J., point in the same direction. Lord Brampton, indeed, in the *Great Western Case*, seems disposed to include as customers persons whose dealings would appear quite insufficient to constitute them such. The question is perhaps more one for the application of a common-sense view than for legal definition; but, broadly speaking, a customer might fairly be defined as one who, for an appreciable period, has had with the bank transactions of the nature of legitimate banking business, productive of profit or advantage to both parties.

A man who had for years been in the habit of bringing bills to a bank for discount on a business footing might well be regarded as a customer, in the event of the bank collecting a casual cheque for him, although he had no current account. A deposit account might qualify a man as a customer, apart from any current account. Very possibly both these cases are outside the original purview of the section, but, in the absence of definition, it would be hard to deny that such a person was, in common parlance, a customer. A question might be raised whether the protection extends to a first trans-

action, a cheque paid in to open an account, perfectly *bonâ fide*, with the real intention of continuing the account afterwards. Probably protection would be withheld. Use and habit are lacking, and intention cannot supplement what is, for the time being, an isolated transaction. As Darling, J., said in *Tate* v. *Wilts and Dorset Bank*, "Journal of The Institute of Bankers," vol. xx., p. 376, of the man paying the first cheque into an account which continued for nearly two months afterwards: "He was not a customer at the moment, but he was going to become a customer if that cheque was collected."

If a man is not otherwise a customer, such expedients as making him draw a counter-cheque for the amount, or entering the transaction under some such head as "Sundry Customers" will be of no avail. (*Cf. Matthews* v. *Williams Brown & Co.*, 10 Times L. R. 386.)

Sect. 82, being confined to cheques, has no application to a document which purports to be a cheque, but to which the drawer's signature is a forgery. Still, whether crossed or not, it would seem that a banker incurs no liability by unwittingly collecting such a document for a customer. Even if there could be a true owner of such a document, other than the customer, the double contingency of a forged drawer and a subsequent forged indorsement in fraud of a true owner is too remote to render the question worth consideration. As against the payer or his banker the collecting banker would be protected against loss, as an innocent agent receiving the money for and handing it over to his principal. (See "Money Had and Received," *ante*, p. 140.)

Documents treated as cheques.

Inasmuch as sect. 95 of the Bills of Exchange Act extends the crossed cheques sections to dividend warrants, and sect. 17 of the Revenue Act, 1883, does the same with regard to the documents therein described (see, *ante*, p. 30), section 82 must be read as if such instruments were

CHAP. XVII. specifically mentioned therein. The peculiar limitations of each class of document must, however, be borne in mind when seeking to apply to them any of the crossed cheques sections.

Dividend warrants.

As to dividend warrants, they are frequently nothing more or less than cheques in a somewhat unusual form. If a dividend warrant contains any condition or other feature excluding it from the character of a cheque, it must stand on its own footing. The negotiability or even transferability of dividend warrants, apart from cheques, does not appear ever to have been fully judicially recognised.

Mr. Chalmers suggests (Bills of Exchange, 6th ed. p. 327) that they seem to be contemplated as falling within the Act; but that can only be if they conform to the requisites of a bill. Sect. 8, for instance, to which he refers, could have no application to a document other than a bill. Very possibly a custom of merchants could at the present day be proved showing dividend warrants to be negotiable, even though they materially diverged from bill or cheque form; if not, a banker might be held guilty of negligence if he collected such a warrant for a customer other than the payee. Sect. 97 (3) (d) specially preserves the validity of any usage relating to dividend warrants or the indorsement thereof. This probably refers to the custom of bankers to pay dividend warrants which are payable to several payees on the indorsement of one; but the object in view is discharge or receipt, not negotiation.

Revenue Act, 1883, s. 17.

So, again, with regard to documents brought within the crossed cheques sections by sect. 17 of the Revenue Act, 1883. They are not cheques; and, as shown before, are not negotiable and not even transferable. In face of the terms of the section, it would be practically impossible to affix to them a negotiable character by custom, inasmuch as the section debars them from that quality, and the terms in which it describes them also preclude it. Consequently, a document cannot fall both within the crossed cheques

sections by virtue of sect. 17 of the Revenue Act, 1883, and at the same time be transferable. It would, therefore, be negligence in the banker to collect it for anyone but the payee. It must be admitted that the Court of Appeal appear to have disregarded this consideration in *Bavins, jun. and Sims* v. *London and South-Western Bank* [1900] 1 Q. B. 270, but it was not placed before them, and it is apparently sound in principle.

"Crossed generally or specially to himself."

The next condition which must be fulfilled in order to entitle the collecting banker to protection under sect. 82 is that the cheque be "crossed generally or specially to himself."

It must now be taken as finally settled that this clause is confined to cheques already crossed when coming to the banker's hands; and that a crossing by the banker himself of a previously uncrossed cheque, under sect. 77, sub-sect. 6, does not render it a crossed cheque for the purposes of this section. (*Bissell* v. *Fox*, 51 L. T. N. S. 663; the *Gordon Case* in the Court of Appeal [1902] 1 K. B. 242, and in the House of Lords [1903] A. C. 240, where Lord Lindley says, at p. 249: "It appears to me that sect. 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they came to the hands of the bank seeking the protection of that section.") See further as to this point "Crossing by Collecting Banker," *ante*, p. 54.

As to the effect, with regard to sect. 82, of one banker crossing to another for collection under sect. 77, sub-sect. 5, see, *ante*, p. 52.

By whom must be crossed.

As previously intimated, it is in this connection that importance attaches to the question whether, to constitute a crossed cheque, the crossing must be put on by some person authorised by the Act to do so. The typical case would be that of a perfectly innocent, respectable person who has taken an open, order cheque, *bonâ fide* and for value, on which the payee's or a subsequent indorsement has been forged. He crosses it, either generally or to his own bankers, pays it in to them for

CHAP. XVII. collection, and they collect it for him. As shown before (*ante*, p. 102), such person is neither drawer nor holder, and has, under the Act, no more right to cross the cheque than any casual stranger who might find it lying about (*a*).

Is the instrument "a cheque crossed generally or specially" to that banker within the section so as to entitle the banker to protection? Arguments on both sides will be found under "Paying Crossed Cheques" (*ante*, p. 102). In the case of the collecting banker, however, there is the additional feature that he is under practical compulsion to receive the cheque for collection from his customer, and in that sense is within the purview of the section. The contentions on either side seem fairly balanced, and it is difficult to forecast what view a court might take if the question ever arose, either construction involving some straining of the crossed cheques sections. Very possibly the contingency was not present to the minds of the Legislature, and is therefore not provided for.

The not negotiable crossing.

In *Great Western Railway Company* v. *London and County Bank* [1901] A. C., at p. 422, Lord Brampton said that though he recognised that the bank received payment of the cheques which were marked "Not negotiable" in good faith, he was by no means clear that it did so "without negligence," inasmuch as the bank must be taken to know the effect of the "Not negotiable" crossing. This obviously indicates an impression on Lord Brampton's part that a banker cannot accept a cheque marked "Not negotiable" for collection without negligence, or at least that the fact of its being so marked is, of itself, sufficient to put the banker on inquiry. It is confidently submitted that there is no foundation whatever for any such suggestion. Everything in the Act points to the diametrically opposite conclusion.

The provisions of sections 81 and 82 were formerly

(*a*) Nothing in the judgment of Bigham, J., in *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465, can fairly be cited as controverting this proposition. Cf. *ante*, p. 103, n.

combined in one section, sect. 12 of the Crossed Cheques Act, 1876; the substance of that section being as sect. 81, and the present sect. 82 appearing as a proviso thereto. The whole controversy in *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7, decided in 1879, was whether the proviso applied to cheques other than those crossed "Not negotiable." The court held that it did; the proviso, though in that form, operating as a substantive enactment, and not being in terms restricted to any particular form of crossing.

It would indeed be extraordinary if the Bills of Exchange Act, in emphasising this decision by reproducing the proviso as an independent section, had excluded from its operation the very class of crossing to which alone it had been contended it applied.

Next, the whole scheme of sect. 76 makes the words "not negotiable," where they appear, part of the "addition" which "constitutes a crossing," the existence of which crossing renders the cheque a crossed cheque. The words are as much a part of the crossing, and as much an element of a cheque crossed generally or specially, as the two parallel transverse lines or the name of a banker. The words used in each case are "with or without the words 'not negotiable.'" When, therefore, sect. 82 uses the phrase "without negligence" in reference to a crossed cheque, it must mean negligence independent of anything which simply goes to constitute a crossed cheque.

Again, sect. 81 specifically limits the effect of the not negotiable crossing to title gained or conferred by the person taking the cheque so crossed. The collecting banker neither acquires nor confers any title to a cheque coming to his hands for collection and being so dealt with.

Again, where there is prior absence or defect of title, the effect of the crossing is to render the customer's title null or defective, the precise contingency against which the banker is protected by sect. 82.

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Finally, the statutory authorisation of the not negotiable crossing for the protection and benefit of the public, and the consequent obligation on bankers to collect such cheques for their customers as much as crossed cheques not bearing those words, render applicable the canon of construction which requires that the banker should receive equivalent safeguards, which he would not do if any distinction were made, as regards him, between the two classes of cheques.

The addition of words such as "account payee" to the authorised crossing forms no part thereof. They can only affect the position under the clause requiring that the collection shall be "without negligence," which see, *ante*, p. 197.

"The customer has no title or a defective title thereto."

The case in which the banker is protected under sect. 82 is therein defined as being where "the customer has no title or a defective title" to the cheque. There are allusions or hints in the judgments of the Lord Chancellor and Lord Brampton in *Great Western Railway* v. *London and County Bank* [1901] A. C. 414, which might be taken to imply that the position of a *bonâ fide* holder for value of a cheque, or even of the banker who collected it, might be affected by the question whether the fraud by which the cheque was obtained amounted to larceny by a trick, which is a felony; or was merely an obtaining by false pretences, which is a misdemeanour. The suggestions are too vague to admit of detailed criticism, but there appears to be really no basis for any such proposition.

A man who has stolen a cheque can give a perfectly good title to another, who takes it as a holder in due course. The Larceny Act, 1861, s. 100, exempts negotiable instruments in the hands of a *bonâ fide* holder for value from revesting in the original owner even after conviction of the offender, an exemption which has been judicially interpreted as affording complete protection to such holder (see *Chichester* v. *Hill*, 52 L. J. Q. B. 160).

Cheques are not "goods" within sect. 62 of the Sale of Goods Act, 1893, and so are exempt from sect. 24, subsect. 1 of that Act. It would be strange if civil trials on a bill or cheque were liable to be complicated by incidental criminal proceedings to determine, in the absence of the alleged criminal, whether his conduct amounted to felony or misdemeanour. In *Clutton* v. *Attenborough* [1897] A. C. 90, there was actual theft, coupled with fraud which might well have been classed as larceny by a trick; yet the House of Lords unhesitatingly decided in favour of the holder in due course.

If the cheque is crossed "Not negotiable," it can make no difference whether the infirmity of title arises through felony, misdemeanour, or some disabling circumstance not amounting to crime. In other cases, the only question which can be raised against the holder in due course is, was the document knowingly issued as a negotiable instrument? (See "Void and Voidable Contracts," *ante*, p. 136).

The position is, if possible, stronger in the case of the collecting banker. The customer cannot have less than no title, even if he has obtained the cheque by larceny; and against the total absence of title sect. 82 affords protection.

As to cases in which a collecting banker may be protected against the consequences of collecting a cheque for a customer whose title is defective, apart altogether from sect. 82, see, *ante*, p. 138.

The operative words of sect. 82 are "the banker shall not incur any liability to the true owner by reason only of having received such payment." As to who is "true owner," see *ante*, p. 134.

"Shall not incur any liability to the true owner."

As before stated, and as pointed out by Lord Macnaghten in the *Gordon Case*, see *ante*, p. 190, the protection, when it can be claimed, extends not only to the receipt of payment, but "to every step taken in the ordinary course of business and intended to lead up to that result."

"By reason only of having received such payment."

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Duty as to bills and cheques paid in.

The duty of the collecting banker, with regard to bills and cheques paid in, is to present them for acceptance where necessary, and for payment at the proper period. With regard to bills payable on demand, they must be presented for payment within a reasonable time after issue to charge the drawer, and within a reasonable time after indorsement to charge the indorser (sect. 45). By the same section, in determining what is a reasonable time regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

Time for presenting cheques.

Cheques stand on a somewhat different footing. It may be taken that the indorser, if any, not being the drawer, is discharged by the omission to present the cheque for payment within a reasonable time after the indorsement. But, as shown before (see, *ante*, p. 73), the provisions of section 45 are, in the case of cheques, modified by implication from sect. 74; and the drawer, except in the case of, and to the extent of, damage sustained by failure of the bank on which the cheque is drawn pending its presentment, remains liable on the cheque unless and until released by the Statute of Limitations. It is, however, clearly the banker's duty not to subject his customer, and incidentally himself, even to this risk, and all cheques should be presented within a reasonable period of the receipt. If the delay has occurred prior to their reaching the banker's hands, he is, of course, not responsible for that. The rule as to reasonable time for presenting cheques, as formulated by Mr. Chalmers (Chalmers on Bills, 6th ed., p. 251), requires that the cheque be presented on the day after receipt, if the recipient and the banker on whom it is drawn reside in the same place, or that it be forwarded for presentment on the day following receipt, if the recipient and the drawee banker are in different places. Where the intervention of an agent, such as a collecting banker, occasions delay in presentment, the question seems to be whether the employment of such

Intervention of agent.

agent was a reasonable thing to do. In the case of crossed cheques the employment is not only reasonable, but a necessity imposed by statute; and any delay occasioned by such a cheque being paid in to a banker for collection would consequently and unquestionably be held justifiable.

Uncrossed cheques.

And in the case of uncrossed cheques, there can be little, if any, doubt that a man is entitled to avail himself of the services of his banker for their collection. The point does not seem ever to have been raised; but the obvious impossibility of a business concern, or even a private individual, personally presenting or forwarding every cheque for payment, and the frequent judicial recognition of the Clearing House system, would render it almost ludicrous to contend that it was an unreasonable thing for a man to pay a cheque into his banker's instead of presenting or forwarding it himself. If on no other ground, such a course could be supported by reference to sects. 45 and 74, both of which provide that usage of trade shall be taken into account in reckoning what is reasonable time; while sect. 74 provides that not only usage of trade, but that of bankers, shall constitute an element of the calculation. These terms assuredly sanction a practice so universal as that of the collection of cheques through the medium of a banker. And, both with regard to bills and cheques, the provisions of sect. 49, sub-sect. 13, as to notice of dishonour, where a bill when dishonoured is in the hands of an agent, appear to recognise the intervention of the banker as collecting agent.

It would follow that the banker has the day following the receipt of the cheque within which to present or forward it.

Presentment through the Clearing House is equivalent to actual presentment to the bank on which the cheque is drawn.

Duty to give notice of dishonour.

The collecting banker must give notice of dishonour with regard to any bills or cheques dishonoured on presentation by him.

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On cheques.

So far as cheques are concerned, the need for notice of dishonour to the drawer is, as previously stated, *ante*, p. 42, somewhat of an anomaly, the drawer being the principal debtor on the instrument, and having no right of recourse against any other party. Still he is drawer within sect. 48, and as such entitled to notice, though in the majority of cases omission to give it would be excused under either (4) or (5) of sub-sect. (c) of sect. 50, the dishonour having arisen either from insufficient funds, in which case the banker is under no obligation to pay the cheque, or from countermand of payment by the drawer.

To whom to be given.

Under sect. 49, sub-sect. 13, where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. The latter would seem far the preferable course for the collecting banker. It is somewhat improbable that he should be acquainted with the addresses of the parties to the bill or cheque other than his own customer; there seems no reason why he should take upon himself the additional labour of notifying them of the dishonour; and if he gives notice, say to the last indorser only, he runs the risk of that indorser not passing it on, and of the other parties being consequently discharged. In such case he would be liable to his customer; as the alternative course to giving notice to the customer, allowed by the section, is that of giving notice to the parties liable on the bill, a duty which is not fulfilled by giving notice to some or one of them.

When to be given.

The time allowances for giving notice, where a bill or cheque is in the hands of a bank for collection, are on a fairly liberal scale. By sect. 49, sub-sect. 13, the banker has the same time to give notice to his customer as if he (the banker) were the holder, and the customer, upon receipt of such notice, has himself the same time for giving notice as if the banker had been an independent holder. Moreover, where the instrument has been forwarded by one

branch to another, or a branch to the head office, or *vice versâ*, for collection, each such constituent of the entire bank is, for the purpose of giving notice of dishonour, regarded as a separate entity, and the same time allowed as if they were independent holders. (*Clode* v. *Bayley*, 12 M. & W. 51; *Prince* v. *Oriental Bank Corporation*, 3 A. C., at p. 332; *Fielding* v. *Corry* [1898] 1 Q. B. 268.)

As to the method of giving notice of dishonour, s. 49, sub-s. 6, enacts that "the return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour." Mr. Chalmers' note is, "This sub-section approves a common practice of collecting bankers which was previously of doubtful validity" (6th ed. p. 161).

Returning bill to customer.

The usual and natural practice of collecting bankers would seem, however, to be to return the bill or cheque to their own customer; and the sub-section does not appear very aptly framed for a complete authorisation of this practice. It does not cover the case of a bill or cheque payable, or by means of blank indorsement become payable, to bearer, of which the customer is the holder; and the return therefore of such a document to the customer is not notice of dishonour within the sub-section, which only applies where the customer is either drawer or indorser. Presumably indorsement for collection would be sufficient to constitute the customer an indorser within the provisions both of this sub-sect. and of sect. 49, sub-sect. 13.

The words "*return* of a dishonoured bill" seem to point to the sub-section being confined to the bill or cheque being restored to the source whence it came; in the banker's case, to the customer. It might be doubted whether the mere transmission of the bill to a prior party, not the holder's immediate transferor, would be within these terms.

In any event such a course would be an undesirable one for the banker to adopt. There seems no reason why he

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should put the bill or cheque out of the possession of himself or his customer, its production being necessary if proceedings have to be taken on it.

How given.

Save in the exceptional case of the return of the bill to a drawer or indorser, the notice must be given in writing or by personal communication (sect. 49, sub-sect. 5). It may be sent by post. Sect. 49, sub-sect. 12 (*b*) clearly recognises this.

Notice by telegram.

Notice by telegram would seem to be good. Willes, J. appears to have doubted as to this in *Godwin* v. *Francis*, L. R., 5 C. P., at p. 303; but in *Fielding* v. *Corry* [1898] 1 Q. B. 268, A. L. Smith, M.R., expressed the opinion that such notice was sufficient.

When must be given.

It is, however, to be noticed that, except in the case of personal communication, the crucial time is the sending, not the receipt, of the notice, sect. 49, sub-sect. 12. Thus, where the parties reside in different places the notice must be 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.

In *Fielding* v. *Corry*, *ubi sup.*, there being convenient posts on the day following dishonour, a telegram sent the next day, though it arrived about the same time as a letter posted the previous day would have done, was held to be too late. Had a special messenger been despatched at any time during the day after dishonour, though he might have been far later in arriving, that would presumably have sufficed.

In that particular case notice of dishonour was posted by mistake to the wrong branch, and the telegram was sent to the right branch. It was held that this was equivalent to a redirection of the letter, and that the notice was good: but the decision seems open to criticism.

Whether by telephone good.

No case has yet arisen as to the validity of notice by telephone. It might fairly be considered to come under the head of a personal communication, the actual voice

being transmitted by the reciprocal vibrations of the discs by means of the electric current in the same way as by vibration of the air or intervening material in the case of ordinary speaking, as shown by the phrase "to speak through the telephone."

Cheque by post to paying bank.

Where a bank, apart from agency, forwards a cheque by post direct to the bank on which it is drawn and requests a remittance, the latter bank would appear to hold the cheque in the capacity of agent for collection, not that of drawee banker. It is true that a bill may be presented by post, sect. 46, sub.-sect. 8, being merely confirmatory of the pre-existing English practice, but the above view is that taken by Mr. Cohen and Mr. Chalmers. (See "Questions on Banking Practice," 5th ed., Question 5.)

The drawee bank has therefore the whole of the day following receipt within which to return the cheque.

The same principle would seem to apply where a private person adopts the same course of sending the cheque direct to the drawee bank, if on the facts it appears that such forwarding was in the nature of employing the drawee bank in the dual capacity of agent and payee, and not by way of presentment only. In no case, however, can the drawee bank claim to hold the cheque two days, one for presentment to itself, the other as an agent holding a dishonoured bill.

Duty of paying bank

The duty of a bank receiving a cheque drawn on it by post, for payment only, is, if it is not going to pay the cheque, to post the cheque back the same day. Where the rules of the country clearing apply, that is, where a cheque is presented to a country bank through the London Clearing House, the time allowed is still shorter. The cheque must be returned by the first post after receipt, and must be returned direct to the country or branch bank whose name and address is across it. Rule 4 is as follows: "Any country bank not intending to pay a cheque sent to it for collection to return it direct to the country or branch

bank, if any, whose name and address is across it." The words "for collection" as used here, though justified by banking phraseology, are somewhat misleading, especially as they occur elsewhere in the rules in the ordinary sense. In this particular case they are equivalent to "for payment," the cheque necessarily reaching the country bank through its own London agent. If the drawee country bank does not return the cheque direct by the first post after receipt, it is held liable to pay the amount (*Parr's Bank* v. *Ashby*, 14 Times L. R. 563) if the presenting bank have acted on the presumption that it would be paid.

The rules of provincial clearing houses differ as to the time within which unpaid cheques must be returned.

CHAPTER XVIII.

SECURITIES FOR ADVANCES.

The Banker's Lien.

APART from any special security, the banker can look to his general lien as a protection against loss on loan or overdraft. The general lien of bankers is part of the law merchant and judicially recognised as such. (*Brandao* v. *Barnett*, 12 Cl. & Fin. 787.)

As stated in that case (p. 806), "Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied c ontract, inconsistent with lien."

Securities subject to lien.

What class of securities may be the subject of lien is not very clearly defined. The words used in *Brandao* v. *Barnett* are "all securities." In *Davis* v. *Bowsher*, 5 Term Reports, 488, Lord Kenyon, C. J. uses first the words "all the securities," but afterwards says: "Whenever a banker has advanced money to another he has a lien on all the paper securities which come into his hands for the amount of his general balance." Grose, J. uses the term "paper securities."

The class of securities covered by these definitions cannot, on the one hand, be limited to fully negotiable securities. In *In re United Service Company*, L. R., 6 Ch. 212, share certificates; in *Currie* v. *Misa*, 1 A. C. 564, an order to pay money to a particular person; in *Jeffryes* v. *Agra and Masterman's Bank*, L. R., 2 Eq. 674, a species of deposit receipt, were all held subject to the banker's lien, though none of them was negotiable. On

CHAP. XVIII. the other hand, the general lien cannot be said to extend to all classes of documents, even though they might otherwise be utilised as security.

In *Wylde* v. *Radford*, 33 L. J. Ch. 51, Kindersley, V.-C., expressed the view that a conveyance of land was not subject to the general lien. He said: "The cases refer to a deposit of documents which are in their nature securities, but there is some ambiguity in the term 'securities.' Anything may of course be deposited, and deeds or plate, after they have been deposited, may be said to be a security; but what is intended is such securities as promissory notes, bills of exchange, exchequer bills, coupons, bonds of foreign Governments, &c., and the courts have held that if such securities are deposited by a customer with his banker, and there is nothing to show the intention of such deposit one way or the other, the banker has, by custom, a lien thereon for the balance due from the customer." See, however, *In re Bowes*, 33 Ch. D. 586, and *Mutton* v. *Peat* [1900] 2 Ch. 79, where it would seem to have been assumed that the lien would attach to a policy of insurance and a lease respectively.

The nature of the "securities" subject to the lien is further deducible from the condition that they must come to the banker's hands in his capacity as banker; in the course of banking business. Very possibly it is part of a banker's business to advance money, and any class of property may by proper means be made the subject of security. But save in the case of specific deposit as security, or by way of equitable mortgage, in which cases lien becomes immaterial, it is difficult to conceive how such things as leases or conveyances should come to the banker's hands in the course of his business as such. The better view would seem to be that the lien only attaches to such securities as a banker ordinarily deals with for his customer, otherwise than for safe custody, when there is no question

or contemplation of indebtedness on the part of the customer.

Character in which in banker's possession.

But if not so circumscribed by the limitation of "securities," the same restrictions probably arise from the qualification that the goods must be in the possession of the banker in the course of his trade as banker, or for the performance of some office which was his duty as banker. It is not everything a banker does to oblige his customer which falls within this category. The receiving of valuables for safe custody, for instance, though a common courtesy from bankers to their customers, could scarcely be regarded as in the course of the banker's trade or duty. Lord Campbell said in *Brandao* v. *Barnett, ubi sup.*: "A special verdict might find that it is the custom of bankers in the course of their trade as such to receive such deposits from their customers, but I do not think that from that finding a general lien could be claimed on the plate chests."

No doubt the conditions of receipt would also exclude the lien in such cases, the receipt being for a specific purpose, but the illustration is adduced by Lord Campbell as indicating the class of transaction which does not give rise to the lien.

Immediately after the above remarks Lord Campbell added: "In both cases a charge might be made by the bankers if they were not otherwise remunerated for their trouble."

Whether payment makes difference.

It has been deduced from this that where a charge is made by the banker for the performance of any office it is *primâ facie* evidence that the performance of that office is not within the duty or business of bankers. (See Walker on Banking, p. 186.) This does not seem to be the case. It is not an uncommon practice with banks to charge a small commission for keeping the account, especially if the credit balance stand below a certain figure. The doing so could hardly be said to destroy the relation of banker and customer, or stand in the way of cheques paid in being

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received by the banker in the course of his business as such, and so subject to the lien. In *In re United Service Company*, L. R., 6 Ch. 212, certificates were deposited with a bank, which charged a commission for receiving the dividends. James, L. J., nevertheless held that the bank would have had a lien on the certificates for their general balance.

It would not seem necessary that the security should have been absolutely sent or deposited by the customer himself. If it reach the banker's hands by direction of the customer, that would be the same thing. In *Roxburghe* v. *Cox*, 17 Ch. D. 520, the money, with regard to which the banker's lien was recognised, had never been in the customer's hands.

Whether a particular security is in the banker's possession for the purpose of being dealt with by him in his trade as banker, or otherwise, is a question of fact, depending partly on the general usage of bankers, and partly on agreement or course of dealing between the banker and the particular customer who owns the security.

Collection and safe custody.

It has been suggested that the classification is collection on the one hand, safe custody on the other. This is probably too sweeping, though collection is no doubt the primary idea of the banker's functions with regard to securities subject to the lien. The possession of anything essential to collection, though not itself to be collected, would clearly be covered by the collection to which it was essential. A bond which had to be produced whenever interest was paid would be subject to the lien if the bankers were instructed to collect the interest. Bonds being deposited with the banker in order that he might cut off and collect the coupons, the lien would probably attach to the bonds as well as the coupons; but not if the customer himself cut off the coupons as they became due, and, as to these latter, only if they were then handed to the banker for collection. If bonds redeemable at a fixed time

or by drawings were deposited with the banker to be presented for payment at the due date, or in the event of their being drawn, the lien would attach. The case of debenture or stock certificates deposited with a bank which is to receive the interest for the customer seems doubtful. The possession of them would not seem to be essential or instrumental to the receipt of the interest, and would seem more consistent with mere safe custody until they should be required on a transfer. In *In re United Service Company*, L. R., 6 Ch., at p. 217, James, L.J., appears to have considered that certificates deposited in such circumstances would be subject to the lien. Mr. Chalmers expresses doubt, but inclines to the view above expressed, as being the natural inference from the transaction. (See "Questions on Banking Practice," 5th ed., question 999.)

Lien on money.

Money paid in to the banker's has been expressly stated by the House of Lords to be subject to the banker's lien. (*Currie* v. *Misa*, 1 A. C. 564.)

It is somewhat difficult to see how in ordinary cases money could be the subject of lien; it would be usually incapable of identification; or if ear-marked, would be either deposited for safe custody or as specific security, conditions equally excluding the idea of lien. And the application of the principle of lien to money paid in to the bank is complicated by the consideration that such money, when paid in, constitutes a mere debt of equivalent amount from the banker to the customer, and a debt is not a suitable subject for a lien. It seems a more logical view to attribute the banker's unquestionable right to retain a credit balance against a debt due from the customer to the doctrine and rule of law which authorises the setting off of one debt against another. In *Roxburghe* v. *Cox*, 17 Ch. D. 520, the Court of Appeal, while recognising that the banker's lien applied to money paid into the account, preferred to base their decision on this doctrine of set-off. If the lien

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applies to money, it would apply to money received for a cheque paid in for collection. In such case the money is unquestionably received by the banker in the course of his business as such. But here again the doctrine of set-off would as efficiently meet the banker's needs.

What will exclude lien.

As laid down in *Brandao* v. *Barnett*, 12 Cl. & F. 787, the banker's general lien is excluded by an express contract, or circumstances that show an implied contract, inconsistent with lien. Outside the clear cases of goods for safe custody, bills or money paid in to meet specific bills accepted payable at the banker's, and distinct understandings to return securities on fulfilment of defined conditions, no very exact rule can be laid down as to what constitutes inconsistency with lien.

The question has generally arisen where securities have been deposited to cover specific advances, on repayment of which there has still been a balance due to the banker.

Apart from any special agreement, it was doubted in *Jones* v. *Peppercorne*, Joh. 430, whether the banker might not in such case assert his general lien. In *Wilkinson* v. *London and County Bank*, 1 Times L. R. 63, decided in the House of Lords November 14, 1884, it was assumed throughout that a customer depositing securities as cover for specific advances was entitled to have them back on repayment of those advances, independent of the state of account between him and the banker. In *In re London and Globe Financial Corporation* [1902] 2 Ch. 416, Buckley, J., held that securities deposited as cover for specific advances, but after discharge thereof left in the banker's hands, became liable to the general lien. In *In re Bowes*, 33 Ch. D. 586, a policy of life insurance was deposited with a bank with a memorandum stating it to be deposited as security for all monies then or thereafter due on balance of current account or otherwise, not exceeding in the whole at any one time the sum of £4,000. The customer died indebted to the bank in more than £4,000.

North, J., held that the special agreement was inconsistent with a general lien for the balance of £1,000.

The judgment of Buckley, J., seems distinguishable, on the ground that the securities, being consciously left in the banker's hands after satisfaction of the specific advances, might be regarded as having come into his hands anew in the way of business or as impliedly repledged or redeposited; and the better view seems to be that, even where not so expressed, securities deposited for specific advances can be claimed by the customer on discharge of those specific advances, although he may still owe money to the banker.

But the same rule does not apply to the proceeds of such securities when sold. (See, *post*, "Realisation of Securities," p. 277.)

Securities lodged to cover acceptances of particular bills are exempt from the general lien (*a*).

Lien and pledge.

Lien being the right to retain another man's property until a debt is paid, property and lien cannot co-exist in the same person with regard to the same article. The lien peculiar to a banker, with regard to negotiable securities, is defined in *Brandao* v. *Barnett*, 3 C. B., at p. 531, as "an implied pledge," but assuming this to be the case, absolute property is as inconsistent with the rights of a pledgee as it is with those of a person having a lien.

Merger.

If, therefore, the banker becomes holder in his own right of negotiable securities coming into his possession as banker, his right of lien or pledge is gone, or rather is merged in the higher rights of an independent holder for value.

Lien on bills.

With regard to bills, notes, and cheques, the position is as follows. Under sect. 27, sub-sect. 3, "where the holder of a bill has a lien upon 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." There cannot be two holders for value of the

(*a*) In *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* [1904] 2 K. B. 465, Bigham, J., uses words which might be taken to imply that collection is a special purpose inconsistent with lien. This is clearly not the case. Cf. *Currie* v. *Misa*, 1 A. C., at pp. 565, 569, 573.

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same bill, inasmuch as there cannot be partial negotiation of a bill. The property in a bill is in ordinary cases vested in the holder for value of it. The words "he is deemed" must therefore be interpreted according to the exigencies of the section. (See *Hill* v. *East and West India Dock Co.*, 9 A. C. 448.)

The person who has a lien on a bill, though not to its full amount, has not the property in it as against the real owner, but he is placed by the sub-section in the exceptional position of being holder for value to the extent of his lien, with full beneficial interest to that extent against all the world. (See the judgment of the Court of Appeal in *Great Western Railway Co.* v. *London and County Bank* [1900] 2 Q. B. 464.) To that extent he could sue all parties to the bill, irrespective of any defect of title in the person from whom he took it, if he have taken it in good faith. To the same extent he could presumably sue the person from whom he took it, if his name is on the bill. If there be no defect of title, he recovers the whole amount of the bill from any party to the bill other than the one from whom he took it, holding the excess over the amount of the lien as trustee for or to the use of his debtor.

As expressed in the sub-section, this is the banker's position equally whether the lien arises from contract, as where a bill or note is deposited as collateral security, or from implication of law, as where a cheque comes into his possession in the course of his business as banker, say for collection.

But if the banker takes the cheque, bill, or note in the first instance as holder for value, or if, having taken it in the first instance in the course of his business, he subsequently so deals with it as to become holder for value, there is no question of lien. If he give cash over the counter, if he demand and receive it in reduction of an ascertained overdraft, or if, according to the *Gordon Case*, having received it generally, he credit it as cash, the

banker becomes a mere transferee, the absolute property vests in him and so excludes lien. But he acquires the higher rights of a transferee for value. He can sue for the full amount of the instrument, because, in the case of a holder for value, the court will not go into the *quantum* of the consideration. He would not sue in any sense as trustee (*per* Vaughan Williams, L.J., in *Great Western Railway Co.* v. *London and County Bank* [1900] 2 Q. B. 464), and would not have to account to any one for the balance recovered by him, so long as he duly rendered the stipulated consideration.

Whether he holds under a lien or as holder for value in his own right, forged indorsement or, in the case of a cheque, the not negotiable crossing, has precisely the same effect on his rights against parties to the instrument.

Where bills, notes, or cheques are in the banker's hands subject to the lien, it is his duty to present them at maturity and give notice of dishonour if they are not paid.

This obligation may be based either on his position as agent or as holder for value.

As before stated, the banker is entitled to combine all accounts kept with him by the customer in his own right, and treat the balance as that for which he may claim his lien, unless precluded from so doing by agreement or course of business.

Collateral Security.

It is not unusual to find classed under the head of lien cases where securities are definitely deposited as cover for a running account or for specific advances. The recognition of the banker's lien may no doubt be adduced as showing that it is part of a banker's business to lend money, and, in that sense, it might be said that the securities come into his possession in the course of his business. But the true conception of lien seems to be rather of its attaching

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to documents which come to the banker's hands by a process not directly connected with any overdraft or advance.

Pledge.

Where the security is professedly handed over for the purpose of securing an overdraft or an advance, the transaction is strictly of the nature of a pledge.

Pledge of bills.

With regard to bills, notes, or cheques, the distinction is immaterial. Probably the lien arising from contract mentioned in sect. 27, sub-sect. 3, was intended to refer to pledge. In any case the pledgee has the same rights. If he takes in good faith, he acquires an independent title and right to sue on the instrument to the extent of what is due to him, and to hold the instrument against the true owner until his claim is satisfied; except, of course, in the case of forged indorsement or "not negotiable" crossing. He must not negotiate the instrument; he is bound to present it at maturity and give notice of dishonour if it is not paid.

Pledge and transfer.

The dividing line between the pledge of a bill or note and its absolute transfer, equivalent to discount, is sometimes difficult to draw. The presumption in all cases of negotiation is in favour of absolute transfer, and this presumption is heightened when the transfer is by indorsement. The question is, however, one of fact, and the presumption is rebuttable. It may be shown, as laid down in *Ex parte Schofield*, 12 Ch. D. 337, that the indorsement was not by way of transfer, but merely by way of affording the additional security of the pledgor's name in a transaction which was really one of pledge only.

Bill as collateral security no suspension of remedy.

A bill or note deposited as security or pledged to cover an advance or overdraft does not, as does a bill or note or cheque given for a debt, suspend the remedy for the debt. The two co-exist, run side by side, are in the true sense collateral. There is nothing in law to prevent a banker suing for an overdraft even during the currency of a note or bill at a fixed date which he has taken as security.

Satisfaction of debt not payment of bill.

And satisfaction of the debt is not necessarily payment of the bill or note. In *Jenkins* v. *Tongue*, 29 L. J. Ex. 147,

the secretary of an institution had given a promissory note to secure an advance; part of the advance was stopped, with his consent, out of his salary. Held that this would not support a plea of payment *pro tanto* of the promissory note. In *Glasscock* v. *Balls*, 24 Q. B. D. 13, a promissory note was given to secure an advance, and property was mortgaged as further security. The mortgage was realised, and the mortgagee paid himself the advance out of the proceeds. The Court of Appeal were of opinion that this did not constitute payment of the promissory note. It will be noticed that in neither of these cases was there an actual direct payment by the borrower, the debt being satisfied from other sources; but, assuming the basis to be the collateral, concurrent nature of the debt and the security, there would seem to be no valid distinction.

Rights of pledgor in such case.

In *Glasscock* v. *Balls*, Lord Esher expressed himself as not being clear what were the rights of the pledgor in such a case. He suggested that he might be entitled to a perpetual injunction restraining the pledgee from negotiating or parting with the instrument.

It is difficult to see why, on satisfaction of the debt, however made, the pledgor is not entitled to claim the instrument, like a redeemed pledge. It is only Lord Esher's silence as to this obvious course that suggests a doubt. If the note or bill is, after satisfaction of the debt, left in the pledgee's hands, a *bonâ fide* holder for value, taking it before it is overdue, can acquire a good title (*Glasscock* v. *Balls*, 24 Q. B. D. 13), and the satisfaction of the debt would be no defence against him when suing on the instrument.

Promissory notes as cover.

A common form of security as cover is a promissory note payable on demand, that being a continuing security. But if such note be indorsed, it must be presented within a reasonable time after indorsement to charge the indorser (sect. 86, sub-sect. 1). In estimating such reasonable time, the character of the instrument as a continuing security must be taken into account; but that would

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not justify its being held over for any period during which the loan might be outstanding. Mr. Chalmers suggests ten months as the limit, and this is probably the maximum.

Fully negotiable securities as cover.

Fully negotiable securities, other than bills or notes, may be utilised as cover by deposit with or without an accompanying memorandum.

The lender becomes at once pledgee; if he takes the instrument *bonâ fide* and for value, he acquires a title against all the world to hold it until the obligation it was given to cover is discharged. (*London Joint Stock Bank* v. *Simmons* [1892] A. C. 201; *Bentinck* v. *London Joint Stock Bank* [1893] 2 Ch. 121.) The test of good faith is the same as is applied in the case of the transferee of a bill. An antecedent debt forborne by express or implied agreement on deposit of the security is sufficient consideration.

Fully negotiable instruments of this class, such as bonds payable to bearer, recognised as negotiable by the Stock Exchange and the mercantile community, are the best security a banker can get. No question of forged indorsement can arise, and by their nature they give no scope for the danger attaching to bills that they may have been obtained by such fraud as excludes the contracting mind. A negotiable security of this class may be stolen from its true owner, and yet the pledgee, if he take it *bonâ fide* and for value, can hold it against him, as if it had been a bank note.

Absolute negotiability is a fixed quantity, admitting of no qualifications or degrees.

Taking securities from agent as cover.

For a short period a pernicious theory obtained that some sort of constructive notice affected the banker if he took by way of pledge instruments, however fully negotiable, from an agent, such as a stockbroker.

That, however, was finally dispelled by the case of *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201. The previous decision of the House of Lords in *Sheffield* v.

London Joint Stock Bank, 13 A. C. 333, was the foundation of the pre-existing error above referred to. This decision was not unreasonably understood as laying down that if negotiable securities were tendered as cover by a person who, from the nature of his business, was likely to have securities of other persons in his hands, it was the duty of the bank to inquire into the nature and extent of his authority to deal with the securities; that the omission to make such inquiry might preclude the banker from the position of holder in good faith and for value; and further that, though the agent might have authority to pledge the securities of each principal separately, this would not avail the bank if the securities of various principals were pledged *en bloc* to secure one advance.

London Joint Stock Bank v. Simmons.

In the *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201, the House of Lords declared that *Sheffield* v. *London Joint Stock Bank* was decided purely on the particular facts of the case, which in their opinion were such as to affect the bank with either actual or legal notice of the limited right of property of the person with whom they were dealing and further that he was exceeding such right of property or any authority reposed in him, in pledging the securities as he did. They repudiated the idea that any new principle of law was laid down by that case, and emphatically affirmed the right of a bank or any other person to take as security negotiable instruments even from a person known to be an agent, without the necessity of inquiring into his authority so to deal with them, provided always there were no extrinsic circumstances reasonably calculated to arouse suspicion. The guiding principle for bankers in dealing with brokers or other agents who, from the nature of their business, are likely to have in their hands securities belonging to their clients, must therefore be derived from *Simmons' Case* irrespective of any supposed general propositions which may have appeared deducible from *Lord Sheffield's Case*. Lord

CHAP. XVIII. Halsbury in *Simmons' Case* expressly says that there is nothing in the position of broker and customer which makes it a reasonable inference that the broker is exceeding his authority, or raises a doubt on the subject; that the inferences arrived at in *Lord Sheffield's Case* have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities. "The deposit of securities," he proceeds, "as cover in a broker's business, is as well known a course of dealing as anything can be, and the phrase that they are deposited *en bloc* seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know that the banker could reasonably be expected to presume, that they belonged to different customers, and that the limit of the broker's authority was applied to each individual security by his own client" [1892] A. C., at p. 211. He then says that in *Lord Sheffield's Case* no countenance was given to the notion that, because the pledgor was assumed to be the agent for the owners of the property, that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt, and adds: "To lay down as a broad proposition that in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in *Lord Sheffield's Case* would justify so novel an idea. The broad proposition laid down by Chief Justice Abbott in 3 B. & C. 47, that whoever is the holder of a negotiable instrument 'has power to give title to any person honestly acquiring it,' seems to me to be decisive of this case."

Lord Herschell dwelt strongly on the absurdity which would result if negotiable securities could not be as readily taken by way of pledge from an agent as documents of title to goods are by virtue of the Factors Acts. He

said it was admitted that a good title to negotiable instruments could be acquired by purchase from an agent entrusted with them, and could see no reason why the case of pledge should stand on any different footing. "What ground," he says, "is there for the position that in regard to a pledge the case is different, that one may safely take a negotiable instrument by way of sale from an agent, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled in order to secure a good title to yourself to inquire into the nature of his title or the extent of his authority," *ubi sup.*, at p. 217.

And at the conclusion of his judgment Lord Herschell sums up the whole matter in words which concede all that any banker could reasonably ask. He says: "I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation, after the event, of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculation. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person the only consideration likely to engage his attention is whether the security is sufficient to justify the advance required, and I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them. Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case

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would be different. The existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed, and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting" [1892] A. C., at p. 223.

It would be superfluous to comment on the position so clearly and satisfactorily stated, except to say that the main principle involved is in no sense restricted to the case of an agent, but applies just as much to that of a person who professes to deal with the securities as an independent owner. (Cf. *Jones* v. *Peppercorne, Joh.*, 430.)

But it must be borne in mind that all the rights and immunities accorded to the banker in the *Simmons' Case* were founded and dependent on the proved or assumed full negotiability of the instruments pledged to him. It is necessary, therefore, to consider what are the tests of negotiability.

Conditions of negotiability.

To be negotiable, an instrument must fulfil the following conditions: It must purport to be, in its then condition, transferable by delivery; it must, either by statute or by the custom of the mercantile community of this country, be recognised as so transferable and as conferring upon a person who takes it honestly and for value, independent and indefeasible property in and right of action on it. (Cf. *per* Blackburn, J., in *Crouch* v. *Credit Foncier*, L. R., 8 Q. B., at p. 381; *per* Lord Herschell in *London Joint Stock Bank* v. *Simmons* [1892] A. C., at p. 215; and especially the lucid statement of the true rule by Bowen, L.J., in *Simmons* v. *London Joint Stock Bank* [1891] 1 Ch., at p. 294.) The admission made in the latter case was that the bonds in question passed from hand to hand on the Stock Exchange; and Bowen, L.J., points out the difference between transferability and true negotiability, and that the admission was consistent with the bonds being transferable, but not legally negotiable. The House of

Lords [1892] A. C. 201, coupling this admission with a somewhat general statement made in evidence that the bonds so passed as "negotiable securities," held their legal negotiability proved. Lord Macnaghten, indeed, seemed desirous of minimising, or even obliterating, the difference between transferability and negotiability by deprecating the setting up of "refined distinctions habitually ignored on the Stock Exchange" (p. 224).

The inevitable and desirable extension of the category of negotiable instruments is probably better forwarded by the growing custom of merchants, exercised on a proper and intelligent basis, than by any such summary levelling of carefully defined and logical boundaries.

How negotiability established.

It is sometimes said that the custom of the Stock Exchange is the only criterion of the negotiability of an instrument. No doubt the concentration in the Stock Exchange of dealings in all classes of securities renders that body a factor of ever increasing importance in the determination of the question, and evidence from the Stock Exchange is the most available and carries the greatest weight in the courts; but there is no justification, certainly not in any of the earlier cases, for confining the recognition of negotiability to the Stock Exchange, to the exclusion of bankers, merchants, and other classes of the mercantile world.

Recent recognition sufficient.

The recent origin of a mercantile custom to treat a particular class of instrument as negotiable is no bar to its validity.

This is disputed by those who advocate the view that the negotiability of certain instruments was recognised by, and incorporated in, the ancient law merchant, and that, save by statute, no addition can therefore be made to the category.

The judgment of Kennedy, J., in *Bechuanaland Exploration Company* v. *London Trading Bank* [1898] 2 Q. B. 658, in which the earlier and somewhat conflicting decisions are carefully reviewed, is very convincing in the

opposite direction; and it was followed by Bigham, J., in *Edelstein* v. *Schuler & Co.* [1902] 2 K. B. 144. Apart from authority, it hardly appears conducive to national prosperity that an important part of the circulating medium of the country should be once and for all limited to that which sufficed for the comparatively small commerce of earlier days, with no possibility of expansion to meet the larger needs of modern times.

Must be negotiable here.

The negotiability of a foreign instrument in the country of its origin is no evidence that it is negotiable here. As Bowen, L.J., said in *Picker* v. *London and County Bank*, 18 Q. B. D. 515: "Is evidence that an instrument or a piece of money forms part of the mercantile currency of another country any evidence that it forms part of the negotiable currency in this country? Such a proposition is absurd; for, if it were true, there could be no such thing as a national currency. For the same reason, as it appears to me, that a German dollar is not the same thing as its equivalent in English money for this purpose, and that the barbarous tokens of some savage tribe, such as cowries, are not part of the English currency, evidence that the instrument would pass in Prussia as a negotiable instrument does not show that it is a negotiable instrument here."

So-called Quasi-negotiable Securities.

Outside the region of really negotiable securities, one comes across the dubious doctrine of securities which are said to be or to have become negotiable by estoppel, or quasi-negotiable. Either term is misleading, the latter particularly so.

The true view is that expressed by Judge Willis (Negotiable Securities, p. 14): "Title by estoppel is what men mean when they speak of negotiability by estoppel, but title by estoppel is a different thing altogether from negotiability."

"Negotiable by estoppel."

The phrase "negotiable by estoppel" is no doubt used by Bowen, L.J., in *Easton* v. *London Joint Stock Bank*, 34 Ch. D., at pp. 113-114; but he is most careful to explain that it is a mere convenient figure of speech; and that the real underlying principle is that of personal estoppel by conduct, representation, or holding out an agent as having certain authority; of which the instrument is an element or evidence; not the attribution of partial or fictitious negotiability to the instrument itself.

There is no case of this nature which is not either actually explained on this basis or is not so explainable.

In *Goodwin* v. *Robarts*, 1 A. C., at p. 489, Lord Cairns puts the position thus: "The plaintiff bought in the market scrip which, from the form in which it is prepared, virtually represented that the paper would pass from hand to hand, and that anyone who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign Government. The appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present would have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and, although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation to anyone taking it, a representation which the appellant must be taken to have made or to have been a party to, that if the scrip were taken in good faith and for value the person taking it would stand to all intents and purposes in the place of the previous holder. 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

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against the foreign Government; still the appellant is in the position of a person who has made a representation, 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. My Lords, I am of opinion that, on doctrines well established, the appellant cannot be allowed to defeat the title which the respondents have thus acquired."

Varied in form and expression, that is really the substance of all the cases which have given rise to the theory of quasi-negotiability or negotiability by estoppel.

Bowen, L.J., in *Easton* v. *London Joint Stock Bank*, *ubi sup.*, though for convenience, as before stated, he uses the ambiguous term, clearly shows that the ground of his decision is the principle enunciated by Lord Cairns.

He says (p. 113): "If these bonds are not strictly negotiable and do not possess the incidents of negotiable instruments which are recognised as such, nevertheless a further question arises: whether Lord Sheffield by the way he has treated these bonds has not estopped himself from denying their negotiability, whether he has not, by placing for disposal, and with the intention that they should be transferred, in the hands of an agent of his own, bonds which on their very face purport to create a liability quite independent of anterior equities between the company and the person who takes them, really chosen to treat these bonds as negotiable and to authorise his agent to treat them as such. If the negotiability of these bonds by estoppel, so to speak, arises, that disposes of all difficulty that would arise owing to the seal being attached to these bonds, because it is no longer a question whether they are, strictly speaking negotiable, but whether Lord Sheffield has chosen to treat them as such. This second way of looking at the matter may be dealt with from two points of view, but practically

they run into one another. You may say that Lord Sheffield, having placed in the hands of his agents these bonds with the intention that they should be transferred beyond those agents and held his agents out to the world as clothed with authority to transfer them as negotiable, cannot afterwards, by any unknown dealing or limitation of authority which he has conferred on his agents, prejudice those who took the bonds which have been so floated. Or you may say, which I think is a sound way of putting it, that as regards Lord Sheffield and the bank these bonds have become negotiable by estoppel, and therefore Lord Sheffield is precluded from saying the legal title to these bonds is not in the bank."

The same principle is briefly expressed by Lord Herschell in *Colonial Bank* v. *Cady*, 15 A. C. 267, at p. 285: "If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who has received it in good faith and for value."

Conditions of estoppel by conduct.

This same case of *Colonial Bank* v. *Cady* indicates certain constituents which must be present to render the representation effective or justify a person in acting on it so as to acquire title by estoppel. The instrument must be complete; there must be no further formality required on the face of it to entitle the taker to full rights and title. If, for instance, it is a blank transfer, it must, on the face of it, purport to pass *ipso facto*, in its then condition, and without the necessity of any further step, all rights and title to a person taking it *bonâ fide* and for value. The possession of the agent must, taken in connection with the nature and condition of the instrument, be only consistent with intention on the part of the principal that the agent shall have power to transfer it by way of sale or pledge. Possession is not, as in the case of fully negotiable instruments, indicative of right to dispose of the

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instrument. If the agent's possession is ambiguous, is equally compatible with authority to transfer and another purpose, the taker has no right to assume the former. As Lord Halsbury points out in *Colonial Bank* v. *Cady*, *ubi sup.*, at p. 273, mere custody apart from what the instrument, upon the face of it, represents to any person to whom it might be exhibited, is not a representation of authority to transfer. That only comes in when the document itself, in the condition in which it was entrusted to the agent, represents, by its being in that condition, that the agent is entitled to deal with it in the way he proposes to do. The real test is whether the principal has represented the agent as invested with disposing power. (*Per* Lord Halsbury, in *Farquharson* v. *King* [1902] A. C., at p. 330.)

A somewhat analogous case is that of a person who entrusts another with title-deeds for the purpose of raising money on them for the principal's benefit. In such case the owner is estopped from disputing the title of any person who honestly lends money on the security, notwithstanding the agent utilised the deeds to borrow money on his own account and exceeded the limit imposed by the principal. (*Brocklesby* v. *Temperance Building Society* [1895] A. C. 173; *Rimmer* v. *Webster* [1902] 2 Ch. 163.)

Estoppel of this character may arise from representation of the character of the document conveyed by its terms, as well as by representation of the authority of an agent.

If a company, for instance, choose to issue instruments, such as debentures, in a form whereby they bind themselves to pay the amount to bearer, they may be estopped by such representation from asserting any equities of their own affecting a previous holder, as against a person who has taken the instrument *bonâ fide* and for value on the faith of such representation. (See *In re Imperial Land Company of Marseilles*, L. R., 11 Eq. 478.)

Documents of Title to Goods—The Factors Act, 1889—*The Sale of Goods Act*, 1893.

Provided the banker is dealing with honest and responsible persons, documents of title to goods, such as bills of lading, dock warrants, warehousemen's certificates, delivery orders, and the like, are convenient securities for advances. By means of them goods can be effectively pledged which obviously could not otherwise be so utilised by reason of their bulk. By means of bills of lading, in especial, goods on the high seas can be hypothecated before arrival, and thus used as security for bills given for the price. The two above-mentioned Acts constitute a praiseworthy effort to protect bankers and others who take such documents as security. They do not profess to elevate them to the position of the banker's ideal security, the fully negotiable instrument to which he acquires an indefeasible title, whatever the customer's position, whether the customer is honest or not, whether the security is his own or he has authority to deal with it, or not, and whether the banker takes it for an existing debt or a fresh advance. And, unfortunately, the provisions of the two Acts are so tangled, so overlapping and complicated by cross-references and the idea of reducing everything to the common denominator of "the mercantile agent," that, for want of certainty, the safeguards are not so reassuring as they were doubtless intended to be. Yet it is to these Acts that the banker has to look when confronted with questions of title or authority in relation to documents of this sort pledged as security for advances. For, with the possible exception of bills of lading, no document of title to goods is a really negotiable instrument. The documents are merely symbols of the goods, and the idea of indirectly making goods negotiable has no place in law.

Bills of lading not negotiable.

As to bills of lading, opinions will always differ as to whether they have any, and what, intrinsic negotiability

of their own. The special verdict on the second trial of *Lickbarrow* v. *Mason*, 5 Term R. 683, found that, by the custom of merchants, they were "negotiable and transferable by the shipper's indorsement," but the interpretation of a legal term used in a verdict must always be somewhat doubtful, and, as Bowen, L.J., said (13 Q. B. D., p. 173), "the words of the special verdict in *Lickbarrow* v. *Mason* admittedly overstate the law." The interesting criticisms of Lord Blackburn on that case in *Sewell* v. *Burdick*, 10 A. C., at p. 98, raise considerable doubt whether the judgment delivered by Lord Loughborough in the Exchequer Chamber was ever reversed on its merits, and that judgment in the plainest terms denied the negotiability of bills of lading.

Though subsequently criticised, the judgment delivered by Lord Campbell in *Gurney* v. *Behrend*, 3 E. & B., at p. 633, is by many regarded as setting forth the true view. In it he says: "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bonâ fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

The Bills of Lading Act, 1855, gave a right of action on the bill of lading to the "indorsee to whom the property in the goods shall pass," but it is generally assumed that it did not invest the instrument with any additional degree of negotiability. It seems possible that the only exceptional feature akin to negotiability ever possessed by bills of lading

was their acknowledged capacity to defeat the unpaid vendor's right of stoppage *in transitu* when transferred with authority to a *bonâ fide* transferee for value.

If bills of lading were fully negotiable there would be no need for their being included, as they are, with other documents of title to goods, in the Factors Act, 1889, and the Sale of Goods Act, 1893.

Factors Act, 1889. Sale of Goods Act, 1893.

These two Acts are set out and interpreted, so far as interpretation is possible, by Mr. Chalmers in his "Sale of Goods Act, 1893," 5th ed.

With regard to documents of title to goods, the two Acts have to be read together; a peculiar feature being that sects. 8 and 9, of the Factors Act, 1889, are reproduced, in somewhat fuller form, by sect. 25 of the Sale of Goods Act, 1893, without being repealed; the reason assigned by Mr. Chalmers being that the repeal was omitted in the later Act in order that the draftsman of the earlier one might be consulted and the matter dealt with some day by a Statute Law Revision Act. The same reduplication occurs in sect. 10 of the Factors Act, 1889, and sect. 47 of the Sale of Goods Act, 1893.

Another clue to the labyrinth of these particular provisions may be derived from the judgment of the Court of Appeal in *Cahn* v. *Pockett's Bristol Channel Packet Company* [1899] 1 Q. B. 643.

Fresh difficulties are, however, introduced if the rule laid down by the House of Lords in *Inglis* v. *Robertson* [1898] A. C. 616, is to be strictly followed.

That rule inculcates that the provisions of the Factors Act, 1889, shall be treated as limited by the headings under which they occur; that those, for instance, included under the heading, "Dispositions by Mercantile Agents," must be confined to dealings by persons answering that description.

The construction of the Act, which only states the effect of dealings by persons other than mercantile agents

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by assimilating such dealings to those of a mercantile agent, renders absolute adherence to this rule in all cases impossible; and it seems probable that it was originally only directed to preventing isolated sections, such as sect. 3, general in their terms, from being utilised by persons and in circumstances altogether outside the purview of the Act.

The Acts make no distinction between the various classes of documents of title to goods, which they define as "including any bill of lading, dock warrant, warehouse keeper's certificate, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented." (Factors Act, 1889, s. 1 (4); Sale of Goods, 1893, s. 62.)

Design of the Acts.

The general design of the Acts is to protect persons dealing *bonâ fide* and for value with others of specified classes, on the faith of their possession of documents of title to goods, such possession being primarily indicative of ownership of, or authority to deal with, the goods. The classes specified do not comprise actual owners. Dealings with them require no protection. The basis of inclusion in the classes is a position which, occupied by A. with the consent of B., enables A. to obtain money or money's worth from C. by utilising the documents wrongfully or in excess of authority.

The mercantile agent.

The type and standard is "A mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." (Factors Act, 1889, s. 1.)

Vendor and vendee.

The other classes include:—

(*a*) A person who has sold the goods (Factors Act, 1889, s. 8; Sale of Goods Act, 1893, s. 25 (1)).

(*b*) A person who has bought or agreed to buy the goods. (Factors Act, 1889, s. 9; Sale of Goods Act, 1893, s. 25 (2)).

This latter class (*b*) does not include a person holding goods under a hire-purchase agreement which gives him an option to purchase or not, although, if he do not purchase, he forfeits both goods and previous instalments of payment. (*Helby* v. *Matthews* [1895] A. C. 471.) It does include such person if the agreement absolutely binds him to buy. (*Lee* v. *Butler* [1893] 2 Q. B. 318.)

Possession of the agent.

The possession of the goods or documents of title by the mercantile agent must either be with the consent of the owner (Factors Act, 1889, s. 2 (1)), or it must have originally been with such consent, and the person dealing with the mercantile agent must not have notice of withdrawal of that consent (*Ib.*, s. 2 (2)); or the documents of title must have been obtained by reason of the mercantile agent's being, or having been, with the consent of the owner, in possession of the goods represented thereby, or of other documents of title to the goods. (*Ib.*, s. 2 (3)).

Possession of the vendee.

The possession of the vendee or person who has agreed to buy must have been obtained with the consent of the seller. (Factors Act, 1899, s. 9; Sale of Goods Act, 1893, s. 25 (2).)

As Collins, L.J., says in *Cahn* v. *Pockett's Bristol, &c., Company* [1899] 1 Q. B., at p. 658: "Possession of, not property in, the thing disposed of is the cardinal fact."

The element of consent must, however, be present at least in the original acquisition of possession. "The Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods or documents, or otherwise got possession of them without the consent of the owner." (Collins, L.J., *ubi sup.*, at p. 658.)

The consent will be good enough notwithstanding it may

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have been fraudulently obtained, provided the fraud did not amount to larceny by a trick.

As Collins, L.J., says: "If a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent, he is able to pass a good title to a *bonâ fide* purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it 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." (*Cahn* v. *Pockett's, &c., Company, ubi sup.*, at p. 699.)

The distinction drawn by Collins, L.J., is much the same as that between void and voidable contracts as affecting the property in a bill, referred to under the heading "Void and Voidable Contracts," *ante*, p. 137. No sale, pledge or other disposition made by a mercantile agent is protected by the Act unless he was at the time acting in the ordinary course of business of a mercantile agent. Good faith and an absence of notice of want of authority in the agent are essential in anyone dealing with a mercantile agent. As to notice of lien or other right of the vendor, see *post*, p. 262.

Consideration.

Consideration is necessary to support any transaction under the Acts. Consideration is defined by sect. 5 of the Factors Act, 1889; and the enumeration of what may constitute it concludes with the general words "or any other valuable consideration."

Primarily, and inferentially from the exception to be presently referred to, this would include an existing debt, forbearance to sue for which was expressly or tacitly stipulated for on the deposit of security.

Pre-existing debt.

Sect. 4 of the Factors Act, 1889, however, precludes a pre-existing debt as consideration, at any rate where the

person dealt with is a mercantile agent. It provides: "Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge."

In terms this section only applies to pledges of the actual goods.

Sect. 3 says: "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods." Both sections occur under the same heading, and presumably, as Mr. Chalmers says, the pledge of documents by a mercantile agent comes under sect. 4 as well as a pledge of the goods themselves.

In the case, then, of pledge of documents or goods by a mercantile agent for an antecedent debt, the banker's remedy, if the agent was exceeding his authority, would be limited to the equivalent of the agent's actual rights against his principal, probably some trivial claim for charges or expenses.

Case of vendors.

Mr. Chalmers is of opinion that this same restriction does not apply in the case of vendors. Certainly sect. 4 is not comprised in those under the heading dealing with those persons. Vendors are dealt with under sect. 8 of the Factors Act, 1889, and sect. 25 (1) of the Sale of Goods Act, 1893, apart from reference to the mercantile agent, so his view is probably correct.

Case of vendees.

Vendees or persons who have agreed to purchase are, however, by sect. 9 of the former and sect. 25 (2) of the latter Act, placed on the same footing as mercantile agents in possession of the documents with the consent of the owner. (See *per* A. L. Smith, M.R., in *Cahn* v. *Pockett's, &c., Co.*, [1899] 1 Q. B. 643.) If such a mercantile agent pledged the goods or documents for an antecedent debt, sect. 4 would apply, and thus it seems difficult to exclude its operation in the case of the vendee.

If it were the documents that were so pledged, not the

goods themselves, the pledgee might, however, defeat the vendor's lien or right of retention under the subsequent sect. 10 of the Factors Act, 1889, or under sect. 47 of the Sale of Goods Act, 1893.

Subject to the foregoing conditions, exceptions and doubts, any sale, pledge or other disposition of the goods or documents in their possession by the parties described, is to have the same effect and validity as if made with the authority of the owner, vendor or other person competent to give such authority.

toppage *in ransitu*. ien.

Sect. 10 of the Factors Act, 1889, and sect. 47 of the Sale of Goods Act, 1893, deal somewhat more specifically with the question of the vendor's lien and right of stoppage *in transitu*, and the effect of a transfer of the documents of title in defeating them.

Under sect. 47 of the Sale of Goods Act, 1893, re-enacting in somewhat fuller terms sect. 10 of the Factors Act, 1889, "Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

The distinction between this section and sect. 25 (2) of the same Act and sect. 9 of the Factors Act, 1889, which deal with the vendee or person having agreed to buy, is stated by Mr. Chalmers to be as follows: The latter sections cover the case of a vendee who has obtained documents of title under a contract voidable on the ground of his fraud. As shown before, such fraud does not exclude the consent required by the sections. To establish title in such cases

the sections require on the part of the person claiming it, not only good faith, but also absence of notice of any lien or other right of the seller. The mere fact of the price being unpaid does not make it fraud to transfer the documents so as to defeat the vendor's lien or right of stoppage *in transitu*, so that notice that the price is unpaid does not invalidate the transferee's title or affect him with bad faith.

Sect. 47 of the Sale of Goods Act, 1893, therefore eliminates the question of notice, requiring only good faith with relation to matters other than knowledge that the price remains unpaid. But, according to Mr. Chalmers, this section, unlike those above mentioned, operates only where the documents were, in the first instance, honestly obtained. (See Chalmers, "Sale of Goods Act, 1893," 5th ed., p. 141.)

The distinction is apparently based on the variance in language: "Where a person obtains with the consent of the seller possession of the goods or the documents of title to the goods," in the one case; "Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods," in the other.

Lawfully transferred.

In view of the construction put on the words "lawfully transferred" in *Cahn* v. *Pockett's, &c., Co.* [1899] 1 Q. B., at p. 665, namely, as merely referring to the prescribed methods of dealing with the document, as by indorsement or delivery, the distinction does not appear very clear.

If, in pursuance of a contract voidable for fraud committed by the vendee, the seller handed to the vendee a bill of lading for the goods, indorsed in blank, the document of title would have been "lawfully transferred" to him, and at the same time he would be in possession of it with the consent of the seller.

If the distinction between fraud and no fraud was intended, "lawfully obtained by" would have been the apter words.

The matter seems somewhat important, because if resort

has to be had to sect. 25 (2) of the Sale of Goods Act, 1893, or sect. 9 of the Factors Act, 1889, questions of the antecedent debt as consideration and notice of the vendor's lien or other right are imported.

Where, however, sect. 47 of the one Act or sect. 10 of the other applies, an antecedent debt is good consideration. Valuable consideration includes an antecedent debt expressly or impliedly forborne, and the words in sect. 10, "the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*," and the saving of the rules of the common law, including the law merchant, embodied in sect. 61 (2) of the Sale of Goods Act, 1893, let in the rule laid down in *Leask* v. *Scott*, 2 Q. B. D. 376, that an antecedent debt is good consideration for the transfer of a bill of lading.

Pledge of bill of lading.

It will be noticed that sect. 47 of the Sale of Goods Act, 1893, expressly recognises the utilisation of bills of lading and other documents of title by way of pledge as well as absolute transfer, and formulates the rights arising out of such pledge, following the lines laid down in *Sewell* v. *Burdick*, 10 A. C. 74.

Liability for freight.

As shown by that case, the liability for freight and other liabilities which, under the Bills of Lading Act, 1855, s. 1, attach to "every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such indorsement," do not attach to one who takes the bill by indorsement and delivery by way of pledge for a loan; inasmuch as the absolute property does not pass to him, but only a special property."

As to the risks attendant on bills of lading being signed in several parts, and the desirability of the lender on such security getting all the parts into his own possession, see *post*, p. 269.

Documents as cover for acceptances.

Documents of title to goods, particularly bills of lading,

may be utilised as security for bills which the banker has agreed to accept and accepted for the customer. The usual method, as exemplified in *Banner* v. *Johnston*, L. R., 5 H. of L. 157, is for the banker to furnish the customer with a letter of credit, authorising him to draw to a specified amount against shipments or bills of lading, and undertaking to accept bills so drawn, provided the documents are transmitted with the bills.

The customer is enabled to show this letter of credit to those from whom he desires to purchase, and so gets credit for his drafts. But to ensure acceptance the shipping documents or other documents of title must accompany the bill, or reach the bankers before or at the time when they are called on to accept. The combination of these terms in a letter of credit, shown to the person who parts with his goods on the faith of it, does not constitute any right in him, or any other holder of the bill, to the goods. As Lord Cairns says, in *Banner* v. *Johnston*, *ubi sup.*, at p. 174: "The two arrangements are perfectly separate in their nature, namely, the arrangement or promise to accept the bills, which promise is to be shown to the parties selling the cotton, and the order from the bankers to those dealing with the cotton at Pernambuco to send home the shipping documents. The order to send home the shipping documents and the condition annexed to the promise to accept, that the shipping documents shall be sent to them, are for the protection of the bankers, and not, as it seems to me, in any way for the protection of the persons who negotiate the bills of exchange."

Degree of property acquired by banker.

The degree of property which the banker acquires by possession of the documents would probably depend on the purpose for and arrangement under which he received them. Cases of sale like *Shepherd* v. *Harrison*, L. R., 5 H. of L. 116, where the absolute property necessarily vests in the acceptor on his accepting the bill, do not stand on the same footing as cases where the goods are only to constitute security.

In *Banner* v. *Johnston*, the expression is that on acceptance "the cotton passes into the hands of the bankers themselves."

In *Ex parte Brett*, L. R., 6 Ch. 841, it is implied that where a person accepts bills, not being under actual liability to do so, on having bills of lading transferred to him, those bills become part of his estate, though he can only hold them as security for the liability he incurs on behalf of the drawer. Probably, as Mr. Chalmers says, "there is a kind of mixed property in the goods, both drawer and acceptor having a defeasible interest therein," the acceptor's interest extending to justify anything necessary for his protection or indemnity.

If the banker do not accept the bill of exchange he has no right to keep the bill of lading or other document of title, and no property in the goods passes to him. (Sale of Goods Act, 1893, s. 19, sub-s. 3; cf. *Cahn* v. *Pockett's, &c., Company* [1899] 1 Q. B. 643.)

As between the banker and the customer, an undertaking to forward bills of lading against acceptance will give the banker who has accepted the bill an equitable claim to the bill of lading, equivalent to a valid hypothecation of it, which would hold good against the customer's trustee in bankruptcy. (*Lutscher* v. *Comptoir d'Escompte*, 1 Q. B. D. 709.)

But as against third parties, it would seem that nothing short of possession of the documents, or at least constructive possession of them, as by their having been posted to the banker, will give him a good title to the goods.

Bills drawn against goods.

It is not uncommon to find on the face of a draft mention of a cargo or credit against which it is drawn, such as "Against credit No. 20." "Pay to my order £100, which place to account cargo per 'Acacia.'" "Pay A. or order £1,000, and place the same to account cotton shipments as advised."

It would appear that this does not create a charge even in favour of the drawee who accepts. (See *per* Cotton, L.J., in *Phelps* v. *Comber*, 29 Ch. D., at p. 819.) The remark of Mellish, L.J., in *Robey* v. *Ollier*, L. R., 7 Ch., at p. 699, that "A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed," though primarily directed to the case of an indorsee, seems of general application.

Such a statement on the face of a bill clearly gives no claim on the goods to holders of it, in case of dishonour of the bill. (*Inman* v. *Clare*, Joh., at p. 776; *Banner* v. *Johnston*, L. R., 5 H. of L. 157; *Robey* v. *Ollier*, *ubi sup.*; *Ex parte Dever*, 13 Q. B. D., at p. 777.) The authority of *Frith* v. *Forbes*, 4 D. F. & J. 409, so far as it militates against this rule, was displaced by *Brown* v. *Kough*, 29 Ch. D. 848.

Position of acceptor.

A bank which has, under a letter of credit, accepted bills in this form is not therefore in any sense a trustee for the holders of those bills, with respect to the goods or securities pledged as security, and the bill-holders have no right to question the bank's dealings with such goods or securities. (See *per* Lord Hatherley, in *Banner* v. *Johnston*, *ubi sup.*, at p. 168.)

Assignment of rights by drawer.

The drawer of the bill may, however, by formal agreement, apart from the bill, transfer his remaining rights in the goods or securities to a specific person, who may be the holder of the bill. Such assignment, however, cannot affect the rights of the acceptor to raise the money for payment of the bills if so provided, or, in any event, to indemnify himself out of the goods or securities deposited with him; it only gives the transferee the same right as the drawer possesses, namely, to require that the goods and securities should be applied to the payment of the bills, independent, to that extent and no further, of the general lien or right of set-off.

The rule in *Ex parte Waring*, *ubi inf.*, which is an

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apparent exception to the rule that a bill-holder, as such, has no claim on the goods, though mentioned on the bill as being drawn against, is in no way inconsistent therewith. That rule is in no sense derived from contract, but simply from the necessities of adjusting in court the equities between two insolvent estates, both of which are liable to the bill-holder, and one of which holds goods or securities of the other's as cover for the bills. (See the note by Mr. Chalmers, "Bills of Exchange," 6th ed., p. 305.) In fact, in the original case of *Ex parte Waring*, 19 Ves. 345, there was no reference whatever on the bill to the goods against which it was drawn, and the same was the state of facts in other cases which were decided on the authority of that case.

Even where the holder of the bills of exchange has had the bill of lading with it, he will not be entitled to claim specific appropriation of the goods to the acceptance, if he took the bill of lading with notice of the acceptor's right to have it on acceptance. In *Ex parte Dever*, 13 Q. B. D. 766, the letter of credit provided that the bills of lading were to accompany the bills of exchange, but were to be surrendered to the acceptors against their acceptances. This had been shown to the holders, and the bills referred to it. The bills of lading having accompanied the bills and having been delivered up to the acceptors on acceptance, it was held that the holder could not claim any specific appropriation of the goods to meet the acceptances, the acceptors having failed.

Bills payable on delivery of documents

A bill accepted conditionally, payable on delivery of the bill of lading, has much the same effect as if the acceptor held the bill of lading. The acceptor incurs no liability unless the bill of lading is tendered to him before or at the time of presentment for payment. The acceptor gets, in a sense, a security for his acceptance on the goods, and at the same time this does not interfere with the holder having the bill of lading with the bill, and so obtaining a security on the goods in case the bill of exchange is dishonoured.

(*Ex parte Brett*, L. R., 6 Ch., at p. 841.) Of course, such an acceptance is a qualified one (*Smith* v. *Vertue*, 30 L. J., C. P. 56), and the drawer and indorsers prior to acceptance would be discharged under sect. 44 of the Bills of Exchange Act, unless they had expressly or impliedly authorised the holder to take a qualified acceptance, or subsequently assented to his having done so.

Payable on delivery of bills of lading.

If the acceptor requires the bills of lading to be delivered to him on the day the bill falls due, as he very possibly might in order to carry out a sub-sale, he must clearly specify this in his acceptance; if the acceptance is in the form "Payable on delivery up of bills of lading," &c., the acceptor is not discharged by the bills of lading not being tendered prior to or on that day. (*Smith* v. *Vertue*, 30 L. J. C. P. 56.)

Parts of bills of lading.

As to the inconveniences and risks involved by the custom of giving bills of lading in more parts than one, see the remarks of Lord Cairns in *Glyn* v. *East and West India Dock Co.*, 7 A. C., at pp. 599, 600, and of Lord Blackburn, at p. 605. Lord Cairns suggests that any person advancing money upon a bill of lading, and seeing, as he would, that it had been signed in more parts than one, should insist on all the parts being brought in. Lord Blackburn recognises the difficulty of a banker enforcing such a demand without offending his customer.

Change in Character of Parties affecting Deposit of Securities.

Strictly speaking, if any change occurs in the constitution of the body holding securities for advances, further advances would not be covered by those securities. Theoretically they were deposited to cover debts due to a specific body of persons, and are, therefore, not available for obligations contracted with what in law would be a distinct entity. (*Per* Lord Eldon, C., in *Ex parte Kensington*, 2 V. & B. 83; Lindley on Partnership, 6th ed., p. 12.)

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Joint stock companies. Absorption. Amalgamation.

The mere alteration of the composition of a joint stock company or corporation would of course have no such effect, inasmuch as the body remains the same; nor presumably would the absorption of smaller concerns into the larger one, if their identity were completely sunk in it. (*Capital and Counties Bank* v. *Bank of England*, 61 L. T., N. S. 516; *Prescott, Dimsdale & Co.* v. *Bank of England*, [1894] 1 Q. B. 351.) If the case were one of amalgamation as distinct from absorption, the deposit would presumably not cover further advances, unless the amalgamation were by statute reserving such rights, which is not likely. (See *post*, "Guarantees," p. 307.)

Change in character of borrower.

Again, a security may cease to be effectual as cover for further advances by reason of a change in the personality of the borrower. A change in the firm depositing the security might have this effect (*Bank of Scotland* v. *Christie*, 8 Cl. & Fin. 214); and in a case cited in Lindley on Partnership, 6th ed., p. 128, a person deposited deeds as security for advances to be made to him, and it was held that the security did not cover advances made to him and his partners.

Provision against in memorandum.

Both these contingencies should therefore be provided for in any memorandum of deposit where future advances are contemplated; or when such change takes place and is not provided for in a memorandum, the matter should be put on a proper footing. As pointed out by Lord Lindley, *ubi. sup.*, at p. 128, an equitable mortgage by deposit may be readily extended, even by parol, to cover advances made after a change in the firm or body with which the securities are lodged, or may be turned into a continuing security for the obligations of a firm in which a change has taken place.

Dealings inconsistent with lien or pledge.

Whether he hold under lien or pledge, the banker must be careful not to imperil his charge by dealing with the securities or goods in a manner inconsistent with the right he claims.

He must not negotiate bills, notes or cheques: he must present them at maturity, and do his best to collect the amount.

The parting with the possession of the securities to a third party, or even to the pledgor for a temporary specific purpose not involving or facilitating the creation of any conflicting right or interest, and which purpose fulfilled, the securities are to be immediately returned to the pledgee, would not divest him of his rights.

The pledgee may even re-pledge so long as he does so merely to the extent of his own interest, and does not purport to pledge or charge the entire property. (*Halliday* v. *Holgate*, L. R., 3 Ex. 299.)

And the pledge equally remains intact if the goods or securities are entrusted to the pledgor as agent for the pledgee, as where they were confided to him for sale on the pledgee's behalf, the proceeds to be remitted to the latter. (*North-Western Bank* v. *Poynter* [1895] A. C. 56.)

The matter is one, however, which should be treated with circumspection, as the tests of what is or is not inconsistent with the right of pledge or lien are somewhat vague and general.

CHAPTER XIX.

REALISATION OF SECURITIES.

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THE banker may find himself under the necessity of resorting to his securities to recoup himself the monies advanced.

The method to be adopted must depend on the nature of the securities and the capacity in which the banker holds them.

Mortgaged land.

Mortgaged land can be dealt with either by sale, under a power of sale if conferred by the mortgage, or by application to the court for foreclosure or sale. (See "Mortgages," *post*, p. 279.)

Bills, notes, and cheques.

The remedy on bills, notes or cheques held either under the banker's lien or under direct pledge as collateral security, is easy and practically automatic, the person having the lien or the pledgee being in the position of holder for value and entitled to sue thereon in his own name. (See, *ante*, pp. 239, 242.)

A mere lien gives no power of sale, and no ground for applying to a court to grant such power. The only method of realising securities held under such lien would seem to be by recovering judgment for the debt and then taking the securities in execution.

But in *Brandao* v. *Barnett*, 3 C. B., at p. 531, Lord Campbell defines the banker's lien as an implied pledge.

It has been generally understood that the banker's lien conferred rights more extensive than ordinary liens, and adopting Lord Campbell's view that it is an implied pledge, the ordinary remedies of a pledgee would appear to apply, where appropriate to the character of such securities, to securities held under the lien.

The rights of a pledgee are briefly as follows :—

Pledged goods or documents of title to goods : sale.

Where goods have been pledged, either actually, or constructively by means of the documents of title, or where negotiable securities have been pledged, as by deposit, with or without a memorandum, the pledgee has on default a power of sale without the necessity of resorting to any court of equity.

An expression of opinion which might be interpreted to the contrary is found in the words of Lord Herschell in *North-Western Bank* v. *Poynter* [1895] A. C., at p. 69, where he says as follows: "In the paragraph from which I have quoted those words it is pointed out that a pledge gives only a right of detention of the goods, and gives no right to sell. Where, as in the present case, the delivery of the goods is accompanied by a grant of an absolute right of sale to the pledgee, he is certainly something more than an ordinary pledgee : he has a right which a mere pledge does not convey." The paragraph quoted was from a text-book on Scotch Law; the power of sale, as shown by the terms of the memorandum from the bank, set out at p. 57, accepted as the basis of the transaction by the borrowers (see p. 58), was "an immediate and absolute power of sale," independent of any default; and it must be either to Scotch Law or to this exceptional right of sale that Lord Herschell was really referring. He seems to emphasize the word "absolute."

Authorities for power of sale.

For the authorities for the power to sell on default appear conclusive.

In *Burdick* v. *Sewell*, 13 Q. B. D., at p. 174, Bowen, L.J., says : "The pledgee of goods is entitled to sell them upon default."

In *In re Morritt*, 18 Q. B. D., at p. 232, Cotton, Lindley, and Bowen, L.JJ., say : "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the

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thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale."

What is default.

Where the debt is repayable at a fixed date, the default occurs on non-payment at that date, but notice to the pledgor of intention to sell is apparently also necessary.

Where the advance is for an indefinite period, demand of payment, with notice that if not complied with within a certain reasonable time the securities will be sold, is sufficient. This is generally accepted as law, and would seem involved in the proposition in *In re Morritt*, *ubi sup.*, which is in no wise limited to pledges for advances repayable at a fixed date. So also in *Shillito* v. *Hobson*, 30 Ch. D., at p. 403, Fry, L.J., says: "The pawnee would have a right to sell the chattel pawned either in default of payment at the time fixed if there be a time fixed, or in default of payment after reasonable notice if no time be fixed."

If the pledge does not realise sufficient to cover the debt, the balance of the debt is still recoverable.

The pledgee's only remedy is by sale; he is not entitled to apply for foreclosure with a view to acquiring the absolute property in the pledge. (*Carter* v. *Wake*, 4 Ch. D. 605.)

Where held as cover for acceptances.

The position of a banker who holds bills of lading, or other documents of title to goods, as cover for his acceptances of a customer's bills is as follows: He is a pledgee of the goods, the consideration for the pledge being the liability he assumes on the bills at the customer's request, and the object of the pledge being his indemnification against that liability.

If the matter stand simply thus, there is no particular event which constitutes a default entitling the banker to realise. Either a default is inferred from the banker having to pay, or a power of sale is implied after he has so paid, as being essential to his indemnity. It is beyond question that, having paid, he can realise his security. (Cf. *Banner* v. *Johnston*, L. R., 5 H. of L. 157.) In that

case there are references to the banker's selling in order to put himself in funds to pay the bills. These must be read in the light of the particular facts of the case, namely, that the drawers had agreed that the bankers should be kept out of cash advances, which, as pointed out by Lord Hatherley at p. 167, could only be by their realising before the bills of exchange became due.

Probably the right to realise would also accrue if the drawer had undertaken to put the banker in funds to meet the bills a specified time before their maturity and had failed to do so, as this would constitute a default.

In the absence, however, of some such agreement or of a definite power to sell at any time, the banker would not be entitled to realise until he had paid the bills. Even then it would seem desirable that he should apply to the customer to reimburse him, and give him notice that, failing his doing so within a limited time, he will proceed to realise the securities.

What subjec of pledge.

Inasmuch as pledge is an operation only applicable to goods and chattels and negotiable securities, the inherent power of sale does not extend to things or documents not falling within that category.

The doctrine of so-called quasi-negotiability, or negotiability by estoppel, would probably hardly suffice to give a right of sale on the pledge of documents not otherwise negotiable. The estoppel goes rather to the authority of the agent to deal with the document than to its nature, of which the pledgee is as competent to judge as the pledgor. See *ante*, p. 250.

When treate as equitable mortgage.

Where the documents deposited are not clearly negotiable instruments or documents of title to goods, it is therefore advisable to treat them as the subject of equitable mortgage. *Harrold* v. *Plenty* [1901] 2 Ch. 314.

If the memorandum of deposit gives a power of sale, this may be exercised, on default, by the banker on his own initiative, without the sanction of any court; if no power

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of sale has been acquired, the Chancery Division will order foreclosure or sale practically at the option of the applicant. This procedure appears equally applicable to pledges of shares or stock completed by transfer, with respect to which there is a further preferential claim to an order for sale instead of the more dilatory process of foreclosure. A pledgee of stocks and shares to whom they have been transferred, and who has got himself registered, is, in form at least, in a position to deal with them as absolute owner, but the equitable right of redemption still remains vested in the pledgor until determined by the intervention of the court. Were the pledgee to sell without the authority of the pledgor or the court, he would presumably be liable to the pledgor should the shares and stocks subsequently rise in value.

Title-deeds to land.

Title-deeds, whether of freehold or leasehold land, though of themselves in the nature of chattels, are too intimately connected with the land itself to come within the power of sale implied in a pledge. Another reason assigned for this exemption is the hardship and inconvenience that would accrue from allowing them to be dealt with apart from the land on their small intrinsic worth as compared with their relative importance to the landowner.

Statute of Limitations.

Where securities, goods, stocks, or shares have been equitably mortgaged, as by deposit, the remedy by foreclosure or sale is not barred by the expiration of the period which, under the Statute of Limitations, would preclude the recovery of the debt for which the security was pledged.

The personal remedy and the remedy against the property are independent, and there is no statutory provision relating to personal property similar to that relating to land, extinguishing the title to it after a certain time. (*London and Midland Bank* v. *Mitchell* [1899] 2 Ch. 161.)

In taking securities a margin of value in excess of the liability they are to cover is always allowed. On realisation, if the security brings in more than the debt, the disposition of the balance may give rise to questions.

Disposition of surplus on realisation.

With regard to bills, notes, and cheques, the distinction previously alluded to (*ante*, p. 240) between taking such documents by way of pledge and taking them as absolute transferee and owner must be borne in mind. In the latter case, the holder is entitled to the full amount irrespective of the value he gave; in the former, the surplus must be treated as if it arose from the realisation of any other security.

Of bills or notes.

Where the security has been given to cover all indebtedness, and its realisation brings in more than enough to satisfy that indebtedness, and the banker is not affected with notice of any assignment of the depositor's remaining rights or any further charge on the security, he must, of course, pay over the surplus to the debtor or hold it at his disposal.

Where all debt paid.

If, however, the depositor is further indebted to the banker, say on general account, the banker can retain the surplus or a sufficient part thereof, to cover such further indebtedness, by virtue either of his general lien or the right of set-off.

Can retain for further indebtedness

It may at first sight seem curious that immunities attaching to the security itself should not extend to what is only a converted part thereof, but the authorities are clear. (*Jones* v. *Peppercorne*, Joh. 430; *Inman* v. *Clare*, Joh. 769; *In re London and Globe Financial Corporation* [1902] 2 Ch. 416, recognising *Jones* v. *Peppercorne*.) In *In re Bowes*, 33 Ch. D. 586, North, J., while holding that the bank had no general lien on the security itself, said that if the memorandum had given a power of sale, or if such power had been obtained from the court, the surplus proceeds would have probably been retainable by the bank by way of set-off for their further claim against the customer's estate.

The explanation may be that the express or implied power of sale is an incorporated or inherent incident of the deposit, and its exercise terminates any fiduciary relation that may have existed with regard to the security itself.

Cases like *Stumore* v. *Campbell* [1892] 1 Q. B. 314, are distinguishable. Where money is deposited for a purpose which fails, there arises a resulting trust which affects the whole sum and puts it outside lien or set-off. In the case of securities lodged to cover a specific advance, the purpose is cover, and, if necessary, realisation; on a legitimate sale there is, therefore, no failure, but fulfilment, and no resulting trust even as to surplus proceeds. The phrase so commonly met with in this class of cases, that the creditor holds the surplus proceeds as trustee for the debtor, would seem to be really only a figure of speech; there is no actual fiduciary relation. The money is, in truth, held for the debtor's account, or as money had and received to his use; in other words, constitutes a mere debt to him, and so is subject to lien or set-off.

Surplus of goods or securities pledged to cover acceptances.

The same holds good with regard to a surplus realised by sale of goods or securities pledged to cover acceptances. It was expressly declared in *Inman* v. *Clare*, Joh. 776, that the surplus, if any, was subject to the general lien of the banker or broker who paid the acceptances. The drawer's only right is to have the goods or securities or their proceeds applied to the bills, so that no liability, either direct or by increased debit, shall accrue to him in respect of those bills. This right does not affect surplus after the amount of the bills has been so applied.

The drawer's right is assignable by agreement collateral to and independent of the bills, but the transferee can clearly take no higher right than his transferor, and has, therefore, no claim whatever with regard to the surplus balance. (*Inman* v. *Clare*, Joh. 769; *Ex parte Dever*, 13 Q. B. D. 766.)

CHAPTER XX.

MORTGAGES.

It would be outside the scope of this work to endeavour to treat generally of mortgages. The whole subject is comprised in exhaustive treatises of acknowledged authority. Legal mortgages are matter of complicated conveyancing with which no banker would venture to deal without legal advice. The position of legal mortgagee and mortgagor is not in any way naturally incidental to that of banker and customer, indeed sometimes is inconsistent with and rebuts that relation, as where a legal mortgage is given to a banker for a fixed sum, in which case the banker cannot include that sum in the banking account, so as to charge compound interest thereon (*London Chartered Bank of Australia* v. *White*, 4 A. C. 413, 424), though the taking of a mortgage to secure the fluctuating balance of an account is not held inconsistent with the relation of banker and customer. (*National Bank of Australasia* v. *United Hand in Hand Company*, 4 A. C. 409.)

Equitable mortgage.

A simpler form of mortgage is that known as equitable mortgage, constituted by deposit of title-deeds, with or without a memorandum setting forth the object, terms, and conditions of the deposit. The absence of formality or delay commends this class of security to bankers; and if taken and subsequently dealt with with due precaution, the protection is hardly inferior to that afforded by a formal deed.

Remedies on

For it may now be taken as established that the remedies on an equitable mortgage, though they may necessitate recourse to the court, are, through that

CHAP. XX. medium, practically identical with those on a formal mortgage.

Even prior to the Conveyancing Act, 1881, the equitable mortgagee by deposit of title-deeds, either with or without a memorandum, seems to have been entitled to apply to the court, not only for foreclosure, but for sale. (See Fisher on Mortgages, par. 1004.)

The remedy by sale has been questioned by some authorities, but Fisher's view is probably correct. Sect. 25 of the Conveyancing Act, 1881, declares the power of the court to order a sale in cases where foreclosure could be ordered; and in *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205, and *Wade* v. *Wilson*, 22 Ch. D. 235, sale was ordered on the application of the equitable mortgagees, though in neither case was there any memorandum.

No doubt the power to order sale in lieu of foreclosure is optional with the court, but there is no ground for assuming that the discretion would not be so exercised in fitting cases.

If it is desired to acquire a more formal security without resorting to foreclosure or sale, an undertaking to give a legal mortgage is implied in the deposit, and the mortgagor can be called upon to fulfil this undertaking.

Mortgage of leaseholds.

Leasehold as well as freehold property may be the subject of either formal mortgage by assignment or underlease, or equitable mortgage by deposit of the title-deeds with or without a memorandum.

However treated, property of this sort is not regarded favourably by bankers as security, except possibly in the case of valuable leaseholds with a long term to run at a low ground rent.

If the mortgage is a legal one, by way of assignment, the mortgagee becomes liable for such of the covenants as run with the land; if by underlease, the more usual form, he does not become immediately liable on any of the covenants,

but he is somewhat dependent on his mortgagor for the keeping up of the security.

Breach of covenant by the original lessee may lead to proceedings in ejectment for forfeiture.

As underlessee, the mortgagee has a right to apply for relief (*Newbolt* v. *Bingham*, 14 The Reports, 526), and, under sect. 4 of the Conveyancing Act, 1892, an underlessee may be relieved against some forfeitures against which an immediate lessee cannot obtain relief, such as underletting without consent, provided such underlessee has not acted negligently (*Imray* v. *Oakshette* [1897] 2 Q. B. 218; *Ewart* v. *Fryer* [1901] 1 Ch. 499); but in such cases the underlessee will probably find himself put on very stringent terms, involving in some cases the taking a direct lease or its equivalent for the residue of the term.

Where the title-deeds of leasehold property are deposited, with or without a memorandum, so as to constitute an equitable mortgage, the mortgagee incurs no liability whatever under the covenants. The deposit of a lease as security is no breach of the covenant not to assign. (*Gentle* v. *Faulkner* [1900] 2 Q. B. 267.) But the equitable mortgagee runs the risk of the lessee's forfeiting the lease by other breaches of covenant, and, not being an underlessee, he has no *locus standi* for applying for relief against any forfeiture, except possibly a forfeiture for non-payment of rent.

Risks attendant on equitable mortgage; priorities.

The chief danger which is always adduced as attaching to the position of an equitable mortgagee, whether of freeholds or leaseholds, is the possibility of someone obtaining a subsequent legal mortgage, and so gaining priority.

Legal over equitable.

As Stirling, L.J., says in *Taylor* v. *London and County Bank* [1901] 2 Ch. 231, "a legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a court of equity takes away nothing he has honestly acquired."

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The possession of the deeds constitutes, however, a very considerable safeguard. The doctrine of constructive notice, within specified and reasonable limits, comes into operation. A man does not acquire a thing honestly if he takes no steps whatever to satisfy himself whether the person he takes it from can honestly part with it, or shuts his eyes to circumstances tending to show that such is not the case. To use the words of sect. 3 of the Conveyancing Act, 1882, he is to be prejudicially affected by notice of any instrument, fact, or thing which is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him.

So, if a man takes a legal mortgage without asking to see the deeds, or on doing so being put off by accepting an unsatisfactory answer, he will, in ordinary cases, not be allowed priority over a prior equitable mortgagee who has got possession of the deeds. (*Oliver* v. *Hinton* [1899] 2 Ch. 264; *Jared* v. *Clements* [1903] 1 Ch. 428.)

Land Registry Acts.

The various Acts relating to the registration of land and dealings therewith have to be taken into consideration with respect to equitable mortgages by deposit of title-deeds.

"Conveyance" within meaning of Acts.

The original Middlesex Registry Act, 1708, 7 Anne, c. 20, and the Irish Registry Act, 1707, 6 Anne, c. 2, require the registration of any "conveyance" affecting land within their respective jurisdictions, to prevent its being fraudulent and void as against a subsequently registered conveyance to a third party. In *Credland* v. *Potter*, L. R., 10 Ch. 8, the court held, on the words "every deed or conveyance" in the West Riding Registry Act, 2 & 3 Anne, c. 4, s. 1, that a memorandum accompanying a deposit of title-deeds by way of equitable mortgage constituted a "conveyance" of which a memorial must be registered to secure priority. Lord Cairns said: "An instrument giving to a person a charge upon land gives him an interest in the land; if he

has a mortgage before, it gives him a further interest; and so, whether made in favour of a person who has already a charge or of another person, it is a conveyance of an interest in land. This memorandum was, then, in my opinion, a conveyance affecting land within the meaning of the Act." (Cf. *In re Calcott and Elvin's Contract* [1898] 2 Ch. 460.)

Letters leading up to deposit.

And this rule has lately been extended, beyond memoranda, to letters directly tending or leading up to the deposit of the deeds. In *Fullarton* v. *Provincial Bank of Ireland* [1903] A. C. 309, the House of Lords held that certain letters from the proposing mortgagor, read in a business light, amounted to an undertaking to deposit the deeds as security, and so constituted a "conveyance," requiring a memorial to be registered in order to secure priority. It was objected that there was no consideration shown for such undertaking, but the House supplied one from the forbearance of the bank for a reasonable time to press for an existing overdraft, in reliance on the proposed security held out by the letters. No acceptance of the proposal by the bank was proved other than the ultimate deposit of the deeds, but Lord Lindley observed that when something is offered which it is to a man's advantage to receive he must be taken to accept it unless he can show he declined it.

In the case of a proposed advance, original or further, the consideration would be the promise to make the advance on receiving the security.

Equitable deposit of deeds without memorandum.

The deposit of title-deeds without any memorandum is not, however, a "conveyance" within the above-mentioned Registry Acts. This was decided in *Sumpter* v. *Cooper*, 2 B. & Ad. 223, followed in *In re Burke's Estate*, 9 L. R. Ir. 24, while in *Fullarton* v. *Provincial Bank of Ireland*, *ubi sup.*, the House regarded these decisions as too firmly established to be disturbed. (See *per* Lord Davey at p. 314.)

Rule in Yorkshire.

The Yorkshire Registry Act, 1884, 47 & 48 Vict. c. 54,

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however, contains an exceptional provision (sect. 7) by which an equitable mortgage by bare deposit is inoperative as against a subsequent registered assurance, unless a memorandum in terms explicitly provided is signed by the mortgagor and registered, though the registration may be effected by the mortgagee. (*Battison* v. *Hobson* [1896] 2 Ch. 403, where it was further held that under sect. 14 of the Act nothing short of actual, as distinguished from legal, fraud would postpone the subsequent registered incumbrancer.)

Unregistered equitable mortgage.

Where an equitable mortgage ought to be registered, and is not, a subsequent legal mortgagee is in a very strong position. If he search the register and find nothing there, he is absolved from making any inquiries with a view to the discovery of unregistered interests. He is probably absolved from the necessity of requiring production of the title-deeds. Nothing but actual knowledge, or such extraordinary negligence as is hardly consistent with anything but fraud, would apparently suffice to postpone him to the unregistered incumbrance. (*Agra Bank* v. *Barry*, L. R., 7 H. of L. 135.) The position, therefore, of a mortgagee by bare deposit in cases where he is not compelled to register when he would have been, had he taken a memorandum, is, as pointed out by Lord Davey in *Fullarton* v. *Provincial Bank of Ireland* [1903] A. C., at p. 314, an anomalous one. His existence is not disclosed by the register, yet he is presumably entitled to hold his priority if the legal mortgagor, after searching the register, abstains from inquiry.

The Land Transfer Acts.

The Land Transfer Act, 1875, 38 & 39 Vict. c. 87, sect. 127, excludes from the jurisdiction of the Middlesex and Yorkshire Registry Acts land otherwise subject to that jurisdiction, if registered under its own provisions.

Effect of Land Transfer Acts.

General anticipatory legislation of this sort is unusual and inconvenient. Its bearing on subsequent legislation must necessarily be open to question. For instance, does this Act, passed in 1875, control the Yorkshire Registry

Act, 1884, which contains no exception or reference as to its provisions? If title deeds of land in Yorkshire, registered under the Land Transfer Acts, were deposited and a memorandum registered in Yorkshire, would this affect a prior charge by deposit of the land certificate?

The better view seems to be that the Land Transfer Act, 1875, overrides all previous or subsequent legislation so far as land registered under it or the Land Transfer Act, 1897, is concerned. The provisions of sect. 127 of the Act of 1875 are treated as existing for all purposes by sect. 17 of the Act of 1897 and by the first schedule to the same Act.

Are the ruling enactments where applicable.

Bankers should therefore regard the Land Transfer Acts as the ruling enactments in all cases to which they are applicable. Registration under the Land Transfer Acts is only compulsory where adopted by the local authority, and then only in cases of sale. There is no obligation on an owner to register. Deeds relating to property registered under the Land Transfer Acts carry their own danger signal in the note made upon them by the Land Transfer Office. On seeing this, the banker knows that such land is outside the jurisdiction of ordinary registries, and also that, in order to obtain priority, he must adopt the procedure laid down by the Land Transfer Acts.

Procedure under Land Transfer Acts.

That procedure is apt and reasonable enough. By sect. 8, sub-sect. 6, of the Act of 1897, any registered proprietor may, subject to registered charges or rights, create a lien on his land by deposit of the land certificate, and the effect is equivalent to a lien created by deposit of title-deeds by an owner entitled in fee simple for his own benefit. The word "lien" is inapposite in this connection. The only recognised lien on land is that of an unpaid vendor; the deposit of title-deeds by an owner in fee simple constitutes an equitable mortgage or charge, and this is what the Act must be interpreted to mean.

It has been suggested that the words "for his own benefit" afford an extra protection to anyone taking a

security on land under the section; that, for instance, a trustee raising money by this means for his own ends can give a good title as against his *cestui que trust*. This view, though startling, is certainly arguable. (See Brickdale and Sheldon on the Land Transfer Acts, p. 296.)

The scheme of those Acts, like that of other Registry Acts, is to give priority to registered over unregistered charges.

But the Act of 1897, sect. 8 (1), imposes a salutary check on illegitimate dealings, by providing that the land certificate must be produced on any proposed alteration in the register.

This land certificate is thus made the effective symbol of title to, and authority to deal with, the land.

It is the recognised instrument by deposit of which an equitable mortgage is to be effected. As soon, therefore, as the banker sees by the note on the deeds that he is dealing, or about to deal, with land registered under this Act, he should insist on having the land certificate, if that is not the security tendered him in the first instance.

Notice of deposit.

Having got the land certificate, the banker's next step should be at once to fortify his position by sending a notice to the Land Transfer Office. The method of so doing is prescribed by the rules made in 1903. The Land Transfer Act, 1897, sect. 22 (6) (*f*), gave power to make rules for notice of deposits of land certificates. The Land Transfer Rules, 1903, provide (rule 243) that such notice may be sent by registered letter with a shilling fee enclosed. The sending of such notice has the same effect as the lodgment of a caution under sect. 53 of the Act of 1875. By that section there can be no dealing with the land without due notice to the cautioner. Sects. 54 and 55 of that Act prescribe the length and method of this notice, and provide that the registrar may delay dealing with the land till any question which may arise is settled. Rule 249 enacts that, so long as such notice is on the register, no

new certificate will be issued under sect. 8, sub-sect. 3 of the Act of 1897, to any person representing that the original has been lost or destroyed, or under sub-sect. 4 of the same section, as on a sale under a charge subsequent to the notice of deposit, without notice similar to that under a caution. So that the system of protection is fairly complete. The depositee's remedy is by application to the court for foreclosure or sale; but application would at the same time have to be made to have the register corrected under sect. 95 of the Act of 1875.

In all questions of priority, the abstaining from requiring the land certificate would have the same effect as the not calling for title-deeds of unregistered land.

The forms of charge prescribed under rules 158 and 160 of the Land Transfer Rules, 1903, forms 44 and 46 in the first schedule, as also form xxxix. in Messrs. Brickdale and Sheldon's book, are so simple and comprehensive that in the case of land registered under the Land Transfer Acts one of them might well be utilised as a memorandum accompanying the deposit of the land certificate. It could then be registered as a mortgage or charge and the extra security and facilities of realisation afforded by such registration acquired.

Priorities between equitable mortgagees.

Apart from any element of registration, questions of priority may arise between two equitable mortgagees.

An equitable mortgagee, who has made an advance without notice of a prior equitable title, may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him to do so. (*Taylor* v. *Russell* [1892] A. C., at p. 253.)

But so long as the first equitable mortgagee keeps possession of the deeds this situation could not well arise, inasmuch as their absence would amount to constructive notice to any subsequent mortgagee, legal or equitable. And an equitable mortgagee may be postponed to a subsequent equitable mortgagee where the prior one has

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allowed his mortgagor to retain or regain possession of the title-deeds, and so enabled him to borrow from the subsequent mortgagee, who has obtained possession of them. (*Taylor* v. *London and County Bank* [1901] 2 Ch., at p. 261.)

There is, however, an exception to this rule. Where the relation between the first equitable incumbrancer and the person in whose possession he leaves the deeds is not merely that of mortgagor and mortgagee, but is of a fiduciary nature, such as that of *cestui que trust* and trustee or client and solicitor, he is not acting negligently or improperly, and he will not be postponed by reason of improper acts of the person entrusted with the deeds, so long as he had no reason to doubt his honesty. (*Taylor* v. *London and County Bank*, *ubi sup.*, at p. 261; *In re Lake*, *Ex parte Cavendish* [1903] 1 K. B. 151.)

Legal postponed to equitable.

So much does equity dominate the whole system of mortgage that a prior legal mortgage may be, in certain cases, postponed to a subsequent equitable one. (*Jared* v. *Clements* [1903] 1 Ch. 428.)

The court will take this extreme step in any of the following states of circumstances: (1) where the legal mortgagee has assisted in, or connived at, the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title-deeds may be sufficient evidence, where such conduct cannot otherwise be explained; (2) where the owner of the legal estate has constituted the mortgagor his agent, with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

But the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness, or want of prudence on the part of the legal owner.

The foregoing summary is derived from the judgment of the Court of Appeal in *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D., at p. 494, recognised in *Taylor* v. *London and County Bank* [1901] 2 Ch., at pp. 259, 260, and in many other cases; see also *Jared* v. *Clements* [1903] 1 Ch. 428.

Advances made after notice of further charge.

Another question of priorities, in which bankers have been before now involved, and affecting legal as well as equitable mortgages, arises where a mortgage is given to secure past and future advances or future advances alone, and the mortgagee receives notice that the mortgagor has parted with his reversionary interest, or has created a further charge thereon.

It was at one time an open question whether advances made by the first mortgagee after such notice were chargeable on the security in priority to the claims of the person who had acquired the reversionary interest or the further charge. The decision of the House of Lords in *Hopkinson* v. *Rolt*, 9 H. of L. Cases, 514, established conclusively that a first mortgagee cannot claim priority for voluntary advances made on such a security after notice of the second mortgage. Lord Campbell's judgment in that case clearly demonstrates that the rule as laid down does not bear hardly on a banker who receives notice of such second charge, inasmuch as his security is in no wise affected with respect to advances prior to the date of notice, and it is entirely within his option whether or no he will make further advances after that date. "The hardship upon bankers at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes the bankers have only to consider (as they do as often as they discount a bill of exchange) what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss" (p. 535).

Union Bank of Scotland v. *National Bank of Scotland*,

12 A. C. 53, is another decision of the House of Lords to the same effect, and affords a particularly strong example of the principle, because there the disposition of property in the first instance was on the face of it absolute, and it was only from collateral facts that it could be shown to be in the nature of a security only. The doctrine of *Hopkinson* v. *Rolt* applies equally or, perhaps, *a fortiori* where the second disposition of the property is an absolute sale of the residuary interest, of which the mortgagee has notice. (*London and County Bank* v. *Ratcliffe*, 6 A. C. 722.) The principle was also approved in *Bradford Banking Co.* v. *Henry Briggs & Co.*, 12 A. C. 29. In this latter case Lord Blackburn says of the decision in *Hopkinson* v. *Rolt*: "It seems to me to depend entirely on what I cannot but think a principle of justice, that a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor" (p. 37).

In none of the cases up to this date had the first mortgagee bound himself to make advances on the security to any specified amount; and the principle, as stated by Lord Campbell and Lord Blackburn, rested largely on the entirely voluntary and optional character of the advances subsequent to notice of the dealing with the reversion.

Where mortgagee has agreed to make further advances.

The question naturally arose as to the position of a first mortgagee who had bound himself to make advances on the security up to a certain amount, which amount was not reached at the date of the notice; whether he was still bound to continue advancing up to the specified sum, and, if so, entitled to priority in respect of such advances.

In *West* v. *Williams* [1899] 1 Ch. 132, this question was settled by the Court of Appeal holding that the mortgagor, by borrowing from other quarters on the same security, released the first lender from the obligation to make further advances, and that, if he did so after notice,

such advances must be treated as purely voluntary on his part.

Lindley, M.R., says (p. 143): "Even if the first mortgagee has agreed to make further advances on the property mortgaged to him, the mortgagor is under no obligation to take further advances from him, and from no one else; and if the mortgagor chooses to borrow from someone else and to give him a second mortgage, the mortgagor thereby releases the first mortgagee from his obligation to make further advances. Whatever prevents the mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagee from his obligation to make them."

Chitty, L.J., says (p. 146): "The covenant to make further advances creates no difficulty, and for this reason: the covenant is to make the further advance on the security of the property, and inasmuch as the mortgagor has by his own act deprived himself of the power to give the stipulated security, no action for damages would lie on the covenant. It is hardly necessary to add that no action lies for specific performance of any agreement to make a loan."

Mortgages of stock or shares. Priorities.

Questions as to priorities have arisen with regard to shares in companies utilised as security for advances. A man may be a registered shareholder or stockholder, and so be in a position to deal with or transfer the shares or stock, but by reason of his holding a fiduciary position, such as that of trustee, or by reason of prior equitable charges on the security, there may be persons entitled to an equitable interest therein which does not appear. To oust such equitable rights, a person subsequently taking the shares or stock by way of sale or pledge must not only do so honestly and for value, and without any notice of the prior equitable rights, but he must complete his title by acquiring the legal estate. What constitutes the completion of the legal title must partly depend on the constitution and regulations of the particular company.

If the transfer of shares or stock can only be made by deed, as is the case where the Companies Clauses Consolidation Act applies, or as may be required by the articles of association, the delivery of a blank transfer is not sufficient to pass the legal estate. As Lindley, L.J., says in *Powell* v. *London and Provincial Bank* [1893] 2 Ch., at p. 560: "We all know that both at common law and under these statutes, if you execute a transfer in blank, that instrument with the blanks is not a deed."

The person to whom it is delivered is not authorised or able to make it a complete deed by filling up the blanks. It may be redelivered by the transferor after being so filled up, and so become effectual as from the date of redelivery.

An agent cannot effect such redelivery unless himself authorised by deed. (*Powell* v. *London and Provincial Bank* [1893] 2 Ch. 555; *Société Générale de Paris* v. *Walker*, 11 A. C. 20.)

Where, however, the transfer is not necessarily by deed, a blank transfer authorises the transferee to fill up all necessary blanks, and thereupon operates as a good transfer without redelivery. (*Ireland* v. *Hart* [1902] 1 Ch., at p. 527.)

Registration.

In practically all companies, however, the regulations prescribe more than the mere transfer for the completion of a legal title. Registration is a usual requisite, and in such case the transferee must obtain himself to be registered, or at any rate must acquire a present, absolute, and unconditional right to be registered as a shareholder before he is affected with notice of the prior equitable title. (*Société Générale de Paris* v. *Walker*, 11 A. C., at pp. 29—41; *Moore* v. *North-Western Bank* [1891] 2 Ch. 599; *Ireland* v. *Hart* [1902] 1 Ch., at p. 529.)

But registration is ineffectual to perfect a transfer which is in itself inoperative and of no effect. (*Powell* v. *London and Provincial Bank* [1893] 2 Ch., at p. 566.)

Sending in transfer for registration. Forged transfers.

The value of shares or stock as security received a temporary check from the judgment of Lord Alverstone, C.J., in *Corporation of Sheffield* v. *Barclay & Co.* [1903] 1 K. B. 1. He held that the sending in of a transfer for registration amounted to a representation that the signature to that transfer was genuine, or involved an undertaking to indemnify the company against any loss they might sustain by having to replace the stock or shares, should the transfer subsequently prove to have been forged.

The consequences of the decision, had it stood, would have been most serious. In that case the bank who had sent in the transfer, had, on repayment of the advances made by them, transferred the stock to the nominees of the borrowers more than six years before the date at which the claim was made upon them.

The Lord Chief Justice held that the Statute of Limitations did not begin to run until the company suffered loss by having to reinstate the original holders; so that the liability would have hung indefinitely over the heads of all persons who had sent in transfers, in view of the possible discovery of a forgery. And yet registration, being, in most cases, necessary to complete title, could not safely be pretermitted.

The Court of Appeal, however, reversed the judgment of the Lord Chief Justice, holding that the sending in of the transfer for registration involved neither representation of the genuineness of the signature, nor indemnity of any sort, but was merely the calling on the company to do a ministerial act. [1903] 2 K. B. 580. The question is, therefore, for the present, set at rest.

CHAPTER XXI.

GUARANTEES.

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ONE of the commonest methods by which bankers protect themselves against loss on advances or overdrafts is by taking a guarantee. There are advantages attaching to this class of security. It is adaptable to most states of circumstances, present and possible, it entails few positive obligations on the banker, while it enures for him to fall back upon in case of need. There are also disadvantages. The efficacy of a guarantee is absolutely dependent on two things: first, the completeness in form of the guarantee itself; second, the continued solvency of the guarantors.

Essentials in form.

With regard to the form of guarantee, the difficulty mainly arises, first, from the necessity of defining very clearly the extent to which the guarantors bind themselves, and precluding them from afterwards suggesting that the bank has gone beyond what they undertook to be answerable for; and next from the necessity of anticipating conceivable contingencies, such as death, bankruptcy, change of firm, amalgamation, taking collateral security, giving time to the principal debtor, receipt of dividends, and the like, and of reserving to the bank the power to act on every occasion in the manner most conducive to its own interests, without prejudicing its right to resort to the guarantors for the ultimate balance due.

The law is rightly solicitous for the interests of sureties, and the main object of a guarantee should be to keep a free hand for the bank and a tight one on the guarantor.

It is largely a matter of drafting, which is outside the

scope of this work. Most banks keep their own stock of guarantee forms; these should be overhauled from time to time, to make sure that they are in working order, up to date, broad and strong enough for the purposes for which they are intended. Prolixity is no criterion of efficiency.

The second necessary element in a reliable guarantee, the financial position and stability of the guarantors, is for the consideration and judgment of the banker himself.

Definition of guarantee.

A guarantee is a promise to answer for the debt of another, made to a person to whom that other already is, or is about to become, answerable. It must be in writing, or there must be a memorandum of it in writing, signed by the guarantor or his authorised agent, to satisfy sect. 4 of the Statute of Frauds. In practice, as will be gathered from the foregoing remarks, there must be a good deal more in writing than could be fairly described as a memorandum.

Analogous contracts.

There are cases at first sight analogous to guarantees, which are not within the Statute of Frauds, such as contracts of indemnity and contracts for the acquirement of property by payment of another man's debt. (*Harburg & Co.* v. *Martin* [1902] 1 K. B. 778.) The ordinary transaction, however, by which a banker allows a man credit on another's undertaking to see him paid, is a guarantee pure and simple, for which reason, if for no other, writing and signature are essential.

Main points of an effectiv guarantee.

Without going into details, the following are the main points to be kept in mind in taking a guarantee:

Several or joint and several.

Judgment against one.

If there is more than one guarantor, their obligation must be made several, or joint and several. If it be joint only, an unsatisfied judgment against one, except under Order XIV., or in default of appearance, under Order XIII., rule 4, constitutes a bar to any action against the other or others. (*Kendall* v. *Hamilton*, 4 A. C. 504.) The case of *Morel* v. *Westmoreland* [1904] A. C. 11, must not be

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understood as implying that a similar result would follow when the obligation was joint and several.

The judgment against the wife in that case barred the remedy against the husband, even on the supposition of an original several liability, because the liability of husband and wife could only be alternative, being that of principal and agent, and the judgment against one operated as a conclusive election.

The remedy against joint and several guarantors is not alternative, but cumulative, until the whole debt is not only recovered, but satisfied.

From the point of view of the guaranteed person a guarantee by each of the co-guarantors severally would be quite satisfactory; but, as above shown, the fact of its being joint and several does not affect him, and it may have advantages for the guarantors.

The guarantors should always bind themselves, their executors and administrators; and if under seal, their heirs as well. The executors or administrators would in any event be bound, but their specific inclusion may be useful in the case of death of the surety and notice thereof, hereinafter mentioned.

Limited or unlimited.

It may be intended that the guarantor's liability shall be limited. If so, the limitations must be strictly defined. Where a fixed sum is inserted as the limit of the surety's liability, it must be carefully stipulated whether the surety is surety for the whole debt, with the specified limitation to his total liability, or whether he is surety only for part of the debt. The former is the more advantageous for the person guaranteed, inasmuch as it entitles him, on the bankruptcy of the principal debtor, to dividends on the whole debt from his estate, notwithstanding the surety has paid the full sum he guaranteed; whereas in the latter form the surety, having paid his liability, is entitled to the dividends on that amount. (See *In re Rees*, 17 Ch. D. 98; *In re Sass* [1896] 2 Q. B. 12.)

A slight variation in the wording is sufficient to assign the liability to one category or the other, and it is therefore always desirable to supplement the statement of the liability, and anticipate any question, by adding a clause or proviso, such as proved so efficacious in both the above-mentioned cases, under which the surety contracts himself out of any such possible equity in plain and distinct terms.

Amount advanced and amount guaranteed.

Care must also be exercised that the limitation applies to the amount guaranteed, and not to the amount advanced. If such words as "In consideration that you will advance to A. B. a sum not exceeding £250, I guarantee you the payment of that amount," were used, the guarantee might be invalidated *in toto* by the advance of a sum exceeding £250.

Specific and continuing.

Guarantees are further divided into specific and continuing. The first are where provision is made for the advance of a specified sum or for advances up to a fixed limit, and the guarantee is applicable only to that particular advance or series of advances, and ceases on repayment thereof. The continuing guarantee is the commoner form, and is designed to cover a fluctuating or running account, securing the balance due at any time, irrespective of payments which obliterate past advances.

Here again, the plainest terms should be used to express the continuous character of the obligation. The words "ultimate balance" are sometimes used in this connection. They are useful as pointing to the continuing nature of the guarantee; but if there are more accounts than one, and the guarantee is intended to apply exclusively to one, without bringing in any credit balance there may be on another, this must be clearly defined. "Ultimate balance" primarily means the sum finally owing, combining all accounts. (See *Mutton* v. *Peat* [1900] 2 Ch. 79.)

If, on the other hand, it is the real ultimate balance, combining all accounts, which it is desired to secure, this should be clearly expressed.

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Existing overdraft or debt.

It must be stated whether the liability is to extend to existing overdraft or debt, if any, as well as to future advances. This is sometimes involved in the statement of the consideration. It is not necessary that the consideration should be set out in the guarantee (Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3). But if it is set out, it should be done correctly. Such forms as "in consideration of your having advanced A. B. £500," or "in consideration of your having allowed A. B. to overdraw his account with you to the extent of £500," are obviously wrong. The mere antecedent debt of a third person is no consideration for a promise.

It is true that the statement of a consideration is not conclusive, and another consideration may be supplied by external evidence. The real consideration, where further advances are not stipulated for, is the forbearance of the creditor to sue or press the debtor. No doubt the existence of this consideration may be implied from the nature of the transaction as between business men. (See *Fullarton* v. *Provincial Bank of Ireland* [1903] A. C., at p. 316.) But, in the absence of statement in writing, the matter must always remain doubtful whether any claim was contemplated, and if so, whether it was forborne at the request of the guarantor. (*Miles* v. *New Zealand, &c., Co.*, 32 Ch. D. 266.)

Where, therefore, the only consideration is the forbearance to press for an existing debt, this should be clearly specified, and the time for which such forbearance is to last stated. "Reasonable time" is too vague and incapable of definition, while "so long as you may think fit," or words leaving the respite entirely in the hands of the creditor, would render the sufficiency of the consideration doubtful.

Method of future advances.

The method by which future advances are to be made should be formulated in accordance with the intention of the parties, or in such general terms as to include all methods likely to be adopted, as, for instance, the

acceptance and discounting of bills. Interest and banking charges should be provided for. With regard to the former, it is sometimes desirable to stipulate for the method in which it is to be, or may be, charged or reckoned, as by yearly or half-yearly rests; and some draftsmen insert a provision that this method of charging shall continue, notwithstanding that the relation of mortgagor and mortgagee has superseded that of customer and banker. This would only come into operation where a mortgage was taken for a specific sum, and not for a fluctuating balance (see *National Bank of Australasia* v. *United Hand in Hand Co.*, 4 A. C., at p. 410), and it would introduce much complication if the accounts had to be kept in one way against the customer and in another against the surety.

Conditions of determination.

Where the guarantee is to be a continuing one the conditions of its determination should be clearly marked.

A guarantor is, in ordinary cases, entitled to determine the guarantee as to future advances at any time by notice, and by paying what is then due. (*Beckett* v. *Addyman*, 9 Q. B. D., at p. 791.) Even if the guarantee is for a specified period, or is under seal, this right probably exists in equity, if not at law. (*In re Crace* [1902] 1 Ch., at p. 738.) It is generally found advisable to impose restrictions on this power. It may be provided that the liability of each guarantor shall only be determinable on the expiration of specified notice, to be given by him in writing, and on payment of all sums due or accruing due at the date of receipt of such notice, or subsequently becoming due by virtue of any engagement entered into prior to receipt of such notice, which, if such notice had not been given, would have been covered by the guarantee. The sort of case it is necessary to anticipate is that of a bill accepted by the bank on the faith of the guarantee prior to receipt of notice, but not falling due till after the expiration thereof. (Cf. *Hollond* v. *Teed*, 7 Hare, 50, where the form of

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the guarantee, though not very clearly expressed, was held to cover such bills.)

Whether the liability of a joint and several guarantor for future advances would be affected by the determination of the liability of his co-guarantor might be doubtful. If the analogy of the death of another joint and several surety is to be accepted, determination by one such surety would not release the other from liability for future advances. Where the sureties are joint only it is an open question whether the death of one stops the liability of the other for subsequent advances. (*In re Sherry*, 25 Ch. D., at pp. 703, 705.) Where the contract is joint and several, the death of one guarantor does not affect the liability of the other for subsequent advances. (*Beckett* v. *Addyman*, 9 Q. B. D. 783.) It is, however, wiser to make it quite clear in the guarantee that neither determination by nor the death of one co-surety is to have any effect on the continuing liability of the other for past or future advances.

Formal notice of death of surety. Effect of death.

Again, provision should be made for formal notice of the death of a surety before the liability of his estate for subsequent advances terminates.

The mere fact of the death probably does not put an end to the guarantee, which is a contract. *Bradbury* v. *Morgan*, 1 H. & C. 249, is a direct authority to this effect. But later cases are less positive on the point. In *Harriss* v. *Fawcett*, L. R., 8 Ch., at p. 869, Mellish, L.J., says: "As mere matter of law, although it is not necessary, perhaps, positively to decide it, I am of opinion that this guarantee was not determined by the death. If one were to suppose a case, which might very easily happen, where a bank holding such a guarantee was not aware of the death, I should think it very hard upon the bank to hold that a guarantee worded like this was terminated by the death of the guarantor." In *Coulthart* v. *Clementson*, 5 Q. B. D. 42, Bowen, J., implies that constructive notice of the death would prevent the bank claiming further advances

against the estate of the deceased. In *In re Silvester* [1895] 1 Ch. 573, Romer, J., dissented from this view, but did not touch the question of the effect of the death. Joyce, J., agreed with Romer, J., in *In re Crace* [1902] 1 Ch., at p. 739.

It seems admitted that the usual provision for notice of determination by the guarantor applies only to his life, and that the legal representatives after his death can always determine as to future advances by reasonable notice. It is, in the present state of the question, essential that the provision for notice of determination should stipulate for formal notice, not only by the guarantor, if given in his lifetime, but also by his legal representatives, under the name of executors or administrators, in case of his death without having given notice. This would exclude any question as to constructive notice, or acting on the footing of the guarantee being determined. (See *In re Silvester* [1895] 1 Ch. 573.)

Release of a surety.

The danger of releasing a surety by dealings with the principal debtor or a co-surety must always be borne in mind in framing a guarantee, and provided against so far as is deemed necessary.

By release of principal.

The release of the principal discharges the sureties in any case, because the debt is extinguished. (*Commercial Bank of Tasmania* v. *Jones* [1893] A. C., at p. 316.) And where the release is absolute, no language purporting to reserve remedies against the sureties can have any effect. On the other hand, a covenant or agreement entered into between the creditor and the debtor not to sue the latter, with a reservation of rights against the sureties, will not release the latter. (*Price* v. *Barker*, 4 E. & B. 760.) And even though the document purport to be a release, but it appears therefrom, as by reservation of the right against sureties, that the real intention of the parties was merely an agreement not to sue the debtor, it will be interpreted as such agreement, and the sureties will not be released. (*Green* v. *Wynn*, L. R., 4 Ch., pp. 204, 206;

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In re Whitehouse, 37 Ch. D., at p. 694; *Duck* v. *Mayell* [1892] 2 Q. B., at p. 514.) The novation of a debt by accepting a new debtor in place of the old is a complete release of the latter, which releases the sureties and precludes any such interpretation as the above. (*Commercial Bank of Tasmania* v. *Jones* [1893] A. C. 313.)

Where liability joint and several.

Where the liability of the sureties is joint and several, the release of one surety releases the others (*Ward* v. *The National Bank of New Zealand*, 8 A. C., at p. 764; *In re E. W. A.* [1901] 2 K. B. 642), even though a joint and several judgment has previously been recovered against them. (*In re E. W. A.*, *ubi sup.*)

Where several only.

But where the liability of the co-sureties is several only, not joint and several, the release of one does not discharge the other, unless that other had a right to contribution in equity, and that right is taken away or injuriously affected by the release of the co-surety. (*Ward* v. *National Bank of New Zealand*, 8 A. C., at pp. 765, 766.) Theoretically a several surety has the same right of contribution as a joint surety (*Ward* v. *National Bank of New Zealand*, *ubi sup.*, at p. 765; *Whiting* v. *Burke*, L. R., 6 Ch. 342), but, if alleging release, the burden is on him to show not only the right but the loss of or injury to it.

It is not very obvious why a bank should ever desire to release one of several co-guarantors, and the contingency seems hardly one to be contemplated in a guarantee.

By giving time to the principal.

Giving time to the principal debtor releases the surety if the time is given by a binding agreement arrived at for good consideration, and the rights against the surety are not reserved. (*Per* Lord Herschell in *Rouse* v. *Bradford Banking Co.* [1894] A. C., pp. 590, 594.) The agreement to give time need not be in writing to be binding; it may even be implied. It usually arises where the principal is pressed for further security, the giving of which constitutes consideration for the giving of time. (See *Overend*,

Gurney & Co. v. *Oriental Financial Corporation*, L. R., 7 H. of L., at p. 361.)

Taking bill from principal.

So also the taking a bill from the principal debtor would constitute a giving of time, unless possibly it were clearly shown that it was taken merely as collateral security, not suspending any remedy on the debt. (See *Croydon Commercial Gas Co.* v. *Dickinson*, 2 C. P. D. 46.)

Question as to surety not being injured.

There is some authority for holding that the surety will not be discharged if his remedies are not diminished or affected. But, in view of the judgment in *Ward* v. *National Bank of New Zealand*, 8 A. C. 755, it would not be safe to rely on this. The Judicial Committee say at p. 763: "In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured and may even be benefited thereby." The surety is the only judge whether a variation of the contract without his consent is for his benefit or detriment, except possibly in absolutely self-evident cases, as, for instance, the creditor agreeing to take a cheque for £500 in full discharge of a debt of £1,000.

Against reliance on reservation of rights, there is the opinion of Lord Eldon, who held in *Boultbee* v. *Stubbs*, 18 V. 26, that a reservation of rights against the surety is of no avail, if the contract for reserve prevents the surety's remedy against the principal.

Reserving right to give time.

In order to avoid any such questions, the guarantee should, in the plainest terms, secure to the creditor the right to give time to the principal debtor in any way he may deem advisable. (Cf. *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672.)

Taking other securities.

Save as touching the question of giving time, the risk of releasing a surety by taking securities for the debt affects cases where the suretyship takes the form of a note executed by principal and sureties rather than those where a regular guarantee is given. In so far as the doctrine is based on merger, it is not easy to see what can merge the guarantee,

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unless it were another one by the same parties under seal. But it might be contended that other securities, though taken primarily for the debt, were in substitution for the security afforded by the guarantee, or, by merging or suspending the debt, affected the liability of the surety.

Power to vary and release securities.

There should always be a proviso that the guarantee is to be in addition to, and without prejudice to, any securities of any kind then or thereafter held or to be held by the creditor, and full power should be reserved to take, vary, exchange, or release such securities, renew bills, and so forth, without prejudice to the guarantee.

The taking of additional security does not, unless it involves the giving of time, of itself discharge the surety. (*Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L. R., 7 H. of L., at p. 361.)

Creditor not bound to resort to securities before suing surety.

It has been deduced from the case of *Duncan Fox & Co.* v. *North and South Wales Bank*, 6 A. C. 1, that where a creditor holds securities deposited by the principal for his debt he is bound to resort to them first, before he can have recourse against the surety. (Walker on Banking, p. 244.)

It is true that in that case Lord Watson says, at p. 22, that, seeing the real conflict of interest was between the acceptor and the indorsers, he thought it would be inequitable to compel payment from the indorsers (who stood in the place of sureties) until the securities given by the acceptor (treating him as principal) to the bank had been exhausted; and he further says that he is satisfied that it is a settled rule of equity that, in circumstances analogous to those of that case, the creditor is bound to take payment from that one of his debtors who is *inter eos* primarily liable for his debt.

Exceptional nature of this case.

But in that case the facts were peculiar. The bank had discounted bills for and indorsed by Duncan Fox & Co. accepted by Radford & Co. Before the bills became due Radford & Co. stopped payment. The bills were dishonoured, and Duncan Fox & Co. became liable to the

bank. The bank held securities from Radford & Co. to cover advances and other liabilities, but this was unknown to the indorsers. There was nothing due from Radfords to the bank except the liabilities on these bills. Duncan Fox & Co. having got to know of these securities, applied to the bank either to realise them and apply the proceeds in payment of the amounts due on the bills, or to render an account of what was due from Radford & Co., and on payment of that amount by Duncan Fox & Co. to transfer to them securities of equal value out of those in their hands. The securities being also claimed on behalf of Radfords' unsecured creditors, the bank declined to do anything without the direction of the court, assuming a perfectly neutral attitude, and offering to do whatever the court ordered. (6 A. C., pp. 8, 10.) There were respondents other than the bank, namely, Radfords, and representatives of the unsecured creditors.

The order originally made, which was ultimately restored by the House of Lords, was that the bank should hand over the securities to Duncan Fox & Co. on payment by them of the balance remaining due to the bank. (See 11 Ch. D., at p. 91.) The real question was whether Duncan Fox & Co., as indorsers, were entitled to the same rights as sureties on paying the bills ; and, save for the words of Lord Watson quoted above, there is nothing in the judgments to support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor.

Contrary expressions in same case.

On the contrary, the right to sue the indorser without resorting to the securities is clearly recognised by Lord Selborne, *ubi sup.*, at pp. 10, 14, and by Lord Blackburn at pp. 18, 20. (See also *Ex parte Brett*, L. R., 6 Ch. 841, where Mellish, L.J., lays down the broad rule that a surety has no right or interest in securities until he has paid the debt.) In the Scotch case of *Ewart* v. *Latta*, 4 M'Queen's H. of L. Cases, at p. 987 (new ed., p. 829), Lord Westbury, C., says:

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"Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied." At p. 989 (new ed., 830) he says: "The same principle prevails also in the law of England, that if a debt be due from A. and B., and B. be the surety, B. has no right in respect of that debt as against the creditor unless he undertakes to pay and actually does discharge it."

It may therefore fairly be assumed that Lord Watson's remarks above quoted were intended to be, or must be, confined to cases where no claim or objection is raised by the holder of the securities, and that no general proposition is to be deduced from them.

There appears, therefore, no absolute necessity for the creditor to secure by the guarantee the right to resort to the surety without first realising securities held from the principal.

Surety's right of set-off.

The surety is entitled to a set-off of debts due from the creditor to the principal debtor arising out of the transaction on which his own liability is founded. (*Bechervaise* v. *Lewis*, L. R., 7 C. P. 372.)

This principle is not likely to operate in the case of a guarantee to a bank. There would be no credit balance on the guaranteed account, and credits on another account are outside the question. (*York City and County Banking Co.* v. *Bainbridge*, 43 L. T. N. S. 732.)

Right to close account on determination.

The right to close the account on the determination of the guarantee and open a fresh one, to which monies paid in by the customer can be carried, instead of being applied

in reduction of the guaranteed account, is established by *In re Sherry*, 25 C. D. 692, but the right is usually reserved in the guarantee.

Provision for change in parties.

Where the account or transactions guaranteed is or are those of a partnership, the guarantee should provide that it shall not be affected by any change in the constitution of that partnership. This is the more necessary because under the Partnership Act, 1890, s. 18, any change in the constitution of the firm for or to which the guarantee is given revokes the guarantee as to future advances "in the absence of agreement to the contrary," and the same Act repeals sect. 4 of the Mercantile Law Amendment Act, 1856, which admitted "necessary implication from the nature of the firm or otherwise."

In the case of a guarantee given to a private bank provision must be made for the contingency of any change in the constitution of the bank partnership.

Where bank is a corporation.

Where the bank is a joint stock one or otherwise incorporated, the matter is different. The Partnership Act, 1890, only deals specifically with "firms," without defining them. From the nature of the Act the term must, however, be taken as equivalent to "partnerships." But the principle involved is a general one; that change in the identity of the person to or for whom the guarantee is given revokes it as to future advances.

A bank, joint stock, or otherwise incorporated is not a firm; it is a corporation, a legal entity, apart from the members composing it. Any internal changes produced by transfer of shares, election of directors, and so on, do not work any change in the corporation. So far there could be nothing to affect the liability of the surety. And, as before suggested with reference to securities for advances, the opening of new branches is no change in constitution. The corporation remains the same. Branches and the head office constitute but one undertaking. (*Prince* v. *Oriental Bank Corporation*, 3 A. C. 325.)

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Absorption.

The absorption of another bank, a small into a large concern, whereby the identity of the small one is obliterated, would, as regards guarantees given to the absorbing bank, stand on the same footing as the opening of a new branch. (*Capital and Counties Bank* v. *Bank of England*, 61 L. T. (N.S.) 516; *Prescott, Dimsdale & Co.* v. *The Bank of England* [1894] 1 Q. B. 351.) No mere arrangement between the banks could, however, keep alive guarantees given to the absorbed one.

Amalgamation.

Amalgamation, as distinct from absorption, stands on a different footing. "An amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either; it must depend upon the nature and character of the businesses amalgamated and how the amalgamated business was subsequently carried on. In each case it must be a question of fact." (*Per* A. L. Smith, L.J., in *Prescott, Dimsdale & Co.* [1894] 1 Q. B., at p. 365.)

And it must be remembered that, with regard to guarantees, it is not so much the identity of the business that is the test, as the identity of the persons or the legal entity carrying it on. If on amalgamation the names of both banks are combined and preserved, and the board of directors comprises former directors of each of the original banks, the identity of the one to which the guarantee was given becomes difficult to trace.

Lord Lindley appears to be of opinion that, in the absence of special provisions, amalgamation of two companies would release sureties on guarantees to either separately. (See Lindley on Partnership, 6th ed., p. 127; Lindley on Company Law, 6th ed., p. 369, note (*s*).)

There are two cases where a bond given by way of guarantee to a railway company was only held not to be discharged, as to the future, by the amalgamation of the company with another, on the ground that the Act of Parliament effecting such amalgamation contained special

clauses preserving such rights. (*London, Brighton, and South Coast Railway* v. *Goodwin*, 3 Ex. 320; *Eastern Union Railway Co.* v. *Cochrane*, 9 Ex. 197.) The security in both cases was for the faithful service of an employé, but the principle is equally applicable to a guarantee for advances.

Provision for in guarantee.

The guarantee should, therefore, provide that it is not to be affected by any change in the constitution of the bank, or by its absorption of or by, or its amalgamation with any other bank or banks.

If the account guaranteed is that of a company, possible similar changes in its constitution should be borne in mind.

Surety's right to securities on payment.

On payment, the surety, if his payment discharges all obligations of the principal to the creditor, is entitled to all securities held by the creditor, whether they were held at the time the surety became bound or have been subsequently acquired, and whether the surety knew of them or not. (*Duncan Fox & Co.* v. *North and South Wales Bank*, 6 A. C. 1.)

The banker, if absolutely recouped by the surety, would have no further need of the securities.

Where part of debt paid.

But cases may exist where security is held for a debt, for part only of which the surety is liable. On discharging that liability, the surety is entitled to a proportionate part of the security. (*Goodwin* v. *Gray*, 22 W. R. 312.)

The apportionment of the security might be difficult in some instances. The surety would claim something he could realise in order to reimburse himself, and the security might not be divisible. In *Goodwin* v. *Gray*, *ubi sup.*, the surety appears to have been satisfied with a proportionate share of the dividends on the debtor's shares in the bank represented by the defendant, which constituted the security, but it is conceived that he was also entitled to a share in or at least a charge on the shares themselves.

If the surety is surety for the whole debt, but his liability is limited, it would appear from *In re Sass* [1896] 2 Q. B. 12, that he has no claim against the securities or

any part of them until the whole debt is satisfied in full. As before stated, this is the form of liability which should be exacted from the guarantor wherever possible, as being the more advantageous for the bank.

Clause as to right to securities.

The addition of a special clause to the effect that all securities held against the debtor's liability were to stand to secure full payment of the ultimate balance due to the bank would remove any doubt in either case. (Cf. *Waugh* v. *Wren*, 11 W. R. 244.) The clause might well be worked in with the proviso as to the bank being entitled to receive dividends in bankruptcy and other payments without prejudice to the liability of the surety for the ultimate balance of the debt, which, as before stated, *ante*, p. 297, was found efficacious in *In re Sass* [1896] 2 Q. B. 12. A proviso or clause to that effect should never be omitted.

General words as to rights of surety.

General words might no doubt be inserted in a guarantee which, if the guarantor signed it, would make him contract himself out of all the rights of a surety, so far as the creditor was concerned. But it would be doubtful policy to resort to this. A careful guarantor would decline so to bind himself; a careless one would afterwards contend he was not cognisant of what he was committing himself to.

Other acts or defaults.

The acts or defaults which would release the surety, outside those generally provided for in a well-drawn guarantee, are such as a bank can readily avoid, if it bear in mind the salutary rule that there must be no variation of the contract, no dealing with the principal, or a co-surety, or with the securities for the debt, behind the back of the surety, or without his consent, either given by anticipation in the guarantee, or prior to such dealing; and that, save in absolutely self-evident cases, the surety is the only judge whether such dealing or variation is or is not for his benefit. (See *Ward* v. *National Bank of New Zealand*, 8 A. C., at pp. 763, 764.)

Right to call on creditor to sue.

The surety who has paid his liability has a theoretical right to call on the creditor to sue the debtor. If the

creditor refuse, the surety may, on indemnifying the creditor, sue in his name. (See Mercantile Law Amendment Act, 1856, s. 5.) But the surety can just as well himself sue the debtor on the basis of indemnity or money paid for him, so that the other remedy is not usually necessary.

No necessity for special appropriation.

The existence of a guarantee does not of itself constrain the banker to any particular system of appropriation of payments in, so long as he deals with the accounts in the ordinary course of business. In the absence of express agreement, a surety has no right to control the right of appropriation possessed by the person making the payments, or, if he make none, that which is in the payee. (*Williams* v. *Rawlinson*, 3 Bing. 76; *In re Sherry*, 25 C. D. 692.) Payments in may be appropriated to a pre-existing debt of which the surety has no knowledge (*Williams* v. *Rawlinson*, *ubi sup.*), or to a new account opened on the close of the guaranteed one. (*In re Sherry*, *ubi sup.*)

Where unbroken account.

Even where there is an unbroken account circumstances may exist which rebut the presumption of the appropriation of the earlier items on one side to the earlier on the other. (See *Cory Bros.* v. *Owners of the "Mecca"* [1897] A. C., at p. 295.) But such circumstances would have to be exceptional and indicative of the surety's intention that his guarantee, though not strictly a continuing one, should extend for a specified period or to cover a particular class of transactions, which object would be inconsistent with the extinction of his liability by the ordinary system of appropriation. (See *City Discount Co.* v. *M'Lean*, L. R., 9 C. P. 698.)

Where the guarantee is a continuing one to secure an ultimate balance, the question of appropriation does not arise, except in the sense suggested by Cotton, L.J., in *In re Sherry*, *ubi sup.*, at p. 706, namely, that credits could not be carried to a new account during the currency of the guarantee so as to deprive the surety of

the benefit of them in estimating the ultimate balance for which he was liable. (Cf. *Mutton* v. *Peat* [1900] 2 Q. B. 79.)

The remedies of the surety who has to pay against the principal debtor or the co-sureties do not concern the banker.

Effect of Statute of Limitations on continuing guarantee.

Questions have arisen as to the effect of the Statute of Limitations on a continuing guarantee.

In *Hartland* v. *Jukes*, 32 L. J. Ex. 162, it was contended that the six years began to run in favour of the guarantor as soon as the principal debtor became indebted to the bank, inasmuch as there was then a right of action against the guarantor; but Pollock, C.B., said: "It was contended before us that the statute began to run from the 31st of December, 1855, by reason of the debt of £179 1*s*. 11*d*. then due to the bank; but no balance was then struck, and certainly no claim was made by the bank upon the defendant's testator (the guarantor) in respect of that debt; and we think the mere existence of the debt, unaccompanied by any claim from the bank, would not have the effect of making the statute run from that date."

On the other hand, in *Parr's Banking Company* v. *Yates* [1898] 2 Q. B. 460, the Court of Appeal appear to have taken the opposite view. It is true that in that case the account, so far as drawing on it went, had been practically closed more than six years prior to the commencement of the action, but the court treated the statute as commencing to run in respect of each item on the debit side from the date it came into the account. Vaughan-Williams, L.J., in especial, said that the right of action on each item of the account arose as soon as that item became due and was not paid, and the statute ran from that date in each case, in favour of both principal and surety.

It is submitted that this latter view is altogether inconsistent with the intention and effect of a continuing guarantee.

The object of such guarantee is the extension of a real working credit to the principal debtor. There could be no right of action against the guarantor unless there was also one against the principal debtor, and the guarantee would be meaningless if the creditor could demand and enforce repayment of every overdraft within twenty-four hours or less from the time it was granted.

Lord Herschell said in *Rouse* v. *Bradford Banking Co.* [1894] A. C., at p. 596, "It is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that, whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature." The case is stronger where a continuing guarantee is taken.

Where money is payable at a fixed date, and the payment is secured by guarantee, both principal and surety become liable on failure by the former to pay at the specified time, because it is the surety's business to see that his principal performs his obligation; but in the case of agreed advances it is difficult to see what default is attributable to the principal at the date of the advance, so as to render the surety liable at once.

There is, no doubt, the difficulty of saying, in the absence of express stipulation, how long the advance is to be outstanding before it is deemed to be repayable; and it must be admitted that the measure above suggested, namely, a practical working credit, is vague and unsuited for general application. But the alternative view is open to equal, if not greater, objections.

Practically few guarantees are outstanding for six years, and the difficulty might be met by having a settling up and taking a fresh guarantee before the expiration of that

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period. The statute would also be precluded from beginning to run if the liability of the surety were specified to be to pay, say, within two days after demand made. It must be remembered that payments on account of principal or interest by the principal debtor do not keep alive the liability of the surety, not being made on his behalf.

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