English Ruling Cases
CITED "E. R. C."

CONTINUED BY

British Ruling Cases
CITED "B. R. C."

The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.

English Ruling Cases

ARRANGED, ANNOTATED AND EDITED
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WITH AMERICAN NOTES
BY
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VOL IV.
BANKRUPTCY—BILL OF LADING

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PREFACE TO VOLUME IV.

The editor acknowledges the continued assistance of Mr. A. E. Randall.

In accordance with the suggestion of a subscriber, which had reached the editor while this volume was passing through the press, there is prefixed to the Ruling Cases under the title "Bill of Lading," — besides the abstract of principle contained in the rule, — a head-note stating the form in which the case came up for decision, and a brief *précis* of the facts. This system will be continued throughout.

R. CAMPBELL.

April, 1895.

TABLE OF CONTENTS.

VOLUME IV.

BILL OF EXCHANGE (*continued*). PAGE

BILL OF EXCHANGE (*continued*).

TABLE OF ENGLISH CASES.

VOL. IV.

NOTE.—The RULING CASES are shown by distinctive type.

TABLE OF AMERICAN CASES.

VOL. IV.

RULING CASES.

BANKRUPTCY.

NOTE. — The cases selected under this head are confined to those which, for the most part depending on enactments embodied in the earlier statutes and substantially retained in the later ones, illustrate what may be regarded as general principles of Bankruptcy Law.

SECTION I. — *Jurisdiction.*

No. 1. — EX PARTE BLAIN. IN RE SAWERS.

(C. A. 1879.)

RULE.

THE English Court of Bankruptcy has no jurisdiction to make an order of adjudication in bankruptcy against, or to order service of bankruptcy proceedings upon, a foreigner domiciled and resident abroad, and who has not come into this country and committed an act of bankruptcy here.

Ex parte Blain. In re Sawers.

12 Ch. D. 522–533 (s. c. 41 L. T. 46; 28 W. R. 334).

This was an appeal from a decision of Mr. Register [522] PEPYS, acting as Chief Judge in Bankruptcy.

James Sawers, of Liverpool, and six other persons, traded at Liverpool and in London under the firm of James Sawers & Co., and at Valparaiso and other places in South America under the

firm of Sawers, Woodgate, & Co. The principal place of business of the firm in England was at Liverpool. Two of the partners were Chilian subjects, domiciled and permanently resident in Chili, and they had never been in England or in any part of Great Britain.

[* 523] * On the 16th of December, 1878, William Blain commenced an action in the Queen's Bench Division against the firm of James Sawers & Co., in respect of a debt of £2500 contracted by the firm in England. The writ was served the same day on James Sawers personally, at the place of business of the firm in Liverpool. It was not served on any of the other partners. On the 24th of January, 1879, the defendants not having appeared to the writ, judgment for £2500 and costs was entered for the plaintiff against the defendant firm. A writ of *fi. fa.* was issued upon the judgment, under which the sheriff seized goods of the firm at Liverpool and sold them on the 29th of January, 1879. On the same day the plaintiff presented a bankruptcy petition in the London Court against all the members of the firm of James Sawers & Co., alleging that the levy of the execution by seizure and sale was an act of bankruptcy committed by them. An *ex parte* order was made, under rule 66 of the Bankruptcy Rules, 1870, giving the petitioning creditor leave to serve the petition on the two Chilian partners in Chili. Before the hearing of the petition as against them they appeared under protest, not submitting to the jurisdiction of the Court, and asked that the order for service might be discharged, on the ground that the Court had no jurisdiction over them. The Registrar discharged the order. The petitioning creditor appealed.

De Gex, Q. C., Cohen, Q. C., and Yate Lee, for the appellant:

The respondents come within the words of the Bankruptcy Act; they are debtors within the meaning of sections 6 and 8 of the Act, and there is no reason why the English Court of Bankruptcy should not have jurisdiction over them. The debt was contracted in England, the cause of action arose entirely here. There is property of the firm in England, and the firm has traded here. Bankruptcy is merely a process against the bankrupt's property. By Rules of Court, 1875, Order XVI., rule 10, partners may now be sued in the name of the firm, and under Order IX., rule 6, service of a writ on one partner is good service on the firm, and by Order XLII., rule 8, where a judgment is against partners in the name of

the firm, execution may issue against any property of the partners as such; against any person who has admitted on the pleadings that he is, *or has been adjudged to be, a part- [* 524] ner; and against any person who has been served with the writ, as a partner, and has failed to appear. In *Ex parte Crispin*, L. R., 8 Ch. 374, 42 L. J. Bankr. 65, it was held that a foreigner domiciled abroad, who contracts debts in England and commits an act of bankruptcy in England, is liable to an adjudication of bankruptcy in England, although he has left England before the petition is presented. Here an act of bankruptcy has been committed in England by suffering the goods of the firm to be seized and sold in England. A passive act of bankruptcy (so to speak) like this may be committed through an agent; indeed the act may be considered the act of the firm. Rule 1 of the Bankruptcy Rules 1870, defines the word "debtor" as including a firm of debtors in partnership. Here the execution is against the firm, and they have committed an act of bankruptcy by failing to pay the debt. Under the provisions of sects. 18 and 19 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), if an action was brought on an English contract, whether entered into personally or through an agent, the writ could be served on a foreigner abroad without any leave of the Court. A single creditor could then under a judgment seize all the debtor's property in England, and the other creditors would get nothing. This is equally so under the Judicature Acts. The very object of the Bankruptcy Act is to prevent a single creditor from thus obtaining a preference. The joint assets will not be protected unless all the partners are adjudged bankrupts. There is no violation of international law or comity in making a foreigner a bankrupt, if the Court only assumes to deal with property situate in England.

In *Ex parte Crispin*, the Court did not consider international law at all. There is nothing inconsistent with international comity in giving notice to a foreigner who has never been in England, but has contracted debts here, that, if he does not pay those debts, the English Court of Bankruptcy will distribute his property which is in England equally among his creditors.

The circumstance of a trader being a foreigner makes no difference: Cooke's Bankrupt Laws, 8th ed. vol. i. p. 81. No doubt, the act of bankruptcy must be committed in England, but an act of bankruptcy is not a criminal act; it is a mere test of insolvency,

[* 525] and it may * be committed through an agent. Suppose an English trader happened to be abroad, and the manager of his business during his absence allowed an execution to be levied on his goods; would he not have committed an act of bankruptcy? And it could not be said to be a personal default of his. Why should not that apply equally to a foreigner who has never been in England, but who has traded here?

[James, L. J.: There is no such thing as a limited act of bankruptcy. If only the property of the bankrupt which is in England would be affected it would be another matter.]

The authorities show that the English Bankruptcy Court can only deal with that property of a foreigner which is within Her Majesty's dominions. If the Court cannot exercise the whole of its jurisdiction, why should it not exercise a part? The real test is, where is the property situate? Here, by virtue of the Judicature Act, the judgment is against the firm, and the property of the firm has been taken in execution. The firm have committed an act of bankruptcy. The words of the Bankruptcy Act literally apply to the case. What principle of municipal or international law compels an exception to be made?

At any rate, the objection is taken prematurely. We have merely obtained leave to notify certain proceedings to foreigners who have never been in England. This cannot be a violation of any international comity. They may choose to appear on the hearing of the petition and submit to the jurisdiction, or they can take the objection then.

Benjamin, Q. C., Winslow, Q. C., and Everitt, for the Respondents, were not heard.

James, L. J.: —

It appears to me that the Registrar's order was perfectly right. The respondents come here under protest, as they have a perfect right to do, to discharge an order which was made in this country, by a Court of this country, on the ground that it is an order which improperly emanated, and they ask to have the order discharged, so that they may never be embarrassed, or be liable to be embarrassed, by the fact of such an order having been issued.

[* 526] * It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect

to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the Sovereign, entitled to the protection of the Sovereign and subject to all the laws of the Sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English Legislature could have ever intended to make such a man subject to particular English legislation. English legislation has said that if a debtor allows his goods to be taken in execution certain consequences shall follow; and English legislation has a right to say that with regard to an English subject. But what right has it to say so with regard to a Chilian? No doubt it has a right to say to a Chilian, or to any other foreigner, "If you make a contract in England, or commit a breach of a contract in England, under a particular Act of Parliament, a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country." But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognised abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner, being served with a writ under the provisions of the Judicature Act, did not choose to appear, and the Legislature said, "If you do not appear you will commit a default in that way, and we will give judgment against you," whether that judgment would, under such circumstances, be recognised by foreign tribunals, as being consistent with international law and the general principles of justice, is a matter which must be determined by them. But we have to consider a matter, not of British, but of peculiarly English legislation, because the Bankruptcy Act is *confined to England, and does not extend to Scotland [*527] or Ireland, except in certain cases expressly provided for; and I believe it does not extend to the colonies. And we have to deal with the case of a Chilian who says, "I am a Chilian, and I wish to be a Chilian; I have never made myself subject to English legislation or English tribunals. I do not wish to come here to be made a bankrupt." It seems to me he has a right to say that.

As I happen to know, there is in the Sandwich Islands a code of bankruptcy, which was introduced by Kamehameha II., and I think it would be monstrous if an English merchant of Liverpool, having business transactions in the Sandwich Islands, was summoned by the Court there to appear in a bankruptcy proceeding at Honolulu. It is not consistent with ordinary principles of justice, or the comity of nations, that the Legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction. Of course, if a foreigner has come into this country and has committed an act of bankruptcy here he is liable to the consequences of what he has done here; but, in the absence of express legislative provision, compelling me to say that the Legislature has done that which, in my opinion, would be a violation of international law, I respectfully decline to hold that it has done anything of the kind.

I therefore entirely agree with the decision of the Registrar that the order for service ought to be discharged. The other ground on which he put his decision would, I think, be sufficient, namely, that the whole of the provisions of the Bankruptcy Act, with regard to acts of bankruptcy, proceed on the commission of some act or default by the debtor. Sect. 6 begins with saying that the following "acts or defaults" are to be included under the expression "acts of bankruptcy," and the Registrar was of opinion that it would be impossible to say that these Chilian subjects had been guilty of any default. I do not at all differ from him in that conclusion.

Brett, L. J.: —

In this case the English Court of Bankruptcy has made an order that notice of a bankruptcy petition should be served on Chilian subjects abroad, and those Chilian subjects have appeared [* 528] * here under protest, and have taken the objection that the English Court of Bankruptcy had no jurisdiction to make such an order as against them. If the English Court of Bankruptcy has no jurisdiction at all over these Chilian subjects, it follows that it has no jurisdiction to make the order for service of the petition.

It is said that the case is literally within the words of the statute, and so, no doubt, it is. But does it follow that because a case is literally within the words of a statute of any country, therefore it is within the jurisdiction of the Courts of that country? Cer-

tainly not. The governing principle is that all legislation is *primâ facie* territorial; that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time bring themselves within the allegiance of the legislating power. The English Legislature has a right to make a bankruptcy statute which shall bind all its own subjects, and any foreigner who for the time is in England and does something there which the statute forbids. As long as he is in England he is under the allegiance of the Queen of England, and in the power of the English Legislature. Therefore it has been held that if a foreigner, though not domiciled or permanently resident in this country, comes into England, and does or omits to do some act in England which the English Legislature has declared to be an act of bankruptcy, then, by reason of that act of bankruptcy done or suffered in England, he may be made a bankrupt in England. But, upon the ground of the limited power of the Legislature of England to legislate, all the authorities have held that it is necessary that the act of bankruptcy should have been committed in England, if the person against whom the statute is invoked is a foreigner who is not domiciled in England.

Mr. Cohen admits that the act of bankruptcy must be committed in England; but he says that in this case there was an act of bankruptcy committed in England. That on which he relies is this: that the firm, of which these Chilian subjects are members, trades in England, and that an action was brought against the firm, and, under the authority of the Judicature Rules, the writ was served upon one member of the firm in England, and that thereupon an action ensued, and was carried through, and judgment was obtained against the firm, upon which execution was * levied by seizure and sale of the goods of the firm in [* 529] England, and that he says, by the English bankruptcy law, is an act of bankruptcy. He says it is an act of bankruptcy by the firm. He is met and challenged by being asked whether a firm as such can commit an act of bankruptcy. He assumes that it can. I beg leave to doubt it. Nay, more, I am of opinion that a firm as such cannot commit an act of bankruptcy. An act of bankruptcy must be the personal act or the personal default of the person who is to be made a bankrupt.

Then it was said that by virtue of the Judicature Act, service upon the firm is service of the writ on these foreigners. For the

purposes of the judgment, and under the Judicature Act, that may possibly be so. But does it follow that, because that is so under the Judicature Act, it gives a larger jurisdiction under the Bankruptcy Act? Certainly not, as it seems to me.

It was said that a person may commit an act of bankruptcy by his agent, and that the partner in England was the agent of these foreign partners, and therefore they committed an act of bankruptcy by their agent in England, that is, by allowing the execution to go without satisfying the judgment, and that, this having been done by their agent in England, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorized the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he has had no cognizance. In truth, the argument comes to this; it would be admitted that, at the time of the passing of the Bankruptcy Act, and up to the passing of the Judicature Act, this would not have been an act of bankruptcy by these Chilians, but it is said that the Judicature Act, which is an act of mere procedure, has, by enactments as to procedure, extended the jurisdiction under the Bankruptcy Act, so as to reach foreigners who would not otherwise be subject to the English bankruptcy law. That, as it seems to me, is a view of legislation which is wholly untenable. I think the case comes within the well-recognised rule, and that the respondents cannot be made subject to the English Bankruptcy Act, being foreigners not [*530] domiciled *here and not present in this country; that they could not be made subject to the English bankruptcy law unless they had committed an act of bankruptcy in England. It is the act of bankruptcy which gives the Bankruptcy Court jurisdiction, and, unless that act be committed in England, if the debtor is a foreigner and not domiciled in England, the English Court has no jurisdiction over him. Therefore the Bankruptcy Court had no jurisdiction over the respondents, and no jurisdiction to make the order for service, and that order was properly set aside.

Cotton, L. J.: —

It has been contended that even although we should hold that, on the true construction of the Act, there is no jurisdiction to

make an order of adjudication against the respondents, yet we ought to discharge the Registrar's order, which discharged the previous order for service out of the jurisdiction, the service being a mere notice, and that we ought to let the matter go to a further stage, for the purpose of allowing the Court hereafter to decide whether or no there is jurisdiction to make an adjudication. In my opinion that would be quite wrong. The persons against whom the order for service has been made appear here under protest, and they ask that the order for service on them out of the jurisdiction may be discharged, thus raising at once the question of jurisdiction, and declining to litigate any matter in the Court of Bankruptcy. In my opinion, if the Court of Bankruptcy has no jurisdiction, it is its duty at once to discharge the order and not to say that it will give the parties an opportunity of coming here and meeting the case, and saying, if they like, that the order for service was a mistake. In my opinion they have a right to come here at once and raise the question of jurisdiction. If the Court thinks there is no jurisdiction, it ought not to sanction the bringing of persons before it, on a petition under which it has no jurisdiction to make an order for adjudication.

Now we come to the question whether against the respondents there is any jurisdiction under the Bankruptcy Act. They are foreign subjects, and they have never been in England. The question, to my mind, comes to the simple one whether or no they * are debtors within the meaning of the 6th sec- [* 531] tion of the Bankruptcy Act. That section provides that a creditor may present a petition praying that the debtor be adjudged a bankrupt, and the Court may make the adjudication if the debtor has done, or has suffered, some of the various things mentioned in the sub-sections of that section, or, to put it more correctly, if, as regards the debtor, some one of the things mentioned in the sub-sections has happened. When we look at those sub-sections, I think it must be obvious, notwithstanding the argument of Mr. Cohen, that the word "debtor" must receive some qualification, because we find in the second sub-section "That the debtor has, in England or elsewhere, made a fraudulent conveyance or transfer of his property." The act there specified as giving the Court a right to adjudicate the person doing it a bankrupt, may have been done, not only in England, but elsewhere, and, unless we put some limit on the word "debtor," it will come to this, that

any man who has never been in England, a subject of a foreign state, can be made a bankrupt in England, because in a foreign state he has done a certain act. The argument of Mr. Cohen did not go to that extent, but that is its logical result.

Let us see what the case is. We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject, or any other alien who had never been in England, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execution of the English Act of Parliament, whatever the consequences might be, and however foreign nations might object, to say, This is the English statute, and we must act on it, and the question which you, a foreigner, raise, we are bound to disregard. I do not say that would be so, because, if the Act had clearly gone beyond the power of the English Legislature, there might be a question. But that is not so here. All we have to do is to interpret an Act of Parliament which uses a general word, and we have to say how that word is to be limited, when of necessity there must be some limitation. I take it the limitation is this, that all laws of the English Parliament must be territorial — territorial in this sense, that they apply to and bind all subjects [*532] of the *Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the statute as regards them, comes within its provisions. Of course it is not necessary that a person, to be subject to an English Act, should be domiciled here. If he is resident here temporarily, and does an act which comes within the intent and purview of a statute, he, as regards that statute, as does every alien who comes here in regard to all the laws of this realm, submits himself to the law, and must be dealt with accordingly. As regards an Englishman, a subject of the British Crown, it is not necessary that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act by reason of his being a British subject, though, of course, in the case of a British subject not resident here, it may be a question on the construction of the Act of Parliament whether that which, if he had been resident here, would have brought him within the Act, has that effect when he

is not resident here. As regards a British subject, whether he is here or not, he can be made bankrupt, if the Act of Parliament has declared that, in the events which have happened, he can be made bankrupt. But, as regards foreigners, there is *primâ facie* no right to bind them if they are not here. I think, therefore, that the true interpretation of the general word "debtor" in the Bankruptcy Act, is a debtor subject to the English bankruptcy law. I say to the English bankruptcy law, and not to the English law generally, for this reason, that we are dealing with a question of bankruptcy; and it may be that there are English statutes which give our Courts power to deal with foreigners who are not here as regards matters which, according to all principles, ought to be adjudicated upon by our Courts, such as, for instance, questions relating to real property situate in England. Of course it is right that questions of title to such property should be adjudicated upon here, and there may well be English statutes giving our Courts power to deal with suits relating to the title to real property in England as regards aliens, and for the purpose of serving them. But that is a very different thing from saying that you shall deal with a foreigner who has never been here, and has never submitted himself to the English Act of * Parliament, in [* 533] the special subject of bankruptcy to which this Act refers.

In my opinion, we are not justified in giving the interpretation which we are asked to give to the word "debtor," simply because some convenience would result from so doing, or some inconvenience may result from not doing so. We have to consider what is the fair interpretation of the Act, and we must not give to general words an interpretation which would, in my opinion, violate the principles of law admitted and recognized in all countries.

James, L. J.: —

The appeal will be dismissed with costs. I cannot help thinking that some difficulty may arise with regard to that provision of the Judicature Rules which enables partners to be sued in the name of the firm, because we have not yet introduced into our law the notion that a firm is a *persona*. What I mean is this, supposing there to have been an entire change in the constitution of the firm, and that, although the name of the firm continued, the firm at the time when the action was brought consisted of entirely different persons from those of whom it consisted at the time when the

contract was made; for instance, if A., B., and C. were the partners at the time of the action, and E., F., and G. at the time of the contract.

BRETT, L. J.: —

I quite agree; it may be that under such circumstances you could not sue the firm.

ENGLISH NOTES.

The English bankruptcy law depends entirely on statutory enactments. The earliest statute, 25 Ed. III., stat. 5, c. 23, deals with the subject of absconding debtors in a peculiar manner: for it makes members of the guild of Lombards — a guild consisting of foreign traders resident in England — responsible for the contracts of absconding members of the guild, if entered into with Englishmen. The statute 34 & 35 Hen. VIII. c. 4, was designed to meet an evil set out in the preamble, — "Where divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience." The Act then makes provision for taking possession of and distributing the property of these "divers and sundry persons." The statute 1 Jac. I. c. 15, s. 16, provided that the death of the bankrupt should not interfere with the administration of his property. The next statute was 21 Jac. I. c. 19, which, with statutory amendments, remained in force until the consolidation Act (6 Geo. IV. c. 16) was passed. The statute of James dealt for the first time with the question of reputed ownership (sect. 11), and enabled the commissioners of bankrupts, by deed enrolled, to bar the estate tail of the bankrupt, except where the reversion was in the Crown (sect. 12). It was not, however, until 4 Anne, c. 17, that a bankrupt, making a full disclosure of his property, was entitled to an order of discharge. The question of mutual credit was first dealt with in 1729, by 2 Geo. II. c. 22, s. 13.

The next important change was the abolition of the distinction between insolvency and bankruptcy by the Bankruptcy Act 1861, 24 & 25 Vict. c. 134, whereby non-traders were made subject to bankruptcy.

The category of "debts provable" has been enlarged by the more recent Acts; and, at the present day, with the exception of demands in the nature of unliquidated damages arising otherwise than on a con-

tract, promise, or breach of trust (and excluding debts or liabilities contracted by the debtor subsequently to the creditors having notice of an act of bankruptcy), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge, by reason of any obligation incurred before the date of the receiving order, are debts provable in bankruptcy. Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 37. This section has been held, in the case of a debt on which interest was payable for a certain future term, to make the interest (as well as the principal debt) provable, subject to the rebate of five per cent mentioned in r. 21, in the 2nd Schedule to the Act. *Ex parte Ador., In re Brown and Wingrove* (C. A. 1891), 1891, 2 Q. B. 574, 61 L. J. Q. B. 15, 65 L. T. 485, — a case in which the history of English legislation will be found in the elaborate judgment of the Court, which was delivered by LINDLEY, L.J. The case also affords a clue to the authorities on the point.

The statutes now in force which may be referred to on the principles of Bankruptcy law are 13 Eliz. c. 5 (fraudulent settlements); The Debtor's Act 1869, 32 & 33 Vict. c. 62 (fraudulent debtors), amended by the Debtor's Act 1878, 41 & 42 Vict. c. 54; The Married Women's Property Act 1882, 45 & 46 Vict. c. 75, ss. 1 (5), 3 (married women); The Bankruptcy Act 1883, 46 & 47 Vict. c. 52; Preferential Payments in Bankruptcy Act 1888, 51 & 52 Vict. c. 62; The Bankruptcy Act 1890, 53 & 54 Vict. c. 71; The Deeds of Arrangement Act 1887, 50 & 51 Vict. c. 57.

The following are the sections (with the more recent cases) particularly relating to jurisdiction in Bankruptcy: —

By the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 6, sub. sect. 1, it is enacted that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided, or had a dwelling-house or place of business, in England." A domiciled Frenchman, who came to England for the purposes of an action, which he had commenced in the English Courts, and who had lived for three months in furnished rooms with his wife and servants, was held to be liable to bankruptcy proceedings, although during the three months he had paid frequent visits to France. *Ex parte Hecquard, In re Hecquard* (C. A. 1889), 24 Q. B. D. 71; 38 W. R. 148. Prior to the Bankruptcy Act 1883 the Court used to decline to consider the length of the residence within the jurisdiction. *Alexander* v. *Vaughan* (1776), Cowp. 398; *Allen* v. *Cannon* (1821), 4 B. & Ald. 418. The principal case was held to be in point in *Ex parte Pearson, In re Pearson* (C. A. 1892), 1892, 2 Q. B. 263; 61 L. J. Q. B. 585, 67

L. T. 367, which was decided on the Bankruptcy Act of 1883. Under the old law an English subject carrying on business out of the jurisdiction was not subject to the English bankrupt law while domiciled out of the jurisdiction, even though trading with persons domiciled in England, so as to make him a trader within the English bankrupt law. *Ingliss* v. *Grant* (1794), 5 T. R. 530.

An infant cannot be made a bankrupt. *Ex parte G. W. Beauchamp, Re Beauchamp Bros.* (C. A. 1893), 1894, 1 Q. B. 1, 63 L. J. Q. B. 105; s. c. *nom. Lovell* v. *Beauchamp*, (H. L. 1894), 1894 App. Cas. 607.

By the Married Women's Property Act 1882, s. 1 (5), it is enacted: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." It has not yet been decided whether the old cases, on the similar exemption of men who were non-traders from the bankruptcy laws, apply to the word "trade" in this section. As, however, they may afford some assistance in argument, a few of the more important cases are here collected. Trading was defined to be a buying and selling with a view to making a profit: *Patman* v. *Vaughan* (1787), 1 T. R. 572; *Ex parte Magennis* (1811), 1 Rose, 84; *Cannan* v. *Denew* (1833), 3 M. & Scott, 761, 10 Bing. 292; and the quantum of the trading was immaterial (s. c.). It was therefore sufficient to give in evidence one act of trading, from which it was presumed that the trading had continued down to the time of the bankruptcy. *Heanney* v. *Birch* (1812), 1 Rose, 356, 3 Camp. 233; *Ex parte Paterson* (1813), 1 Rose, 402. Ceasing to trade did not relieve a debtor from liability to bankruptcy proceedings, as regarded debts contracted prior to retiring from business. *Ex parte Bamford* (1809), 15 Ves. 449; *Ex parte Dewdney* (1808), 15 Ves. at p. 495; *Willoughby* v. *Thornton* (1816), 1 Selw. N. P. 175. It was for the jury to find what the facts were, and for the Court to say whether, upon those facts, there had been a trading. *Hankey* v. *Jones* (1778), Cowp. at p. 745; *Gale* v. *Halfknight* (1821), 3 Stark. 56. Whether a man had ceased to trade did not depend upon discontinuance of business, or the absence of any specific act of trading, but upon whether there was an intention to exercise or resume the business; and it was for the jury to find what the intention was. *Ex parte Paterson* (1813), 1 Rose, 402, *Paul* v. *Dowling* (1829), 1 M. & Malk. 263, 3 C. & P. 500. So it was held that a pawnbroker who had ceased to take goods in pledge, but sold goods that had been forfeited to him as unredeemed, might be said to carry on the trade of a pawnbroker. *Rawlinson* v. *Pearson* (1821), 5 B. & Ald. 124.

The Act requires not only trading, but trading separately from the

husband. Similar words occurred in the Married Women's Property Act 1870 (33 & 34 Vict. c. 93), s. 1, and from the decisions the question seems to have been treated as one of fact in each case. *Laporte* v. *Costick* (1875), 31 L. T. 434, 23 W. R. 131; *Ashworth* v. *Outram* (C. A. 1877), 5 Ch. D. 923, 46 L. J. Ch. 687; *Lovell* v. *Newton* (1878), 4 C. P. D. 7, 39 L. T. 609. It has been decided by a Divisional Court (Vaughan Williams, J., and Kennedy, J.) that in order to make a married woman a bankrupt it must be shown (*a*) that there has been a trading separate from the husband, and (*b*) that she is possessed of separate estate. *Ex parte Helsby, Re Helsby* (1893), 63 L. J. Q. B. 261.

It has been customary to limit execution upon judgments recovered against a married woman, whether a trader or not, to her separate property, and this limitation appears on the face of the judgment: *Scott* v. *Morley* (C. A. 1887), 20 Q. B. D. 120, at p. 132, 57 L. J. Q. B. 43. Where a judgment as in *Scott* v. *Morley* is recovered, no "bankruptcy notice" can be given to the married woman so as to found bankruptcy proceedings. *Ex parte Lester & Co., Re Hannah Lynes* (C. A. 1893), 1893, 2 Q. B. 113, 62 L. J. Q. B. 372, 68 L. T. 739. It does not appear that the Court has been asked to remodel the form of judgment against a married woman trader, so as to make a judgment against her as effectual for bankruptcy purposes "as if she were a *feme sole*."

AMERICAN NOTES.

[Every State of the American Union has its separate statutory system of Insolvency law, but there is at present no general Federal Bankrupt law. Such Acts, however, were passed in 1800, 1841, and 1867, and repealed respectively in 1803, 1843, and 1879. In all these Acts residence within the United States is made essential to jurisdiction.]

In *Isett* v. *Stuart*, 80 Illinois, 404; 22 Am. Rep. 194, on a petition to the District Court of the United States by partners to have the partnership adjudged bankrupt, personal service was made outside the district on a partner refusing to join in the petition. The Court said: "We are clearly of opinion that there was no authority to make service of the writ beyond the jurisdiction of the Court issuing it."

Section II. — *Acts of Bankruptcy.*

No. 2. — ROBERTSON *v.* LIDDELL.

(K. B. 1808.)

RULE.

To constitute the departure of a trader from his dwelling-house (or any of the acts enumerated in the Statute 1 Jas. I. c. 15, followed by the words "to the intent or whereby . . . his creditors . . . shall or may be defeated or delayed") an act of bankruptcy, the primary and sufficient criterion is the intent. If the words "or whereby" are not surplusage, they merely point to some circumstance which would afford a presumption of the intent.

In the case of an act of bankruptcy by the trader's beginning to keep house, the denial of a creditor is usually given in evidence, not to show the fact of the creditor being delayed, but to prove the intent of the act of keeping house which is in itself equivocal.

Robertson v. Liddell.

9 East, 487–496 (s. c. 9 R. R. 596).

[487] In trover, the following case was made for the opinion of this Court, which was tried before Chambre, J., at the assizes for Northumberland in 1805.

The action was brought against the late sheriff of Northumberland to recover the value of household furniture belonging to the bankrupt Milburn, sold by the sheriff under an execution at the suit of Newnham & Co. upon a judgment obtained after the supposed act of bankruptcy and the actual assignment to the plaintiffs. Milburn, Hallowell, and Walmsley were co-partners in the business of ship-building at North Shields, in the county of Northumberland; and Milburn, Hallowell, and one Humble were also partners in a brewery at the same place. In August, 1803, their partnership concerns became much deranged, and on the 6th of December following, Milburn, Hallowell, and Walmsley (the two

former having been arrested about three weeks before) left North Shields from an apprehension of being arrested by Brown and Dixon, of Newcastle, and other creditors. They left home together, and crossed over the river Tyne to South Shields, in the county of Durham, in order to get out of Northumberland, and came up to Gateshead in the county of Durham. Whilst they were at Gateshead they sent for Mr. Bainbridge, an attorney of Newcastle, who went to Gateshead, and found all the three parties there together. They then * informed him that they had left [*488] their homes for fear of being arrested, and they said that they crossed the water at South Shields in order to get out of the county of Northumberland as soon as they could, and had come up on the south side in the county of Durham, and that they were on their road to Gillsland, in Cumberland. Bainbridge told them that he was afraid their proceedings would end in a commission of bankrupt, and wished them to go back to North Shields. Walmsley did in fact return thither, either on that or the following day; and Bainbridge told him to be extremely circumspect in what way he acted; but Milburn and Hallowell proceeded to Gillsland. Several creditors of Milburn, Hallowell, and Walmsley, called for payment of their debts [1] during the absence of Milburn and Hallowell; but it did not appear whether they so called during the absence of Walmsley, in manner and for the purpose aforesaid, or after Walmsley's return to North Shields from Gateshead. A joint commission of bankrupt was issued against Milburn, Hallowell, and Walmsley; upon which they were declared bankrupts, and the plaintiffs were duly chosen assignees. The question was, whether an act of bankruptcy had or had not been committed by Milburn, Hallowell, and Walmsley.

The only question argued was, whether Walmsley's having departed from his dwelling-house with intent to delay his creditors, but no creditor having been in fact delayed by such his departure and before his return home, constituted an act of bankruptcy. The affirmative of the question was argued by Carr for the plaintiffs; and the negative by Hullock for the defendant. The argument turned upon the critical meaning of the words of * the stat. 1 Jac. I. c. 15, s. 2, as preceded and explained [*489] by the stat. 13 Eliz. c. 7, s. 1, made in *pari materiâ*, and upon the construction which these statutes have received in differ-

[1] It was admitted that they were not paid.

ent cases. The gist and force of the argument was afterwards fully stated by Lord Ellenborough in delivering the judgment of the Court on a subsequent day in the term, and therefore it will be sufficient to state the several provisions of the two statutes, and the cases which were referred to and commented upon.

By stat. 13 Eliz. c. 7 s. 1, "If any merchant, &c., shall depart the realm, or begin to keep his house, or otherwise to absent himself, or take sanctuary; or suffer himself willingly to be arrested for any debt, &c.; or suffer himself to be outlawed; or yield himself to prison; or depart from his dwelling-house, or houses, to the intent or purpose to defraud or hinder any of his creditors of their just debt," &c.; he shall be deemed a bankrupt. Then the stat. 1 Jac. I. c. 15 intituled "An act for the better relief of the creditors," &c., reciting, amongst other defects, that "the description of a bankrupt in former statutes is not so fully expressed" as is meet, enacts, by s. 2 "that every person using the trade of merchandise, &c., who shall depart the realm; or begin to keep his house, or otherwise to absent himself, or take sanctuary; or suffer himself willingly to be arrested for any debt, &c.; or suffer himself to be outlawed; or yield himself to prison;[1] or willingly or fraudulently procure himself to be arrested, or his goods, money, or chattels to be attached or sequestered; or depart from his dwelling-
[*490] house; or make or cause to be made any fraudulent *grant or conveyance of his lands, goods, &c., to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their just and true debts; or being arrested for debt shall after his arrest lie in prison six months or more upon that arrest, or upon any other arrest, &c., shall be adjudged a bankrupt." The authorities cited and commented upon by Carr were 1 Com. Dig. 523, Bankrupt, C. 1; 1 Bac. Abr. 383, Bankrupt, A; *Colkett* v. *Freeman*, 2 T. R. 59; 1 R. R. 421;[2] *Heylor* v. *Hall*, Palm. 325; *Dickinson* v. *Ford*, Barnes, 160; *Phillips and Peake* v. *The Sheriff of Essex*, before Eyre, C. J., Green, 52, and 2 Montague, 158; *Aldridge* v. *Ireland*, cited 7 T. R. 512; and *Fowler* v. *Padget*, 7 T. R. 509; 4 R. R. 511; and *Hawkins* v. *Lukin*, 7 T. R. 516 n.; *Barnard* v. *Vaughan*, 8 T. R. 149, explained in *Wilson* v. *Norman*, Cullen,

[1] So far from following the former statute.

[2] This was only cited to show, that if Walmsley committed an act of bankruptcy by departing from his dwelling-house with intent to delay his creditors, his return home again could not purge the act of bankruptcy; which was admitted at once by the Court.

34, 1 Esp. 334; *Assignees of Miller* v. *Turner*, Montague, 167; *Adey and others, Assignees of Parker* v. ———, Sittings at Westminister, M. 41 Geo. III. ib. There Lord KENYON, C. J., said (MS.) that the real ground of decision in *Barnard* v. *Vaughan* was that Mrs. Barnard left her dwelling-house to avoid the inconvenience of being there with the sheriff's execution, and not to avoid her creditors. *Hornsby and Others, Assignees of Needham* v. *Neville*, York L. Assizes, 1801, when CHAMBRE, J., held that the trader leaving his house with intent to delay his creditors, though none were actually delayed, was an act of bankruptcy. The same opinion by Lord ELDON, in *Wolf* v. *Horn*, in Chancery, T. 44 G. III., and *Hammond and Others, Assignees of Gadsden* v. *Hincks*, 5 Esp. 139; S. P. * *Garret* v. *Moule*, 5 T. R. 575; *King* v. *Bebb*, Exchequ. [*491] Hil. 46 G. III. and *Dudley* v. *Vaughan*, 1 Camp. 271, before Lord ELLENBOROUGH, C. J., who ruled that a trader beginning to keep house with intent to delay his creditors was sufficient to constitute an act of bankruptcy, though he were only denied to be seen, but not denied to be at home. In addition to these, Hullock mentioned another *Nisi Prius* case before CHAMBRE, J., where the result was different from that in *Hornsby* v. *Neville*; also *Jackman* v. *Nightingale*, E. 13 G. II. per LEE, C. J., at Guildhall, Bull. N. P. 40; *Hawkes* v. *Saunders*, T. 24 G. III. Cooke's Bank. Laws, 4th edit. 74; *Judine* v. *Da Cossen*, 1 Bos. & P. (N. R.) 234; 8 R. R. 786; and *Ex parte Cockshot*, 3 Bro. C. C. 504.

Lord ELLENBOROUGH, C. J., now delivered judgment, after stating the case. — The validity of this joint commission of bankrupt against the three partners depends upon the question whether Walmsley, one of them, duly became a bankrupt under the circumstances stated; for respecting the bankruptcy of the other two, Millburn and Hallowell, no question has been ever raised. Whether Walmsley became a bankrupt depends upon this point: whether a departure from his dwelling-house by a trader, with intent to delay his creditors, be a sufficient act of bankruptcy within the meaning of the stat. 1 Jac. I. c. 15, s. 2, although no creditor should have been thereby in fact defeated or delayed for the recovery of his debt. This fact of departing from the dwelling-house by a trader is one of several indications of insolvency, constituted and declared to be acts of bankruptcy by stat. 13 Eliz. c. 7, when accompanied with the intent or purpose to defraud or hinder any of his creditors, &c. It will be

[*492] *observed that, upon the language of this statute, the act is complete by being done with the intent specified; the words "or purpose" being merely additional words to the same effect, and which carry the sense no further than it was carried before by the preceding word, intent. The stat. 1 Jac. I. c. 15, introduces three new specific acts of bankruptcy in addition to those specified in the stat. 13 Eliz., two of which, together with all the other acts of bankruptcy enumerated in the stat. 13 Eliz., precede and are governed by their relation to these words which follow them; viz., "to the intent, or whereby his or their creditors shall or may be defeated or delayed," &c. The third new act of bankruptcy in the stat. 1 Jac. I., viz. the lying in prison six months upon an arrest, is made a substantive act of bankruptcy, independent of any intent of the party, not being in the context connected therewith. These words, "to the intent or whereby," literally taken in their disjunctive sense, may be thought to import that a beginning to keep house, and a departing from the dwelling-house (and any other of the acts specified), are acts of bankruptcy, whether they be done with an intent to delay, or be merely productive of that effect, however innocently and unintentionally they may have happened to produce it. Upon this construction of the words "or whereby," a temporary retirement and privacy, by staying in a man's own house, to the exclusion of strangers, during the hours of sleep, or refreshment, or during a period of sickness or domestic affliction, might be an act of bankruptcy as "a beginning to keep house;" in the same manner as going abroad for the purpose of exercise, business, or entertainment, might also be as a departing from the dwelling-house, if during any of those periods a creditor called in vain for [*493] his debt. It hardly needs any *argument to prove that such could not have been the intention of the Legislature; and if it could not, the words "or whereby" must either be rejected or understood in some other sense. A cure for this difficulty was sought in the case of *Fowler* v. *Padget*, 7 T. R. 509; 4 R. R. 511, where a creditor had left his dwelling-house for a short time in order to seek and secure the means of satisfying his creditors, and with no purpose of delaying them, but who had in fact by his absence occasioned a delay to some of them, who had called for payment whilst he was from home. Lord KENYON, in that case, thought that "by reading the word 'and' for 'or' in the

stat. 1 Jac. I. c. 15, as was frequently done in the construction of legal instruments where the sense requires it, all difficulty would be got over." And, indeed, the difficulty of the particular case was thereby disposed of; for, as no intention of delay existed on the part of the trader who departed from his dwelling-house, both the circumstances, which a copulative construction of the words required (if that were the necessary construction), could not take effect in that case; and if the intent of the departure be alone considered as material, still that case will at any rate have been well decided; although the mode of solving the difficulty which was resorted to on that occasion may not be satisfactory. The objection to this construction, which requires that both the intent and the consequence of delay should concur, in order to constitute the act of bankruptcy, is that the bankruptcy is made to depend not merely on the acts and intents of the bankrupt himself, however clear and unequivocal they may be, but upon the fortuitous coincidence of the acts of other persons; and which acts (in the instance particularly of a departure from the dwelling-house) are less likely to *concur in the proportion in [*494] which that departure is most notorious. For when the flight of an insolvent trader from his house of trade is universally known, it is not likely that any creditors, by uselessly calling for payment of their debts at such a time, should furnish the ordinary proof of delay, which arises from the non-payment of creditors so calling. If the consequence of actual delay be necessary to perfect every one of the several acts of bankruptcy in the stat. 1 Jac. I. c. 15, which precede the words "to the intent or whereby," &c., it must be necessary to perfect the act of making a fraudulent conveyance, which is one of them: but inasmuch as a fraudulent conveyance, shown to be such, cannot in law have the effect of defeating or delaying a creditor, unless the making such a conveyance be an act of bankruptcy, consummated by the intent with which it is made, it can never become more an act of bankruptcy by anything which may happen in respect to it afterwards. And indeed it has never been held necessary, in proof of this act of bankruptcy, to do more than to prove the execution of the deed under such circumstances as rendered it a fraudulent one in respect of creditors, without going on to show that any creditor had been in fact ever delayed or defeated thereby. Indeed the fact of delay in the case of beginning to keep house is usually

resorted to in evidence for the mere purpose of explaining an act which might otherwise be equivocal; and the denial to a creditor is there given in evidence to show that the party has begun to keep house; and it is from mistaking the intended effect of this evidence, as given to prove actual delay, that proof of actual delay can be required where the act of bankruptcy is by departing from his dwelling-house. If these, and other inconveniences which [* 495] might be shown, * arise from construing the word "or" for "and," in this part of the statute, it is material to consider whether some other cure in point of construction cannot be applied to these words, and whether the words which follow the word "intent," *i. e.* "or whereby," may not by a small change in them be rendered susceptible of another sense, more consistent with the meaning of the original sentence as it occurs in the stat. 13 of Eliz., and more agreeable to the general scope and object of the bankrupt laws. If, instead of "or whereby," the sentence should be read "or that thereby," or "that" (omitting the word whereby), the original sense of the word "purpose" in the stat. 13 Eliz. is restored; and inasmuch as it would neither extend or narrow the meaning of the immediately foregoing word "intent," it would leave to that word its full operation and effect, without engrafting upon it any of the inconveniences already observed upon as resulting from the copulative construction suggested in the case of *Fowler* v. *Padget*. Another mode of considering the words "to the intent" "or whereby," as meaning the same thing, is this; by referring the former to the word "shall," and the latter to the word "may:" *i. e.*, to the intent that the creditors shall be defeated, or whereby they may so. This gives the words the same effect as intent or purpose in the statute of Eliz., and prevents this act from operating in restriction of that, which it otherwise would do, and which, as may be collected from the title, which is for the better relief of creditors, could not have been intended. It would be a superfluous waste of time to advert to all the various cases which have been cited in argument. The latest of them is that of *Hammond and Others, Assignees of Gadsden, a Bankrupt*, v. *Hincks*, 5 Esp. 139, which, having been tried at *Nisi Prius*, before the present Chief [* 496] Justice of the Common * Pleas, came before that Court upon a motion for a new trial, as reported in 5 Esp. 141. In that case the Chief Justice is reported to have laid down at *Nisi Prius*, and the Court of Common Pleas, in refusing to make

the rule absolute, must be taken to have agreed with him, that evidence of the actual delay of a creditor, by the bankrupt's leaving his house to avoid his creditors, was not necessary to constitute an act of bankruptcy. As far as we are able to collect what was the opinion of the Court of Exchequer upon that subject from the statement made to us of what passed in that Court upon the motion for a new trial, in *King* v. *Bebb*, upon Castell and Powell's bankruptcy, we cannot but suppose that it inclined the same way with that of the Common Pleas in the case of *Hammond* v. *Hinchs*. Upon the authority, therefore, of these latter cases, in which all the former ones were, as we understand, considered — as indeed they have been by us upon the present argument — upon the sound construction of the statute 1 Jac. I. c. 15, explained by the antecedent statute of 13 Eliz., made in *pari materiâ*, and almost *in iisdem terminis* with the other, excepting only what appears to have been a casual and unintended variation in the phrase of a particular sentence, as well as upon the reason and convenience of the thing; we are of opinion that Walmsley, in leaving home with intent to delay his creditors, committed an act of bankruptcy, although no creditors were thereby in fact delayed; and that, therefore, the *postea* should be delivered to the plaintiffs.

Judgment for the plaintiffs.

ENGLISH NOTES.

By the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 4, a debtor commits an act of bankruptcy if he does or omits any of the following acts or matters: —

(*a*) Makes an assignment for the benefit of creditors.

(*b*) Makes a fraudulent gift or conveyance.

(*c*) Makes a conveyance or creates a charge which would be void as a fraudulent preference if he were adjudged a bankrupt.

(*d*) If with intent to defeat or delay his creditors he departs out of England, or remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.

(*f*) Files in Court a declaration of his inability to pay his debts, or present a bankruptcy petition against himself.

(*g*) Fails to satisfy the terms of a bankruptcy notice founded on a "final judgment," unless he can satisfy the Court that he has a cross demand against the creditor equal to or exceeding the judgment debt, and which he could not have set up in the action in which the judgment was obtained.

(*h*) Gives notice to any of his creditors that he has suspended, or is about to suspend payment.

By the amending statute, the Bankruptcy Act 1890 (53 & 54 Vict. c. 71), s. 1, an execution levied by seizure of goods under civil process followed by a sale or possession by the sheriff for twenty-one days, is an act of bankruptcy. The time during which interpleader proceedings are pending are excluded in the computation of time.

An assignment for the benefit of creditors requires registration under the Deeds of Arrangement Act 1887 (51 & 52 Vict. c. 57), s. 5. Execution by one creditor is sufficient, and the execution by other creditors, subsequent to registration, does not avoid the deed or vitiate the registration of it. *Ex parte Milne, In re Batten* (C. A. 1889), 22 Q. B. D. 685, 58 L. J. Q. B. 333. A declaration of trust in favour of creditors is within the section. *Ex parte Hughes, In re Hughes* (C. A. 1893), 1893, 1 Q. B. 595. 62 L. J. Q. B. 359, 68 L. T. 629.

The question of a fraudulent conveyance is discussed under No. 3, *infra*, p. 25, *post*.

What amounts to a fraudulent preference will be discussed *post*, Sect. V. p. 73.

The words "with the intent to defeat and delay his creditors" are the governing words of sect. 4, subsect. 1 (*d*), of the Bankruptcy Act 1883, as appears by the following cases: *Ex parte Osborne* (1813), 2 Ves. & B. 177, 1 Rose. 387, 13 R. R. 51 (Departure from the realm); *Ex parte Bunny* (L. JJ. 1857), 1 De G. & J. 119, 26 L. J. Bank. 83; 3 Jur. N. S. 1141 (Remaining out of the realm); *Robertson* v. *Liddell*, the principal case, *Ex parte Coates, In re Skelton* (C. A. 1877), 5 Ch. D. 979, 37 L. T. 43, 25 W. R. 800 (Departure from dwelling-house); *Ex parte Meyer, In re Stephany* (L. JJ. 1871), L. R., 7 Ch. 188, 41 L. J. Bank. 33, 25 L. T. 733 (Otherwise absenting himself): *Robertson* v. *Liddell*, the principal case, *Smith* v. *Currie* (1813), 3 Camp. 349, 14 R. R. 754 (Keeping house).

In order that a judgment may be a "final judgment," there must have been an actual adjudication by a Court in an action. Thus a garnishee order is not a final judgment: *Ex parte Chinery, In re Chinery* (C. A. 1884), 12 Q. B. D. 342, 53 L. J. Ch. 662, 50 L. T. 342; nor a consent order staying proceedings on payment of costs: *Ex parte Schmitz, In re Cohen* (1884), 12 Q. B. D. 509, 53 L. J. Ch. 1168, 50 L. T. 747; nor an order dismissing an action for want of prosecution, with costs. *Ex parte Earl of Strathmore, In re Riddell* (C. A. 1888), 20 Q. B. D. 512, 57 L. J. Q. B. 259, 58 L. T. 838. But where, at the hearing of a partnership action in the Chancery Division, it was, amongst other things, ordered that a counterclaim should be dismissed, with costs, the judgment, in so far as it ordered the payment of these costs, was held

to be a "final judgment." *Ex parte Alexander, In re Alexander* (C. A. 1891), 1892, 1 Q. B. 216, 61 L. J. Q. B. 377, 66 L. T. 133. But an order upon a director or other officer or promoter of a company in liquidation, to make good money or property of the company misapplied by him is now a "final judgment." Companies (winding up) Act, 1893, 56 & 57 Vict. c. 58, s. 1. The bankruptcy notice must follow the terms of the judgment strictly. *Ex parte Hughes, In re Howes* (C. A. 1892), 1892, 2 Q. B. 628, 62 L. J. Q. B. 88; *Ex parte Lester & Co., In re Hannah Lynes* (C. A. 1893), 1893, 2 Q. B. 113, 62 L. J. Q. B. 372.

It is not essential that the debtor should give notice in express terms that he has suspended or is about to suspend payment; it is sufficient that the notice should reasonably bear that interpretation. *Crook* v. *Morley* (H. L. 1891), 1891, A. C. 316, 61 L. J. Q. B. 97. A notice, expressed on the face of it to be "without prejudice," is none the less effectual under the section. *Ex parte Holt. In re Daintrey* (1893), 1893, 2 Q. B. 116, 62 L. J. Q. B. 511, 69 L. T. 257.

That portion of the Bankruptcy Act 1890, s. 1, which makes the holding of the goods for twenty-one days by the sheriff an act of bankruptcy is new.

The Court will consider whether the petitioning creditors' debt is sufficient to support the petition: *Ex parte Margrett, In re Soltykoof* (C. A. 1891) 1891, 1 Q. B. 413, 60 L. J. Q. B. 337, 39 W. R. 339, and will, as has been compendiously said, "go behind a judgment, even at the instance of the debtor." *Ex parte Lennox. In re Lennox* (C. A. 1885), 16 Q. B. D. 315, 55 L. J. Q. B. 45, 54 L. T. 452; *Ex parte Central Bank of London, In re Fraser* (C. A. 1892), 1892, 2 Q. B. 633, 67 L. T. 401. In order to induce the Court to adopt the last-mentioned course, there must be evidence that there has been a miscarriage of justice. *Ex parte Scotch Whisky Distillers Limited. In re Flatau* (C. A. 1888), 22 Q. B. D. 83; 37 W. R. 42. Although the Court has gone behind a judgment, and set aside bankruptcy proceedings, a fresh application may be made by the petitioning creditor on the same judgment, and the plea of *res judicata* is not applicable. The Court will, however, protect the debtor from vexatious and harrassing proceedings. *Ex parte Vitoria, In re Vitoria* (C. A. 1894), 1894, 2 Q. B. 387.

No. 3. — Ex parte KING. In re KING.

(C. A. 1876.)

RULE.

An assignment of all, or of what is substantially the whole of, a debtor's property for a past debt is an act of

bankruptcy; but, where made in consideration of a past debt and a further advance, it is not an act of bankruptcy. And an assignment made in pursuance of an agreement entered into at the time of the further advance stands on the same footing as if it had been given at the time of the further advance; unless it were purposely postponed until the debtor's circumstances were desperate.

Ex parte King. In re King.

45 L. J. Bank. 109–113 (s. c. 2 Ch. D. 256; 34 L. T. 466; 24 W. R. 559).

[109] Charles King, the debtor in this case, appealed against an adjudication of bankruptcy made by the Judge of the County Court at Bedford, and affirmed by the Chief Judge, the act of bankruptcy being a mortgage deed, dated the 6th of October, 1875, whereby, after reciting that Charles King was indebted to John King (his brother) in the amount of £900 for money lent, and that John King had agreed to lend him £50 more upon the terms of having the whole £950 and any further advances secured as therein mentioned, the said Charles King conveyed to the said John King the Railway Inn at Shefford, in the County of Bedford, then in the occupation of Charles King, and the brewery and brewing plant thereon, subject to a prior mortgage for £400, and assigned to him all his fixtures, trade utensils, household furniture and effects in or about the premises, and all his book debts, by way of security for the £950, and any further advances. It was admitted that the deed comprised substantially the whole of Charles King's property, but it was alleged that it was executed for the purpose of securing money advanced at the time, and further advances to be made *bonâ fide* for the purpose of enabling the debtor to carry on his business of a brewer.

It appeared that in June, 1875, Charles King, being indebted to his brother John to the amount of £800 for advances previously made, applied to him by letter for a further advance upon a second mortgage of his property. John replied that this would not be sufficient security, but that if Charles would also agree to give him a bill of sale of his plant, furniture, and book debts, he would make him a further advance, from time to time, of £150. This offer was accepted by Charles, who wrote to say that if John would advance

him £150 as he wanted it, he would give him a second mortgage and a bill of sale at any time when called upon to do so. After this John advanced to Charles three several sums of £50, one in August, 1875, a second in September, and the last on the 6th of October, when the deed was executed; and in the same month after the execution of the deed, he advanced a further £100.

The Chief Judge was of opinion that the case was governed by the decision of the Lords Justices in *Ex parte Fisher; Re Ash*, L. R. 7 Ch. 636; 41 L. J. Bankr. 62, and affirmed the adjudication made by the County Court Judge.

Charles King appealed.

Mr. F. Knight and Mr. E. Pollock, for the appellant, contended that the deed was *bonâ fide* executed to secure the repayment of a substantial advance, and further advances to be made for the purpose of enabling the debtor to carry on his business, and with no intention to defeat or delay his creditors. The case was different from *Ex parte Fisher; Re Ash*. Mr. De Gex and Mr. Bonsor, for the respondent, contended that the case was undistinguishable from *Ex parte Fisher; Re Ash*. The mortgage was in reality in consideration of a past debt, and was an act of bank- [*110] ruptcy. *Ex parte Fowle; Re Haynes*, L. J. Notes of Cases, 1872, p. 196; *Lindon* v. *Sharpe*, 6 M. & G. 895; 7 Sc. N. S. 730; 13 L. J. C. P. 67; *Lacon* v. *Liffin*, 4 Giff. 75; 32 L. J. Ch. 315; *Graham* v. *Chapman*, 12 C. B. 85; 21 L. J. C. P. 173; *Lomax* v. *Burton*, L. R., 6 C. P. 106; 40 L. J. C. P. 150; *Ex parte Sparrow; Re Fowke*, 2 De Gex, M. & G. 907.

Mr. Knight replied, citing *Ex parte Izard; Re Cook*, L. R., 9 Ch. 271; 43 L. J. Bankr. 31.

James, L. J. I quite agree with what was very forcibly urged before us by Mr. De Gex, namely, that it is very desirable that there should be no nice distinction drawn between one case that has been decided and another case that is before us for decision. It is very desirable to make the law as certain as possible. But on the other hand, cases like the one that we have been referred to, of *Ex parte Fisher; Re Ash*, must not be strained beyond their fair meaning to apply to any case that is supposed to be similar to them. This class of cases is one that it is impossible to avoid the task of considering. No Court can lay down any codified principles that will govern all cases, and no Court can escape from examining into all the facts of each case that may come before it. The

question is what, under the surrounding circumstances of the case, is the inference of fact to be drawn as to the conduct of the parties. The moment the question is settled that the advance was not made on all the debtor's property you are obliged to consider whether it was on all his property with the exception of what was an unsubstantial part; you have, therefore, to consider what was an unsubstantial part; then you have to consider whether it was a security for a past debt or a further advance. Then you have to consider whether it was a real further advance or only a sham further advance for the purpose of obtaining a security for a past debt. All those are questions which you have to consider, and we have to consider them all in this case; and all cases like this case resolve themselves into questions of inference of fact to be drawn from all the circumstances. Now, here, beyond all question, the brother refused to lend any money except he had security. Letters passed, and, as far as I can see, there is no reason to believe that these letters were written for the purpose of giving colour to a security which was to be given by the debtor to his brother for a past debt. The brother undertook to make, and did make, advances to the extent of £150, which, under the circumstances, seems not to be an inconsiderable sum. It was agreed that the £150 should be lent, and it was lent. When the £150 was fully lent, that is, when the third sum of £50 was advanced, the bill of sale was given in pursuance of the agreement. Now, at that time, this gentleman was going on, and he evidently intended to go on, with his business. He was not in expectation apparently of any petition in bankruptcy being presented against him. He certainly was not contemplating filing a petition for liquidation himself or taking any proceedings of that kind, because, as far as we can see, he was anxious to go on, and was going on, in his business, receiving goods from the person who was continuing the business of his former creditor, Mr. Lovell. The advance was made by his brother, and seems to have been an advance intended to be used for the purpose of continuing the business, and it was used for the purpose of continuing the business, and it was followed by other advances not inconsiderable in amount, having regard to the value of the property and the amount of the debts, for they were over £100, and were also applied in the way of business, so that I have come to the conclusion that the advances were *bonâ fide* made, not for the purpose really of obtaining security for a past debt, but for the pur-

pose of enabling the debtor to carry on his business, and in the confident and reasonable hope that *the debtor [* 111] would be enabled to continue his business. Under those circumstances it seems to me that it would be straining the case of *Ex parte Fisher ; Re Ash*, if we were to apply it to a case of this kind. Therefore, I think that the decision of the Court below must be reversed.

Mellish, L. J. I am of the same opinion. I should be sorry by our decision in this case to make the law more doubtful than it is at present. I think that the numerous cases which have been decided upon this subject have now settled the law, and the only difficulty is to apply it properly to the circumstances of the particular case before us. An assignment of all a man's property in consideration of a past debt is an act of bankruptcy. If there is a mere nominal exception, that will not prevent it being an act of bankruptcy. But if there is a substantial exception that will prevent it from being an act of bankruptcy, although of course it must depend upon all the circumstances of the case whether the exception is substantial or not.

Then if there is an assignment of all the property partly for cash down and partly in consideration of future substantial advances, that has just the same effect, in my opinion, as a substantial exception from the property assigned ; the one equally with the other makes it possible that it may be the *bonâ fide* intention of the parties that the trade shall continue to be carried on.

Then, besides that, it has been laid down in several Common Law cases that if there be an agreement to give a bill of sale in consideration of an advance made at the time, and the bill of sale is given in pursuance of that agreement, then the bill of sale is to be considered, not to be given for a past debt, but to be given for an advance made at the time. In the case of *Ex parte Fisher ; Re Ash*, we certainly made a qualification of that rule, and said that that would not support a bill of sale when the giving the bill of sale was purposely postponed until the debtor was in a state of insolvency in order to avoid the injury to his credit that would result from the registration of the bill of sale. Now, I do not at all depart from that ; but the question in this case is a question of fact, namely, was the giving of the bill of sale purposely postponed in this case for that purpose ? The present case differs from *Ex parte Fisher ; Re Ash*, in this respect : first, that we have a plain

agreement in writing by the letter, that, in consideration of the advance of £150, a bill of sale should be given; then, by that agreement, the advance is to be made, not all at once, but from time to time, as the debtor may require it. Now, the three sums of £50 appear, as far as I can judge, to have been advanced from time to time according as the debtor required them, and when the last of them was given, which was two months after the first was given, the bill of sale was executed. There no doubt arises a difficulty, from the circumstance that Lovell, a creditor, had been making a demand, and there was possibly some pressure at that time, and that may cause a doubt in the case; but still I think that the result of the evidence, even as to what took place at that time, is that both the brothers thought that the debtor might get over his difficulty and continue his business. That view does seem to me to be strongly confirmed by this, that the bill of sale is made a security, not only for the £950 in terms, but for any future advances that may be made, and the brother does go on making substantial advances, advancing, in the whole, £100 in the course of the next month. Taking all those circumstances together, I do not think that we should be justified in coming to the conclusion that there was any want of *bona fides* in this case. Of course an act of bankruptcy must be proved. The intention of the debtor to defeat and delay creditors must be proved by the petitioning creditor. I do not think that we should be justified in coming to the conclusion that the giving of the bill of sale in this case was purposely postponed in order to prevent the destruction of the debtor's credit by the registration of the bill of sale. In coming to that conclusion, the £150 is to be taken as the fresh advance, and comparing that amount with the value of the debtor's property,

[* 112] * the furniture and the book debts being of very uncertain value, and the equity of redemption being probably worth nothing, and also comparing the amount of the fresh advance with the amount of the unsecured past debt, I think we ought to come to the conclusion that there was a substantial advance, and, having come to that conclusion, it follows that there was not an act of bankruptcy.

Baggallay, J. A. I am of the same opinion. The bill of sale in this case might probably have been properly treated as an act of bankruptcy had it not been given in pursuance of an agreement entered into between the debtor and his brother at the end of June,

1875; but when we connect the bill of sale with that previous agreement, we find that the consideration for the bill of sale was, not only the amount mentioned in the bill of sale itself, but also the advance made on two separate occasions, pursuant to the original agreement. Then the question arises whether the whole consideration so given for the bill of sale is a fair equivalent for the transfer made by the debtor by the bill of sale. Now, that was the principle enunciated and acted upon in the Exchequer Chamber in the decision of the case of *Mercer* v. *Peterson*, L. R., 2 Ex. 304; 36 L. J. Ex. 218; (Ex. Ch.) L. R., 3 Ex. 105; 37 L. J. Ex. 54. It is put very clearly and distinctly in the judgment of Lord Chief Justice COCKBURN, in giving the judgment of the Court upon that occasion. But then it is suggested that, while recognising those general principles, the present case falls within the qualification introduced for the first time by the decision in *Ex parte Fisher: Re Ash*. Now, as I read the judgment of the Court, there is nothing in that case that disputed the authority of the rule established by *Mercer* v. *Peterson*. On more than one occasion in the course of the judgment of the Lord Justice MELLISH, distinct allusion was made to these authorities, and in one passage, to which I drew attention in the course of the argument, it appears to me that the principles applicable to the present case, and which explain how a case similar to the present may be an exception to the rule laid down in *Mercer* v. *Peterson*, were put by the Lord Justice in these words: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." Therefore you have a case of that kind to be introduced into circumstances similar to the present before you can say that it forms an exception to the general principle, and, having regard to all the circumstances in this case, I see nothing of any intention to commit a fraud against the general body of creditors. It appears to me to have been a *bonâ fide* advance, made by the brother for the purpose of enabling the debtor to carry on his business. The intention

on the part of the brother is strongly evidenced by the fact that even at a later period, when not required to do so by the terms of the contract or of the bill of sale, he made a further advance of £100 to the debtor within a very short period of the filing of the petition.

Mellor, J. I am entirely of the same opinion. I confess that, in the first instance, the coincidence of the bill of sale and the postponement of the intention to take active steps upon the part of the creditor on the 6th of October did impress my mind very much, and at that time I thought it difficult to explain the circumstances of that coincidence, but I think that they have been explained, and I confess that my mind has changed upon that subject, and that I think we ought not to draw the conclusions of fact which were drawn in the case of *Ex parte Fisher ; Re Ash*. The law, as applied in that case, depended upon the conclusions of fact that the [* 113] Court drew, and if the conclusions of fact now to be * drawn were the same, I should not consent to any judgment that would qualify the law as there laid down. I think it was quite correctly laid down, and is applicable to the facts, and to the conclusions which the Court there drew from them. Upon those facts it was a perfectly righteous judgment. But I think that the circumstances of the present case do really distinguish it from that case, and I think that the postponement until the 6th of October of the execution of the bill of sale was not the result of any intention such as that which was found to be the intention in the case of *Ex parte Fisher ; Re Ash*, but that it was the result of the fact that on that day the third instalment or the third sum of £50 was paid, and it was natural, under the circumstances, that that should be the date of the bill of sale. I also think that, under the circumstances of this case, it might be reasonably, and I think properly, said that the advance of £150 in such a trade and under the circumstances under which it was advanced, may very well be considered to have been a substantial assistance, a substantial substitution of money for the matter contained in the assignment of the goods and the security then given. The result at which I arrive, as a matter of fact, is that both parties at that time really believed that they should tide over the difficulty, and that the business could be carried on, — because the conduct of the brother, certainly so far as he is concerned, is inexplicable upon any other ground; for in that state of things he advances, subsequently to

the execution of the bill of sale, a sum of about £100. All these circumstances induce me not to draw the conclusions of fact that were drawn by the Court in *Ex parte Fisher; Re Ash*. I draw the contrary conclusions, and therefore consider that that case has no application to the present. Provided we are right in the view that we take as to the conclusions that we ought to draw from the facts, I agree entirely with the rest of the Court.

ENGLISH NOTES.

A transaction on the lines of the principal case has always been considered outside the mischief of the bankruptcy laws. *Baxter* v. *Pritchard* (1834), 1 Ad. & E. 456. The existence of a fraudulent intent in the debtor, unknown to the lender, should not prejudice the latter: s. c. *Ex parte Johnson, In re Chapman* (C. A. 1884), 26 Ch. D. 338, 53 L. J. Ch. 763, 50 L. T. 214. The principle of the ruling case was treated as of universal application by the Privy Council in *Administrator-General of Jamaica* v. *Lascelles de Mercado & Co.* (P. C. 1894), 1894, A. C. 135.

AMERICAN NOTES.

A general assignment is an act of bankruptcy. *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 14 Nat. Bankruptcy Reg. 311; *Cragin* v. *Thompson*, 12 ib. 81; *In re Biesenthal*, 15 ib. 228; *In re Frisbie*, 15 ib. 522. There must, however, be a fraudulent intent, in making the payment, to prefer the creditor, and it is not unlawful if done in a reasonable hope that his affairs "will rally and come round again." *Jones* v. *Howland*, 8 Metcalf (Massachusetts), 377; *Phœnix* v. *Ingraham*, 5 Johnson (New York), 426; *Utley* v. *Smith*, 24 Connecticut, 291. See note, citing authorities, 28 Am. Dec. 212.

Section III. — *Vesting of Property.*

No. 4. — SELKRIG *v.* DAVIS.

(H. L. APPEAL FROM SCOTLAND, 1814.)

RULE.

By the law of Scotland, founded on a general principle of international law, the assignment under an English Commission of Bankrupt (or the vesting clause of the modern Bankruptcy Acts) vests in the assignees (or trustee in bankruptcy) without the necessity of intimation to particular debtors, the whole of the bankrupt's personal

property in Scotland; and any subsequent attachment of that property by a Scotch or any other creditor is thereby precluded.

Selkrig v. Davis.

2 Rose, 291–319 (s. c. 2 Dow, 230; 14 R. R. 146).

In the House of Lords,[1] March, 1814.

[291] In the year 1750, Samuel Garbett, a native of England, and a trader at Birmingham, came to Scotland, and there [* 292] entered into a variety of trading concerns * of the most extensive and important nature. Carrying on these branches of trade in Scotland, he continued also his business at Birmingham, and from time to time was occasionally in England and in Scotland, having places of mercantile establishment and domestic residence in both countries. From the year 1772, however, he was resident in England.

In 1782, he became a bankrupt,[2] but previously to his bankruptcy the following occurrences had taken place: —

In June, 1770, Samuel Garbett, in conjunction with his son [* 293] Francis, and his son-in-law Charles Gascoyne, * purchased of Ludovick Grant,[3] the then trustee for the creditors of Adam and Thomas Fairholmes, certain shares of Carron stock, at the sum of £22,951 5*s.*; and they in payment gave their joint and several bond in the Scotch form,[4] obliging themselves, conjunctly and severally, their heirs, &c., personally to pay that sum at the time and in manner therein mentioned. The bond contained an obligation by Francis Garbett and Charles Gascoyne, to infeft Mr. Grant in further security.

[1] To the kindness of Mr. Lyon who was one of the counsel for the respondents upon this appeal, the reporter is indebted for the papers and notes from which he has been able to prepare a fuller statement of this valuable case, and of the argument of the noble and learned Judge on affirming the decision of the Court of Session, than has yet been presented to the profession. The case is correctly reported by Mr. Dow, 2 Vol. 231, 2 Rose, 97. Its importance as a precedent in the branch of law to which these cases are confined, has induced the reporter to give a note more detailed than the general nature of Mr. Dow's work would have admitted.

[2] Upon his bankruptcy, his property was stated thus:

Stock in Carron Company	£37655 17 9
Effects at Preston Pans	33476 15 0
	71132 12 9
Effects in England	28451 0 7½
	99583 13 4½

[3] Samuel Garbett had no interest in the subject of the purchase, but joined merely in security for the payment.

[4] In this bond Mr. S. Garbett was described as of Birmingham.

No. 4. — Selkrig v. Davis, 2 Rose, 293, 294.

In 1772, Charles Gascoyne and Francis Garbett became bankrupts, and their estates were sequestrated. William Anderson was appointed trustee for the creditors.

The obligors being unable to pay the first instalment, Grant, on the 21st of December, 1773, recorded the bond, raised letters of horning on it, and on the warrant therein contained arrested[1] in the hands of Carron Company, all stock, share, and interest in the Carron Company, of and belonging to Samuel and Francis Garbett and Charles Gascoyne, or either of them.

* This preliminary diligence of arrestment, however, was [* 294] not followed by a forthcoming, the effect of which would have been to vest the property arrested absolutely in the arrester. Terms of accommodation were proposed by Gascoyne and Francis Garbett, and accepted by Grant.

The terms upon the whole were, that Fairholme's creditors should discharge the arrestments, and not demand any dividend from the trustees of Francis Garbett and Company, prior to January, 1776; that the trustees should consent to the assignment of £6000 Carron stock to Fairholme's creditors: that they should pay the interest on the bond regularly, and allow Fairholme's creditors to rank on the funds of Francis Garbett and Company, and of the individual partners without distinction. Charles Gascoyne further bound himself personally to pay £2000 in money, and to keep down the interest on a preferable security over the lands contained in the bond, so that Fairholme's creditors might have the full advantage of it.

These arrangements were substantially, or at least to a very considerable extent, carried into execution. The £6000 Carron stock was assigned; some payments were made;[2] and the arrestments, though never actually discharged, were considered as at an end. By this arrangement, the property in the Carron Company was in effect unshackled of the arrestment; certainly, as far as it

[1] Arrestment is an ordinary process, by which a creditor enjoins a third person from paying a debt, or performing a personal obligation to the debtor of the arresting creditor, till the debt, which is the subject of the arrestment, be paid or secured. The arrestment gives the creditor a lien on, or inchoate interest in, the property arrested; to be completed by forthcoming. Foreign attachment, by the custom of London, or "*pone per vadios*" in the Court of Durham, bear some resemblance to it.

[2] Mr. Gascoyne gave Mr. Grant bills on the Carron Company £2000, paid interest on the debt £550, and assigned £6000 Carron stock, and gave him a power to sell the heritable estate which he had not by the bond.

was a direct process in the hands of Grant. It had, how-
[*295] ever, been proposed by Anderson, the *trustee for the creditors of Charles Gascoyne and Francis Garbett, that he should be allowed to make use of the arrestments, in order, as he alleged, to extricate the concerns of Francis Garbett and Company from their entanglement with those of Samuel Garbett; he, Anderson, indemnifying Grant from all expenses and other consequences of that indulgence. This was acceded to; the arrestments were accordingly by deed, bearing date the 28th April, 1777, made over by Grant to Anderson for that purpose; but the deed contained a declaration, that Grant was not barred, by anything therein contained, from resorting to judicial proceedings against the heritable estates of the said Francis Garbett and Charles Gascoyne, or from otherwise effecting full payment of the sums remaining due on the bond.

In the same year 1777, the Carron Company found it necessary to raise certain processes of multiple poinding[1] in the Court of Session against Grant, Anderson, and other creditors of Samuel and Francis Garbett and Charles Gascoyne, copartners in the Carron Company, and a great deal of procedure took place, in the course of which, on the 7th December, 1778, being less than five years from the 21st December, 1773, Grant's arrestment was produced and founded on.[2]

In this state of affairs, a commission of bankrupt, bearing date March 2, 1782, was taken out against Samuel Garbett in England;
and at the same time, on the application of Samuel Gar-
[*296] bett himself[3] with the *concurrence of his English creditors to the Court of Session, the LORD ORDINARY, on the 10th of April, 1782, pronounced an interlocutor, whereby he sequestered the whole personal estate belonging to the said Samuel Garbett, or to the said Samuel Garbett and Company, situate within the jurisdiction of the Court. Under this sequestration trustees were appointed, one of them being also an assignee under the commission. The assignees under the commission attended meetings of Carron Company; and during various proposals and discussions upon the subject of Samuel Garbett's interest, were recognized by the Com-

[1] In the nature of a bill of interpleader.

[2] By these processes it was alleged that the whole Carron stock belonging to Samuel Garbett was rendered litigious, or a fund *in medio* in the Court of Session.

[3] According to the bankrupt law at that time in force in Scotland.

pany as his assignees. Under the commission against Samuel Garbett, Grant applied to prove a debt for £26,862 18*s.* 8*d.*, after deducting all partial payments from the estates of the other obligants. The commissioners rejected the proof, but admitted a claim to the extent of £15,000. Grant, in the affidavit of his debt, took no notice of the arrestments, but stated that the deponent had no other security for the debt than what he had mentioned (being the bond and the agreement with Gascoyne), except a decree of adjudication obtained on the 5th of December, 1776, against the said Samuel Garbett, Francis Garbett, and Charles Gascoyne for payment of the sums therein specified then accruing due on the said bond.

Grant died. The appellant Selkrig succeeded him as trustee, and again applied to prove under the commission: for that purpose he tendered an affidavit, which after noticing the arrestments stated, that the trustee and committee upon Gascoyne's estate, with the privity of the said Samuel Garbett, did agree, upon the said arrestments being withdrawn, to assign certain shares of stock, &c., with the exception of which * he, Selkrig, had [*297] no other security for the debt[1] for which he was desirous of proving. The commissioners again refused the proof, but did not expunge the claim; and Selkrig appealed upon petition to the Lord Chancellor against their refusal. Upon that petition the Lord Chancellor ordered a report to be made to the Court by the commissioners, upon the facts connected with Mr. Selkrig's claim. A report was accordingly made; but no further proceedings took place. Selkrig, abandoning the proceedings under the commission and before the Chancellor, resorted to the course stated in the sequel.

The sequestration which had issued at the instance of Samuel Garbett, had never been renewed under the acts of the 23d and 33d of the King.[2] Its operation * had consequently [*298]

[1] The state of the debt which he sought to prove was as follows: After giving credit for all the dividends and partial payments received, and for the £6000 of stock which had been assigned to Mr. Grant, he exhibited a balance of the whole debt of £20,763 3*s.* 1*d.*, the amount of capital and interest.

[2] The sequestration against Mr. S. Garbett, issued under the Bankrupt Acts 1772, 12 Geo. III. c. 72, 20 Geo. III. c. 43. These Acts expired. A new statute passed in 1783, 23 Geo. III. c. 18, containing a clause for renewing the sequestrations which had expired with the former Act. Under this clause, however, no steps were taken in Mr. Garbett's sequestration. Then the Act 1793, 33 Geo. III. c. 74, (being the Act by which bankruptcies in Scotland are now regulated), was passed, wherein, after reciting the omission to renew sequestrations within the provisions

determined; and, by the express words of the last-mentioned statute, the funds were exposed to the diligence of all the creditors of the bankrupt, prior or posterior. Selkrig therefore proceeded to execute (according to the form used where a debtor is out of Scotland) an arrestment *jurisdictionis fundandæ causâ* against Samuel Garbett; and, upon that process, raised an action against him before the Court of Session, concluding for payment of the balance due on the above-mentioned bonds, being £20,763 3*s.* 1*d.* of capital, as at the 11th of January, 1796, with interest from that date. Upon the dependence of this action, Selkrig used a common arrestment in the hands of Carron Company, arrested all stock, share, or interest which Samuel Garbett might have therein, and all debts due by the Company to him, upon the 24th December, 1798. The Carron Company raised a process of multiple poinding, in which Selkrig, upon the grounds already stated, claimed to be preferred upon the fund *in medio*. The English assignees entered an appearance in the same process, and contested his claim.

After some proceedings[1] before Lord ARMADALE, Ordinary, his Lordship reported the cause, on informations, to the Court; and informations, with the minutes and answers, were accordingly lodged. The Court ordered the parties to state the cause in memorials. Memorials were given in; and on advising them, their Lordships pronounced an interlocutor (or judgment) [* 299] finding * that the assignees under the English commission were preferable upon the fund *in medio*, and they remitted to the LORD ORDINARY to proceed accordingly.[2]

Mr. Selkrig appealed against this interlocutor, and prayed that it might be altered or reversed.

The case was argued by Adam and by Leach for the appellant; and by Sir Samuel Romilly and Wetherell for the respondents.

of the former Acts, it was enacted, that "failing an application to the Court within six months after the commencement of this Act, it shall be held and considered, that the sequestration or trust created under the said Act of the 12th of his Majesty, and not renewed under the Act of the 23d, is entirely at an end; and if there be still any part of the estate or effects falling under such sequestration or trust remaining undivided, the same shall be open to the legal diligence of any creditor of the bankrupt, prior or posterior."

[1] The points discussed in those proceedings are principally those noticed as the grounds of appeal.

[2] This interlocutor was petitioned against, but their Lordships in the Court of Session adhered to their opinion; the appellant, therefore gave in a note, stating his intention not to discuss the case farther before the Court of Session.

No. 4. — Selkrig v. Davis, 2 Rose, 299, 300.

The appellant contended that, by the law of Scotland, it was competent for a creditor to attach by the legal form of arrestment, the moveable estate debts or effects of his debtor in the hands of any third party within Scotland; such arrestment, duly executed, was effectual to secure to the creditor using it an absolute preference in competition with every other creditor of his debtor, unless either there were, and in this case there clearly were not, other arrestments prior in date: assignations regularly intimated to the holder of the funds or effects, also prior to the intimation; or that a sequestration in terms of the bankrupt statutes should have been previously awarded, or should follow within the period specially provided by those statutes to exclude the preference of previous arrestments. By virtue of the arrestment of 1773 the appellant had established a preferable title to the fund *in medio;* there was at that time no other arrestment prior in date, no assignation intimated, no title under the bankrupt law in competition. That supposing the claim under this arrestment to be nugatory, then —

That the estate of Samuel Garbett, in Scotland, had been put regularly under sequestration in 1782 * by [* 300] virtue of the Scotch Bankrupt Act of the 12 Geo. III., renewed by the Act 20 Geo. III. By this sequestration all preferences, whether by arrestment, intimation, assignation, or otherwise, were necessarily prevented. That sequestration not having been renewed under the Act of the 23 or the Act of the 33 Geo. III. fell totally to the ground, and by the express provision of the last of these statutes the sequestration was declared to be at an end, and the whole funds of the bankrupt in Scotland were declared to be open to the diligence of any creditor, whether prior or posterior to the sequestration. None of the measures provided by the statute had been adopted; the case fell exactly within the operation of the clause. No application was made by the bankrupt, by the trustee, or by any creditor under the expired sequestration, and the result by the express terms of the Act was incontrovertible.

At the date of the execution of the appellant's arrestment on the 24th December, 1798, no previous arrestment had been executed by any other creditor in the hands of Carron Company, and no assignation of the debt due by them to Samuel Garbett had been previously intimated according to law. It was not pretended

that there was any other arrestment except the former one, at the instance of the same parties, in 1773. There was no antecedent assignation, except that by the commissioners to the assignees under the commission in England; but that could not be stated as an intimated assignation.[1] It was not made for the [*301] express purpose * of asserting a right in virtue of the assignment. It was natural that the English assignees should make enquiries into the affairs of the Carron stock, in which they, as representing by Samuel Garbett, were interested; but they never could imagine that they were possessed of an estate sequestered and conveyed to, and then actually under the management of trustees in Scotland.

The preference thus obtained by the appellant's arrestment over the funds of his debtor, open by virtue of the statute already cited to the diligence of any creditor, was not barred by any previous agreement or engagement whatever; for supposing the arrestment in 1773 to have been in effect discharged by the agreements in 1774 and 1777, yet unless the debt had been paid the power of future arrestments was not excluded. The bond was not discharged. The appellant was intitled to raise an action for payment; and upon the dependence of his action, to use the diligence of arrestment for the security of his debt till it could be ascertained by decree.

Assuming, therefore, the arrestment in 1798 to be unobjectionable, *quoad se*, the question arose whether it was excluded by the commission of bankruptcy issued in England, resolving itself into the principal ground of appeal, whether Selkrig ought not to have been preferred to the fund *in medio*, in competition with the assignees under that commission. The fund *in medio* was constituted of the effects of a Scotch trader, situate in Scotland. The debt upon which the arrestment proceeded was contracted in Scotland with a Scotch creditor, and secured by a bond in the Scotch form.

The argument of the assignees is founded upon the [*302] * mistake of a legal fiction for a principle of law. *Mobilia non habent situm.* They assume that a rule admitted to

[1] There had been, it was contended on one side and denied on the other, a previous assignation of Carron stock to certain creditors in trust, regularly intimated; but as the papers involved the effect of that transaction rather as a controverted fact than as a ground of legal discussion, it has been considered unnecessary to introduce it.

regulate cases of succession is to govern the distribution in bankruptcy. That the domicil shall regulate the title to personal property in cases of death, was recognized as a rule of law at a time when both the law of Scotland and the law of England notoriously stood very differently with regard to the effect of the domicil upon insolvency, from what it is represented to be at present. With what consistency can the respondents assert that *mobilia non habent situm*, when they have been discussing the question by the principles, the authorities, the statutes, and the practice of the law of Scotland, and in the Courts of that country? The preliminary question, whether the property is to rank as moveable or not, or whether the owner had or not a particular domicil,[1] must always be decided *in foro rei sitæ*. Does not this show that the proposition relied on is not a maxim of law, but a fiction of convenience? An executor has no legal title to moveables in Scotland till he be confirmed an executor in the Scotch form. That *mobilia non habent situm* is at least but an arrangement of international convenience or indifference; but is it either convenient or indifferent that after a man has contracted debts to a great amount in a country, and under the protection and faith of the law of that country, he shall withdraw his property from the control of its laws and the reach of his creditors?

The law of Scotland has for a long period been in favour of the appellant's case. The title under an English assignment is placed upon the same footing as a title derived from a private assignation, and to gain *priority over an arrestment [*303] requires intimation. The present discussion, and the decisions in *Strother* v. *Read*, 1803,[2] are the only interruption to a series of decisions uniformly repugnant to the title of the assignees. In 1798, when Selkrig had recourse to the arrestment, no lawyer, as the law of Scotland then stood, could have said he was not right in so doing. The cases are as follows: Lord Kilkerran, page 199; *Thorold* v. *Forrest*, Morrison's Appendix, *voce* Foreign; *Scott* v. *Lesley*, November 28, 1787; *Crawford* v. *Brown*, Faculty Collection, Vol. II.; *Davidson and Graham* v. *Fraser*, ibid. These cases decided the important point that the domicil does not regulate the matter, and that where the debts arrested are Scotch debts the arrestors are to be preferred to the assignees; and Mr. Erskine, B. 3, t. 6, s. 19, in express terms adopts that conclusion.

[1] Voet. lib. 1, p. 4, t. 2, s. 11; Erskine, B. 3, t. 2, s. 42.

[2] July 3, 1803, Fac. Coll.

The case of *Strother* v. *Read*, in which the Court pronounced a judgment preferring the assignees, was contrary to former decisions and involves circumstances distinguishing it from the present. In that case Edwards and Duplex were traders at Leeds exclusively; Strother, their creditor, was an Englishman, resident in, and whose debt had been contracted in that country. Strother, subsequently to a commission against Edwards and Duplex and the assignment under it, executed an arrestment in the hands of a merchant at Glasgow. The assignees were preferred; but the preference was over an arrestment by an English creditor upon an English debt, and upon the principle of the English cases cited in the sequel.

That the law of Scotland has been understood in England to be in conformity with the earlier decisions which have been cited, appears from the writers of authority there. Cullen's [*304] Principle of the Bankrupt Law, * page 243; Cooke's Bankrupt Law, page 320; *Hunter* v. *Potts*, 4 T. R. 182; 2 H. Bl. 403; 2 R. R. 353; *Sill* v. *Worswick*, 1 H. Bl. 665; 2 R. R. 816. None of the cases in England have gone the length of deciding that a foreign creditor, contracting in his own country with a party settled and trading there, and attaching his debtor's effects by the law of that country, shall be excluded by the assignees under the English commission. All the cases in which that question has been touched have required as the very principle of the whole argument, first, that all the parties should have been resident in England at the time of contracting the debt; and secondly, that the creditor attaching should be subject to the laws of England. Nor is the argument *ab inconvenienti* to be disregarded. The inconvenience of giving to an English commission the effect which has been contended for would be very great from the conflicting laws of different countries with respect to preferences and the rankings on particular funds, and the other technicalities of their different proceedings.

But supposing that in other circumstances the assignees under an English commission of bankrupt would exclude even Scotch creditors arresting for debts contracted in Scotland, while the bankrupt was a domiciled Scotch trader, they ought not to exclude the appellant in this case in respect of the special circumstances. The bankrupt's estates in Scotland were actually put under sequestration by the courts in Scotland, and were afterwards, by positive statute, laid open to the diligence of all the bankrupt's creditors,

whether prior or posterior. There can be no doubt that the sequestration was under the laws of Scotland, effectual, and that the debts and effects which were the object of it * were [* 305] vested in the Scotch trustees. When, therefore, the rights of the trustees fell with the expired sequestration, the estate was left wholly unoccupied, and open to the diligence of the appellant. By the Act, the effects were declared to be open to the diligence of all creditors, prior or posterior; but if the assignees are to be preferred, the clause as to posterior creditors is useless, because under the English commission later creditors could not be admitted.

For the respondents, it was contended, that the question upon the effect of the arrestment of 1773 was entirely at an end. By the arrangement of January, 1774, between Grant and Gascoyne, the process was discharged. Grant had resorted to the specific modes of obtaining payment marked out by that agreement. As the trustee of Fairholme's creditors, he had not only given up every right to his arrestment, but had repeatedly declared that he had done so. In the processes of multiple poinding in December, 1777, the trustees of Fairholme's creditors stated, in a judicial minute given in by him, that he had agreed, in return for the assignment of Carron stock, to give up the arrestment. The arrestments themselves were produced by Anderson as his interest; and in the papers for the creditors, and in several memorials by Grant, it is stated that these arrestments had been made over to Anderson, and that Grant had no interest or concern in them. In the process in which these statements were made, Grant, in virtue of his assignment of Carron stock, obtained a decree of preference, which he extracted, and afterwards sold the stock. The affidavits under the commission, made upon the tendering the proof of the debt, take no notice of these arrestments; and, on the petition to the Chancellor, Selkrig produced a certificate from the Signet Office, dated the 30th of July, 1798, that no * summons of [* 306] forthcoming had passed the Signet Office, — that the arrestments were in fact prescribed. The arrestment gone as to Fairholme's creditors could not be suspended in the hands of Anderson. An arrestment is good for nothing unless there be a debt to sustain it; but it could not be pretended that Samuel Garbett owed any debt to Francis Garbett and Charles Gascoyne, or to Francis Garbett and Company. On the contrary it was not disputed that they were largely indebted to him. It was unnecessary, however, to discuss

here the effect of the arrestment of 1773; that had been completely disposed of in the Court below. It was a question, not of general law, but of mere practice in the Court of Scotland, which the Court here would not interfere with, unless under circumstances much stronger than those which the case of the appellant presented.

The arguments which had been successfully urged against the injustice of allowing the appellant to found upon the arrestments of 1773, applied equally to the claim of preference attempted to be founded by the appellant upon the arrestment of 1798. By the agreement of 1774, not only was the then pending arrestment discharged, but, by the letter and spirit of the transactions, the right of arrestment in future was excluded. The principal question however, upon the appeal, resolved itself into the effect of the title under the English commission. The principle upon which the respondents relied was, that the assignment under the commission of bankruptcy, issued in 1782 against Samuel Garbett, *ipso jure* transferred the whole of his property to the assignees, for the general benefit of his creditors, and completely barred future arrestments. The operation of this assignment could not be restricted by a sequestration of the bankrupt's estates in Scotland, obtained upon the petition of the bankrupt himself, [*307] who * had been previously divested of his property by the commission: or, if it could, yet when the sequestration was extinguished, the effect was the same as if it had never existed.

An English commission transfers all the personal property, be it where it may. The analogous process of insolvency in a foreign country operates upon the property here. This is not a result of the domicil; for bankruptcy, here, may exist without domicil, but of the curtesy of international law, — of the credit which one country gives to the fair administration of justice in another. The question is, whether Scotland is an exception to that general curtesy. The cases of *Strothers* and of *Stein* established that it was not. Could it be said, that the case of *Strothers* rested upon the distinction which the appellant had taken? If so, by what definition can you say who is an English, or who is a Scotch creditor? Upon the principle of convenience, surely the administration of insolvent estate, under a commission or sequestration, according to their priorities, was less embarrassing than the competition of conflicting systems. *Stein's Case*, 1 Rose, 462. The appellant in this case has endeavoured to avail himself of the commission, and is estopped from impeaching it.

Putting the title of the assignees no higher than the case of an ordinary assignment of a debtor's interest in property, for the completion of which, intimation by the law of Scotland was necessary, even in that view of it, this was an assignment intimated long before arrestments were resorted to by the appellant. That the intimation must be by a notarial or formal instrument, cannot be maintained in argument; nor in practice is it adopted. The interference of the assignees, as Garbett's representative * in [* 308] the Carron Company, their attendance at the meetings, their proposals and discussions there, constituted a full and effectual intimation.

THE LORD CHANCELLOR: —

My Lords, your Lordships know perfectly well that it is not usual to state the reasons which induce an affirmance of the judgment of the Court below. In this case, its nature and importance are such, that I hope your Lordships will excuse me, if I state the reasons as they appear to me, why this judgment ought to be affirmed. It is unnecessary to notice a great deal of the statement in the printed papers laid before your Lordships. The material facts, I think, may be stated thus: On the 21st December, 1773, Mr. Grant, the predecessor of Mr. Selkrig the appellant, arrested in the hands of Carron Company, all stock, share, and interest belonging to Messrs. Samuel and Francis Garbett and Charles Gascoyne. That arrestment led to a treaty for the administration of the affairs of Mr. Garbett, in consequence of which treaty, a certain sum of money, though not all that the Fairholmes were entitled to, was received. In April, 1782, a sequestration was taken out against Mr. Garbett's personal estate in Scotland, under the 12 Geo. III. c. 72, continued by the 20 Geo. III. c. 43. In the 23 Geo. III. c. 13, there was a provision under which the sequestration might be renewed if certain steps were taken. And by the 33 Geo. III. c. 74, there was another provision which directed that an application should be made to the Court by the trustee, or in case of his not doing so by the common debtor, or any of the creditors, within six months after the passing of that Act, where the sequestration had not been renewed under the authority of the Act of the 23rd of the King, and failing any such application, it should be held that the sequestration or trust created under the said Act of * the 12th of His Majesty, and not renewed [* 309] under the Act of the 23rd, was entirely at an end: and if

there be still any part of the estate or effects falling under such sequestration or trust remaining undivided, the same shall be open to the legal diligence of any creditor of the bankrupt, prior or posterior. As far as that Act of Parliament has been made the foundation of argument, it has been insisted, that the sequestration was terminated; nothing, it was said, having been done under this last Act of Parliament by the bankrupt, the trustee, or the creditors, the effects in Scotland, then outstanding, were by that omission exposed to the legal diligence of any creditor prior or posterior. It is impossible, however, to put any construction on that Act of Parliament other than this. If there are effects undivided under the sequestration, such effects shall be open to the legal diligence of any creditor, unless there be some title paramount to the sequestration; and if so, that paramount title could not be affected by the terms of this clause of the Act.

My Lords, in March, 1782, Mr. Garbett became a bankrupt, and there was the usual assignment by the commissioners which obtains under the authority of the Act in such cases. Under that commission an application was made on behalf of the persons whom the present appellant represents to the commissioners in England, to be permitted to prove the debt that was due to him. That application was not successfully made before the commissioners; but a claim was entered on the proceedings: and I need not state to your Lordships, that a claim being entered is a matter of some consequence; because there never could be a final dividend of the estate till that claim was expunged. So long as the claim stood, part of the bankrupt's estate would be reserved to meet it.

[* 310] * My Lords, that claim not being successful before the commissioners, an application was made to the Chancellor sitting in bankruptcy. The affidavit, made by Mr. Selkrig to support that application, stated that he held no other security for the payment of the debt than those mentioned in his affidavit, and there, the arrestment of 1773 was stated to be withdrawn. In addition to this, there was exhibited on behalf of the appellant in the course of those proceedings, a certificate that there had been no summons of forthcoming upon the arrestment of 1773, from the 1st of December, 1773, to the 1st of December, 1779, a period, whence, generally speaking, it may be said the arrestment had prescribed. The appellant represents, that worn out by the

long-continued course of proceedings in Chancery, he resolved to abandon them, and did abandon them, without having received anything under the commission; that, in my opinion, makes no difference as to the effect of the proceedings he adopted. In December, 1798, the appellant again used a common arrestment in the hands of Carron Company, and the competition between these parties is, whether the appellant under this arrestment in 1798, or the arrestment in 1773, is to be preferred to the assignees under the English commission of bankruptcy sued out in March, 1782? Your Lordships know, the arrestment of 1773 could not be affected by the proceedings in the bankruptcy of 1782, supposing that arrestment not to have been discharged. I abstain therefore from any observation upon that part of the argument. I consider the question to be, whether the arrestment of 1798, which is posterior to the bankruptcy, is to have any effect on the commission, with regard to personalty in Scotland? I think it may very fairly be stated to your Lordships, that when the English commission of bankruptcy was taken out, it was the general opinion, that in order duly to administer the bankrupt's estate (however
* that administration might differ as to the distribution in [*311]
England and Scotland), it was necessary to have an English commission and a Scottish sequestration, if there was real or personal property in Scotland, as well as real or personal property in England. One cannot, I think, furnish stronger demonstration that such was the opinion, than the proceedings in this very cause exhibit.

My Lords, I have, for one reason amongst others, been induced to trouble you shortly on this subject, because, in another case, the general principle has been before the Court of Session in the case of the *Royal Bank of Scotland* v. *Stein and Co.* That was an application for a sequestration. The assignees in that case stated, that inasmuch as they were assignees, they were entitled to hold the property of the bankrupt, and, therefore, that sequestration, which was a proceeding to affect the property of the bankrupt, would be a sequestration that would affect them, and which the Court ought not to sanction. It appears, that in that particular case, the bankrupt himself had executed such instruments, and made such dispositions, as would pass for the benefit of the creditors under the English commission, not only his personal estate, but also his real estate. But the judges seem to have enter-

tained an opinion, that by the bankrupt law of England, the bankrupt could be compelled to execute a conveyance to his creditors of his real and personal estate. No man can doubt that there is a moral obligation imposed on the bankrupt, to make that conveyance: but it was argued, as if there was a legal obligation imposed on him by the English commission. I believe this is effected in Scotland by force of the sequestration, or that by certain Acts the bankrupt is ordered to make a conveyance. However that may be, if the question happens again to come under the considera-
[*312] tion of the Scottish Court, it will not be * considered, that according to the effect of an English commission of bankruptcy, the bankrupt can be compelled to make a conveyance of his estate to his creditors. The principles of the English bankrupt law are more connected with criminal than with civil considerations. Those who have had a great deal to do with bankrupt estates in this country know, that where persons propose to buy a real estate belonging to a bankrupt, they are extremely apprehensive there may be some secret act of bankruptcy affecting the commission and the title of the assignees; and yet, that you cannot call on the bankrupt to execute a conveyance has been ruled over and over again. If therefore such a judgment is to stand, merely on the existence of a supposed obligation, capable of being enforced by legal process in England, it cannot, I am afraid, be supported.

In the difficulties which these questions present, there is a necessity for the interference of the Legislature, equally applicable as to real estates, whether the administration is to be made under a Scottish sequestration on the one hand, or under an English commission of bankruptcy on the other. I have heard it repeatedly stated in the Court in which I have the honour to administer the bankrupt laws, that it was usual for the creditors not to proceed against a real estate in Scotland, according to the forms of the law of that country, but for the bankrupt to convey his real estate there to the English assignees, in order that it may be converted into money for the benefit of all the creditors. It has very frequently happened, when a man becomes bankrupt, and is known to possess a real estate in Scotland, that his creditors say to him, "We will not talk to you on the subject of legal obligation, the moral obligation on you is clear; and we have the disposal of your certificate: if you will not convey your real estate, you
[* 313] shall remain uncertificated." Under * the effect of that

control, the real estate is very frequently brought into the common fund. But I know no process in the law of England, that can compulsorily effect it.

My Lords, it is a different thing with respect to the personal estate. This I shall state shortly. I may leave out of the case the arrestment of 1773. Though perhaps technically it may be in force, with reference to this case it is gone forever. It has proved beneficial to the parties, and if they have not received the whole that was due to them they have derived considerable advantage from it. After the affidavit of the appellant, to which I have already adverted, in which it is stated that he had no such security as that arrestment, in which he treats it as being withdrawn; and after the production of the certificate that there was no process of forthcoming, as evidence that these arrestments were prescribed, it appears to me quite impossible that he can now avail himself of it. I observe some of the Judges below are of opinion that the arrangement with regard to the arrestment of 1773 affects or applies to the arrestment of 1798. How it affects that of 1798 is not explained; it does not appear to be now insisted on at the bar, and therefore I shall take the arrestment of 1798 to be a good arrestment, subject only to the question of competition with the English commission of bankruptcy.

My Lords, it is quite impossible to say that this case, in whatever way it is viewed, is not surrounded with difficulties strongly calling for legislative interposition. I agree with the gentlemen at the bar, that no matter what the difficulties may be, in order to get rid of them we must not legislate. We are to state what the judicial difficulties are, arising out of the circumstances of
* the case; and when we are sitting in another capacity, [* 314] to redress the grievances of opinions judicially given.

In whatever way a Scottish sequestration may be enforced, the distribution of a bankrupt's effects under it is perfectly different from what it is under an English commission of bankruptcy. The Scottish law cuts down all securities that have been made or given within a certain number of days prior to the issuing of the sequestration, whether they have been given *bonâ fide*, or given, as we should say, in contemplation of bankruptcy. On the other hand, in our law, though the approximation of the security to the date of the commission may be evidence that it was given in contemplation of bankruptcy; yet it is but evidence, and the security

may be perfectly good. Again, in England a man cannot become a bankrupt without committing an act of bankruptcy. The commission must be founded on that act of bankruptcy, and there are various other differences, applying to the property of a bankrupt, as administered under an English commission, or *vice versa*, as distributed by the rules, and according to the forms of a Scottish sequestration. If, my Lords, you attempt to obviate these inconveniences by a co-existing sequestration and commission, the difficulty is tenfold greater, unless the one should be used merely as the means of assisting the distribution of the funds under the other. What personal property shall belong to the one proceeding, and what to the other proceeding, is no ordinary difficulty; the counsel for the appellant say there is no difficulty, — that a debt owing to the house in Scotland, wherever the debtor lives, ought to go to the Scotch sequestration; and in like manner that the debt owing to the house in England, wherever the debtor lives, should go to the commission.

But the house may be constituted of persons of whom it [*315] may be difficult to say whether *a man is a Scotchman or an Englishman. It may happen that a house is composed of persons, some of whom reside in Scotland and some in England. I should wish to know not only how the joint debt due to one firm, and the joint debts due to the other, are to be distributed, but where separate debts are due to each, whether the separate debts are to be a fund of distribution under the English commission, or under the Scottish sequestration, or what is to become of them?

All these difficulties certainly belong to this case. But notwithstanding that, one thing is quite clear; there is not in any book any *dictum* or authority that would authorize me to deny, at least in this place, that an English commission passes, as with respect to the bankrupt and his creditors in England, the personal property he has in Scotland or in any foreign country. It is admitted that the assignment under the English commission, as between the bankrupt and the English and Scotch proprietors, passes the Scotch property and vests it in the assignees, when the Scotch creditors have not used legal diligence. I think the case was put at the bar thus: That the commission of bankrupt operated so as to bring into the fund the Scotch personal property, provided that such personal property was not arrested by legal diligence in Scot-

land, prior to the intimation of the assignment in Scotland. It was therefore argued that this was to be put on the same footing as the case of the assignation of a particular debt to a particular individual. Now your Lordships need not be told that by the law of Scotland, if B. assign a debt which is due from C. to B., a creditor of B. may arrest that debt in the hands of the debtor, notwithstanding the assignment, unless the assignee has given an intimation formally to the person by whom the debt is owing. That must be admitted. Upon that it has been insisted here *that no intimation has been given, and that this [*316] subsequent arrestment in 1798 ought to have the preference of the title of the assignees, under the commission that was sued out in the year 1782.

Now, my Lords, in looking at the cases that have been stated to your Lordships from the bar, and which are very well stated in the printed papers on the table, I quite agree with a very respectable writer [1] in what he says respecting the cases prior to *Strother's Case:* "The determinations of the Court have exhibited a very distressing versatility of opinion." I speak only for myself at looking at every one of the cases. I cannot find any one principle or circumstance stated to be common to them all. The law, as it has been contended to be on the part of the assignees of Garbett, is stated by that author at length; the Court were almost unanimous in this case, except one Judge who differed from the rest. That is a decision which is not to be taken simply as a decision on the subject before the Court, but may be taken in a sense as confirming judgment after judgment since 1803, and therefore as carrying with it more authority than would belong to the particular case itself.

My Lords, with respect to this matter of intimation, the book cited authorizes me to say there has been an intimation in this case; that the entries on the books of the Carron Company are a sufficient intimation. But I cannot help thinking there is a great difference between the assignation of a particular debt by a particular individual, and the assignation of all a man's property for the benefit of all his creditors. If we were to hold in this country that in every commission of bankruptcy a particular intimation was necessary, it would cut up the *effect of [*317] English commissions by the roots, for when a commission

[1] Bell's Bankrupt Law of Scotland.

is taken out, the bankrupt gives no account of his property to his creditors; he has a very considerable period after the commission of bankruptcy allowed him before he passes his examination. It is admitted by the appellant that in adjudication and marriage no intimation is necessary; a decree of adjudication by the Court of Session implies actual possession, and at the same time publication, in the records of the Court. Marriage, which is presumed to be known to all the world, transfers, by force of the law of Scotland, all the rights of the wife to the husband. In these instances the technical form of intimation is not necessary; and I should be very strongly inclined to hold (if it were necessary) in analogy to the assignment by marriage, as mentioned by Lord MEADOWBANK in his judgment in *Stein's Case*, that the particular circumstance of intimation was not necessary to an assignment under an English commission of bankruptcy of effects in Scotland. But if it were necessary, I say there was intimation.

It was argued very powerfully that there could be no such thing here as intimation; and speaking as an individual, I do not know there was any intimation either intended to be given or accepted, because the sequestration was originally taken out from the understanding of all parties, as I believe it was, that the commission of bankruptcy could not affect either the real or the personal estate in Scotland; the transaction shows it was taken out with the concurrence of the English assignees. They never intended to oppose the sequestration. That sequestration fell to the ground under the circumstances I have related to you; but I should be very glad to know when it fell to the ground, and when nothing was left but the English commission, whether the intermediate transactions, up to the arrestment in 1798, are not [* 318] intimation * enough? But besides that, these creditors would be bound by another transaction. For if you are unable to solve all the difficulties which have been raised, — and your Lordships must be very ingenious if you could solve all the difficulties that have been stated, as to what is an English and what is a Scottish creditor, what is an English and what a Scottish debtor, composed of firms partly resident in England, and partly resident in Scotland, — yet I think there is no difficulty if the Scottish creditor thinks proper to come in under the English commission. Then he is to all intents and purposes an English creditor.

It has been decided that a person cannot come in under an English commission without bringing into the common fund what he has received abroad. The reason of that cannot be merely that all the creditors under a commission are to be put on an equal footing. If, my Lords, he has got property which did not pass under the commission before he came in, whatever Chancellors may have said on the subject, they had no more right to call into the common fund that which he had got by law, and which was kept out of the common fund, than any other part of his property. It could only be, therefore, because the law did not pass the property of the individual coming within your jurisdiction that you say to him, If you claim anything under this commission, you shall not hold in your hands the property which you have got by force of the law of another country. If a man choose to say, I will not bring into the common fund that sum which I have received, then let him retire. Now, with reference to this view of the case, a claim has been made under this commission, and the claim has been admitted, and I have stated the importance of that in the administration of the effects of the bankrupts.

* On these grounds the question respecting this personal [*319] property appears to me to depend: in the first place, that intimation was not necessary in such a case. In the next place, if I am wrong in that, then that in this particular case intimation was given. And, lastly, if intimation was not given, it appears to me that under the circumstances of this case the English commission might have been applied to, and has been applied to, and that the appellant has thereby consented to bring in his foreign debt under its distribution; and that is another ground on which this judgment ought to be affirmed.

Is it your Lordships' pleasure that this judgment be affirmed?

Judgment affirmed.

ENGLISH NOTES.

By the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 5, the initial step on a bankruptcy petition being presented is to make a receiving order. The effect of this order is to constitute an official known as an Official Receiver the receiver of the bankrupt's property, and to suspend the creditor's remedies against the property or person of the debtor, subject only to the right of secured creditors to realize their securities. Bankruptcy Act of 1883, s. 9.

Notwithstanding a receiving order, the title or property is still in the debtor. *Rhodes* v. *Dawson* (C. A. 1886), 16 Q. B. D. 548, 55 L. J. Q. B. 134; *Ex parte Mason, In re Smith* (1892) 1893, 1 Q. B. 323, 67 L. T. 596.

Where a debtor is adjudicated a bankrupt, his property vests in the official receiver or trustee in bankruptcy, as the case may be, and the property is transmitted upon every appointment of a trustee (original or new) without the necessity of any transfer or conveyance. And where in British dominions property can only be transferred by a document registered, enrolled, or recorded, the certificate of the appointment of the trustee is to be registered, enrolled, or recorded. Bankruptcy Act 1883, s. 54. The title of the trustee relates back to the date of the act of bankruptcy upon which the petition is grounded, or to the date of any prior act of bankruptcy which has occurred within three months of the presentation of the petition. Bankruptcy Act 1883, s. 43. The trustee is entitled not only to property of the bankrupt, at the commencement of the bankruptcy, but also to any property devolving upon the bankrupt at any time prior to his discharge. Bankruptcy Act 1883, s. 44. Creditors and other persons are protected as regards contracts and dealings with the bankrupt prior to the date of the receiving order, where they have no notice of an available act of bankruptcy. Bankruptcy Act 1883, s. 49. Whether the creditors or other contracting persons are entitled to retain the benefit of a contract with the debtor depends in a large measure on the nature of the contract. Where the obligation on the part of the bankrupt is ascertained, it seems that the creditor may retain any benefit which he has obtained, notwithstanding that bankruptcy intervenes before he can carry out all the items to which he has bound himself; but where the obligation is unascertained there bankruptcy puts an end to the contract as regards those items which are unfulfilled at the time when the trustee's title accrues. Thus a debtor employed a solicitor to make an arrangement with creditors; the solicitor made it one of the terms of his consenting to act that he should have his costs secured, which was effected by the debtor placing a sum of cash in the solicitor's hands: upon bankruptcy supervening it was held that the solicitor could not retain the balance which remained after deducting his costs up to the act of bankruptcy of which he had notice, as against the trustee: *Ex parte Minor, In re Pollitt* (C. A. 1893), 1893, 1 Q. B. 455, 62 L. J. Q. B. 236, 68 L. T. 366; and a similar view was taken in the case of an accountant. *Ex parte Ball, In re Simonson* (1893), 1894, 1 Q. B. 433, 63 L. J. Q. B. 242. But where a solicitor agreed to conduct a criminal defence for the debtor in consideration of a lump sum, which was paid by the debtor, and carried out the obligation; he was held entitled to retain the whole of the

money, notwithstanding that the debtor was adjudged a bankrupt before the trial. *Ex parte Masters. Re Charlwood* (1894), 1894, 1 Q. B. 643.

The "property" of the bankrupt does not include rights of action founded on pure torts. *Beckham* v. *Drake* (1843), 8 M. & W. 846, 11 ib. 315, 2 H. L. C. 579; *Rogers* v. *Spence* (1844), 13 M. & W. 576, 12 Cl. & Fin. 700. As to whether a right of action in tort is a "chose in action," see a learned discussion in the Law Quarterly Review, Vol. 9, p. 311 (Oct. 1893), and Vol. 10, p. 143 (April, 1894).

There is power to take a portion of the salary or income of the bankrupt earned in the exercise of his personal skill. Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 53, 54. It is a question of fact whether the earnings can be properly described as salary or earnings, or whether it is a precarious return. *Ex parte Benwell, In re Hutton* (C. A. 1884), 14 Q. B. D. 301, 54 L. J. Q. B. 53, 51 L. T. 677; *Ex parte Lloyd, In re Jones* (1891), 1891, 2 Q. B. 231, 60 L. J. Q. B. 751; *Ex parte Shine, In re Shine* (C. A. 1892), 1892, 1 Q. B. 522, 61 L. J. Q. B. 253; *Ex parte Collins, In re Rogers* (1893), 1894, 1 Q. B. 425. The bankrupt should not be put on a "starvation allowance": *per* Lord Esher, M. R., *Ex parte Shine, In re Shine, supra*; *per* Vaughan Williams, J., *Ex parte Collins, In re Rogers, supra*.

The trustee has, in certain cases, higher rights than the bankrupt, and may, in certain cases described in the 47th section of the Bankruptcy Act 1883, impeach voluntary settlements (including conveyances or transfer of property) made in favour of third parties. Such settlements are made void (*a*) if the settlor becomes bankrupt within two years after the date of the settlement, or (*b*) if the settlor becomes bankrupt within ten years after the date of the settlement, and could not at the date of the settlement pay his debts in full without the aid of the property settled, and the interest of the settlor was not effectively conveyed. By the same section (47th) a covenant or contract to settle property in which the debtor has not a vested or contingent interest in possession or remainder, not being property or money of the wife, is void if the settlor becomes bankrupt before the property or money has been transferred or paid. These provisions are aimed at transfers which are in the nature of settlements: *Ex parte Brown, In re Vansittart* (1892), 1893, 1 Q. B. 181, 62 L. J. Q. B. 277; but were held not to be applicable to the case of a gift of money by a father, who subsequently became bankrupt, to his son to enable the latter to commence business on his own account. *Ex parte Harvey, In re Player* (1885), 15 Q. B. D. 682, 54 L. J. Q. B. 554. The word "void" in this section must be construed as meaning "voidable," and a *bonâ fide* purchaser for value obtains a good title against the trustee in bankruptcy, even if he knew that the donee claimed under a voluntary set-

tlement. *Ex parte Norton, In re Brall* (1893), 1893, 2 Q. B. 381, 62 L. J. Q. B. 457. The questions of reputed ownership and fraudulent preference are dealt with at pp. 58 and 73, *infra*.

The same policy which dictated the statute of set-off, led to the enactment of what is known as the "mutual credit clause." The clause now in force is contained in the 38th section of the Bankruptcy Act 1883, and is as follows: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due to the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively;" with an exception in the case of where the person claiming set-off had, at the time of giving credit, notice of an available act of bankruptcy. A very wide interpretation has been given to this clause and similar clauses under former Acts. Thus a legal debt may be set off against an equitable debt, *Bailey* v. *Johnson* (Ex. Ch. 1872), L. R., 7 Ex. 263, 41 L. J. Ex. 211; a debt payable *in futuro* may be set off against a debt payable *in presenti*. *Alsagar* v. *Currie* (1844), 12 M. & W. 751, 13 L. J. Ex. 203. The liability sought to be set off must in general be of an ascertained character. *Ex parte Price, In re Lankester* (Ch. App. 1875), L. R., 10 Ch. 648, 33 L. T. 113; *Ex parte Morier, In re Willis, Percival & Co.* (C. A. 1879), 12 Ch. D. 491, 49 L. J. Bank. 91, 40 L. T. 792; and must be of such a nature as to result in pecuniary liability. *The Eberles Hotel Company* v. *Jonas* (C. A. 1887), 18 Q. B. D. 459, 56 L. J. Q. B. 278. The right is not lost by taking collateral security, *per* Lord Blackburn, *McKinnon* v. *Armstrong Bros. & Co.* (H. L. 1877), 2 App. Cas. 531, 36 L. T. 482. The clause does not apply where money has been handed over by the debtor for a particular purpose, and the trustee is entitled to intervene and countermand the order. *Ex parte Minor, In re Pollitt* (C. A. 1893), 1893, 1 Q. B. 455, 62 L. J. Q. B. 236.

Notwithstanding bankruptcy, the debtor may, until the trustee intervenes, dispose of chattels which would have devolved upon him but for the bankruptcy. *Cohen* v. *Mitchell* (C. A. 1890), 25 Q. B. D. 262, 59 L. J. Q. B. 609. The contrary rule at one time prevailed. *Smith* v. *Mills* (1589), Moor. 594. There is a *dictum* of Cave, J., to the effect that the decision in *Cohen* v. *Mitchell, supra*, would only apply to the case, where a man was carrying on business. *Ex parte Woodthorpe, In re Rogers* (1891), 8 Morrell, 236. There is a decision of Chitty, J., to the effect that *Cohen* v. *Mitchell* does not apply to the

case of freehold land. *In re New Land, &c. Association*, and *Gray* (C. A. 1892), 1892, 2 Ch. 138, 61 L. J. Ch. 323, 66 L. T. 404. The Court of Appeal affirmed his decision, upon the ground that the Court will not compel a purchaser to buy a lawsuit; but during the course of the argument there was a very strong intimation of opinion from the bench that the broad distinction between chattels, which pass by delivery, and land, which passes by conveyance, and of which possession is not even *primâ facie* evidence of title, would make the decision in *Cohen* v. *Mitchell, supra,* inapplicable. Upon this reasoning a chattel interest in land must be considered as falling outside the decision in *Cohen* v. *Mitchell.*

Notice of an act of bankruptcy was always sufficient to prevent a person having control of the debtor's property from dealing with it to the prejudice of the trustee, *Vernon* v. *Hankey* (1787), 2 T. R. 113, 1 R. R. 444; and a creditor in England was not entitled to retain any part of the debtor's property, even where it had been recovered out of the jurisdiction. *Hunter* v. *Potts*, *Phillips* v. *Hunter* (1791), 4 T. R. 182, 2 H. Bl. 403, 2 R. R. 353. Therefore, where a creditor was paid by his debtor an amount which would reduce his debt below the amount sufficient to entitle the former to present a petition, the creditor was allowed to present a petition, on the ground that, the payment being invalid, the original debt remained. *Mann* v. *Shepherd* (1794), 6 T. R. 79, 3 R. R. 123. But where the assignees of a bankrupt had recovered a sum of money from the bankrupt's bankers, received and paid by the latter to a creditor of the bankrupt with knowledge of an act of bankruptcy, they were not allowed to recover the amount from the creditor who had received it with notice of the act of bankruptcy. *Vernon* v. *Hanson* (1788), 2 T. R. 287, 1 R. R. 481. The principle of these cases is, in effect, adopted by the Act of 1883, sections 43, 44, and 49.

The rule in the principal case was held in point under the Bankruptcy Act 1861 (24 & 25 Vict. c. 134), s. 152; *Ex parte Wilson, In re Douglas* (Ch. App. 1872), L. R., 7 Ch. 490, 41 L. J. Bank. 46, 26 L. T. 489, and the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 37; *Banco de Portugal* v. *Waddell* (H. L. 1880), 5 App. Cas. 161, 49 L. J. Bankr. 33, 42 L. T. 698.

English law recognizes the validity of a discharge, under foreign bankruptcy proceedings, of a liability incurred by a breach of contract which was to be performed in the foreign country: *Potter* v. *Brown* (1804), 5 East, 124, 7 R. R. 663; but not the validity of an order of discharge in a foreign bankruptcy, to release a debt to a British subject in respect of a contract to be performed in England. *Smith* v. *Buchanan* (1800), 1 East, 6, 5 R. R. 499; *Gibbs & Sons* v. *Société, &c. des Métaux* (C. A. 1890), 25 Q. B. D. 399, 59 L. J. Q. B. 510, 63 L. T. 503. A

discharge in an English bankruptcy is, in English Courts, a discharge from all debts wherever contracted. *Armani* v. *Castrique* (1844), 13 M. & W. 443, 14 L. J. Ex. 36. The local legislatures of the English Colonies are not regarded as having imperial powers, and their Bankruptcy Acts stand on a similar footing to those of foreign nations. *Bartley* v. *Hodges* (1861), 1 B. & S. 375, 30 L. J. Q. B. 352, 4 L. T. 445. But the Acts of the Imperial Parliament (where so intended) are of universal application in the dominions owing allegiance to the sovereign of the United Kingdom. *Royal Bank of Scotland* v. *Stein* (1813), 1 Rose, 462; *Philpotts* v. *Reed* (1819), 1 Brod. & B., 3 Moo. 344; *Simpson* v. *Marabita* (1869), L. R., 4 Q. B. 257; 38 L. J. Q. B. 76, 20 L. T. 275. And so it has been held that a discharge under a Scotch sequestration under an Imperial Act (54 Geo. III., s. 137), was a good answer to an action in the English Courts for a debt contracted in England. *Sidaway* v. *Hay* (1824), 3 B & C. 12. And it has likewise been held that the English Bankruptcy law is binding upon the Colonies, and that an English composition deed containing a covenant not to sue (pursuant to the English Bankruptcy Act of 1861) was effectually pleaded to an action in a Canadian Court in respect of an action upon a contract made and to be wholly performed in Canada. *Ellis* v. *McHenry* (1871), L. R., 6 C. P. 228, 40 L. J. C. P. 109, 23 L. T. 861.

Section IV. — *Reputed Ownership.*

No. 5. — MACE *v.* CADELL.

(K. B. 1774.)

RULE.

The doctrine of reputed ownership established by the Act 21 Jac. I. c. 19, s. 11 is not confined to goods which were originally the bankrupt's. The criterion is whether the true owner allows the trader (who has become bankrupt) to sell the goods as his own.

Mace v. Cadell.

Cowp. 232, 233.

[232] Trover for goods. Upon showing cause why the verdict given in this case for the plaintiff should not be set aside, and a nonsuit entered, the Court took time to consider. And

No. 5. — Mace v. Cadell, Cowp. 232, 233.

now Lord MANSFIELD delivered the unanimous opinion of the Court as follows: —

The plaintiff, Mace, kept a public house, had a license, and said she was married to one Penrice. She went to the Excise Office, had his name entered in the books, with a note in the margin "married." Penrice had the license, and continued in possession of the house and goods from that time till he absconded, and went to Pimlico, which was an act of bankruptcy. Mace, the plaintiff, first claimed the goods in question under a bill of sale from Penrice; but afterwards as her own original property, and denied that Penrice and she were married. Penrice was examined, and he said that it was not till within three weeks before he went away that he knew whether he would marry her or not.

At the trial a doubt occurred to me whether this case did not come within the Stat. 21 Jac. I. c. 19, sect. 11. For the possession which the bankrupt had of these goods was emphatically a possession of them as his own, and kept by him as such. It was suggested, that there was a similar case depending in the C. B., where the question was, Whether the enacting clause of the eleventh section extends further than the preamble of that section, so as to include goods not originally the bankrupt's. The preamble only says: "And for that it often falls out that many persons before they become bankrupts, do convey their goods to other men, upon good consideration, yet still do keep the same, and are reputed owners thereof, and dispose of the same as their own." But the words of the enacting part are as follows: "Be it enacted, that if any person, at such time as he shall become bankrupt, shall, by the consent of the true owner, &c., have in his possession, &c., any goods, &c., whereof he shall be reputed owner, the commissioners shall have power to sell the same in like manner as any other part of the bankrupt's estate." These words clearly extend to other persons' goods as well as to those which were originally the bankrupt's property. For the sake of conformity, we were desirous to * stay till the Court of Common Pleas had given [* 233] their opinion. But that case we understand is made up.

We have considered the general question; and, to be sure, there is a variety of mooting in the books without any determination.

But if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all. Because even before the statute, if a man had conveyed his own goods to a third

person, and had kept the possession, such possession would have been void, as being fraudulent according to the doctrine in *Twine's Case*, 3 Co. Rep. 81. At the same time, the statute does not extend to all possible cases, where one man has another man's goods in his possession. It does not extend to the case of factors or goldsmiths, who have the possession of other men's goods merely as trustees, or under a bare authority, to sell for the use of their principal; but the goods must be such as the party suffers the trader to sell as his own. Therefore, upon this ground, we are all of opinion that the verdict ought to be set aside.

But, in the consideration of this general question another point appeared, upon which we are equally clear; namely, that after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she shall never be allowed to say that she was not married to him, and that the goods were her sole property. On either ground, therefore, the verdict is wrong. If such a practice were to be allowed it would be laying a trap for persons to deal with bankrupts.

Per Cur. Let the verdict be set aside, and a nonsuit entered.

ENGLISH NOTES.

The reputed ownership clause is now contained in the 44th section of the Bankruptcy Act 1883, and is as follows: "The property of the bankrupt divisible amongst his creditors . . . shall comprise . . . : (*iii*) All goods, being at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." The original enactment, upon which much of the case law upon the subject was founded, is contained in the Statute of James (21 Jac. I. c. 19, s. 11), and is expressed to apply where a bankrupt "shall by the consent and permission of the true owner and proprietary have in his possession, order, and disposition, any goods, or chattels, whereof he shall be reputed owner, and take upon him the sale, alteration, or disposition as owner."

The expression "goods and chattels" in the Statute of James was held to include bills of exchange, *Hornblower* v. *Proud* (1819), 2 B. & Ald. 327; money in the hands of third parties, *Gordon* v. *East India Co.* (1797), 7 T. R. 228, 4 R. R. 428; and to vats and stills

used in a distiller's business, *Horn* v. *Baker* (1808), 9 East, 215, 9 R. R. 541; but not a chattel interest in land. *Roe* v. *Galliers* (1787), 2 T. R. 133, 1 R. R. 445. The future rent of land in lease can only be assigned by writing, and presumably cannot be within the reputed ownership clause. *Ex parte Hull, In re Whitting* (C. A. 1878), 10 Ch. D. 615, 48 L. J. Bank. 79, 40 L. T. 179. Chattels which pass with the lands as fixtures are not within the reputed ownership clause, *Horn* v. *Baker*, *supra*; *Ex parte Dorman, In re Lake* (Ch. App. 1872), L. R., 8 Ch. 51, 42 L. J. Bank. 30, 27 L. T. 528; nor are shares in a joint stock company which requires a deed for their transfer. *Colonial Bank* v. *Whinney* (H. L. 1886), 11 App. Cas. 427, 56 L. J. Ch. 43, 55 L. T. 362.

Registered mortgages of British ships were exempted by the provisions of The Merchants' Shipping Act 1854 (17 & 18 Vict. c. 104), s. 72, now by The Merchants' Shipping Act 1894 (57 & 58 Vict. c. 60). Freight follows the ship. *Brown* v. *Tanner* (Ch. App. 1868), L. R., 3 Ch. 597, 37 L. J. Ch. 923; *Rusden* v. *Pope* (1868), L. R., 3 Ex. 269, 37 L. J. Ex. 137, 18 L. T. 657. The Merchant Shipping Acts only apply to British ships. *Union Bank of London* v. *Lenanton* (C. A. 1878), 3 C. P. D. 243, 47 L. J. C. P. 409, 38 L. T. 698.

The goods must be in the sole possession of the bankrupt. *Ex parte Dorman, In re Lake* (Ch. App. 1872), L. R., 8 Ch. 51, 42 L. J. Bank. 20, 27 L. T. 528. In the case of bulky goods, if the purchaser has taken the best delivery possible under the circumstances, they will not be deemed the reputed goods of a bankrupt vendor. *Manton* v. *Moore* (1796), 7 T. R. 67, 4 R. R. 376. Goods which are in the possession of the bankrupt as apparent owner, if applicable for a particular purpose, will not until that purpose is satisfied pass under the reputed ownership clause, *Collins* v. *Forbes* (1789), 3 T. R. 316, 1 R. R. 712; *Hollingworth* v. *Tooke* (Ex. Ch. 1793), 5 T. R 215, 2 H. Bl. 501, 2 R. R. 573; even although the bankrupt might be liable to third persons as a partner. *Smith* v. *Watson* (1824), 2 B. & C. 401.

Formerly a chose in action, legal or equitable, was in the reputed ownership of the original creditor until notice of assignment had been given to the debtor in the obligation. The principle is that where the interest in a chose in action is transferred, the consent of the transferee to any power of disposition remaining in the transferor is withdrawn by the notice. *Ex parte Stewart, In re Shelley* (1865), 34 L. J. Bank., *per* Westbury, L. C., p. 8. The notice to take the debt out of the reputed ownership need not be a formal notice. But it must be given in such a manner as to make it the duty of the debtor to recognise it. And to affect a company it must have been given to some official of the company in such a manner that it becomes his duty

to see that the notice is recorded and acted on. *Edwards* v. *Martin* (1876), L. R., 1 Eq. 121, 35 L. J. Ch. 186, 13 L. T. 236; *Lloyd* v. *Banks* (1878), L. R., 3 Ch. 448; *Ex parte Agra Bank, In re Worcester* (1878), L. R., 3 Ch. 555, 37 L. J. Bank. 23, 18 L. T. 866; *Alletson* v. *Chichester* (1875), L. R., 10 C. P. 319, 44 L. J. C. P. 153, 32 L. T. 151. In the case of a policy of insurance it was not necessary (until the Act 30 & 31 Vict. c. 144, s. 3) that the notice should be in writing. *Alletson* v. *Chichester, supra.*

The question as to notice can now only arise in the case of a debt due to the bankrupt in the course of his trade or business, which is excepted from the proviso that things in action are not within the section (section 44 of Act of 1883, set forth *supra*). Shares in a partnership have been held to be choses in action within the Act of 1869, which first introduced the exception. *Ex parte Fletcher, In re Bainbridge* (1878), 8 Ch. D. 218, 47 L. J. Bank. 70, 38 L. T. 229. And it has been decided by the House of Lords that shares in an incorporated company are things in action within the exception of the Act of 1883. *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426, 56 L. J. Ch. 43, 55 L. T. 362. In order to fall within the exception the debt must be connected with the trade or business. *Ex parte Rensburg, In re Pryce* (1877), 4 Ch. D. 685, 36 L. T. 117. Notice should be given to the person who is to make the payment. *Gardner* v. *Lachlan* (1838), 4 My. & Cr. 129; *Wragge's Case* (1868), L. R., 5 Eq. 284. The danger of not giving notice is exemplified by the case of *Cooke* v. *Hemming* (1864), L. R., 3 C. P. 334, 37 L. J. C. P. 179, 18 L. T. 772. In that case a person who had contracted to supply meat to a lunatic asylum assigned the benefit of his contract. The assignee supplied his own meat until the contract was determined. Before he could obtain payment the assignor became bankrupt, and the debt due from the asylum was held by the majority to be within the reputed ownership clause. Willes, J., dissented on the ground that B., having supplied his own meat, was all along the real creditor; and as the case was afterwards compromised, the possibility of this view being correct was doubtless taken into consideration. But that does not detract from the authority of the case as to the necessity of giving notice where there is a transfer of the credit.

Although the goods are in the physical possession of the bankrupt at the commencement of the bankruptcy, an attempt by the true owner to obtain possession before bankruptcy proceedings has been treated as a determination of the consent, so as to take the goods out of the statute. *Ex parte Cohen, In re Sparke* (1870), L. R., 7 Ch. 20, 40 L. J. Bank. 14, 25 L. T. 473; *Ex parte Harris, In re Pulling* (Ch. App. 1872), L. R., 8 Ch. 48, 42 L. J. Bank. 9, 27 L. T. 501. It is sufficient that

there has been an equitable assignment, *Ex parte Montague, In re O'Brien* (C. A. 1876), 1 Ch. D. 554, 34 L. T. 197, and that there has been an attempt to get possession of part only of the goods. *Re Eslick, Ex parte Phillips, Ex parte Alexander* (1876), 4 Ch. D. 496, 46 L. J. Bank. 30, 35 L. T. 912. In *Day* v. *Day* (Ch. App. 1857), 1 De G. & J. 144, 26 L. J. Ch. 585, a solicitor had assigned the costs due to him by reason of his acting as solicitor to the plaintiff. Notice of the assignment was given to the plaintiff and to the trustees. The costs were by an order of the Court payable out of the funds in Court, subject to certain prior charges which more than absorbed those funds. After the bankruptcy of the solicitor a further fund was brought into Court out of which the costs could have been satisfied, and although no stop order had been obtained by the assignee, he was held to be entitled to be paid the amount of the costs as against the trustee in bankruptcy of the solicitor, who claimed in virtue of the order and disposition clause.

From these cases it appears that the true owner must have consented to the possession of the bankrupt to bring the case within the reputed ownership clause; and in this respect the principle is distinguishable from that of "apparent possession" under the Bills of Sale Acts (see under title "Bills of Sale," R. C. Vol. 5). The consent need not extend to a possession for all purposes; so that where goods have been sent on sale or return, the reputed ownership clause has been held to apply. *Livesey* v. *Hood* (1809), 2 Camp. 83, 11 R. R. 669. So wheat sent on approval to a miller who was in the habit of grinding his own corn. *Ex parte Clarke, In re Bell* (1877), 47 L. J. Bank. 33, 37 L. T. 509. But these cases do not apply where there are circumstances — such as where the manufacturer's goods are sent for sale to a trader who conspicuously describes himself as "merchant and manufacturers' agent." *Ex parte Bright, In re Smith* (1879), 10 Ch. D. 566, 48 L. J. Bank. 81, 39 L. T. 649; or where there is evidence of a notorious custom in the trade. *Ex parte Wingfield, In re Florence* (1879), 10 Ch. D. 591, 40 L. T. 15, — showing that reputation of ownership was excluded. Where chattels had been assigned by way of mortgage, and the mortgage deed provided for possession by the mortgagor until certain events had happened, this was a sufficient consent to bring the case within the reputed ownership clause. *Freshney* v. *Wells* (1857), 1 H. & N. 653, 26 L. J. Ex. 129; *Spackman* v. *Miller* (1862), 12 C. B. N. S. 659, 31 L. J. C. P. 309. An unregistered assignment of furniture for value by a husband to a trustee in trust for a wife for her separate use was held not to exclude the reputed ownership clause, where the furniture remained in the house occupied by the husband and wife. *Ashton* v. *Blackshawe* (1870), L. R., 9 Eq. 510, 39 L. J. Ch. 205, 21 L. T. 197.

A bill of sale duly registered under the Bills of Sale Act 1878 (41 & 42 Vict. c. 31), s. 20, excluded the reputed ownership clause, but this has been repealed by the Bills of Sale Act 1882 (45 & 46 Vict. c. 43), s. 15, with a saving as to past transactions. The reputed ownership clause has been given effect to in favour of the trustee in bankruptcy of an acting partner as against the dormant partner. *Ex parte Enderby, In re Gilpin* (1824), 2 B. & C. 389, see p. 123, *post*.

The words "in his trade or business" have been held to exempt goods in the possession of a person who carried on a farm for pleasure, although he derived a profit from the farm. *Ex parte Sully, In re Vallis* (1885), 14 Q. B. D. 950, 52 L. T. 625. The importance of the words "in his trade or business" is again insisted on in *Ex parte Nottingham, &c. Bank, In re Jenkinson* (1885), 15 Q. B. D. 441, 54 L. J. Q. B. 601.

The words "under such circumstances that he is the reputed owner thereof" will be more particularly considered under *Ex parte Watkins, In re Couston*, the next case.

No. 6. — Ex parte WATKINS. In re COUSTON.

(ch. 1873.)

RULE.

Reputed ownership is excluded by a notorious custom of the trade, in goods of the nature in question, to leave goods purchased in the possession or under control of the vendors until required by the purchaser.

Upon proof of a custom in the wine and spirit trade, well known to persons concerned in that trade, to leave purchased goods in a bonded warehouse under the control of the vendors, held that the custom excluded reputed ownership in regard to goods so purchased and left.

Ex parte Watkins. In re Couston.

42 L. J. Bank. 50–55 (s. c. L. R. 8 Ch. 520; 28 L. T. 793; 21 W. R. 530).

[50] This was an appeal from a decision of the Chief Judge in Bankruptcy reversing a decision of the County Court Judge at Liverpool.

Messrs. Couston & Co. were wine and spirit merchants at Liverpool, Leith, and Leeds. On the 16th of February, 1872, they sold

to Mr. Watkins, a wine merchant at Worcester, some casks of whisky, which were then lying in their bonded warehouse at Leith. An invoice was sent to him, in which the casks were described by mark and number. He accepted a six months' bill of exchange for the price which he paid at maturity. After the purchase the whisky was transferred in the bond and stock books of the vendors into the name of Watkins. It was on the 23rd of February removed to Liverpool and placed in the vendors' own bonded warehouse there, and a delivery warrant for it was sent to Watkins. On the 26th of February, 1872, Messrs. Couston & Co. filed a petition for liquidation by arrangement. The whisky was at that date still in their bonded warehouse, and the trustee under the liquidation claimed it under the 15th section of the Bankruptcy Act, 1869, subs. 5, as being in the possession, order or disposition of the bankrupts by the consent of the true owner. The evidence showed that there is a long-established and well-known custom in the spirit trade at Liverpool for a purchaser after he has bought goods to leave them in the vendor's bonded warehouse, or in a neutral bonded warehouse subject to the vendor's order, in the vendor's name, till the purchaser requires the goods for use, he paying to the vendor a small rent for the use of the warehouse.

Messrs. Couston & Co. were not general warehousemen, but they kept the whisky, sold to Mr. Watkins, in their bonded warehouse in accordance with this custom, and it was under these circumstances that * it was in their possession at the date of [* 51] the liquidation.

The County Court Judge at Liverpool held that the liquidating debtors were not, when the petition was filed, the reputed owners of the whisky which Mr. Watkins had bought; and ordered the trustee to deliver it up to him. Upon appeal to the Chief Judge this decision was reversed on the ground that the custom of a particular trade, not shown to be notorious to the public at large, is not enough to exclude the doctrine of reputed ownership. The case is noted in 8 Not. Cas. 25, *nom. Ex parte Bolland.* From this decision Mr. Watkins appealed.

Mr. Herschell and Mr. Wheeler for the appellant. — The whisky being left in the bonded warehouse of the debtors in accordance with a well-known custom of the trade was not in their possession, order, or disposition as reputed owners. *Joy* v. *Campbell,* 1 Sch. & Lef. 328, 336; 9 R. R. 39; *Watson* v. *Peache,* 1 Bing. N. C. 327;

1 Scott, 149; 4 L. J. (N. S.) C. P. 49; *Hamilton* v. *Bell*, 10 Ex. Rep. 545; 24 L. J. Ex. 45; *Load* v. *Green*, 15 M. & W. 216; 15 L. J. Ex. 113; *Acraman* v. *Bates*, 2 E. & E. 456; 29 L. J. Q. B. 78; *Trismall* v. *Lovegrove*, 10 W. R. 527; s. c. *nom. Prismall* v. *Lovegrove*, 6 L. T. N. S. 329; *Priestley* v. *Pratt*, L. R., 2 Ex. 101; 36 L. J. Ex. 89.

Mr. Benjamin and Mr. Potter, for the trustee in liquidation, contended that, the custom being confined to the particular trade, knowledge of it could not be imputed to the general public. *Thackthwaite* v. *Cock*, 3 Taunt. 487; 12 R. R. 689; *Knowles* v. *Horsfall*, 5 B. & Ald. 134; *Ex parte Marrable*, 1 Glyn & J. 402.

Without hearing a reply —

The Lord Chancellor said: The principle of law applicable to the subject is well expressed in the preamble to the reputed ownership clause in the old Bankruptcy Act of 21 James I. cap. 19: "For that it often falls out that many persons before they become bankrupt do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own." It particularly contemplated the case of a person selling goods which were afterwards permitted by the purchaser to remain in the vendor's possession, so that other persons would give him credit on the presumption that the ownership of the goods had not been changed.

That being the principle, two things really are necessary to bring any case within it. In the first place, it is necessary that the goods should be at the time of the bankruptcy in the possession, order, or disposition of the bankrupt; and next, as a matter of fact, that he should have the reputed ownership arising from that circumstance; but there is no inflexible rule of law that because a man was once the owner of goods which he has sold, if he remains in possession of them he is the reputed owner; the statute does not say that, but only that if he remains in possession with the reputation of ownership the property shall pass to his assignees; it is always a question of fact whether or no he is in such possession.

The next question is what are the principles applicable to the determination of this question of fact. A great deal of ingenious argument seems to me to have proceeded on a fallacious notion as to what is meant by the expression "known to the public." The doctrine of reputed ownership when it is proper to be applied does not really require any investigation into the actual state of knowledge or belief existing in the minds of creditors, and still less of the out-

side world who are not creditors at all, as to the ownership of particular goods. It is enough for the doctrine if those goods are in such a situation as to carry with them to those who do know their situation the reputation of ownership; that is, to carry that reputation, by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known, to those who choose to inquire and inform themselves upon the subject.

* It is not, as I said, at all necessary to examine the de- [* 52]
gree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what would or might be legitimately the reputation arising from that situation to those who knew the particular facts, — I do not mean the facts that are only known to the parties who are dealing with the goods, but such facts as are capable of being and naturally would be the subject of general knowledge, — to those who take any means to inform themselves of those things which are not confined to the knowledge of the individuals who are dealing. So on the other hand it is not at all necessary, in order to exclude reputation of ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods one way or the other. It is quite enough in my judgment if the situation of the goods was such as, with respect to those who knew anything about it, to exclude any legitimate ground for inferring ownership.

Now, if those be the sound principles, how stands the present case? It is conceded, and must be on both hands, that if the bankrupts had carried on the ordinary trade and business of general warehousemen the persons dealing with them who might become holders of their goods, and creditors in any way whatever, those knowing nothing at all about the particular property of any of the goods in their warehouse, whether they were their own, or ever had been their own, or anybody else's, whether they had passed by purchase from them to others, or whatever else might be the history of the goods, the creditors knowing nothing at all about the particular goods in the warehouse; if they had been general warehousemen they would have no right whatever to say that the goods were in the reputed ownership of the bankrupts, because if they troubled themselves to inquire into the matter the information they would have received would have been, the goods were in the warehouse,

which warehouse was kept by the bankrupts as general warehousemen, that is to say, for the reception of other people's goods as well as their own. In such a case it will not be disputed that it would have made no difference whatever if some of the goods in that warehouse, and actually warehoused there for the proprietor for the time being (the real owner for the time being), had been previously the goods of the bankrupts and had been sold by them to the real owner. It is, I think, clear on the evidence that these bankrupts were not general warehousemen; but when we look at the custom of their business, as it is apparently clearly proved, it seems to me that though not general warehousemen, they were warehousemen for such of their customers as purchased wines and spirits from them, and that that was the course and usage of their business, the proper course and ordinary usage of their business, carried on according to that course and usage upon a very large and considerable scale; so that we are told the present question relates to very large values of property in a like situation to the property which is the subject of this immediate controversy. Is there anything at all in such a custom tending to mislead the general public or the persons having dealings with them providing it be known? I put the case in the course of the argument, suppose that they had made such a course of dealing known by putting up a board over the door, and saying on that board distinctly, "This warehouse is kept by the firm for the purpose of warehousing therein their own goods and the goods of their customers who have bought from them and who desire to keep the goods in this warehouse." Had such a notice been put over the door, I suppose it would not seriously have been contended that anybody would be entitled to say that the fact of goods being in that warehouse carried with it a reputation of ownership in the bankrupts. The goods, according to the course of trade, were, at some time or other, their property, but nobody has a right to draw an inference from the fact of goods lying in a particular warehouse belonging to the bankrupt that they are his goods, if on the front of that warehouse the fact is stated that it contains also the goods of other people; and in that case, though [* 53] the * notice does not distinguish the goods or go into their history, yet everybody being aware that there are the goods of other people there, is bound to know that any particular goods may be the goods of other people, and cannot possibly say that the reputation of ownership of all the goods is in the bankrupts. That

was rightly laid down, if I rightly understand the case, by Sir JAMES MANSFIELD in the case cited of *Thackthwaite* v. *Cock*. It was there said that if the facts are such that those who know anything about the reputation, about the circumstances which create the reputation, one way or the other, know the goods may or may not be the property of the bankrupts, that is quite enough to exclude the doctrine of the reputation of ownership.

That being so, the sole question surely is, that being a question of fact, whether that course of trade, that custom of this particular business, is so well known as to make the reputation applicable to these goods, the reputation of goods subject to such a custom and course of trade; because if it were, the knowledge of that custom is just equivalent to the knowledge of the announcement which a board over the door would have given. If the board had been over the door, all the world would not have gone to read it, nor would the holder of promissory notes; but any one who had troubled himself to ascertain the facts would have ascertained the character of that warehouse, which he ought to have done before he could say that he is to have the benefit of any goods arising from the fact of their being in that warehouse. A custom known to the whole trade and to all persons dealing with the trade, surely is as well, and perhaps better advertised than it would be by a notice over the door. The evidence in this case is distinct that this particular custom is an old well-established custom, not of this individual firm but of the whole trade, which is merely carried on by this firm in common with others; and that this long-established and general custom is well known to all the persons in the trade, and also, in point of fact, in this particular case known to all the parties who had been dealing with this firm. It seemed to me no evidence could be more completely sufficient, if we are not bound by any contrary authority, to show that every person who took the trouble to acquire any knowledge of those facts on which the reputation of ownership connected with the lying of the goods in this particular warehouse — a bonded warehouse — must depend, any such person must have become informed of this custom. On the evidence I think we ought to take it that everybody was informed, and it is to be observed that this is not the least like a case of goods in a retail shop. These are goods in a bonded warehouse, which can have no reputation of ownership at all connected with them in a general way, except such reputation as is to be inferred

from the character of the bonded warehouse and the business carried on in it, so that no one has a right to say with regard to such goods that there is such a reputation connected with them, except the reputation which they acquire from the course of the business and the persons to whom that property so belongs. An individual might have been deceived if the bankrupts had been fraudulent, but an individual could only have been deceived by the bankrupts going and taking the man and showing him the goods as their own. This would not happen in the course of such a business as this, and it can constitute no part of the reputation of owner.

With regard to the authorities cited, I do not propose to dwell much upon them. I do not look on the cases cited as so important as some others. It seems to me that in those cases the principles on which the custom was held material, and the principles which were applied to the evidence of the character of the custom, were sound in those cases, and equally sound in other cases like the present. The cases directly in point are, first of all, *Knowles* v. *Horsfall*, which has been evidently regarded with some degree of dissatisfaction by Judges of later date. The learned Judge who reported it expressed regret that he had ever done so, because it turned on the particular manner in which the facts were stated, and it appeared, when carefully examined, that, though [* 54] there was a custom mentioned in the special case, it * was a custom, perhaps intentionally stated, with a view of covering not only the case of the goods in the warehouse of the vendors, but also the goods in the warehouse of other people, which were left in the vendor's name without any notice to the warehousemen. The statement of the custom was left vague and general, and was not stated as a custom applicable to the business of the vendor considered as a person who kept a bonded warehouse himself; in fact, there was no statement such as I collect from the evidence in this case, as to the particular course of the business of wine and spirit merchants having bonded warehouses of their own. It may be said that the custom was stated so generally that it might have been inferred that it would extend to those cases. It was not stated specifically with reference to them, and this has been pointed out in subsequent cases. In *Watson* v. *Peache*, it was stated that no usage was proved in *Knowles* v. *Horsfall*, and I think it is so stated in other cases. *Thackthwaite* v. *Cock* is not

only not an authority for the respondents, but just the reverse, as it appears to me. The actual usage proved there was usage, the purpose and intention of which was to continue reputation of ownership in the vendor. It is not wonderful that under these circumstances it was held that the reputation of ownership did continue. What was said by Sir JAMES MANSFIELD shows, as I understand him, that on such evidence of custom as we have here, he would have held the reputation of custom to be proved. In *Hamilton* v. *Bell* and *Priestley* v. *Pratt* the express point seems to be decided. I am totally unable to distinguish this case from those cases unless there be shown to be some principle in the difference between wine on the one hand and clocks and lambs on the other, which nobody can seriously suggest.

Then there are other cases in which the Courts have shown a decided inclination to reduce within limits appearing to them to be more consistent with the sound and reasonable view of the doctrine, some of the *dicta* or views which are to be found in the earlier cases. I should not, I confess, like to commit myself offhand to the strong language reported in the Law Times to be used by Sir F. POLLOCK in *Trismall* v. *Lovegrove*, in which he said, during the argument, that the old doctrine of reputed ownership, as formerly understood, was out of fashion and had been for forty years. I confess it would be more in accordance with my opinion to say that the doctrine of reputed ownership has been the same from first to last, but the Courts have of late years looked more narrowly and closely to the real value and weight of the circumstances which tend on the one hand to confirm, and on the other to exclude the reputation of ownership. In so doing, they seem to me not to be going against the policy of the statute, but merely to be carrying it into effect in accordance with sound principle. Taking that view, I am of opinion that the present appeal must be allowed.

MELLISH, L. J. I am of the same opinion. With regard to the authorities, all the later cases have been strongly in favour of the proposition that a custom of this kind will exclude the doctrine of reputed ownership, and it appears to me that those cases have been rightly decided on principle. The question to be decided here is a very simple one, viz., were the bankrupts at the date of the bankruptcy the reputed owners of these goods? That must mean reputed by those who had dealings with them in the course of their trade, and it appears clear to me that they were not so. The

section 15 in the present Bankruptcy Act still applies exclusively to traders, showing that it was trade creditors who were intended to be protected, and I cannot agree with Mr. Benjamin's argument, that persons buying or discounting the bills of traders do not know the customs of their trade. Generally, I should think, they know them better than any one else. Country bankers know the customs amongst farmers, bankers at Liverpool know the customs of the cotton trade, and no doubt they know those of the wine trade equally well. As a question of fact, I am decidedly of opinion that the bankrupts were not the reputed owners of these goods at the time of the bankruptcy.

[* 55] * I think it is very desirable that as far as possible the law should be in accordance with the customs of trade. If it were in conflict with those customs, great injustice would be constantly inflicted. Certainly if *Knowles* v. *Horsfall* proves nothing else it proves that the custom in the present case has existed for at least fifty years, and it would be most unjust if merchants who, in accordance with the ordinary course of trade, have allowed their goods to remain in the bonded warehouses of the bankrupts after they have purchased them, the fact being in all probability known to every single creditor, should have those goods taken from them to be divided amongst the creditors who have been in no way deceived and could not be deceived by the goods remaining in the possession of the bankrupts. The appeal must be allowed, and the appellant will have his costs out of the estate.

ENGLISH NOTES.

The principle of *Ex parte Watkins* is applicable although the goods are in the hands of third parties. *Ex parte Vaux, In re Couston* (Ch. App. 1874), L. R., 9 Ch. 602, 43 L. J. Bank. 113, 30 L. T. 739. In *Ex parte Wingfield, In re Florence* (C. A. 1879), 10 Ch. D. 591, 40 L. T. 15, upon the evidence, the Court came to the conclusion that possession of a horse by a horse-dealer did not import that he was the owner of it. The Court will now take judicial notice that furniture in an hotel is frequently the subject of a hiring agreement; and as to such furniture the reputed ownership clause is excluded. *Crawcour* v. *Salter* (C. A. 1881), 18 Ch. D. 30, 51 L. J. Ch. 495, 45 L. T. 62. It is notorious that "malting agents" are in many instances not the owners of the barley and malt on their malting premises. *Harris* v. *Truman* (C. A. 1882), 9 Q. B. D. 264, 51 L. J. Q. B. 338, 46 L. T. 844.

The goods must be connected with the business carried on by the bankrupt. *Ex parte Lovering, In re Murrell* (C. A. 1883), 24 Ch. D. 31, 52 L. J. Ch. 951, 49 L. T. 242.

As to the rule in the case of partnership, *Ex parte Cook*, etc., Nos. 10 & 11, p. 123, *post*.

Section V. — *Fraudulent Preference.*

No. 7. — BROWN *v.* KEMPTON.

(EX. CH. 1850.)

No. 8. — Ex parte BLACKBURN; In re CHEESEBOROUGH.

(BANKRUPTCY, 1871.)

RULE.

In order that a payment to a creditor may be a "fraudulent preference" within the principle of the bankrupt law, the payment must be both voluntary and made in contemplation of bankruptcy. If the payment is made under the pressure and importunity of the creditor, it is not "voluntary," although the desire to favour the particular creditor enters, as a mixed motive, into the transaction.

The clauses of the later Acts of 1869 (s. 92) and 1883 (s. 48) have made no change as to the former criterion, — that of the payment being voluntary; but they have, in effect, constituted the facts of the debtor being at the date of the transaction unable to pay his debts and of his being adjudged bankrupt within three months, conclusive evidence of the latter, — namely, of the payment being made in contemplation of bankruptcy.

Brown v. Kempton.

(19 L. J. C. P. 169–170.)

This was an action of assumpsit in the Court of Common Pleas for money had and received, brought by the plain- [169]

No. 7. — Brown v. Kempton, 19 L. J. C. P. 169.

tiffs as assignees of Tanner & Ward, bankrupts, to recover a sum of £430 paid by the bankrupts to the defendant, who was a creditor of the bankrupts to that amount.

The assignees alleged that the payment was a fraudulent preference of the defendant made in contemplation of bankruptcy. It appeared that several creditors of the firm had applied to the bankrupts for payment of their debts, and had not been paid, but that the defendant who had applied for payment of his debt later than the other creditors had received payment.

On the trial, before WILDE, C. J., in London, on the 20th of February, 1849, the learned Judge directed the jury, — First, that if the bankrupts were induced to make the payment by the importunity and pressure of the defendant, the verdict should be for the defendant. Secondly, that if the bankrupts were not influenced by the importunity and pressure of the defendant to make the payment, but acted voluntarily and with a view to give a preference to the defendant in the event of a bankruptcy, their verdict should be for the plaintiffs; and further, in explanation thereof, that if the payment was made in contemplation that a bankruptcy might take place, and with the purpose and intention of giving a preference to the defendant in that event, and of preventing a distribution of their effects according to the bankrupt laws, by securing the defendant, that would be the contemplation of bankruptcy before referred to, although the bankrupts might hope and expect that they might be able to prevent a bankruptcy taking place. Thirdly, that if the payment was made under the influence of the pressure and importunity of the defendant, and also with a desire to give a preference to the defendant in the event of a bankruptcy, their verdict should be for the defendant.

The counsel for the plaintiffs thereupon excepted to the direction, contending that the direction to the jury to find for the defendant if the motive of the bankrupts in making the payment was a mixed one, was erroneous. The jury found for the defendant.

The question as to the correctness of the ruling of the learned Judge as set forth on the bill of exceptions in the terms stated above, was argued by —

Willes, for the plaintiffs. — The learned Judge was wrong in his direction respecting the third question. When one creditor alone presses a bankrupt, and payment is made by him in consequence

of the pressure, it must be admitted that there is no fraudulent preference. But the case is different when several creditors press. Their demands may be said to neutralize each other. The same principle applies as if none of them had pressed, and then doubtless the payment would have been voluntary and void. The object of the bankrupt laws has always been to make even distribution of the effects of the bankrupt. *The Bankrupt's Case*, 2 Co. Rep. 25. The doctrine that a bankrupt may not * make [* 170] a payment by way of fraudulent preference of one creditor to another may be traced through the cases from *Harman* v. *Fisher*, Cowp. 117, in the time of Lord MANSFIELD to *Cosser* v. *Gough*, 1 T. R. 156, n., where the doctrine was settled as it now stands. The bankrupt would not have paid had there not been both an application for payment and a desire to prefer the defendant. This, it is submitted, entitled the plaintiffs to the verdict. *Cook* v. *Rogers*, 7 Bing. 438; 9 L. J. C. P. 155; *Cook* v. *Pritchard*, 6 Sc. N. R. 34; 12 L. J. C. P. 121.

[PLATT, B. In *Cook* v. *Pritchard* the jury found that the bankrupt was not influenced by the pressure.]

The motive is a question for the jury. The question put to them should have been, — whether the bankrupt would have made the payment but for the desire to prefer. The question of the pressure by the other creditors as well as by the defendant, was not brought before the notice of the jury. In *Cook* v. *Pritchard*, MAULE, J., said: "A simple demand may show that the bankrupt did not select the individual creditor. But suppose ten creditors make application for payment and nine of them are put off, might not the jury reasonably infer a fraudulent preference in favour of the tenth?"

[PLATT, B. The jury, in finding the first and second questions for the defendant, have found the fact against you, that it was not a voluntary payment.]

The definition that to be a fraudulent preference the payment must be voluntary and in contemplation of bankruptcy does not hold good as a universal proposition where there is pressure by many creditors. In 1 Christian's Bankrupt Law, 149, it is said, "Perhaps it might be held to be fraudulent if one was paid on demand after the trader had stopped or refused payment to others with the same ability to pay."

Lush, for the defendant, was not called upon.

PARKE, B. Upon this bill of exceptions it has been contended that the direction of Chief Justice WILDE was wrong. It has long been held that in order for a payment to a creditor to amount to a fraudulent preference it must be made voluntarily and in contemplation of bankruptcy, whether the latter words, "in contemplation of bankruptcy," are taken in the limited sense which I put upon them in *Morgan* v. *Brundrett*, 5 B. & Ad. 289; 2 L. J. (N. S.) K. B. 195, or in the more enlarged construction adopted by the Court of Queen's Bench in *Aldred* v. *Constable*, 4 Q. B. 674; 12 L. J. Q. B. 253. A payment is voluntary when it originates from the bankrupt himself; but if a creditor demands payment, *Mogg* v. *Baker*, 4 M. & W. 348; 8 L. J. (N. S.) Ex. 55, shows that pressure is not necessary on his part to take it out of the class of voluntary payments. No objection has been made to the direction of the learned Judge with respect to the first two questions. The second, indeed, is in accordance with the law as laid down by the Court of Common Pleas in *Cook* v. *Pritchard*, that it is not enough that there should be pressure, but that that pressure must have operated on the mind of the bankrupt in inducing him to make the payment. The only remaining question is, whether it was improper to tell the jury that their verdict ought to be for the defendant if the payment was made under the influence of the pressure and importunity of the defendant, and also with a desire to give him a preference in the event of a bankruptcy. It has been urged that if payment were made with this mixed motive the money is recoverable by the assignees. This direction, however, is in accordance with the rule, that to be a fraudulent preference the payment must be both voluntary and in contemplation of bankruptcy; that both these circumstances must concur. We have heard nothing to induce us to think that the old mode of stating the question is incorrect, and are therefore of opinion that this judgment must be affirmed. *Judgment Affirmed.*

Ex parte Blackburn. In re Cheeseborough.

L. R., 12 Eq. 358–365 (s. c. 40 L. J. Bank. 79, 25 L. T. 76, 19 W. R. 973).

[358] This was an appeal by the trustee against an order made on the 9th of May last, by the County Court Judge at Bradford, dismissing a motion by which the trustee sought to have it declared that a payment of £912 8*s.* 4*d.*, made on the 16th of August, 1870,

No. 8. — Ex parte Blackburn. In re Cheeseborough, L. R., 12 Eq. 358, 359.

by the bankrupts to Thomas P. Hitchcock, was void on the ground "of such payment being made by the bankrupts when unable to pay their debts as they became due from their own moneys, in favour of the said Thomas P. Hitchcock, with a view of giving him a * preference over the other creditors of the [* 359] said bankrupts, within three months of the date of the order of adjudication, and that such payment was fraudulent and void as against the trustee" within the meaning of the 92nd section of the Bankruptcy Act, 1869,[1] and praying for an order directing that such sum might be repaid to the trustee by the said Thomas P. Hitchcock.

The facts were as follows: —

The bankrupts carried on business in copartnership together, at Bradford, as woolstaplers, commission agents, and merchants, under the firm of W. Cheeseborough & Son, for many years prior and up to the 19th of August, 1870, on which day they stopped payment. A petition for liquidation by arrangement was immediately afterwards presented by them, and on the 9th of September, 1870, at a meeting of creditors held under the petition, it was resolved that the estate should be wound up in bankruptcy, and not by arrangement. A creditors' petition for adjudication was then presented, under which they were, on the 13th of September, 1870, duly declared bankrupts. The respondent Hitchcock was a wool merchant residing at Lavenham, in Suffolk, and had for many years been in the habit of consigning wool to the bankrupts, for sale on a *del credere* commission. Some time previously to August, 1858, the bankrupts had failed, and afterwards resumed business; and on the 30th of August, 1858, the bankrupts wrote to Hitchcock as follows: —

"Dear Sir, — You will be aware that in our former business we were accustomed to receive, through two indirect channels, half-bred hogs and down tegs collected in your district. We have,

[1] Section 92 of the Bankruptcy Act, 1869, is as follows: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same, become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration."

some time ago, resumed business as commission agents,
[* 360] and from * our old established connection with the buyers in this district, and our intimate knowledge of the trade, we believe no house is better able to serve their friends well and make the best prices current for your class of wool. Half-bred hogs are at present in very good demand, and the market is thinly supplied with them. Down tegs are less inquired for, and do not sell as well in proportion. If you send us a few sheets of such wool as you may be desirous of trying our market with, you may depend upon our best attention. Our charge would be 7*s.* 6*d.* per pack commission; and our remittances would be cash within fourteen days, less three months discount for cash."

Hitchcock, soon after, consigned wool to the bankrupts for sale on the terms of the above letter, and continued to do so until the stoppage on the 19th of August, 1870, at which time the bankrupts had a quantity of his wool on hand unsold, and which, after the bankruptcy, was treated as his property, and returned to him, or disposed of according to his orders.

It appeared from various letters, that the bankrupts communicated with, and occasionally asked for and received instructions from Hitchcock as to the prices at which the consigned wool was to be sold.

On the 16th of August, 1870, the bankrupts wrote to Hitchcock as follows: —

"Inclosed we beg to hand you cheque for £912 8*s.* 4*d.* to the credit of our account, the receipt of which please acknowledge by return of post."

In the last-mentioned letter there was inclosed a cheque for £912 8*s.* 4*d.* being the balance of the moneys received by the bankrupts on account of wools sold by them for Hitchcock, and which Hitchcock, as he stated in his affidavit, "received from them in perfect good faith, believing that it had been received by them for me as my agents in the sale of my wool, and that a large part had been so received in consequence of sales made in accordance with the directions given by me." In the same letter there was also inclosed an account which represented sales as made on the 11th, 18th, and 23rd of May, and 13th and 15th of August, and the bankrupts took credit for interest and commission upon the
[* 361] footing of * the terms of the letter of the 30th of August, 1858, as applicable to the dates of sales as appearing in the account.

Hitchcock's affidavit also contained the following statements: — "I have been informed since the bankruptcy that the sales advised to me on the 16th of August as made the previous day had really been effected during the previous months of May and June, and that the bankrupts had received bills of exchange for the wool so sold, and had discounted the same, and made use of the proceeds in their business, and I say that such dealings with my property, if they took place, were wholly without my sanction, and that I had no knowledge of the receipt of such moneys, and at the time I received that account I believed it to be correct as to dates and other particulars. I had no occasion to suspect the contrary. I had no knowledge of the position of the bankrupts at the time I received the cheque in question, and I believed them to be highly respectable and responsible men; and relying on their integrity, I intrusted them with my wool to sell for me, and I received the cheque for £912 8*s.* 4*d.* in perfect good faith, as being the proceeds of part of the wool I had intrusted to them to sell for me. At the time I received this cheque for £912 8*s.* 4*d.*, I had no immediate necessity for sending more wool for sale, but I had a large quantity of wool remaining in the hands of the bankrupts as my agents, and I should have left the same with them for sale if it had not been for their stopping a few days afterwards."

It was urged on the part of the appellant that, by the usage of the Bradford market, where the factor is intrusted to sell on a *del credere* commission, the proceeds of the goods, when sold, become the property of the factor, although the goods, as long as they remain *in specie*, are the property of the consignor, and affidavits were filed in support and against this alleged custom.

Mr. De Gex, Q. C., and Mr. Robertson Griffiths, for the appellant: *Primâ facie*, this payment was a fraudulent preference, as it was made by the bankrupts when their affairs were in a hopelessly insolvent condition. The learned Judge thought that on two grounds the payment must be supported: first, that the relation of principal and factor was established between Hitchcock and the *bankrupts; secondly, that the bankrupts did not [*362] think that they were hopelessly insolvent. As to the first objection, the evidence shows that the factor treated the wool as his own, that he paid the money received on the sale of it into his own account, and *Ex parte White*, L. R., 6 Ch. 397, 40 L. J. Bank. 73, shows that in transactions similar to this the so-called factor

is in reality a purchaser from his consignor. The custom of the Bradford market shows that a wool factor always treated the money received from the sale of wool as his own. If the factor is paid by a bill, he discounts the same, which he would not be at liberty to do if he was merely a factor. If the relation of trustee and *cestui que trust* did exist, none of the moneys can be traced, and a debt arising from a breach of trust is on the same footing as any other debt under the bankruptcy law. *Wilson* v. *Balfour*, 2 Camp. 579.

As to the second objection, it is immaterial whether the payment was made in contemplation of bankruptcy or not, as by sect. 92 of the Bankruptcy Act, 1869, it is enacted that the payment shall be deemed fraudulent and void as against the trustee if bankruptcy occur within three months. Robson on Bankruptcy, page 118. If, however, it is still necessary to consider whether or not it was made in contemplation of bankruptcy, we must be guided by the principles of the old law, by which this payment would clearly be considered as being so made. *Nunes* v. *Carter*, L. R., 1 P. C. 342, 36 L. J. P. C. 12; *Gibson* v. *Boutts*, 3 Scott, 229; *Aldred* v. *Constable*, 4 Q. B. 674, 12 L. J. Q. B. 253; *Marshall* v. *Lamb*, 5 Q. B. 115, 13 L. J. Q. B. 75. If the exception at the end of the 92nd section is to be construed in its widest meaning such a thing as a fraudulent preference, as formerly known, could hardly exist. Nearly every payee is ignorant of the state of his debtor's affairs, and the words "in good faith" must be extended to the payer, and "valuable consideration" must be taken to mean present and not past consideration, which would be available to the other creditors.

Mr. Little, Q. C., and Mr. Winslow, for the respondent, were not called upon.

[*363] *Sir James Bacon, C. J., after stating the nature of the application and the decision of the County Court Judge, continued: —

Although the Bankruptcy Act, 1869, is the first statute which contains an express and direct enactment upon the subject which has long been known and called and dealt with by the name of "fraudulent preference," and although that statute lays down the law in phrases not used in the preceding statutes, I have no reason to think it introduces in effect any new principle applicable to the subject. Before that Act it was necessary, in order to constitute fraudulent preference, that two things should concur,— the payment must have been voluntary on the part of the debtor, and it

must have been in contemplation of bankruptcy. With respect to the first of these conditions, the current of the more recent decisions had established that an earnest request by a creditor, although not accompanied by a threat or remonstrance or very positive demand, would be enough to deprive the payment of that voluntary character which would tend to make it impeachable; and with regard to the second, that where a man was in such a hopeless state of insolvency as that it was impossible for him to satisfy his creditors or to carry on his business, he must be held to have contemplated bankruptcy; and upon these principles it was that juries, before whom such questions commonly arose, were directed by the Judges to consider whether, upon the facts proved, the just inference was that a fraudulent preference had been made or intended by the debtor. There are very numerous cases in which the question has been raised, and the circumstances have been various, and frequently complicated and nice; but in all of them the principles I have adverted to have regulated the decisions.

It has, however, never, that I know of, been suggested that a payment in the ordinary course of trade, the honouring bills of exchange presented at their maturity, or the payment of debts which had become due in the usual and customary manner, or payments made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time, were open to any objection on the ground of their being voluntary, even although they were made without any express demand by the creditor, unless, indeed, the creditor had at the time notice of an act of bankruptcy committed by the debtor. To hold otherwise would be to embarrass * and impede the most ordinary every-day tran- [* 364] sactions of commerce, and to make it impossible for creditors to know when the payments received by them in good faith and in common course could be maintained by them or not.

It is, however, necessary to consider the express provisions of the Bankruptcy Act, 1869. The 92nd section provides that every payment made by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, with a view of giving such creditor a preference over the other creditors within three months of the person so paying becoming bankrupt, shall be deemed fraudulent and void as against the trustee in bankruptcy.

If the clause stopped there, it no doubt gets rid of any question which can be raised respecting the "contemplation of bankruptcy,"

the solution of which had sometimes created considerable difficulty. The only condition prescribed by the statute in this respect is, that the debtor be "unable to pay his debts as they become due from his own moneys," and this, be it observed, is applicable to debtors generally, whether in trade or not. But, then, it adds another qualification or condition, which is the very life and essence of the enactment, the payment so made must, in order to be void, be made "in favour of any creditor with a view of giving such creditor a preference over the other creditors." So that unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor. The act of the debtor is alone to be considered — the object and purpose for which the payment is made can alone be inquired into — and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be carefully investigated, yet if the act done can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, then I conceive neither the statute, nor any principle of law or policy, will justify a Court of Law in holding that the payment is fraudulent or void. And that this must be so is, in my judgment, rendered still more plain from the subsequent provision in the same clause; for the first part of the
[* 365] section having * dealt only with the act and motive of the debtor, it is provided that the enactment making void the payment "shall not affect the rights of a payee in good faith and for valuable consideration," a provision which was obviously just, and not more just than necessary, in order to avoid the inconveniences which would arise in the commercial world, and even beyond its pale, if persons receiving payment of their just demands received such payment at the risk of having to refund it in consequence of the improper motive actuating their debtor, but of which motive they had no cognizance, and in which they had in no degree participated.

The suggestion of a local custom at Bradford, by which the wool-broker became the principal, and was entitled to sell the wool as his own, to deal with the proceeds as his own, and so to free himself from the contract upon the faith of which he had been intrusted by the consignee with the goods, in my opinion wholly

fails of proof as a binding custom. But if the custom had been established, it would not have affected the question; for the appellant does not dispute that in the course of the dealing the bankrupts became indebted to Mr. Hitchcock in that amount which they paid him on the 16th of August; and I agree with the learned Judge that the case of *Ex parte White*, L. R., 6 Ch. 397, 40 L. J. Bank. 73, lately decided by the Lords Justices, and now under appeal to the House of Lords, has no application whatever to the case now under discussion. All that their Lordships decided in that case was, that Nevill was debtor to Towle for the goods which had been consigned to him for sale, and, as a consequence, that Towle could not claim as a creditor against the firm of Jourdan & Co., into whose hands the proceeds of the goods sold by Nevill had been paid. No such question arises here; but the only contention on the part of the appellant is, that the bankrupts, the sole debtors to Hitchcock, have made a payment in respect of that debt, which the statute declares to be fraudulent and void. The appeal must, therefore, be dismissed with costs.

ENGLISH NOTES.

The provisions of the Bankruptcy Act 1883 with respect to fraudulent preferences are contained in section 48: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same, is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy." There is no relation back to the presentation of the petition or prior act of bankruptcy, where a debtor is adjudged a bankrupt under the provisions of the Bankruptcy Act 1890 (53 & 54 Vict. c. 71), s. 3 (15), by reason of a composition scheme falling through. *Ex parte McDermott, In re McHenry* (C. A. 1888), 21 Q. B. D. 580, 36 W. R. 725.

It is essential that the person obtaining a benefit should be in the strictest sense a creditor. *Ex parte Kelly & Co., In re Smith, Fleming & Co.* (C. A. 1879), 11 Ch. D. 306, 48 L. J. Bank. 65, 40 L. T. 404; *Ex parte Stubbins, In re Wilkinson* (C. A. 1881), 17 Ch. D. 58,

50 L. J. Ch. 547, 44 L. T. 877; *Ex parte Taylor, In re Goldsmid* (C. A. 1886), 18 Q. B. D. 295, 56 L. J. Q. B. 195. The Court must find as a fact that there was an intention to give a preference to the creditor. *Ex parte Taylor, In re Goldsmid* (*supra*). An actual sale of goods for money, with which the debtor intends to make a payment which can be set aside under this section, cannot be impeached, although the purchaser knows that to be the intention of the debtor. *Ex parte Stubbins, In re Wilkinson, supra.*

Where a creditor insists upon a payment or security, as a condition to the supply of goods upon a fresh credit, the payment or security cannot be set aside as a fraudulent preference, *Ex parte Topham, In re Walker* (Ch. App. 1873), L. R., 8 Ch. 614, 42 L. J. Bank. 57, 28 L. T. 716; and it is immaterial that goods have not been supplied under the arrangement (s. c.). It has to be determined, as a question of fact, whether or not the real, dominant, or substantial object of the debtor was to give a preference. *Ex parte Griffith, In re Wilcoxon* (C. A. 1883), 23 Ch. D. 69, 52 L. J. Ch. 717, 48 L. T. 450; *Ex parte Hill, In re Bird* (C. A. 1883), 23 Ch. D. 695, 52 L. J. Ch. 903, 49 L. T. 278; *Ex parte Lancaster, In re Marsden* (C. A. 1883), 25 Ch. D. 311, 53 L. J. Ch. 1123, 50 L. T. 223; *Ex parte Taylor, In re Goldsmid* (C. A. 1886), 18 Q. B. D. 295, 56 L. J. Q. B. 195; *Ex parte Gaze, In re Lane* (1889), 23 Q. B. D. 74, 58 L. J. Q. B. 373; *Ex parte Tweedale, In re Tweedale* (1892), 1892, 2 Q. B. 216, 61 L. J. Q. B. 505. The threat of legal proceedings is not *per se* sufficient pressure. *Ex parte Hall, In re Cooper* (C. A. 1882), 19 Ch. D. 580, 51 L. J. Ch. 556, 46 L. T. 549. Possession of chattels given to the grantee of a bill of sale to prevent the operation of the reputed ownership clause is not a conveyance or transfer of property within the section. *Ex parte Symmons, In re Jordan* (C. A. 1880), 14 Ch. D. 693, 43 L. T. 106.

The Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 92, which corresponded with the 48th section of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), above set out, provided that the section should not affect "the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration." These words were held to apply to a creditor, and not merely to a transferee of the creditor; and accordingly a creditor, who had received a payment under discount and rebate for goods supplied before the credit had expired, but without knowledge or suspicion of the true state of the vendee's circumstances, was held to be protected. *Butcher* v. *Stead* (H. L. 1875), L. R., 7 H. L. 839, 44 L. J. Bank. 129, 33 L. T. 541. The language of the corresponding proviso in the Bankruptcy Act 1883 is probably intended to incorporate the effect of this decision. It runs: "This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

No. 9. — Tomkins v. Saffery. — Rule.

AMERICAN NOTES.

A preference by the debtor, to be void under the Bankrupt Act, must be the voluntary act of the debtor, and not arise in consequence of any previous agreement with his creditor for security. *Smoot* v. *Morehouse*, 8 Alabama, 370; 42 Am. Dec. 644.

The doctrine of the principal case was advanced in *Crawford* v. *Taylor*, 6 Gill & Johnson (Maryland), 323; 26 Am. Dec. 579, under the Insolvency Act, the Court observing that the creditors "did afterwards demand it" (the loan), "and were urgent and pressing for payment, and prescribed the particular mode and the particular time for the redemption of his pledge, neither the time nor the mode being inconsistent with his ability or his obligation. . . . A man may yield more readily to the solicitation of a creditor to whom he is under peculiar pecuniary obligations. . . . But there is not in the whole testimony one solitary fact that goes to show that he ever moved in the matter, or suggested to him the necessity of making a demand upon him; nor indeed is there the least evidence of his intention to do this, or any other act which should make it necessary for him to discontinue his business and trade, or to diminish its extent, until the appellants required of him the delivery of so much of his stock of goods as was necessary to discharge their claims. . . . The creditor is entitled to use vigilance and obtain security, as well before as after the debt is payable, etc." See *Woodbury* v. *Bowman*, 14 Maine, 154; 31 Am. Dec. 40. See also *Dow* v. *Sargent*, 15 New Hampshire, 115; 41 Am. Dec. 684, in which the solicitation of the creditor was an ingredient.

The doctrine of pressure is repudiated in *Rison* v. *Knapp*, 1 Dillon (U. S. Circ. Ct.), 186; *Re Batchelder*, 1 Lowell (U. S. Circ. Ct.), 373; *Denny* v. *Dana*, 2 Cushing (Mass.), 170; *In re Jackson Iron M. Co.*, 15 Bankruptcy Register (U. S. Circ. Ct.), 444.

No. 9. — TOMKINS *v.* SAFFERY.

(H. L. 1877.)

RULE.

WHERE a member of the Stock Exchange, being unable to meet his engagements there, makes a formal declaration to the proper officer of the Society, having the effect, according to the rules of the Society, that he is called upon to pay, and does pay, a sum of money forming a large part of his available assets to that officer. This was held, upon an ensuing bankruptcy, a fraudulent preference, and the money ordered to be paid over to the trustee for distribution in the bankruptcy.

No. 9. — Tomkins v. Saffery, 3 App. Cas. 213, 214.

Tomkins v. Saffery.

3 App. Cas. 213-238 (s. c. 47 L. J. Bank. 11; 37 L. T. 758; 26 W. R. 62).

[213] This was an appeal against a decision of the Court of Appeal in Bankruptcy, by which the appellants, the two [* 214] assignees officially * appointed under the authority of the committee of the Stock Exchange in the matter of J. E. Cooke, a defaulter on the Stock Exchange, were ordered to pay over to the respondent, the trustee in bankruptcy of Cooke's estate, a sum of £5000.[1]

Cooke had been for some years a member of the Stock Exchange. On the 27th of April, 1876, being severely pressed by his Stock Exchange engagements, he wrote to the secretary of the Stock Exchange announcing his inability to meet these engagements.

There is a body of rules regulating the conduct to be observed under such circumstances by members of the Stock Exchange, and by one of these rules two of the members are annually appointed to act, upon any declaration of default, as assignees of the defaulting member, to obtain his books and statement of accounts, and to attend, and require him to attend, the meetings of his creditors. In 1876 the two gentlemen, now appellants, held that office. On receiving Cooke's declaration of default they gave notice of it to the Bank of England, where he kept his banking account. On the 27th of April they held a meeting of the Stock Exchange creditors of Cooke; he attended, his own accounts were produced, and Cooke was asked, among other things, if he did not owe money to other people, and especially to his father-in-law, Mr. Mackenzie. Cooke then said that he had no liabilities outside the Stock Exchange, and that the various sums of money he had

[1] 4 Ch. Div. 555; 46 L. J. Bank. 34, *nom. Ex parte Saffery, In re Cooke*: where the rules of the Stock Exchange on this subject are fully set out. It is sufficient here to state the effect of some of them: —

16. A member may be expelled or suspended by a decision of the committee of the Stock Exchange.

142. A member unable to fulfil his engagements may, by the committee, be declared a defaulter.

143. On such declaration he ceases to be a member.

148. Creditors for differences have a prior claim on all differences received by the defaulter's estate.

153. The committee will not recognise any payment or claim that does not arise from a Stock Exchange transaction.

The committee may re-admit a defaulter, and the 156th, 163rd, and 164th rules describe the circumstances under which re-admission may take place.

167. "The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible."

received from Mr. Mackenzie were gifts. The Stock Exchange creditors consented to receive a composition. Cooke asserted the possession of property amounting to £8000, and was required to * give to Mr. Tomkins a cheque on the Bank [* 215] of England for £5000, as a sum to rather more than that amount was there standing to his credit. He did so, and the appellants (attended by Cooke's clerk) received the money. They received it on behalf of Cooke's Stock Exchange creditors, and afterwards apportioned it among them.

On the 13th of May Cooke filed a petition for liquidation in the London Bankruptcy Court, and on the 1st of June he was adjudicated a bankrupt. In the meantime he had admitted the existence of other debts, out of the Stock Exchange, and had acknowledged advances to have been made by Mr. Mackenzie, his father-in-law, to the extent of £107,000. The respondent, Mr. Saffery, who was appointed trustee in Cooke's bankruptcy, applied to the Bankruptcy Court for an order on the appellants to pay over to him, as trustee on behalf of the general creditors, the sum of £5000 which they had received under Cooke's cheque. The order was by the Registrar refused. On appeal to the Lords Justices in Bankruptcy, the Registrar's decision was reversed. This appeal was then brought.

Mr. De Gex, Q. C., and Mr. Herschell, Q. C. (Mr. Finlay Knight was with them), for the appellants: —

This was not an act of voluntary preference. Cooke was under pressure at the moment, a pressure which he could not resist. This was not, therefore, like the case of *Wilson* v. *Day*, 2 Burr. 827, where, too, the Court went on the ground that the assignment was of all the property of the debtor. Nor was it like the case of *Harman* v. *Fisher*, Cowp. 117, where the act done was undoubtedly an act of voluntary preference. In *Hartshorn* v. *Slodden*, 2 Bos. & P. 582, a debtor gave goods out of his shop in part payment of a bond not then due, and shortly afterwards became bankrupt; but even there it was held that, under the circumstances, the act was not void as a fraudulent preference. [The Lord Chancellor: Could the agreement of the Stock Exchange creditors to get in this way all they could, defeat the rights of the general creditors?] In itself what was done here was perfectly lawful. The creditors did not get the whole of their * debts; they [* 216] assented to a composition, and they received a sum on

account of it. They had a perfect right to do so. *Van Casteel* v. *Booker*, 2 Ex. 691; 18 L. J. Ex. 9, decided that, in order to render a preference on the eve of bankruptcy valid, it was not necessary that there should be a previous threat or pressure with an immediate power of enforcing it. But here there was pressure, and there was also the power of enforcing it, as, for instance, by expulsion from the Stock Exchange. [Lord BLACKBURN: That is not legal pressure.] But the law recognises any pressure which naturally produces its effect on the mind of the debtor. An assignment, under pressure, of part of the debtor's property is not an act of bankruptcy. *Smith* v. *Timms*, 1 H. & C. 849; 32 L. J. Ex. 215. The existence of pressure makes all the difference, *Tempest's Case*, L. R., 6 Ch. 70; 40 L. J. Bank. 22; *Topham's Case*, L. R., 8 Ch. 614; 42 L. J. Bank. 57; *Brown* v. *Kempton*, 19 L. J. C. P. 169, p. 73, *ante*; and honestly yielding to such a pressure, and giving up a portion of the property, could not be treated as a fraudulent preference.

What was done did not amount to an act of bankruptcy, and the pressure was used, and the cheque obtained, before any act of bankruptcy was committed. In no way whatever did the facts of the case bring it within the 92nd section of 32 & 33 Vict. c. 71 (Bankruptcy Act, 1869).

That Act did not alter the law of fraudulent preference, and the case here being clearly not a fraudulent preference within the old law, the transaction must be treated as valid.

If all the property of the debtor had been assigned; if there had been a real *cessio bonorum*, that might have rendered the transaction invalid. But it was not so; only a part of it was tranferred. Even a promise to assign all would not have had that effect: it would not have been an act of bankruptcy. [Lord BLACKBURN: If there is a promise by a debtor to hand over the whole of the property, and at the moment a part is handed over in performance of that promise, would that amount to an act of bankruptcy?] It would not. A deed of composition did not constitute an act of bankruptcy, nor did a deed of inspection. A denuding himself of all his property in favour of a particular creditor would be an act of bankruptcy, for that would be a delaying of all the [*217] other * creditors, and perhaps it would be so if it was a colourable surrender of the part of the whole. Here there was no pretence to say that it was anything of the kind. The

notice by the Stock Exchange committee to the Bank of England had been misunderstood and exaggerated. It had none of the legal effect of a *distringas*, and it did not operate on the whole property of Cooke.

To constitute a fraudulent preference in such a case, the wrongful intentions of the debtor and the creditor must concur. *Cheesborough's Case; Ex parte Blackburn*, L. R., 12 Eq. 358; 40 L. J. Bank. 79, p. 76, *ante*. There was nothing of the kind here, everything that was done was done *bonâ fide*. The Stock Exchange creditors knew that they were creditors of Cooke. They were told, and they believed, that Cooke had no other creditors, and they fairly, and even generously, said that if he would secure them a certain proportion of their claims by way of composition, they would release him from the rest, and their doing so would have had the effect of securing his re-admission to the Stock Exchange. There was no fraud in such conduct, and it was important to him to obtain such compromise, for then he might, under one of the rules of the Stock Exchange (the 164th), be re-admitted to the body. On the principle adopted in *Edwards* v. *Glyn*, 2 Ell. & Ell. 29; 28 L. J. Q. B. 350, and on the construction given in this House in *Butcher* v. *Stead*, L. R., 7 H. L. 839; 44 L. J. Bank. 129, to the 92nd section of the Bankruptcy Act, 1869, it is clear that, there being here no fraudulent intention on the part of the creditors; no merely voluntary and spontaneous surrender of property by the debtor, but an actual pressure on him to which he was obliged to yield; the payment made by him was valid, and cannot be recalled.

Mr. Benjamin, Q. C., and Mr. Romer, for the respondents, were not called on to address the House.

The Lord Chancellor (Lord Cairns): —

My Lords, the question in this appeal is as to the right of the appellants, who are styled the official assignees of the London Stock Exchange, to retain a sum of £5000, which came into their hands under circumstances to which I shall shortly refer.

The * bankrupt Cooke was a member of the London Stock [* 218] Exchange, and in the month of April, 1876, he became unable to meet his engagements, and he then took certain steps which will have to be particularly mentioned, and as to which there is in reality no dispute of fact between the parties, because the narrative of what was done, as given by the bankrupt, tallies

in every substantial point with the narrative given in the affidavit of one of the appellants.

My Lords, what the bankrupt says is this: "On the 27th of April," 1876, "I suspended payment, not being able to meet my engagements on the Stock Exchange. On the next day, the 28th of April, which was the pay-day, I was not in the Stock Exchange room on that day at all. I was in the room on the 26th of April last, which was the first name-day. I knew then that I could not get through the settling without help, and late in the evening of that day, after business hours, I knew from my father-in-law's solicitors that he had refused to help me, and I still hoped that I might induce him or Mr. William Mackenzie, my wife's brother, and the eldest son of Mr. Edward Mackenzie, to assist me." Then in the 5th paragraph he says: "On the 27th of April I went to Mr. William Mackenzie, who (together with Mr. Cunliffe, his solicitor), had had, on behalf of his father, a long interview with me at my office on the 26th to consider the question of affording me assistance to fulfil my engagements, and he told me his father had decided not to help me farther, and had returned home to Fawley Court. This was about ten in the morning. At this meeting I asked Mr. William Mackenzie whether, if the Stock Exchange did not make me bankrupt, his father would, and he gave me to understand he would not. I then went to my office, and wrote and sent a letter to the secretary of the Stock Exchange, saying I regretted I could not fulfil my engagements. Before writing the letter I saw Mr. Parker, one of the secretaries, and told him I should have to declare myself, and I asked him if it was advisable to call together some of my largest creditors first, or to declare myself insolvent at once. Mr. Parker said it would not be right to tell one more than another, and that I had better declare myself at once. I then did so by writing the official letter before referred to, and my failure was publicly [* 219] announced * in the room in the usual way; that was at or about 11 A. M. on the 27th of April last. I did not go into the Stock Exchange room on that day, the 27th of April, and have not been in it since." In the 10th paragraph he says: "Immediately on my default being announced in the house, the usual official notice thereof was sent by the official assignees to my bankers — the Bank of England — which I am informed practically amounted to a '*distringas*' being placed on my balance.

Beyond this nothing farther occurred that I recollect, except the closing of my speculative accounts on the Stock Exchange, until I received the usual official letter from the official assignees of the Stock Exchange (Messrs. Tomkins and Lyon) requesting my attendance with my books at a meeting on that afternoon (the 27th of April)." My Lords, I pause there, I will refer afterwards to what took place at the meeting.

Mr. Lyon, one of the appellants, says: "Cooke was a member of the Stock Exchange in accordance with the rules and regulations then existing upon the Stock Exchange, and of which a copy is now produced to me marked 'A.' On the 27th day of April, 1876, the said John Edward Cooke, being unable to meet his engagements on the Stock Exchange, announced that fact, and was declared a defaulter in pursuance of the aforesaid rules. Upon the 28th day of April, 1876, a meeting of the creditors of the said John Edward Cooke was held on the Stock Exchange, at my offices, and at which meeting Mr. Charles Branch, of the firm of Messrs. Foster, Braithwaite, & Co., was appointed chairman. The debts then due by the said John Edward Cooke upon the Stock Exchange amounted to the sum of £24,790."

From these passages which I have read, I think your Lordships will have no doubt in arriving at this conclusion, that the course taken by Cooke the bankrupt was in point of fact, and was meant to be, the course pointed out by the rules of the Stock Exchange which are referred to. He was a member of the Stock Exchange, and according to its rules he obviously desired to act. These rules are put in evidence on the part of the appellants. I do not propose to refer to them because they have very recently been under the notice of your Lordships. But it is quite evident from * those rules that they are rules which, dealing with [*220] the case of defaulters, of persons unable to meet their engagements, provide that those persons are to make known the facts of their case to their creditors upon the Stock Exchange; that their estate is to become subject to the intervention and the collection of the official assignees of the Stock Exchange: that the estate is to be administered in such a way as that there may be equality between all their creditors upon the Stock Exchange, and that as soon as that operation has been performed and the estate of the defaulter made available for the equal payment of his creditors upon the Stock Exchange, the question of whether he is to be re-admitted a member

of the Stock Exchange or not is to be considered by a committee of the Stock Exchange upon certain principles, and after a certain investigation of his conduct has been gone through.

I wish, in order that I may not have to return to the subject, to say with regard to those rules, although your Lordships have not called upon the respondents to state their view of this case, that, so far as my own opinion goes, I can see nothing whatever in those rules which is deserving of any animadversion whatever. They seem to me to be judicious and business-like rules. They do not seem to me to be rules contemplating or intending in any way to warp or strain, or in any way to elude or defeat the operation of the bankruptcy law of the country, but they are rules which, from the very nature of the case, are and must be subject to one infirmity, namely, that if they are to be effectual they must be applicable to the case of a person who not merely is a defaulter upon the Stock Exchange, but who has no creditors outside the Stock Exchange: because if such a person has creditors outside the Stock Exchange, the general law of the country will step in and must step in, and will give to those creditors rights which these rules cannot take away from them, and which I am bound to say these rules do not profess to attempt to take away from them. Therefore, although everything done in the domestic forum of the Stock Exchange under those rules may be done according to the rules, and may be most wholesome in its operation for the members of the Stock Exchange, still, what is done must be subject to the rights of those who are not [*221] amenable to * the jurisdiction of the Stock Exchange, and when those higher rights come into conflict with these rules, of course these rules must give way to those higher rights.

Now, my Lords, let us see what took place and what was done with reference to Mr. Cooke in pursuance of these rules of the Stock Exchange. A meeting was held, the meeting to which I am about to refer, and I agree with what has been said on behalf of the appellants that the meeting was not a meeting of the Stock Exchange in its collective capacity, but was a meeting in the Stock Exchange of the creditors of Cooke, the bankrupt, and what was done was done by them and not by the Stock Exchange in its collective capacity. What was done was this, and here I take again the two narratives, the one of the bankrupt, the other of the appellants. The bankrupt says, "I attended with the books as requested, and the result was that the creditors decided that if I

could get enough to make up 13*s.* 4*d.* in the pound, including the assets I showed (about £8000), the Stock Exchange would be content; I had given nothing up to them at that time." Now, it appears that the bankrupt showed assets to the amount of £8000, of which a sum of about £5000 was his balance at the Bank of England. The rest, as I understand it, was not ready money — was either debts due and owing to him or property of some other kind, and it is obvious that his Stock Exchange debts being £25,000, £8000 alone would not have paid the 13*s.* 4*d.* in the pound. Then he proceeds, "It was known that I had, or should have, £5000 or upwards at my bankers, which amount was included in my representation of assets at the meeting. The official assignees, Messrs. Tomkins and Lyon, requested me to give them a cheque for the balance, and I gave them next day, the 28th of April, a cheque for £5000 for distribution among my Stock Exchange creditors. This cheque was presented by Lyon (in company with my clerk) at the bank and duly paid."

The appellant Lyon in his affidavit says that "upon the 28th day of April, 1876, a meeting of the creditors of the said John Edward Cooke was held on the Stock Exchange, at my offices, and at which meeting Mr. Charles Branch, of the firm of Messrs. Foster, Braithwaite, & Co., was appointed chairman. That the debts then due by the said John Edward Cooke upon the Stock * Exchange amounted to the sum of £24,790. That [*222] upon the said 28th day of April, 1876, the said John Edward Cooke handed over for distribution, amongst his creditors upon the Stock Exchange, the sum of £5000, which money remained in the possession of myself and my co-official assignee until the 3rd of May." It was divided as a dividend on the 3rd of May.

This, my Lords, is the sum of £5000 in question, and the first point which arises upon this narrative is this, Was that which was done on the 27th or 28th of April a payment or a transfer of a specific sum of money, part of the estate of the bankrupt, or was it in point of fact a *cessio bonorum* by the bankrupt? If it was a *cessio bonorum* of his estate generally, it is unnecessary to consider any farther question, — any question of fraudulent preference, or any question of the application of the 92nd section of the Bankruptcy Act, 1869. Being a general surrender of his estate, it would of itself be an act of bankruptcy, whatever the intent and purpose may have been, and would therefore be void. My Lords, I am

bound to say that taking the narrative of the bankrupt, which appears to me not only not to be contradicted by the appellants, but to be very strongly confirmed by the evidence of the appellants, I cannot arrive, as a matter of fact, at any other conclusion than that there was, and that there was meant to be, on the part of the bankrupt, a general cession of his estate for the purpose of its being dealt with according to the rules of the Stock Exchange. I can give no other interpretation to these words: "I attended with the books as requested, and the result was that the creditors decided that if I could get enough to make up 13*s.* 4*d.* in the pound, including the assets I showed (about £8000), the Stock Exchange would be content." He does not say that he repudiated that view, that he suggested any other view, that he withdrew himself from the jurisdiction of the domestic forum, and declined to have anything farther to say to their proceedings. He leaves this as that which was the result of what took place between himself and the Stock Exchange creditors, and the result, as I understand it, was this, that his assets, his £8000, were to go as far as they would towards the making up of 13*s.* 4*d.* in the pound, and that the 13*s.* 4*d.* was the sum named by the creditors as that which, if it could be [*223] made up by him from some one *quarter, would induce them to give him a release and discharge from all his debts.

It was attempted in argument to disconnect this from that which immediately follows, — the payment of the £5000; but it appears to me that it is impossible to disconnect the two. What is stated afterwards is this: "The official assignees requested me to give them a cheque for the balance;" that is, the balance of £5000 at the bank. No doubt they made that request, but why did they make that request? Because the bankrupt had put himself in a position by which it was his duty, according to the rules of the Stock Exchange, to make the official assignees of the Stock Exchange the administrators of his estate. Accordingly, turning to that which was the part of his estate immediately tangible and immediately realizable, it was, of course, the natural step for the official assignees to take, to request him to give them a cheque for that balance so immediately realizable. But I cannot look upon this as in the slightest degree analogous to a payment of £5000 disconnected from any other surrender of the estate, leaving him the possessor of the remainder of his estate, leaving him still master of £3000 to be applied to other creditors or for other purposes.

The signing of the cheque for the £5000 was part and parcel of the entire cession of his property for the purpose of the rules of the Stock Exchange, and was merely implementing the provisions of those rules.

My Lords, the appellant Lyon in his affidavit speaks of it in exactly the same way. He says that on the 28th of April a meeting was held, and the debts due by Cooke upon the Stock Exchange amounted to £24,790. On that day "Cooke handed over for distribution amongst his creditors upon the Stock Exchange the sum of £5000, which money remained in the possession of myself and my co-official assignee until the 3rd of May." He does not in any way controvert one word of the statements of the bankrupt in the affidavit which I have read. If, therefore, the matter stood there, I should be obliged, as forming a conclusion of fact, to come to the conclusion that there was here on the part of the bankrupt a cession of all the property he possessed for the purposes of his business.

Now, my Lords, I go to the other questions that have been * raised in the case, and I will take for a moment [* 224] the view of the appellants, that this as a matter of fact was not a cession of the whole of his property, but was a payment of £5000 under the circumstances which I have mentioned; and then I ask the question, how far can that payment be justified having regard to the provisions of the 92nd section of the Act of 1869? This section has to be looked at in two parts. There is first an enacting part, declaring what transfers of property shall be invalid, and there is then a saving, under which in the argument it was endeavoured to say that the appellants might be held to come. With regard to the first part of the section, what it provides is this: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they became due, from his own moneys in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same, become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt."

My Lords, this payment, looking at it as a payment of £5000

simply, is clearly a payment which was made by a person unable to pay his debts as they became due, from his own moneys; about that there is no dispute. Then was it made with a view of giving the creditors to whom it was made a preference over the other creditors. Undoubtedly the debtor had other creditors at the time. The relations between himself and his father-in-law, to which an allusion is made in the affidavit I have read, turned out to be, and are now admitted to be, of a kind which made his father-in-law not a donor of money to him, but a creditor for money advanced to him. Therefore, looking, as your Lordships I think must look, upon Mr. Cooke as being possessed of the knowledge which he ought to have had, and which of course in one point of view he really had, Mr. Cooke must have been aware of the existence of at least one other large creditor, and he therefore must have been aware, looking to what his estate consisted of, that that which he was doing in paying the £5000 would have the effect of [* 225] giving * the creditors upon the Stock Exchange a preference over his other creditors.

But then it was said, Did he make the payment with the view of giving that preference? That, in the argument of the appellants, was said to depend upon this, Was the payment made under pressure? It was said, If it was made under pressure, it is the pressure you are to look to, it is the pressure you are to take as the *causa causans* of the payment, and not any intention of giving a preference to particular creditors. I will accept for this purpose that statement of the law, and accepting it, I am bound to say, and to say without the slightest hesitation, that in my opinion there was no pressure whatever here leading to the making of this payment. The creditors upon the Stock Exchange were not the originators of that which was done. The person who set the machinery in motion which was brought into active operation over this £5000 on the 28th of April was Mr. Cooke himself. It was he who (and I do not blame him for this), endeavouring to comply with the rules of the body to which he belonged, announced to that body that he was unable to fulfil his engagements, and being a defaulter, and making it known to his Stock Exchange creditors that he was a defaulter, thereupon received a summons to attend a meeting of those creditors; he was the person who set the machinery in motion. In attending that meeting of creditors, and laying before them a statement of the whole of his property,

he again was complying with the rules of the Stock Exchange, and was virtually, according to those rules, making his creditors the persons to judge of the disposition of his property. And then, having thus put himself in the position in which, according to the rules of the body, it became his duty to surrender a sum of £5000, he signed a cheque for that amount, in consequence, no doubt, of the request of the official assignees; but that was a request which it was their duty to make by reason of the position in which Cooke had placed himself. Pressure, therefore, there was none. The act was done, the payment was made, as a part and parcel of that machinery which was set in motion by the bankrupt himself.

Therefore, looking at the first part of the 92nd section, I come without hesitation to the conclusion that here was a payment made by a person unable to meet his regular engagements, and was made * with a view of giving a preference to the Stock [* 226] Exchange creditors over such other creditors as he had, he himself having the means of knowing, and therefore being a person who must be taken to have known, that he had other creditors.

But then, my Lords, it is said that the payment is to be protected under the latter words of the 92nd section. Those final words are these, "but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration." My Lords, I am willing to take it that we have here a "payee" or payees "for valuable consideration," namely, pre-existing debts. But are they to be taken as payees "in good faith," within the meaning of this section? Of course I do not speak of good faith in a moral point of view. They may have believed the statement, and I am willing to take it that they did believe the statement of the bankrupt as to his having no other creditors. But are they payees in good faith according to the test which is laid down in this section, a test derived from the operation of the Bankruptcy Law? I take it that in order to give any meaning to the words "in good faith" at the end of this section, your Lordships must hold those words to apply to the matters which are mentioned in the earlier part of the section. If you find a person receiving a payment in complete ignorance of, or without any means of getting information with regard to, the matters mentioned in the earlier part of the section, he may be a payee in good faith. That was the case in the appeal that came before your Lordships' House of *Butcher* v. *Stead*, L. R., 7 H. L.

839, 44 L. J. Bankr. 129. In that case there was a payment made to a person who was admitted not to have any knowledge of the circumstances of the person making the payment, and there was no suggestion that the person receiving the payment was aware that that payment would have interfered with, or could have interfered with, the rights of other creditors. But your Lordships have, in the present case, in the first place, this, that the persons who received the payment, the payees, were clearly aware that he who made the payment was a person unable to pay his debts, as they became due, from his own moneys, for he had told them so in the frankest and clearest way. Upon the application of that test, therefore, these payees must fail.

[*227] * Well then, what as to their good faith, *quoad* the giving to themselves, the Stock Exchange creditors, a preference over other creditors? Now, my Lords, they are in this position as to that, — they knew the amount of the bankrupt's assets, they knew the amount of their own debts, they knew therefore that if there was another creditor undoubtedly they must be receiving a preference over that other creditor. And upon the all-important fact whether there was another creditor or not, they had this farther information, that there was a person with whom the bankrupt had had pecuniary dealings to a considerable amount, which dealings might take the form either of debt or of bounty not amounting to debt. That they knew, for upon that they had asked questions. And my Lords, upon all this they were satisfied to take the word of the bankrupt himself alone, the person who of all others upon a matter of this kind would be their most untrustworthy informant. If they had been disposed, in good faith, really to ascertain what was the truth upon this matter, all they had to do was to ask the person who could have given them the information, namely, Mr. Mackenzie himself. They asked no question of him, or of any other person representing him; they took the word of the bankrupt, and upon that they trusted; and in that view how can they be in any higher position than the bankrupt himself? Whatever notice or knowledge he has, they must be held to have. They did not provide themselves as they might have done with independent information; they rested their title upon the truth, or the untruth, of the assertion made to them by the bankrupt, and upon that truth or untruth they must stand or fall. If the statement had been a true one, the transaction might have been main-

tained, but not being a true one, it cannot, in my opinion, be maintained.

Now, my Lords, I think it due to the appellants and those whom they represent, to say that I have no reason to doubt that in point of fact they were willing to receive the statement as true, — they had no knowledge that it was otherwise than true, but they had the means of knowledge, and legally by that, in my opinion, they must be affected. I desire, however, to impute to these gentlemen no departure from principles of rectitude or morality, and I regret that by what I think was a misapprehension of some expressions which fell from the Court below some feeling of * dissatisfaction has arisen on the part of the [*228] appellants, as if something had been said in the Court below which was intended to impute, to those who were represented by the appellants, a departure from correct and honourable action. My Lords, I read the statements which were made, and the expressions which were used by the learned LORD JUSTICE who delivered the judgment of the Court below, as referring not to the facts of the case, but rather to certain arguments which perhaps with too great confidence had been placed before him as to the law applicable to the case. I repeat, I see nothing whatever in what was done here, upon the Stock Exchange, which was not perfectly consistent with honourable feeling and honourable conduct, but I repeat also, that there was, underlying the whole of what was done, the one infirmity, namely, the question of whether there was an outside creditor who would not be bound by what was done. There was, as it turned out, at least one outside creditor, to a large amount; his rights cannot be affected, and his rights having led to the bankruptcy of Cooke, in my opinion it became necessary and right that the sum of £5000 which had been handed over to the present appellants, should be brought back again for the purpose of the administration of the bankruptcy.

My Lords, I think this appeal ought to fail, and that it should be dismissed with costs, and I move your Lordships accordingly.

Lord O'HAGAN: —

My Lords, I am of the same opinion, and I too feel bound to say that I see nothing in the case which impeaches the integrity, in purpose or in action, of the Stock Exchange. This appeal appears to me to have been prosecuted very much under the influence of irritated feeling; but the words that produced that feeling may

No. 9. — Tomkins v. Saffery, 3 App. Cas. 228, 229.

be accounted for in the way suggested by my noble and learned friend, without an imputation of impropriety either as to the rules of the body or the proceedings of its members. I think there is no ground whatever for such an imputation; if they believed the statements made by the defaulter they were fully justified in what they did; they were only wrong because what he had stated as facts were not facts, and so they were misled.

As to the appeal I cannot doubt, notwithstanding the [*229] ability * with which it has been sustained, that it must be dismissed with costs, whether we regard the salutary principles which have been so long enforced by wise and eminent Judges for the protection of the most important interests of the mercantile community, or the terms of the statute, which have removed many difficulties heretofore embarrassing the application of those principles to such a case as this.

The facts are undisputed. They fully appear in the affidavit of the bankrupt. The arrangement on which the appellant relies took place on the 27th of April. The act of bankruptcy was on the 13th of May, but on the 26th of April the bankrupt had formally declared his insolvency. The persons who insist on the benefit of the arrangement are not all his creditors, but a selected portion of them; and the payment which they seek to have validated, gave them a material advantage, to the detriment of those who did not belong to that selected portion. In these circumstances two questions have been raised and argued. First, was there a *cessio bonorum?* And, secondly, are the appellants entitled to have their separate rights maintained under the provisions of the statute? To the first question I think your Lordships should answer in the affirmative, and to the second in the negative.

If it were necessary to support the judgment of the Court of Appeal, I should have no hesitation in holding with Lord Justice JAMES that there was a *cessio bonorum*. The bankrupt was a member of the Stock Exchange, and, as such, had bound himself by the rules which are in evidence. According to those rules when he became unable to fulfil his engagements, and announced the fact to the secretary, the official assignees were at once brought into action, and it was their duty to take instant proceedings for seizing his assets and securing his creditors. They were authorized to obtain from him his original books of account, a statement of the sums owing to and by him; and he was bound to attend

meetings of creditors, and to give every information and assistance to the official assignees, "in conformity with the rules, regulations, and usages of the Stock Exchange." So that the immediate effect of the notice of insolvency was to take from the insolvent all control over his own property, and to transfer it altogether to the official assignees. And, this having been accomplished, the 167th * rule provides that "the assignees shall collect [* 230] and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible."

In the present case, these rules were acted on with promptitude and strictness; and if there had been no creditors except members of the Stock Exchange, there would have been no possible objection to their enforcement of obligations voluntarily undertaken by the insolvent, on which his own official notice had invited them to insist. It was vainly urged that there was not a complete parting with the property, inasmuch as the insolvent had assets amounting to some £8000, and the creditors requested him, whilst they claimed 13*s.* 4*d.* in the pound on their entire debts, to give the assignees a cheque for £5000 which was at his bankers. Therefore it was said that they did not get, and he did not give, all that belonged to him to meet his liabilities. This is plainly fallacious. The Stock Exchange creditors demanded from him more than all he had; but they took, on account, this balance at the bankers, leaving him afterwards to satisfy fully his engagements as best he could. He had assured them, erroneously, that to them only he was indebted; and it was understood on all hands that they must be losers, after his whole estate was realized, to the extent of one third of their demands. In their condition of knowledge, their arrangement was perfectly legitimate and just, but it took from the debtor everything he possessed. The notice of the insolvent was spontaneous; given on no pressure; procured by no request; and involving the surrender of all his assets for the benefit of the specific class of creditors to whom it was addressed. The moment it was received by the secretary, the *cessio bonorum* appears to me to have been complete. It brought into operation instantaneously the whole machinery of the rules of the Stock Exchange, and entitled the assignees to realize the entire estate of the debtor. He could not more effectually, with a view to bankruptcy, have yielded up that estate if he had assigned every portion of it by a formal conveyance.

No. 9. — Tomkins v. Saffery, 3 App. Cas. 230, 231.

For these reasons, I am of opinion, with the Lord Chancellor and Lord Justice James, that there was clearly in this case a *cessio bonorum* for the benefit of a limited class of creditors when insolvency had been declared and bankruptcy was immi-
[*231] nent, and this * being so, no farther argument is needful to defeat the appellants' claim to exclusive advantages unshared by the general creditors of the bankrupt.

Then, looking to the statute, I think the matter is equally clear. The bankrupt was in an insolvent condition. He was indebted to two classes of persons, — the members of the Stock Exchange and his general creditors, mainly his father-in-law, whose peculiar relations with him do not require to be noticed, as they do not, in my view, affect the argument. And in these circumstances he entered into an arrangement, which, however it may be regarded, was clearly made in the terms of the statute "with a view of giving preference" as against one class of creditors in favour of others. The facts of the case could scarcely be represented in more precise and fitting words. A preference was given as soon as, according to the rules of the Stock Exchange, the declaration of insolvency authorized the official assignees, for the exclusive benefit of creditors who were members of it, to seize upon the greater portion of the assets by impounding the balance at the Bank of England. The practical effect of the notice is thus described by the bankrupt in the tenth paragraph of his affidavit: "Immediately on my default being announced in the house, the usual official notice thereof was sent by the official assignees to my bankers, the Bank of England, which, I am informed, practically amounted to a *distringas* being placed on my balance." I called Mr. Herschell's attention to this passage, and he contended that the notice had not the legal effect of a *distringas*. But however that may have been, the paragraph plainly shows the understanding and intention of the parties to have been that the Stock Exchange creditors should be primarily and exclusively secured. And when we find, from the same affidavit, that the notice to the bank was followed by the demand for the bankrupt's books and for the cheque for £5000, which was only paid on presentation by the assignees in company with the bankrupt's clerk, — whereupon, as he says, "the *distringas* was practically removed," we can have no doubt that the "preference" was not only intended, but very completely carried into effect.

Considering all this, I think that the case comes clearly within

the operation of the first part of the 92nd section of the statute; * and that all the suggestions we have heard as to [*232] the want of spontaneity, the existence of pressure, and the partial character of the payment made by the bankrupt, should be, on the admitted facts, disregarded by your Lordships. Accepting the cheque for £5000, the Stock Exchange creditors did not abandon or postpone their claim to the rest of the bankrupt's assets; and the operation of his notice, as creating a *cessio bonorum*, was not affected by the effort of the assignees to lay hold immediately on all they could.

On the second point, which has been raised with reference to the terms of the concluding part of the 92nd section, it has been dealt with so conclusively by my noble and learned friend on the woolsack that I do not deem myself justified in adding a single observation upon it. On the whole, I concur with him that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

Lord BLACKBURN: —

My Lords, I am also of opinion that this appeal should be dismissed.

I think that the fact that the bankrupt, Mr. Cooke, became a member of the Stock Exchange under the Stock Exchange rules shows that he at that time entered into, not an agreement enforceable in law, but an honorary agreement that he would act in his dealings upon the Stock Exchange according to those rules as long as he continued to be a member. The committee of the Stock Exchange might dismiss him if he did not act according to those rules, and by the very essence of the rules he ceased to be a member the moment he became a defaulter. He had then the knowledge of his being under an honorary obligation, and the knowledge that if he did not act as they thought right and proper, it would be a question whether he should ever be re-admitted to the Stock Exchange. [His Lordship stated the substance of several of the rules.] Observe that by the 167th rule it is provided that "the assignees shall collect and pay the assets to the credit of their joint account at a banker's."

A good deal has been said on a matter which becomes important here from one point of view, namely, what is meant by this rule when it says "the assets." I confess, my Lords, my own impression * is that it means, not only that the official [*233]

assignees shall collect the assets, but that a defaulting member is bound by the agreement which he made when he entered the Stock Exchange to give them the assets; that is to say, the whole of his available property is to be handed over to them. I confess that is the view that I take of its meaning, and that is my impression of what he was bound to do. I quite agree that, in practice, no body such as the members of the Stock Exchange, consisting of mercantile men, would follow that up to the literal extent. But the effect of the rule is this: it is meant that a member of the Stock Exchange shall give over what would be substantially the whole of his property to these official assignees; that is how I should certainly construe this rule. It is in practice far less likely to work unjustly than people might suppose, because, as the members of the Stock Exchange are strictly forbidden by the rules to enter into any other transactions than their Stock Exchange transactions, they seldom have creditors to any great amount, except people who have lent them money without security, and people would seldom have lent the money without security unless they were relatives or friends, which appears to have been the case here. We know that the great creditor here was a near relative of the bankrupt, who had advanced money to him in that way. Therefore it is not, to my mind, surprising that this rule has been so worked, and that although it has been in existence for a great many years, yet this is the first time that it has become the subject of discussion in a Court of Law.

Nevertheless, whether it means the whole assets, which I certainly think it does, or whether it means only such portions of the assets as they could honourably obtain, which is the contention of the appellants, either way it means some assets. Now what are they to do with them? They are to distribute them amongst the creditors, and as to creditors the 153rd rule does not recognise any payment or claim on a defaulter's account that does not arise from a Stock Exchange transaction. Consequently those assets which, according to this honorary agreement, the defaulter was bound to hand over to the official assignees are to be distributed solely and exclusively to those creditors whose claims arise out of Stock Exchange transactions. It is impossible, as it seems to me, not to see that if that be done, these assets, to whatever extent
[* 234] * they go, whether they be the whole of the assets, or a portion of the assets, are to be so distributed as to give a

preference to creditors arising out of Stock Exchange transactions, over creditors arising out of other than Stock Exchange transactions. I do not know that any words can make it clearer than the rule itself does; it says they are to distribute the assets, and they are to recognise no claim except one that arises out of a Stock Exchange transaction. That would clearly be a preference.

Now comes the question, is this proper, is it good according to law, when a subsequent bankruptcy has occurred within the specified time after the payment has thus been made? If it were the whole property which had been transferred, if every portion of it had been given by Mr. Cooke, it would have been an act of bankruptcy as being a conveyance of his whole property, which carries with it the necessary consequence of delaying and defrauding his creditors. The whole property is not transferred; a portion of the property is transferred. Whether it was transferred as being a part of the whole, and as being intended to be followed up and liable to be followed up by the transfer of the remainder, or whether as a separate thing, is a question upon which there has been some argument. If it was as being a part of the whole I cannot help thinking that when it is intended to transfer the whole, and when the transfer of that whole would be an act of bankruptcy as necessarily delaying and defrauding the creditors, then the transfer of a part in performance of the contract must necessarily be an act of bankruptcy also. But while I cannot help thinking that that would be so, I do not know that it is necessary to decide that question in the present case. The facts as to whether it was intended to be a part of the whole and followed by the remainder or not are perhaps not quite so clear as they might be, but it is not necessary to decide that point, as I am clearly of opinion that the appeal must equally be dismissed with costs, if it appears that this was intended to be the only part of the assets which was to be handed over for the benefit of the Stock Exchange creditors.

Now, my Lords, I think the question of fact is material, but the point turns upon the effect of the 92nd section of the Bankruptcy Act. That Act very materially altered the old Bankruptcy Law, * but to a great extent the old Bankruptcy Law re- [*235] mains the same, and it must be considered in construing this Act. By this section it is enacted: — [His Lordship reads it.]

It was argued very ably by Mr. Herschell, and I think to some extent my mind goes with his argument, that when this section

speaks of a payment with a view to give a preference over other creditors, we must see whether it was a payment made under such circumstances as would under the old Bankruptcy Law have been considered a preference, and a fraud in a bankruptcy. Now I think you must say that it is not with a view to give an undue preference, if a man makes a payment to a creditor in the ordinary course of business. Supposing a bankrupt, although knowing that he is very likely to stop payment next week, struggles on and makes a payment without being particularly asked; supposing he pays his debts and sends his money to meet his bills on those days on which they become due, and does other things so as to keep himself alive and in good credit for the time; that would not have been undue preference, I think, because those payments were not made "in favour of" certain creditors as against others, but were made in the hope — a desperate hope perhaps — that if he were able to keep himself alive something might turn up in his favour. Nor do I think it would be an undue or a fraudulent preference if there was a demand upon him, and a yielding to that demand, by making a payment which might not otherwise have been made so soon.

But while I agree with that, the point where I differ from Mr. Herschell's argument is this: I think that that is not at all applicable to this case; I think that as a matter of fact it is impossible to say that Mr. Cooke, the bankrupt, paid this £5000 on account of any ordinary pressure of the kind I have mentioned, or in the ordinary course of business, or anything of the kind. It seems to me to be clear as a matter of fact that he paid this money to the official assignees, because when he became a member of the Stock Exchange he had entered into an honorary engagement that he would, in the event of his becoming a defaulter, pay the money to them which they were to distribute to his Stock Exchange creditors, who were to be preferred to the others. I do not think that there is anything morally dishonest in that, nor [* 236] * anything which in the great majority of cases would produce hardship. Nevertheless, the fact that it is voluntarily paid with the view to give certain creditors, namely, the Stock Exchange creditors, an undue preference, is one which I cannot bring myself to doubt. I think, as I have already said, that the fact was, that beforehand, whilst he was yet solvent, he had entered into an agreement in which he said, In the event of my

becoming insolvent and being unable to pay my debts I will give you what assets I have, and he did so.

Now, my Lords, there remains only one other point to be considered, and that has reference to the proviso at the end of the 92nd section. The earlier part of the section declares that if a payment is made with a view of giving certain creditors a preference, and if the person making it becomes bankrupt within three months afterwards, it shall be void. Then the proviso is: "But this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration." Now comes the question, Are those gentlemen on the Stock Exchange, who are certainly creditors and payees, payees "in good faith and for valuable consideration?" As to "valuable consideration," Yes, we must, I suppose, take it that they are so; but "in good faith"? What does that phrase mean in the section? Now it must be observed that the appellants, the official assignees, knew that this person, Mr. Cooke, was unable to pay his debts out of his own means. They were aware that it was within the Act in that respect; they were aware that those moneys were given to them for the very purpose of preferring the creditors arising out of transactions on the Stock Exchange to the general creditors, if there were any; and they were aware, therefore, that if there were any general creditors, which they would expect and suppose in the ordinary course of things that there would be, although probably the amount of their debts would be small. In point of fact there do appear to have been some few debts here not arising out of Stock Exchange transactions, Mr. Mackenzie's being the great one. I say they were aware that if there were any such, this would be giving the Stock Exchange creditors a preference over the others, and consequently they were aware of the greater part of the circumstances and elements which would, in fact, bring this case * within the operation of the statute. They had no [* 237] express notice or knowledge of the fact that there was any other creditor, but they seem to have had some suspicion about this Mr. Mackenzie, and they asked a question about him, and Mr. Cooke, the man who has since become a bankrupt, told them that the money was not a debt, but a gift. If it was a gift, of course it would not be a debt at all. It is not stated in the affidavits that they believed that altogether. Perhaps I may be supposed to be hypercritical in saying that it may be doubtful whether they

believed it. It is not stated in the affidavit that it made the least difference in their conduct, and I do not believe that it did make any. If he had said, "I have other creditors out of the house for other transactions," I believe they would have said, "Give us the £5000" all the same. They do not by any means say they would not, and I confess I think that is material for our consideration in coming to a conclusion on the matter. It comes round to this, that I think (I am stating it in my own words, but it is very nearly what the LORD CHANCELLOR has already said) that when they knew that the man was insolvent and unable to pay his debts, when they knew that this money was given them to prefer a particular body of creditors to all the other creditors, if there were others, they were then fixed with the knowledge of an infringement of the statute, and although they were told by the man who afterwards became a bankrupt that he had no other creditors, they cannot get out of it; they took their chance. If he had told them the truth, and there had been in fact no other creditors, this transaction would have stood and been perfectly good; if he had any other creditors it would not stand. They knew all that it was necessary for them to know, and I think they took their chance, and they must take the consequences.

Now, my Lords, having said that much, I think I have brought the case round to the conclusion that the appeal should be dismissed with costs. I will only add this farther, that I do not think there is any attempt on the part of the Stock Exchange to break through the general rules of law by this rule of theirs, nor, as they work it, would there be any hardship in it; but I do not think it is in the power of the Stock Exchange or of anybody else, to agree that a man who is in a solvent state, shall before-
[*238] hand * agree, that when he is in an insolvent state, he shall hand over any portion of his moneys with a view to preferring one set of creditors over any other set. I think that that is expressly forbidden by the 92nd section of the statute, and it seems to me that it was with that view that the £5000 were handed over. Consequently, my Lords, I am of opinion that the decision of the Court below was right, and that this appeal should be dismissed with costs.

Lord GORDON: —

My Lords, I entirely agree with the rest of your Lordships with reference to the disposal of this case. The observations of the

Lord Justice in the Court of Appeal were probably made more in consequence of the line of argument which was submitted to him than with a view to suggest the idea that the members of the Stock Exchange intended to get rid of the binding effect of the equitable laws of bankruptcy, which must continue to be binding upon them. At the same time one cannot help seeing that they have probably adopted a very wise and expedient rule in making such regulations as have been the subject of discussion to-day, because all the members of the Stock Exchange are engaged in transactions very much of the same character, — they know what one another's transactions are, and it is of great importance that there should be a code drawn up, not of course binding upon the public, but for the purpose of regulating their rights *inter se*, and with a view to promote equality in cases of default amongst themselves. But nothing could be done by them which would have the effect of infringing upon the common law, or the law of bankruptcy as administered in Courts of Equity, as was suggested by some of the opinions delivered in the Court below.

The judgment must be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 16th November, 1877.

ENGLISH NOTES.

The artificial fund composed of differences, created by the rules of the London Stock Exchange, upon the insolvency of one of its members, do not pass to the trustee in bankruptcy. *Ex parte Grant, In re Plumbly* (C. A. 1880), 13 Ch. D. 667, 42 L. T. 387. A member of the London Stock Exchange, who has received payment on account of his contract with an insolvent member of the Stock Exchange, is not precluded from taking proceedings in bankruptcy for the balance of his debt. *Ex parte Ward, In re Ward* (C. A. 1882), 20 Ch. D. 356, 51 L. J. Ch. 752, 47 L. T. 106.

Section VI. — *Joint and several estates.*

No. 10. — Ex parte COOK.

(Ld. C. King, 1728.)

No. 11. — DUTTON *v.* MORRISON.

(Ch. 1809.)

RULE.

In the bankruptcy of joint traders, it is a settled rule, adopted from convenience, that the joint creditors are first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner. If there is a surplus of the joint estate, it is applied to pay the separate creditors; and if there is a surplus of the separate estate it goes to supply any deficiency that remains as to the joint creditors.

The interest of a partner, which vests in the assignee (or trustee) in the bankruptcy, consists of his share in the surplus, subject to the liabilities of the partnership. Consequently a Court of Equity will not allow a creditor of the firm to carry out an execution against the partnership property under an attachment subsequent to the act of bankruptcy to which the property relates back; but will, instead, direct an account of the joint estate, to be applied among all the joint creditors.

Ex parte Cook.

2 Peere Williams, 500–501 (s. c. *nom. Ex parte Coke*, Moseley, 80).

[500] Two joint traders became bankrupt, and a joint commission of bankruptcy is taken out against them, upon which the commissioners make an assignment of the real and personal estate of the two bankrupts, or either of them; afterwards the separate creditors take out separate commissions against these two bankrupts, and the commissioners on the separate commission

No. 10. — Ex parte Cook, 2 Peere Williams, 500, 501.

assign over the separate effects and estate to other assignees; and now the assignees under the separate commissions, applied by petition to the Court, that they might be at liberty to sue at law for the separate estate.

Lord Chancellor: It seems to me, that the assignment made by the commissioners upon the joint commission, passes as well the separate as the joint estate of the two partners the bankrupts, consequently the assignees on the separate commissions can make nothing of their action at law, and I will not suffer them to spend and waste the estate in vexatious suits there; but if they will join in a bill in equity for an account of the separate estate, I will not hinder them.[1]

It is (2 Vern. 706, *Crowder, Ex parte*) settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate * creditors out of the separate estate of each partner, and if [*501] there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors, and if there be on the other hand a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. But in this case, for the ease of both parties, let it be referred to a commissioner in each of these commissions, to take an account of the whole partnership effects, and also of the separate effects and estates of each of the partners; and if the commissioners find anything difficult, they are to be at liberty to state it specially; and with regard to the surplus of the partnership effects, beyond what will pay the partnership debts, and also touching the surplus of the separate effects, if there shall remain any, over and above what will pay the separate debts, each side to be at liberty to apply to the court concerning any of the said surpluses.[2]

[1] In fact joint commissions do frequently issue after a separate commission has issued against one of the parties, but, upon recent application to the Great Seal, the Court will supersede the separate commission, in order to give validity to the joint commission, under which both sets of creditors may have their proper relief in the manner above mentioned. *Ex parte Hardcastle*, s. c. 1 Cox, 397, and many other cases. *Ex parte Martin*, 15 Ves. 114, 19 Ves. 491; *Ex parte Crew*, 16 Ves. 236; *Ex parte Brown*, 1 V. & B. 60; 1 Rose, 433; *Ex parte Rawson*, 1 V. & B. 160; 1 Rose, 423; *Ex parte Cridland*, 3 V. & B. 94; 2 Rose, 164; 13 R. R. 152; *Ex parte Pachelor*, 2 Rose, 26.

[2] *Twiss* v. *Massey*, 1 Atk. 67; *Ex parte Baudier*, 1 Atk. 98; *In matter of Simpsons*, 1 Atk. 138, &c. See *Horsey's Case*, 1 P. Wms. 23; *Ex parte Rowlandson*, 3 P. Wms. 405.

Dutton v. Morrison.

17 Ves. 193–211 (s. c. 11 R. R. 56–66).

In the year 1806 Robert Rumbold, Robert Dutton, the younger, and James Houghton, carrying on business as merchants and co-partners, having shipped goods on an adventure to New Orleans, which proved unfortunate, called a meeting of their creditors; and by indenture, dated the 17th of December, 1806, they as-
[*194] signed to * the plaintiffs all and singular the goods, wares, merchandise, and effects, so shipped from England, as aforesaid, which had not been sold, and the produce of such part as had been sold, and disposed of; all goods, wares, and merchandises, shipped or consigned back in return for the same, together with all invoices, policies, bills of lading, and other papers, relating thereto; upon trust to sell and dispose of such of the said goods as were unsold, and to get in and collect the property so assigned; and they constituted the plaintiffs Dutton, and Gilgrest, and Mead, since deceased, their attorneys for that purpose; and it was declared, that the trustees should stand possessed of the property so assigned, after payment of the expenses of the trust, to pay and divide the several debts due from them, said Robert Rumbold, Robert Dutton, the younger, and James Houghton, to plaintiffs Dutton and Gilgrest and the several other creditors, parties to said indenture, by an equal pound-rate, according to the amount of their respective debts; and to pay the amount, if any should remain, unto Rumbold, Dutton the younger, and Houghton, in equal shares. The deed contained a proviso, that in case all the joint creditors, whose debts amounted to upwards of £20, should not execute the indenture by the time therein mentioned or a commission of bankruptcy should issue in the mean time, the said indenture should be void.

This deed was executed by Rumbold; but one of the partners never executed it. Several of the creditors, but not all, to the amount of upwards of £20, having executed it within the time, some of those who had not, attached in the Court of the Lord Mayor of London the trust-property in the hands of Dutton, the trustee, and though notice was served on them, that a docket had been struck, and a commission of bankruptcy would be forth-
[* 195] with issued on an act of bankruptcy antecedent to * such attachments, they proceeded; and on the 10th of May obtained verdicts in the attachments, and entered up judgment.

No. 11. — Dutton v. Morrison, 17 Ves. 195–202.

A commission of bankruptcy issued against Rumbold alone, dated the 10th of May, on the petition of a joint creditor, who had not executed the trust-deed; and Rumbold was declared a bankrupt upon an act of bankruptcy, prior to the executions and attachments; viz., by his execution of the indenture of assignment, and proof that the premises thereby assigned comprised the whole of his estate and effects; and a provisional assignment was executed.

The bill was filed by the two surviving trustees in the deed, and the provisional assignee under the commission; charging that the trust-money in the hands of the plaintiffs, being the joint estate of Rumbold, Dutton, and Houghton, is now by reason of the bankruptcy of Rumbold and the absence from the kingdom of the other partners, payable to the assignees under the commission, to be applied in satisfaction of the joint debts; and prayed an injunction against execution under the attachments, and that the trust-money in the hands of the surviving trustees under the trust-deed may be paid into Court, or to the other plaintiff, the provisional assignee under the commission, for the benefit of the joint creditors.

[An objection as to the sufficiency of the alleged act of bankruptcy was relinquished upon proof of other acts of bankruptcy committed by Rumbold, in October, 1805; but in the course of his observations when dealing with that objection the Lord Chancellor observed (at p. 198) that "Courts of Justice acquired the right to treat men as bankrupts by Parliamentary authority and by that alone," and he described the law as perfectly settled, that nothing is an act of bankruptcy, though the consequences may be precisely the same, except what is described in the statutes.]

Mr. Hart and Mr. Roupell, for the plaintiffs, relied on [200] the case of *Barker* v. *Goodair*, 11 Ves. 78; 8 R. R. 89.

Sir Samuel Romilly and Mr. William Agar were heard [201] for the defendants.

The Lord Chancellor (Eldon) (July 24, 1810): —

The report of the case of *Barker* v. *Goodair*, 11 Ves. 78; [202] 8 R. R. 89, correctly represents my opinion that, whatever might ultimately be done, it was fit that the rights of the parties under the circumstances of that case should be judicially decided; and, that being my opinion, I certainly determined nothing upon the

interlocutory motion but that it was not proper to let the property go out of the power of the Court, until that decision could be obtained.

The present case is this. Three persons, in partnership, propose to convey the whole of their property (for that is the effect of it) to trustees in trust for their creditors; with a proviso, to be void in case all the creditors to the amount of above £20 do not execute, or if a commission of bankruptcy should be taken out. In truth it would have been void if it had been actually executed according to the intention. All the creditors to the amount of above £20 did not sign the deed, and one of the assignees never executed. The bill was filed upon the notion that the act of bankruptcy to be insisted upon against the attachments was the execution of this deed; and upon the point made when the cause came on, that the deed, not being executed by all the three parties, was no act of bankruptcy. My opinion was that this deed, being intended for execution by these three persons, and being incapable of being executed according to the trust unless by those three, could not be considered as an act of bankruptcy. It became immaterial, however, to consider that; as, an act of bankruptcy of an older date being proved, brought the case to this; that there [* 203] was an act of bankruptcy preceding the * verdicts under the attachments, on the 10th of May, and a commission actually issued. There was no actual execution therefore under the attachments at the time of the commission issued; and if there had been it was immaterial.

Under these circumstances the question is, what is the effect of the commission, the attachments, under which verdicts of even date were obtained, and the preceding act of bankruptcy: I mean the act of bankruptcy committed by this one partner; whether the attaching creditors, who have succeeded upon the plea of *nil debet* in the Mayor's Court, can find in the hands of the plaintiff Dutton that property of the three partners against which they can have execution entirely, as the property of the three; or if not to be considered the property of the three, property to which the title is such as among the three that such a creditor can take, if not the whole, a part of it.

This question has been in a degree considered in two or three cases; never upon the hearing of a cause. In *Bristow* v. *Potts* (in Chancery, 28th January, 1801), stated 11 Ves. 81, n.; 8 R. R. 91,

No. 11. — Dutton v. Morrison, 17 Ves. 203-205.

upon an application to Lord LOUGHBOROUGH for an injunction under circumstances altogether the same, his opinion was that the assignees of one of the joint debtors had no equity to obtain an injunction against the creditors of all the debtors, having attached the property. When the case of *Barker* v. *Goodair*, 11 Ves. 78; 8 R. R. 89, came before me, I thought the point, as I do still, extremely important; and I could not satisfy myself that it was right, upon the authority of *Bristow* v. *Potts*, to refuse the injunction in that stage of the cause. The difficulty is this. If previous to the plea in the * Mayor's Court, which is in effect [* 204] to try whether the property in the hands of the garnishee is the property of all the debtors, an act of bankruptcy is committed by one, and a commission issues, I cannot conceive the plea that the property of the three was in the hands of the garnishee could be made out in fact; as by the act of bankruptcy by one, previous to the attachment, followed by a commission, the interest of that one passed to his assignees, and was no longer his interest. It is true, if the issue of fact in the Mayor's Court was tendered previously to a commission, it would be difficult, perhaps impossible, to maintain that the plea in fact would not be made good; as, though the commission, when taken out, will relate to the act of bankruptcy, yet if a commission should not be taken out there is no negative of the fact that this was the property of the three. If, however, a commission should afterwards issue between verdict and execution under the attachments, the verdict giving a right to execution upon the property of the three, and the intermediate transaction devesting out of one by relation to the act of bankruptcy his interest in that property, the question would be whether the execution could lay hold of the property of that one; and the two statutes of King James, stat. 1 James I. c. 15, s. 13; stat. 21 James I. c. 19, s. 9, declare, what it was not necessary to enact when it was once determined that the commission should relate to the act of bankruptcy, that, as a judgment, if not executed before, or if executed after, an act of bankruptcy, is of no worth as against the creditors, so an attachment not executed before, or executed after, an act of bankruptcy, as against the creditors affects only the interest of the bankrupt.

* That being the effect of the relation, this commission, [*205] the moment it was taken out, of even date with the verdicts, but founded upon an act of bankruptcy long previous to

any suit in the Mayor's Court, in October, 1805, must have relation to that act of bankruptcy; and by virtue of that relation must vest the property of this individual partner in his assignees, as their property from that time. The consequence is, that this plaintiff must be considered as having in his hands property, not of the bankrupt and the solvent partners, but which was to be disposed of, as it was just, and legal, and equitable, not as their property, but as the property of the assignees and the two solvent partners; and my doubt upon the case of *Bristow* v. *Potts*, 11 Ves. 81 n.; 8 R. R. 91, was whether, if that was not the property of the two partners, Lord LOUGHBOROUGH'S conclusion, in effect that the creditors of the two debtors should have execution against it, as if it had remained their property, was right; and I still think that a difficult conclusion.

Another question remains, of far more difficulty, and of as much importance as any that has been decided. Where a creditor takes out execution against the effects of an individual, concerned in a partnership, it seems to be a very difficult thing to determine with certainty, how he is to take his execution. [See now the Partnership Act, 1890, s. 23.] The old cases, if they are to govern, go in this simple course; that the creditor, finding a chattel belonging to the two, laid hold of the entirety of it; considering it as belonging to the two; and, paying himself by the application of one-half, he took no farther trouble. It is obvious, that it was very difficult to maintain this as an equitable proceeding, if a due proceeding at law; that a creditor of one partner should [* 206] without any attention to the rights of the * partners themselves take one-half of a chattel belonging to them; as if it was perfectly clear that the interest of each was an equal moiety. On the other hand it may be represented, that the world cannot know what is the distinct interests of each; and therefore it is better that the apparent interest of each should be considered as his actual interest: but courts of equity have long held otherwise; and long before the case of *Fox* v. *Hanbury*, Cowp. 445. I understand this Court to have said that was not equitable; and to have held, as is the constant course at present, that upon an execution against one partner, or the *quasi* execution in bankruptcy, no more of the property which the individual has, should be carried into the partnership than that *quantum* of interest which he could extract out of the concerns of the partnership, after all the accounts

of the partnership were taken, and the effects of that partnership were reduced into a dry mass of property, upon which no person except the partners themselves had any claim. In the case supposed by Lord MANSFIELD, a bill filed, where there was an execution at law, a court of equity has no difficulty in managing it; having the means of taking the complicated accounts of the partnership, and reducing the concern into that state in which the property would be divisible as clear surplus: but the Court of King's Bench has repeatedly held, with considerable doubt of late, how the object is to be accomplished, that a creditor, taking execution, can take only the interest his debtor had in the property.

The case now before me must be regarded in this point of view; the question being as to the effect of the *quasi* execution under a commission of bankruptcy * against one partner, [* 207] with reference to the interest of himself and two others in a fund in the hands of the plaintiff. The jurisdiction in bankruptcy being both legal and equitable, let us see whether we must not of necessity go a great way in this case: or admit that we have already gone much too far in bankruptcy. The opinion of Lord HARDWICKE was, that a joint creditor could prove under a separate commission only for the purpose of assenting to, or dissenting from, the certificate; but not to receive dividends; and that they must file a bill for an account of the joint estate. The operation of that bill was to draw into the joint estate the share of that bankrupt partner taken in execution; as far as bankruptcy can be so represented; and by the effect of the commission, the bill, and the decree, nothing could be divided among the separate creditors under the commission but that which formed the separate share of the bankrupt after the account, and an application of the joint estate to all demands against it. Lord HARDWICKE therefore must either have thought, that upon such a case it was clearly fit to say that execution against one partner should not affect the application of the joint fund to the joint demands; or, as I rather believe, he found himself in a situation requiring him to cut the knot, and to make some rule that would upon the whole be most convenient.

This subject took a different course at different periods until the time of Lord THURLOW; who considered it with great anxiety; and, having consulted most of the Judges, expressed his decided opinion, that the contrary course was the best, as being the most legal; and therefore held that the joint creditors should be ad-

mitted to prove, and take dividends, under a separate commission; that a commission of bankruptcy was an execution for all the creditors; that, if a joint creditor had brought an action
[* 208] * against all the debtors, he might have several executions against each; and therefore the bankruptcy, preventing his action with effect, should be considered as a judgment for him as well as the others; that he had a right to receive the dividends; and it was upon the assignees of the separate estate to bring their bill to have the account settled.

The question afterwards came to be considered by Lord Loughborough; who got back to the old rule; and abided by it firmly, *Ex parte Elton*, 3 Ves. 238; 3 R. R. 84; but great difficulties occurred of this sort. Lord Loughborough, adopting the principle of Lord Hardwicke's rule, did not adopt his practice; not putting the joint creditors to file a bill bringing before the Court the assignees and the solvent partners; and taking the account in their presence; but taking this course, — directing the assignees to take an account of the joint estates; and, applying that to the discharge of the joint creditors, to ascertain the shares of the residue belonging respectively to the bankrupt and the solvent partners. From the nature of this proceeding, unless the solvent partners thought proper to come in, and have the account taken before the commissioners, the Lord Chancellor in bankruptcy had no power to compel them: neither could the joint creditors, unless they thought proper to come in before the commissioners, be compelled in that proceeding to come in; and if the other partners did not, or could not, as in the instance of residence abroad, make themselves parties, the account upon ordinary principles could not bind them. I pressed the difficulty that would arise if a joint
[* 209] creditor should bring an action, * and proceed to judgment: would this Court interfere upon the ground that there was an order in bankruptcy to which he and the other joint creditors were not parties: and to enforce that order grant an injunction against execution in that action? That would be a question of great importance, if the law was as simple as it was supposed to be in the early cases upon this subject: that the assignees were tenants in common of a chattel with the solvent partner; and the creditor might satisfy himself out of the apparent interest: but, taking the law to be, that no more should be applied than the result of a general account, the only effect of the execu-

tion would be, that the creditor would have subjected himself to the general account that was going on in another proceeding.

The question then came before me; and upon consideration of all the authorities I thought the best course for me to adopt (whether the best in principle I have often doubted) was, that the rule should continue to be applied, as it had been for some years in a course of application; and therefore I have not disturbed the practice as it has of late prevailed. The result is, that now it has been understood for fifteen years, that, under a separate commission of bankruptcy, the other partners remaining solvent, an account shall be directed of the joint estate in the absence even of the other partners; and upon the application of any one joint creditor, whether the others choose it, or not, the whole account being taken in the bankruptcy, the joint creditors shall be paid *pari passu* out of the joint estate; and the residue shall then be distributed only according to the respective interests of the partners; and, if the rule of law, where a creditor takes execution, is the same, perhaps we are not far wrong. In the course of this period there has been no instance of a creditor coming here, saying, that he had a * judgment, not executed, against a partner; and [* 210] desiring to go on: nor has the case occurred in bankruptcy of a joint creditor, claiming to set aside the execution under the commission by a prior act of bankruptcy, and desiring to have execution against all without any account. Such a case, if it occurred, must be dealt with upon much the same principle as this.

This is the case of an act of bankruptcy in December, 1805; which severed the property of the bankrupt from the property in the partnership. From that moment the partnership effects were the property of the two solvent partners, and, if a commission was afterwards taken out, of the assignees. The effect of that commission, if taken out before the execution, or after it upon a previous act of bankruptcy, is, that a part at least of the property taken under the execution, would, in the latter case by relation, be the property of the assignees; and here it is material to observe that my opinion differs from that of Lord LOUGHBOROUGH; who thought that the bankruptcy of one partner only would not, though founded upon a preceding act of bankruptcy, affect the attachments. I do not agree to that. My opinion is that if after an execution against one partner a commission of bankruptcy issues against him upon an act of bankruptcy, antecedent to the execution executed, whatever may have

been taken under the execution becomes by relation the property of his assignees at the time of that execution executed, and not of the bankrupt himself; the commission by relation devesting his interest.

What then is to be the case of these creditors, who, having attachments against the property of these three partners, while it was their property, did not obtain execution until a commission issued against one of them upon an act of bankruptcy, [* 211] antecedent to the attachments; * by relation therefore devesting the property of that one? It is very difficult to maintain, that the attaching creditor can take the property of the two remaining partners, though he might take the property of the three, or of each; but, admitting that he could take the property of the two, what is it that he can take? Is it more than what will appear to be the property of the two after an account of the estate of the three, and the joint demands upon them? There is infinite difficulty in it: but it appears to me, that, notwithstanding these attachments, under the particular circumstances the joint estate must be applied among all the joint creditors, as well the attaching creditors as the others. The bankruptcy making one-third of this property the property of the assignees, the question is, whether the creditors by attachment, though they have judgment, can take execution: and my opinion is, that execution under the attachment cannot go against the property of the two; if it could go against the property of the three, and of each, and that this is property which must be applied among all the joint creditors, exactly as the application is made in bankruptcy.

I have gone through this; as it is a very difficult subject; and, as it has often appeared to me, that both in bankruptcy and the administration of assets the Court has done more upon principles of convenience, than as standing upon legal reasoning.

An account was accordingly directed of the joint estate; to be applied among all the joint creditors.

ENGLISH NOTES.

The provisions of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) applicable to the initiation of bankruptcy proceedings against partners are sections 110, 111, 112, 113 and 115. Section 110 enacts as follows: "Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of a firm without including

the other." Section 111 enacts: "Where there are more respondents than one to a petition the Court may dismiss the petition as to one or more of them; without prejudice to the effect of the petition as against the other or others of them." Section 112 provides for the administration of the property and the appointment of one trustee of partners made bankrupt upon successive petitions. Section 113 provides for the prosecution of actions, where a member of a partnership is adjudged bankrupt. Section 115 enacts: "Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm," with a provision for the disclosure of the names of the partners.

According to the cases under former Acts, unless all the partners had committed an act of bankruptcy, a joint petition could not issue, even against two or more insolvent partners. *Ex parte Layton* (1801), 6 Ves. 434. Where a joint commission issued subsequently to separate commissions, it was the practice to supersede the separate commission if the joint commission was valid, *Ex parte Wells* (1815), 1 Madd. 72, 15 R. R. 209; but the Court had a discretion, s. c., *Ex parte Hamper* (1811), 17 Ves. 403, 11 R. R. 115; s. c., *nom. Ex parte Rowlandson*, 1 Rose, 89.

To support a joint petition, a joint act of bankruptcy must be proved. *Mills* v. *Bennett* (1814), 2 M. & S. 556, 15 R. R. 348. But a separate creditor might avail himself of a joint act of bankruptcy to found a separate petition, *Eckhardt* v. *Wilson* (1799), 8 T. R. 140, 4 R. R. 618; and where one of several partners committed an act of bankruptcy it could be made the foundation of a separate petition against him. *Bowker* v. *Burdekin* (1843), 11 M. & W. 128, 12 L. J. Ex. 329.

The rule is that the joint estate shall be applied in satisfying the partnership liabilities, and the separate estate in discharge of the individual debts of the partners. A good example of this rule is the case of *Ex parte Reeve* (1804), 9 Ves. 588, 7 R. R. 304, where it was held that the joint creditors were entitled to be paid interest on their debts out of partnership assets, before the separate creditors could make any claim upon the joint estate. The only exception to the rule is where there is no joint estate and no solvent partner or the solvent partner is resident abroad, and (presumably) not subject to the jurisdiction of the English Courts. *Ex parte Kensington* (1808), 14 Ves. 447, 9 R. R. 325; *Ex parte Pinkerton* (1801), 6 Ves. 814 *n.*, 9 R. R. 326 *n.* As an extreme case may be cited *Ex parte Geller and Honischer, Re Sill and Watson* (1817), 2 Madd. 262, 17 R. R. 219, which decided that a creditor, to whom the whole of the joint estate had been pledged, might realize and prove for any balance due against the separate estates. It is however clear that the existence joint estate, however small, will

exclude the exception, although it is apparent that the costs of realization will swallow up the whole of the joint estate. *Ex parte Kennedy, In re Entwisle* (Ch. App. 1852), 2 De G. M. & G. 228. Under the old bankruptcy practice a joint creditor could not only present a separate petition, but also prove in competition with the separate creditors. *Ex parte Ackerman* (1808), 14 Ves. 604, 9 R. R. 358; *Ex parte Detastet* (1810), 17 Ves. 247, 11 R. R. 70. But this it is apprehended is put an end to by the Bankruptcy Act 1883 (46 and 47 Vict. c. 52), s. 59 (1). How the anomaly — it can hardly be called a principle — originated is not disclosed in any of the decided cases: it was firmly established when Lord ELDON was at the bar. *Ex parte Ackerman, supra.* It does not appear that the separate creditors enjoyed a correlative right. It has been frequently said that the liability of partners is joint and several, but the true limits of this expression was pointed out in the well known case of *Kendall* v. *Hamilton* (H. L. 1879), 4 App. Cas. 504 ("Abatement," No. 3, R. C. Vol. 1, 175), which recognised the earlier decision of the Court of Exchequer in *King* v. *Hoare* (1844), 13 M. & W. 494, 14 L. J. Ex. 29.

In the case, where judgment was recovered against one of several joint tort-feasors, a defence of judgment recovered must be specially pleaded, in a subsequent action against the remaining tort-feasors. *Edevain* v. *Cohen* (C. A. 1889), 43 Ch. D. 187. The rights of creditors may however be regulated by express contract, and goods may be supplied to a partnership so as to make the partners liable individually. *Ex parte Gibson, In re Smith, Knight & Co.* (Ch. App. 1869), L. R., 4 Ch. 662, 38 L. J. Ch. 673. But where partners have bound themselves jointly and severally, although the creditor may prove against both estates, he can only receive a dividend out of one or the other estate. *Ex parte Bentley, In re Maltby* (1790), 2 Cox, 218, 2 R. R. 36.

Intricate questions arise where there has been a change in the constitution of the firm since the petitioning creditor's debt was incurred. Where a new partner has been taken in, the question turns upon the determination whether or not there has been a novation. *Ex parte Jackson* (1790), 1 Ves. Jr. 131, 1 R. R. 91; *Rolfe* v. *Flower* (P. C. 1866), L. R., 1 P. C. 27, 35 L. J. P. C. 13. The liability of a partner who has retired, for the debts and engagements of the new firm, is a liability by estoppel; and the question here is whether there has been an election to charge the new firm or to give credit entirely to the firm as originally constituted. *Scarf* v. *Jardine* (H. L. 1882), 7 App. Cas. 345, 51 L. J. Q. B. 612, 47 L. T. 258.

As a general rule the retirement of one of two partners will prevent joint creditors from asserting their rights to the joint estate, even where it remains *in specie*. *Ex parte Williams* (1805), 11 Ves. 3,

8 R. R. 62; *Ex parte Rowlandson* (1813), 2 Ves. & B. 172, 13 R. R. 52; but the circumstances may admit of an appropriation of assets partly to joint creditors of the old firm and partly to the separate creditors. *Ex parte Morley, In re White* (Ch. App. 1873), L. R., 8 Ch. 1026, 43 L. J. Bank. 28, 29 L. T. 442. And where two or more partners continue there may be a right to follow assets of the former partnership existing *in specie*, *Ex parte Butcher, In re Mellor* (C. A. 1880), 13 Ch. D. 465, 42 L. T. 299; while in some cases the right will not exist, *In re Simpson, Ex parte Furniss* (C. A. 1874), L. R., 9 Ch. 573, 43 L. J. Bank. 147, 30 L. T. 488. A partner who has retired may be made to account to the trustee in bankruptcy of the new firm for sums received in fraud of creditors under colour that they were on account of his share of the capital. *Anderson* v. *Maltby* (1793), 2 Ves. Jr. 244, 2 R. R. 206.

A person indebted to the separate estate cannot set off a debt due from the partnership, *Ex parte Twogood* (1805), 11 Ves. 517; *Stainforth* v. *Fellowes* (1814), 1 Marsh. 184, 15 R. R. 672; *New Quebrada Company* v. *Carr* (1869), L. R., 4 C. P. 651, 38 L. J. C. P. 283; *Middleton* v. *Pollock* (1875), L. R., 20 Eq. 515, 44 L. J. Ch. 618. In the last mentioned case the Master of the Rolls (Sir G. Jessel) explained the decision of Lord Eldon, in *Ex parte Stephens* (1805), 11 Ves. 24, 8 R. R. 75, and *Vulliamy* v. *Noble* (1817), 3 Mer. 593, 17 R. R. 143; and showed that in these two cases the decision turned on a question of suretyship, and proceeded on the assumption that the debtor who was sued was entitled to set up the right of the person who was surety to have the liability reduced. The nature of debts will be examined; and if the joint debt is really only a security for a separate debt, the separate creditor will be allowed to set off against a sum which he is liable to pay to the separate estate. *Ex parte Hanson* (1806), 12 Ves. 346, 8 R. R. 335.

The reputed ownership clause is only designed to meet the case where a person who is the true owner of goods allows another person to have possession of them; it does not therefore apply where a dormant partner allows the active partner to have possession. *Coldwell* v. *Gregory* (1814), 1 Price, 119, 15 R. R. 699; *Reynolds* v. *Bowley* (1867), L. R., 2 Q. B. 474, 8 B. & S. 406, 36 L. J. Q. B. 247. The judgments of the Court of Queen's Bench, and of Kelly, C. B. (in which the majority concurred) in *Reynolds* v. *Bowley* treat two earlier cases, *Ex parte Enderby, In re Gilpin* (1824), 2 B. & C. 389, and *Smith* v. *Watson* (1824), 2 B. & C. 401, as inconsistent with the view which ultimately prevailed in the Exchequer Chamber; but, according to the opinions (which appear sound) of two eminent judges, Willes, J., and Bramwell, B., there was no need to treat these two cases as overruled. In *Ex parte Enderby* the partnership had been dissolved by effluxion of time, and

the partnership goods and effects were, by agreement between the active and secret partner, left in the hands of the active partner, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by the secret partner. Upon the continuing partner's subsequent bankruptcy it was held that the goods passed under the order and disposition clause. The ground upon which the Court proceeded is not apparent, as no judgments were delivered, but a certificate sent back to the Lord Chancellor, who had directed the issue. In the subsequent case of *Smith* v. *Watson*, Bailey and Best, JJ., stated that they regarded their decisions as inconsistent with *Coldwell* v. *Gregory*, but this was not necessarily the case. According to the view taken of the facts by Best, J., in *Ex parte Enderby*, the arrangement operated as a transfer of any interest the secret partner might have had in the partnership assets. He says (1 B. & C. 396): "By the contract, Gilpin (*i. e.* the active partner) was to have all the goods, and Enderby (*i. e.* the secret partner) was to be a creditor for £20,000." In this view it is difficult to see what claim the secret partner could set up. The case of *Smith* v. *Watson* rests on precisely similar grounds; for the contract was held to vest no interest in the person whose assignees set up the claim, although the bankrupt might have been held liable in 1824 as an ostensible partner. When considering *Smith* v. *Watson* it must be recollected that the law enunciated in *Waugh* v. *Carver* (1793), 2 H. Bl. 235, 14 R. R. 845, still prevailed, and that 36 years elapsed before the case of *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268, 30 L. J. C. P. 125, finally decided that sharing in the profits did not necessarily make a man liable as a partner to persons dealing with a firm. The class of cases of which *Curtis* v. *Perry* (1802), 6 Ves. 739, 4 R. R. 28, is an example, in no way conflict with the views expressed in the before mentioned cases of *Coldwell* v. *Gregory* and *Reynolds* v. *Bowley*: but proceeded on the policy of the statute requiring registration of ownership of British ships.

A separate adjudication makes the trustee in bankruptcy a tenant in common with the continuing partner, from the date of the act of bankruptcy. *Barker* v. *Goodair* (1805), 11 Ves. 78, 8 R. R. 89; the solvent partner however has the right to realize the partnership property. *Fox* v. *Hanbury* (1776), Cowp. 445. The trustee under a separate commission, where there are solvent partners, cannot obtain the proceeds of an execution levied against the partnership assets for a joint debt. *Brickwood* v. *Miller* (1817), 3 Mer. 279, 17 R. R. 81; *Dibb* v. *Brooke & Sons* (1894), 1894, 2 Q. B. 338. The right to administer is personal to the solvent partner. *Fraser* v. *Kershaw* (1856), 2 K. & J. 496, 25 L. J. Ch. 445, and the trustee may insist upon an application of the assets according to bankruptcy rules. *West* v. *Skip* (1749), 1 Ves. Sen. 239; *Fraser* v. *Kershaw*, *supra*.

In *Collins* v. *Barker* (1893), 1893, 1 Ch. 578, 62 L. J. Ch. 316, 68 L. T. 572, the Court had to consider the validity of a provision in partnership articles, that a partner who should become bankrupt should be deemed to have ceased to be a partner on the date of the bankruptcy, and that his share of the capital should remain as a loan at interest for the residue of the partnership term to be secured by the bond or covenant of the continuing partners or partner. Two of the partners became bankrupt, and of these one had advanced the whole of the capital. In an action by the trustees in bankruptcy of the bankrupt partners against the continuing partner, it was held that the stipulation was valid. The defendant was accordingly appointed receiver and manager, but the Court made it a term of his appointment that he should give security, pass his accounts, furnish the plaintiffs with proper accounts, and allow them reasonable access to his books. Provision was also made for securing the shares of the bankrupt partners by directing that the continuing partner should pay the balances in his hands, as and when they reached a certain amount, into Court, or into a bank in the joint names of the plaintiffs and the defendant.

Where there was cross paper between two houses, which had both become bankrupt, the practice was to throw the paper out of computation. *Ex parte Walker* (1798), 4 Ves. 373, 4 R. R. 218. We are told by Lord Eldon the history of this rule in the subsequent case of *Ex parte Rawson* (1821), 1 Jacob, 274, and the extent to which it was intended to carry it. The facts, however, in *Ex parte Walker* were somewhat special, and the decision has been cut down in the first instance by Lord Eldon, who allowed proof against any surplus of joint estate, *Ex parte Rawson, supra,* and subsequently by two cases in the Court of Appeal, *Ex parte Macredie, In re Charles* (Ch. App. 1873), L. R., 8 Ch. 535, 42 L. J. Bank. 90, 28 L. T. 827, and *Ex parte Cama* (Ch. App. 1874), L. R., 9 Ch. 689, 43 L. J. Ch. 683. 31 L. T. 234. It is decided by these later cases that the principle of *Ex parte Walker* only applies to accommodation bills; and even as to accommodation bills does not apply where they have got into the hands of third parties.

Where there are two firms, and some of the members of the one are partners in the other, they will be treated as separate firms if in fact distinct; and in the event of bankruptcy of the one, the other firm can prove in the bankruptcy. *Ex parte St. Barbe* (1805), 11 Ves. 413. 8 R. R. 196. So too the rule as to double proof was excluded, and the holder of bills upon which the two firms were liable could prove in both bankruptcies, *Ex parte Adams* (1813), 1 Ves. & B. 493, 12 R. R. 280; and this is now recognized by the Bankruptcy Act 1883 (see note 12 R. R. 280).

In the case of *Harris* v. *Beauchamp Bros.* (H. L. 1894), 1894, A. C.

607, a judgment had been recovered against a firm one member of which was an infant. The House recognized the rule that an infant cannot be made a bankrupt; but avoided the difficulty by amending the judgment under the powers conferred by section 105 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), so as to limit its operation to the adult partner and by making a receiving order in similar terms to the judgment as amended.

Section VII. — *The rule "Ex parte Waring."*

No. 12. — Ex parte WARING.

(ch. 1815.)

RULE.

Where A., the acceptor of a bill drawn by B., holds property of B. in security for its payment; then in case of a double bankruptcy of both A. and B., the holder of the bills is entitled to have the property applied for their payment: — not because the holder has any right by way of security over the property, but in order to give such effect to the reciprocal right of A. and B., as the circumstances admit of: — A.'s right being to hold the property in security of his indemnity, and B.'s to have the property upon payment of the bills.

Ex parte Waring.

19 Ves. 345-350 (s. c. 2 Rose, 182; 2 Gly. & J. 404; 13 R. R. 217-220.)

[345] Bracken & Co. had an account with Brickwood & Co. bankers in London; drawing upon them, and lodging in their hands from time to time bills and other securities against their drafts. Brickwood & Co. at the period of their bankruptcy on the 7th July, 1810, were under acceptances for Bracken & Co. to the amount of £24,000; and indebted to them a cash balance £6766 7*s.* 6*d.*; having also in their hands in short bills £21,645 10*s.*, and the title-deeds of premises in London, as a security against their acceptances, which produced by sale near £2961. On the 2d of August, 1810, Bracken & Co. became bankrupt. The accept-

No. 12. — Ex parte Waring, 19 Ves. 345–347.

ances, except to the amount of £600 were proved under both commissions; and the dividends upon Brickwood's estate, of 2*s.* 11*d.* in the pound upon £23,400 amounted to £3412.

* The first of these petitions, by holders of Brickwood's [* 346] acceptance, stated, that an order was obtained in January, 1811, by the petitioners in the second petition, the assignees under the commission against Bracken & Co., without notice to the bill-holders, that the assignees of Brickwood & Co. should keep distinct accounts of their general estate and the proceeds of the short bills; and should account for and pay to the assignees of Bracken the surplus that might remain of such proceeds, after payment of the dividends to the bill-holders; and prayed a variation of that order; and that the assignees of the Brickwoods may be directed to pay to the petitioners and the other holders of their outstanding acceptances on account of the Brackens £3353 17*s.* 6*d.*, the residue of the cash balance, after deducting £3412 10*s.*, the amount of the dividends from Brickwood's estate, the proceeds of the short bills, and the sum of £2961, produced by the sale of the premises in London; and to deliver such of the said bills and securities as have not been converted into money to the petitioners and the other bill-holders towards satisfaction of the money remaining due upon such acceptances, as far as they will extend.

Mr. Leach and Mr. Cooke, in support of the first petition.

The subjects for consideration are, first, whether the bill-holders have not an equitable claim upon this property: if not, secondly, whether the assignees of Brickwood have not a right to have it applied to exonerate their estate from the proofs upon their acceptances on account of the Brackens: thirdly, whether the general creditors have not a right to insist, that these particular creditors should be satisfied out of the appropriated fund.

* The object of the assignees of the drawers appears to be [* 347] to use the bankruptcy of the acceptors as the means of withdrawing that security, which, had they continued solvent, could have been retired only by mutual consent. Those assignees must make out their equity; which, as between them and the assignees of the acceptors merely, would not be difficult: but natural justice forbids the debtor to recall his pledge from the surety, when the effect will be injustice to the bill-holders, who are the creditors of both. The case of *Mawer* v. *Harrison*, 1 Eq. Ca. Ab. 93, pl. 5, has established, that the creditor shall have the benefit of securities

given by the principal debtor to the surety; which case is fortified by the opinion of the MASTER OF THE ROLLS in *Wright* v. *Morley*, 11 Ves. 22, 8 R. R. 73, that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to the surety, the surety has full as good an equity to the benefit of all securities the principal gives to the creditor.

With regard to the right of the other creditors, the principle of equity is, that a creditor shall be driven upon a fund, to which he has exclusive resort: this particular fund therefore of securities to indemnify the surety should be applied in favour of the other creditors. *Povye's Case*, 2 Freem. 51; *Peters* v. *Erving*, 3 Br. C. C. 54; *Wright* v. *Nutt*, 3 Br. C. C. 326; 1 H. Bl. 136, 1 Cox, 424; *Wright* v. *Simpson*, 6 Ves. 714. Thus a creditor, holding a security, is not permitted to prove: so the cases of attaching property abroad and marshalling assets proceed upon the same principle of equity.

The assignees are bound to apply the securities in their [*348] hands * to the utmost extent for the benefit of the creditors. Why is the bankruptcy of the principal debtor to give his creditors an advantage; or that of the surety to prejudice his creditors, and defeat the moral duty to discharge his debts?

Mr. Fonblanque, Mr. Bell, and Mr. Montague, for the assignees of Bracken & Co.

THE LORD CHANCELLOR: —

The prayer of the first of these petitions has been supported upon this ground, that the short bills and the mortgage (laying the cash balance for a moment out of the question) having been placed with Brickwood & Co. as a security against their acceptances, the holders of those bills have an equity to have that security applied specifically to the discharge of those acceptances, upon the general ground, that upon a transaction of this kind, a person holding the bills, which are the subject of indemnity, has a right to the benefit of the contract between the principal debtor and the party indemnified; and, though not himself a party to that contract, to say, that he, who has contracted for the payment of certain debts out of those pledges, is liable in Equity to the demand upon the part of those whose demands are to be so paid, for that application; and a case was cited which goes that length. *Maver* v. *Harrison*, 1 Eq. Ca. Ab. 93, pl. 5.

With regard to that case, or cases in general, I desire it to be understood, that I forbear to give any opinion upon that point:

but I see nothing in this transaction, which, supposing a bankruptcy had not occurred, would entitle those who are creditors by the acceptances of the bankers, having these deposits, to
* maintain an equity upon them: the effect of which [* 349]
would be, that from the moment of that deposit the bankers became trustees for those creditors; and could not come to any new arrangement with those, whose debts are to be so discharged.

That doctrine therefore not being applicable to this case, the view I have taken of it in other respects is this. The first consideration is, what was the nature of the demand of Bracken & Co., who did not become bankrupt until August, upon Brickwood & Co. at the moment of their bankruptcy, on the 7th of July. If these bill-holders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hands of Brickwood & Co. With regard to the demand of Bracken's house upon the 7th of July, it is impossible to deny, that if they had either paid, or undertaken to pay, *i. e.*, to relieve Brickwood's house from those acceptances, the short bills (*Ex parte Pease*, 19 Ves. 25, and the note, 61; 1 Rose, Bank. Cases, 232, 243, 254, 280) and the mortgage must have been restored to them. It is on the other hand equally clear, that they never could have raised any demand against the house of Brickwood in respect of either the cash balance, the short bills, or the mortgage, without bringing in the amount of those acceptances; admitting, that what the house of Brickwood had of their property in short bills, &c., must be first applied to the discharge of those acceptances, for the sake, not of the bill-holders, but of the house of Brickwood, who had become liable to them, and had a right to have that liability cleared away, before any demand could arise for the Brackens.

* That then being the equity between these houses in the [* 350]
interval between their respective bankruptcies, it does not appear to me varied by the bankruptcy of the Brackens in August; supposing their assignees to have put the estate of Brickwood in the same situation as the house they represent, if solvent, must have done, to entitle themselves to the short bills; and, having regard to the demands of all the creditors and the bankrupts, in this circuitous way, I think, the bill-holders must be paid, not as having

a demand upon these funds in respect of the acceptances they hold; but as the estate of Brickwood & Co. must be cleared of the demand by their acceptances; and the surplus, after answering that demand, must be made good to Bracken & Co. That brings me round to the opinion, expressed by Mr. Cooke on a former occasion, to which I did not then agree, and appears the right principle to be applied in drawing out the minutes upon these petitions.

ENGLISH NOTES.

In his introduction to 13 R. R. Sir Frederick Pollock wrote, with respect to the principal case: "This is perhaps the one modern case which combines the greatest novelty in the original decision with the greatest fertility as a precedent. The doctrine it introduced, though probably just, is so artificial, and postulates such special circumstances, that no one has been able to find any better way of describing it than 'the rule in *Ex parte Waring*;' at least I have never heard of any."

The following statement of the rule *Ex parte Waring* by Mr. A. C. Eddis, in his treatise on the subject, has been judicially cited and approved by Brett, M. R., in *Ex parte Dever, In re Suse* (No. 2) (C. A. 1885), 14 Q. B. D. 611, 620; 54 L. J. Q. B. 390, 53 L. T. 131: "Where, as between the drawer and the acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor; then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill." The rule was in this case applied accordingly. As earlier instances of cases, in which the rule has been applied, after argument in the Courts, may be cited *Powles* v. *Hargreaves* (1853), 3 De G. M. & G. 430, 23 L. J. Ch. 1; *Trimingham* v. *Maud* (V. C. Giffard, 1868), L. R., 7 Eq. 201, 38 L. J. Ch. 207, 19 L. T. 554; and *City Bank* v. *Luckie* (Hatherley, L. C. 1870), L. R., 5 Ch. 773, 23 L. T. 376.

The rule in *Ex parte Waring* has no application to Scotch bankruptcy law. *Royal Bank of Scotland* v. *Commercial Bank of Scotland* (H. L. 1882), 7 App. Cas. 366, 47 L. T. 360.

The right which the bill-holders assert is that of the person who gives the security. *Ex parte Alliance Bank, In re General Rolling Stock Co.* (Ch. App. 1869), L. R., 4 Ch. 423, 38 L. J. Ch. 714; *Ex parte Gomez, In re Yglesias* (Ch. App. 1875), L. R., 10 Ch. 639, 32 L. T. 677; *Ex parte*

Banner, In re Tappenbeck (C. A. 1876), 2 Ch. D. 278, 45 L. J. Bank. 73, 34 L. T. 199. But the remittances may be made by a person who is not drawer or acceptor, provided the bills were drawn in respect of a transaction in which he is interested. *Ex parte Smart, In re Richardson* (Ch. App. 1872), L. R., 8 Ch. 220, 42 L. J. Bank. 22, 28 L. T. 146.

The rule is only applicable where there is a double insolvency. *City Bank* v. *Luckie* (Ch. App. 1870), L. R., 5 Ch. 773, *per* Lord HATHERLEY, p. 776; *Banner* v. *Johnston* (H. L. 1871), L. R., 5 H. L. 157, 40 L. J. Ch. 730, 24 L. T. 542; *per eundem*, 5 H. L. p. 168, and *per* Lord CAIRNS, p. 174; *Vaughan* v. *Halliday* (Ch. App. 1874), L. R., 9 Ch. 561, 30 L. T. 741. There must be an inability to pay in full, *In re New Zealand Banking Corporation, Ex parte Hickie* (1867), L. R., 4 Eq. 226, 36 L. J. Ch. 809, 16 L. T. 654; a right of the one insolvent to claim on the bills against the other, *Loder's Case, Re Joint Stock Discount Co.* (1868), L. R., 6 Eq. 691; and something in the nature of bankruptcy proceedings to administer both estates, *Ex parte General South American Co., In re Yglesias* (Ch. App. 1875), L. R., 10 Ch. 635, 45 L. J. Bank. 54, 33 L. T. 112; *Ex parte Gomez, In re Yglesias* (Ch. App. 1875), L. R., 10 Ch. 639, 32 L. T. 677, or a forced administration, *Powles* v. *Hargreaves* (Ch. App. 1853), 3 De G. M. & G. 430, 23 L. J. Ch. 1; *Ex parte Ackeroyd* (Ch. App. 1860), 3 De G. F. & J. 736. The rule does not go so far as to require an executory contract to be carried out in order to pay the bills. *Ex parte Lambton, In re Lindsay* (Ch. App. 1875), L. R., 10 Ch. 405, 44 L. J. Bank. 81, 32 L. T. 380. Where one of two partners was insane, upon evidence that an adjudication of insolvency had been made against the firm, under which the assets were being dealt with as fully as the nature of the case admitted, it was held that there was a forced administration sufficient to admit of the application of the rule. *Ex parte Dever, In re Suse* (C. A. 1885), 14 Q. B. D. 611, 54 L. J. Q. B. 390, 53 L. T. 131.

The next question to be determined is whether or not there has been an appropriation; this is a question to be determined upon a construction of the contract between the parties. *In re New Zealand Banking Corporation, Ex parte Levi* (1869), L. R., 7 Eq. 449, 20 L. T. 296, and *Brown, Shipley & Co.* v. *Kough* (C. A. 1885), 29 Ch. D. 848, 54 L. J. Ch. 1024, 52 L. T. 878; *Ex parte Banner, In re Tappenbeck* (C. A. 1876), 2 Ch. D. 278, 45 L. J. Bank. 73, 34 L. T. 199, it was held that there was no sufficient appropriation. It was held that there was a sufficient appropriation in *Ex parte Dewhurst, In re Leggatt, In re Gladstanes* (Ch. App. 1873), L. R., 8 Ch. 695, 42 L. J. Bank. 87, 29 L. T. 125. The appropriation may however be limited to a certain account or specific bills. *Ex parte Gomez, In re Yglesias, supra; Ex parte Dever, In re Suse, supra.*

The creditor entitled to the benefit of securities under the rule in *Ex parte Waring* must deduct what will accrue to him from the securities, and can only prove for the balance. *Powles* v. *Hargreaves* (Ch. App. 1853), 3 De G. M. & G. 430, 23 L. J. Ch. 1; *Ex parte Joint Stock Discount Co., In re Barned's Banking Co.* (Ch. App. 1875), L. R., 10 Ch. 198, 44 L. J. Ch. 494, 31 L. T. 862. There are cases however in which the form of the security entitles the creditor to prove for the full amount of his debt, and to proceed subsequently to enforce the security. *Ex parte National Provincial Bank of England, In re Rees* (C. A. 1881), 17 Ch. D. 98, 44 L. T. 325.

Where a bill-holder stipulates for a security, although the position of the bill-holder is equally advantageous, it is outside the rule in *Ex parte Waring, Ex parte Copeland, In re Thompson* (1833), 3 D. & C. 199; *Banner* v. *Johnston* (H. L. 1871), L. R., 5 H. L. 157, at p. 174, 40 L. J. Ch. 730, 24 L. T. 542.

BILL OF EXCHANGE.

(INCLUDING PROMISSORY NOTE AND CHEQUE.)

PRELIMINARY. — *The Bills of Exchange Act*, 1882.

The Bills of Exchange Act, 1882, occupies a peculiar position in relation to a collection of case-law. The Act is (with certain exceptions which are easily recognisable, as after-mentioned) declaratory of the common law of England, or rather of the Law Merchant as expounded by the authorities of English Law. As the Bill was drawn by an expert in the subject, now His Honour Judge CHALMERS, submitted in draft to the recognised authorities on English commercial law and prac-

tice, and finally settled by strong committees in Parliament, — the Committee in the Commons presided over by Sir FARRER (now Lord) HERSCHELL, and that in the Lords by Lord BRAMWELL, — the Act may be regarded, for the main part and so far as the propositions contained in it are directly applicable, as an authoritative declaration, under the sanction of the Legislature, of the English law. The bill as finally settled included some amendments drafted by an expert in Scotch commercial law (Mr. Dove Wilson), by which the law of both countries was assimilated to the Scotch law, and other amendments suggested for practical convenience by persons conversant with commercial business. These form the exceptions, easily recognisable, to the above description of the Act as declaratory of English law. But even apart from these amendments, and for English purposes, the Act cannot be regarded as superseding the law more fully expounded in the cases. By section 97 (2) "the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques." And in numerous cases which have been decided by the Courts since the date of the Act, and particularly by the judicial opinion delivered by Lord HERSCHELL in *Bank of England* v. *Vagliano*, 1891, A. C. at p. 145, "Bankers," No. 9, R. C. Vol. 3, at p. 728, it is acknowledged that for many purposes the Courts may be guided in their interpretation of the Act by the previously existing case-law on the subject. It seems necessary therefore, in the first place, to set forth in full, with a brief reference to the principal cases, and an indication of the passages in which the previously existing law has been avowedly altered or modified, —

THE BILLS OF EXCHANGE ACT, 1882.

(45 & 46 VICT. c. 61)

[The words in italics prefixed to the numbers of the sections are the marginal notes in the Queen's Printer's copy.]

An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes.

[18th August, 1882.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: —

The Bills of Exchange Act, 1882.

PART I.

Preliminary.

Short Title.—**1.** This Act may be cited as the Bills of Exchange Act, 1882.

Interpretation of Terms.—**2.** In this Act, unless the context otherwise requires,—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter claim and set off.

"Banker" includes a body of persons whether incorporated or not who carry on the business of banking.

"Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery

"Issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder.

"Person" includes a body of persons whether incorporated or not.

"Value" means valuable consideration.

(*Currie* v. *Misa*, No. 15, p. 317, *post.*)

"Written" includes printed, and "writing" includes print.

PART II.

Bills of Exchange.

Form and Interpretation.

Bill of Exchange defined.—**3.** (1.) A bill of exchange is an unconditional order in writing, addressed by one person to another,

signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(*Carlos* v. *Fancourt*, *Colehan* v. *Cooke*, Nos. 1 & 2, pp. 180, 181, *post*.)

(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional.

(Nos. 1 & 2, *ut supra*, and notes thereto, p. 191, *post*.)

(4.) A bill is not invalid by reason —

(*a*.) That it is not dated:

(*b*.) That it does not specify the value given, or that any value has been given therefor:

(*Hatch* v. *Trayes*, Notes to Nos. 1 & 2, p. 191, *post*.)

(*c*.) That it does not specify the place where it is drawn or the place where it is payable.

Inland and Foreign Bills. — **4.** (1.) An inland bill is a bill which is or on the face of it purports to be (*a*) both drawn and payable within the British Islands, or (*b*) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2.) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

(New Law.)

Effect where different Parties to Bill are the same Person. — **5.** (1.) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

(2.) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having

capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

(*Miller* v. *Thomson* (1841), 3 M. & Gr. 576, 11 L. J. C P. 21; *Smith* v. *Bellamy* (1817), 2 Stark. 223.)

Address to Drawee. — **6.** (1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

Certainty required as to Payee. — **7.** (1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2.) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(Law altered; see *Cowie* v *Sterling* (Ex. Ch. 1850), 6 E. & B. 333, 25 L. J Q. B. 335.)

(3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

(Extends law formerly operating by estoppel. *Gibson* v. *Minet*, &c.: see notes to Nos. 47 and 48, p. 634, *post*.)

What Bills are negotiable. — **8.** (1.) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2.) A negotiable bill may be payable either to order or to bearer.

(3.) 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.

(The words in italics alter the law. See *Walker* v. *Macdonald* (1845), 2 Ex. 527, 17 L. J. Ex. 377.)

(4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(Law altered: see note to Nos. 18 and 19, p. 362, *post*.)

(5.) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(*Smith* v. *McClure*, notes to Nos. 18 & 19, p. 363, *post*.)

Sum payable. — **9.** (1.) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid —

(*a*.) With interest:

(*b*.) By stated instalments:

(*c*.) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due:

(*Carlon* v. *Kenealy* (1843), 12 M. & W. 139, 13 L. J. Ex. 64.)

(*d*.) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(2.) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(*Saunderson* v. *Piper*, "Ambiguity," No. 1, R. C. vol. 2, p. 707.)

(3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

Bill payable on Demand. — **10.** (1.) 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.

(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

(Extends principle as to which English law was formerly obscure; see *Mutford* v. *Walcot*, No. 6, p. 216, *post*, and notes p. 217.)

Bill payable at a Future Time. — **11.** A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable —

(1.) At a fixed period after date or sight.

(2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

(*Carlos* v. *Fancourt*; *Colehan* v. *Cooke*, Nos. 1 & 2, pp. 180, 184, *post.*)

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

(*Carlos* v. *Fancourt*, *ut supra.*)

Omission of Date in Bill payable after Date. — **12.** Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

(Section added in Committee, the law being obscure. Chalmers, 4th ed. p. 32.)

Ante-dating and Post-dating. — **13.** (1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

(*Roberts* v. *Bethell* (1852), 12 C. B. 778, 22 L. J. C. P. 69.)

(2.) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

(*Forster* v. *Mackreth*, No. 5, p. 210, *post.*)

Computation of Time of Payment. — **14.** Where a bill is not payable on demand the day on which it falls due is determined as follows:

(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that —

(*a.*) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal procla-

mation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day:

(*b.*) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

(34 & 35 Vict. c. 17.)

(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

(Marius, p. 19, ed. 1656, cited in *Campbell* v. *French*, 3 R. R. 154, 156, 6 T. R. 200, 212.)

(4.) The term "month" in a bill means calendar month.

(*Webb* v. *Fairmaner* (1835), 3 M. & W. 473, 7 L. J. Ex. 140. And see Interpretation Act, 1889.)

Case of Need. — **15.** The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

(Doubtful point determined by last clause. Chalmers, p. 38, 4th ed.)

Optional Stipulations by Drawer or Indorser. — **16.** The drawer of a bill, and any indorser, may insert therein an express stipulation —

(1.) Negativing or limiting his own liability to the holder.

(*Goupy* v. *Harden* (1816), 17 R. R. 478; see *per* DALLAS, J., 481, 7 Taunt. 159, 163.)

(2.) Waiving as regards himself some or all of the holder's duties.

The Bills of Exchange Act, 1882.

Definition and Requisites of Acceptance. — **17.** (1.) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2.) An acceptance is invalid unless it complies with the following conditions, namely:

(*a.*) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient:

(See *Steele* v. *McKinlay*, No. 7, p. 218, *post*, and notes p. 239, *post*.)

(*b.*) It must not express that the drawee will perform his promise by any other means than the payment of money.

Time for Acceptance. — **18.** A bill may be accepted.

(1.) Before it has been signed by the drawer, or while otherwise incomplete:

(*London & S. Western Bank* v. *Wentworth*, notes to Nos. 47 & 48, p. 635, *post*.)

(2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment:

(*Mutford* v. *Walcot*, No. 6, p. 216, *post*.)

(3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

(Added in Committee, see Chalmers p. 45, 4th ed.)

General and Qualified Acceptances. — **19.** (1.) An acceptance is either (*a*) general or (*b*) qualified.

(2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is —

(*a.*) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;

(*Julian* v. *Shobrooke; Smith* v. *Vertue*, notes to Nos. 1 & 2, p. 191, *post*.)

(*b.*) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:

(*c.*) local, that is to say, an acceptance to pay only at a particular specified place:

(See notes to No. 8, p. 244, *post*.)

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere :

(See *Ibid.*)

(*d.*) qualified as to time :

(*e.*) the acceptance of some one or more of the drawees, but not of all.

Inchoate Instruments. — **20.** (1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit.

(See notes to No. 49, p. 645, *post.*)

(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

(See *Ibid.*)

Delivery. — **21.** (1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto. (*Cox* v. *Troy* (1822), 5 B. & Ald. 474, and see *Baxendale* v. *Bennett*, No. 49, p. 637, *post.*)

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(See *per* BAYLEY, J., *Cox* v. *Troy*, *supra.*)

(2.) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery —

(*a.*) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

(*b.*) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

(*Bell* v. *Lord Ingestre*, No. 4, p. 203, *post*, and notes p. 206, *post*.)

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(*Watson* v. *Russell* (1862), 3 B. & S. 34; 31 L. J. Q. B. 304, cited in *Currie* v. *Misa*, No. 15, p. 320 *et seq.*, *post*.)

(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

Capacity of Parties. — **22.** (1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(See *Bateman* v. *Mid-Wales Ry. Co.* (1866), L. R., 1 C. P. 499, 35 L. J. C. P. 205; cf. *Re Peruvian Railways Co.* (1867), L. R., 2 Ch. 617, 36 L. J. Ch. 864.)

(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

(Probably declaratory, but law not clear. Chalmers, p. 60, 4th ed.)

Signature essential to Liability. — **23.** No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such:

(*Sykin* v. *Walker* (1809), 11 R. R. 715, 2 Camp. 308.)

Provided that —

(1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

(*Swan* v. *Steele* (1806), 8 R. R. 618, 7 East, 210.)

The Bills of Exchange Act, 1882.

Forged or Unauthorised Signature. — **24.** Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

(See notes to Nos. 47 & 48, p. 634, *post.*)

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

Procuration Signatures. — **25.** A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

(*Attwood* v. *Munnings*, No. 20, p. 364, *post.*)

Person Signing as Agent or in Representative Capacity. — **26.** (1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(*Dutton* v. *Marsh*, No. 12, p. 278, *post*, and notes p. 282, *post.*)

(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

(*Ibid.*)

The Consideration for a Bill.

Value and Holder for Value. — **27.** (1.) Valuable consideration for a bill may be constituted by —

(*a.*) Any consideration sufficient to support a simple contract;

(*b.*) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(*Currie* v. *Misa*, No. 15, p. 317, *post.* *Quaere* whether the word "liability" extends the law. Chalmers, p. 81, 4th ed.)

(2.) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(*Hunter* v. *Wilson* (1849), 4 Exch. 489, 19 L. J. Ex. 8.)

(3.) 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.

(*Collins* v. *Martin* (1797), 4 R. R. 752, 1 Bos. & P. 648.)

Accommodation Bill or Party. — **28.** (1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Holder in due Course. — **29.** (1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

(*a.*) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:

(See *Whistler* v. *Foster*, No. 16, p. 332, *post*, and notes p. 335, *post.*)

(*b.*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(*Currie* v. *Misa*, No. 15, p. 317, *post.*)

(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(See *Jones* v. *Gordon*, No. 26, p. 416, *post*, and notes, p. 434, *post.*)

(3.) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that

holder in due course as regards the acceptor and all parties to the bill prior to that holder.

(*Masters* v. *Ibberson* (1849), 8 C. B. 100, 18 L. J. C. P. 348.)

Presumption of Value and Good Faith. — **30.** (1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

(*King* v. *Milsom* (1809), 11 R. R. 646, 2 Camp. 5; cf. *Jones* v. *Gordon*, No. 26, p. 416, *post*, and notes, p. 434, *post*.)

Negotiation of Bills.

Negotiation of Bill. — **31.** (1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(See notes to *Whistler* v. *Forster*, No. 16, p. 332, *post*.)

(2.) A bill payable to bearer is negotiated by delivery.

(*Ibid.*)

(3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(*Ibid.*)

(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(*Whistler* v. *Forster*, No. 16, p. 332, *post*.)

(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

(*Watkins* v. *Maule*, notes to No. 16, p. 336, *post*.)

Requisites of a Valid Indorsement. — **32.** An indorsement in order to operate as a negotiation must comply with the following conditions, namely: —

(1.) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

(*Re Barrington* (1804), 9 R. R. 61, 2 Sch. & Lef. 112; *Ex parte Harrison* (1789), 2 Bro. C. C. 614. And see *Ex parte Yates*, notes to No. 16, p. 336, *post.*)

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognised, is deemed to be written on the bill itself.

(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(*Hawkins* v. *Cardy* (1699), 1 Ld. Raym. 360.)

(3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

(*Carvick* v. *Vickery* (1781), 2 Dougl. 652.)

(4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

(5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

(6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

Conditional Indorsement. — **33.** Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

(Law altered, see notes to 3 and 4, p. 207, *post.*)

Indorsement in Blank and Special Indorsement. — **34.** (1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2.) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(See *Edie* v. *E. I. Co*, No. 18, p. 344, *post.*)

(3.) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

(*Vincent* v. *Horlock* (1808), 10 R. R. 724, 1 Camp. 442.)

Restrictive Indorsement. — **35.** (1.) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof; as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "pay D. or order for collection."

(*Sigourney* v. *Lloyd*, No. 19, p. 353, *post*, and notes, p. 362, *post*.)

(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so.

(*Evans* v. *Cramlington* (Ex. Ch. 1687), 2 Show. 509; *Sigourney* v. *Lloyd*, *supra*.)

(3.) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

(*Sigourney* v. *Lloyd*, *supra*.)

Negotiation of Overdue or Dishonoured Bill. — **36.** (1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (*a*) restrictively indorsed or (*b*) discharged by payment or otherwise.

(*Callow* v. *Lawrence* (1814), 15 R. R. 423; 3 M. & S. 95, and cited in No. 42, p. 555, *post*.)

(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(Nos. 21 and 22, pp. 371, 375, *post*, and notes, p. 397, *post*.)

(3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears

on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(Nos. 23 and 24; pp. 399, 401, *post*, and notes, pp. 405, 407, *post*.)

(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue.

(*Lewis* v. *Parker* (1836), 4 A. & E. 838.)

(5.) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

(Settles a disputed point. Chalmers, 4th ed. p. 120.)

Negotiation of Bill to Party already Liable thereon. — **37.** Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

(*Attenborough* v. *Mackenzie* (1856), 25 L. J. Ex. 244.)

Rights of the Holder. — **38.** The rights and powers of the holder of a bill are as follows: —

(1.) He may sue on the bill in his own name:

(See *Crouch* v. *Crédit Foncier*, *per* BLACKBURN, B., notes to No. 16, p. 335, *post*.)

(2.) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(*Ibid.*)

(3.) Where his title is defective (*a*) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (*b*) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

(*Ibid.*, and *Marston* v. *Allen* (1841), 8 M. & W. at p. 504; 11 L. J. Ex. at p. 126, *per* ALDERSON, B.)

General Duties of the Holder.

When Presentment for Acceptance is necessary. — **39.** (1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(*Ramchurn Mullick* v. *Luchmeechund Radakissen*, No. 30, p. 456, *post.*)

(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(Settles a doubtful point. Chalmers, 4th ed. 131.)

(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(*Ramchurn, &c., supra*, 9 Moore P. C., at p. 65, *per* PARKE, B.)

(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

(Added in Committee, as consequential to sub-sec. (2), and perhaps alters the law. Chalmers, p. 133, 4th ed.)

Time for presenting Bill payable after Sight. — **40.** (1.) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(No. 30 *supra*, and notes thereto, p. 466, *post.*)

(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(*Ibid.*)

(3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

(*Ibid.*)

Rules as to Presentment for Acceptance, and Excuses for Non-presentment. — **41.** (1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(*a.*) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:
(*Parker* v. *Gordon* (1806), 8 R. R. 646; 7 East, 385.)

(*b.*) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

(*c.*) Where the drawee is dead, presentment may be made to his personal representative:
(Settles doubtful point. Chalmers, p. 137, 4th ed.)

(*d.*) Where the drawee is bankrupt, presentment may be made to him or to his trustee:

(*e.*) Where authorised by agreement or usage, a presentment through the post-office is sufficient.
(English practice. Chalmers, p. 137, 4th ed.)

(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance —

(*a.*) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:

(*b.*) Where, after the exercise of reasonable diligence, such presentment cannot be effected:

(*c.*) Where although the presentment has been irregular, acceptance has been refused on some other ground.
(Perhaps new. Chalmers, p. 137, 4th ed.)

(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.
(*Ex parte Tondeur; In re Agra & Masterman's Bank* (1867), L. R., 5 Eq. 160, 37 L. J. Ch. 121.)

Non-acceptance. — **42.** (1.) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

(See *Bank of Van Diemen's Land* v. *Victoria Bank* (1871), L. R., 3 P. C. at pp. 542, 543, 40 L. J. P. C. 28, 32. Chalmers, p. 137, 4th ed., mentions that the clause was much discussed in committee, and eventually reduced to its present vague form, as bankers and merchants took different views as to exact rights of parties.)

Dishonour by Non-acceptance and its Consequences. — **43** (1.) A bill is dishonoured by non-acceptance —

(*a.*) When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or

(*b.*) When presentment for acceptance is excused and the bill is not accepted.

(2.) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

(*Whitehead* v. *Walker* (1842), 9 M. & W. 506; 11 L. J. Ex. 168.)

Duties as to Qualified Acceptances. — **44.** (1.) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance.

(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

(Settles a doubtful point. Chalmers, p. 141, 4th ed.)

Rules as to Presentment for Payment. — **45.** Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

(*Gibb* v. *Mather*, No. 31, p. 467. *post*, and notes thereto, p. 476, *post*.)

A bill is duly presented for payment which is presented in accordance with the following rules: —

(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2.) Where the 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, and within a reasonable time after its indorsement, in order to render the indorser liable.

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.

(3.) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(*Heylyn* v. *Adamson*, No. 29, p. 445, *post*.)

(4.) A bill is presented at the proper place: —

(*a*.) Where a place of payment is specified in the bill and the bill is there presented.

(*Gibb* v. *Mather*, *ut supra*: *Saul* v. *Jones* (1858), 1 E. & B. 59, 28 L. J. Q. B. 37 and p. 476 *post*.)

(*b*.) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(*Hine* v. *Allely* (1833), 4 B. & Ad. 624.)

(*c*.) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

(*d*.) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

Buxton v. *Jones* (1840), 1 M. & Gr. 83.)

(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(*Hine* v. *Allely*, *supra*: *Buxton* v. *Jones*, *supra*.)

(6.) Where a bill is drawn upon, or accepted by two or more

persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(Probably declaratory. Chalmers, p. 146, 4th ed.)

(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(8.) Where authorised by agreement or usage a presentment through the post-office is sufficient.

(Recognised practice. Chalmers, p. 147, 4th ed.)

Excuses for Delay or Non-presentment for Payment.— **46.** (1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(*Rouquette* v. *Overmann*, No. 13, p. 287, *post*. *Patience* v. *Townley*, 8 R. R. 711, 2 Smith, 223.)

(2.) Presentment for payment is dispensed with, —

(*a.*) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected.

(*Phillips* v. *Astling*, No. 32, p. 477, *post*, and *Hardy* v. *Woodroofe*, cited in notes, thereto p. 482, *post*.)

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(*Baker* v. *Birch*, cited in notes to No. 32, p. 482, *post*.)

(*b.*) Where the drawee is a fictitious person.

(*Smith* v. *Bellamy* (1817), 2 Stark. 223.)

(*c.*) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(*Wirth* v. *Austin* (1875), L. R., 10 C. P. 689.)

(*d.*) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(*e.*) By waiver of presentment, express or implied.

(*Hopley* v. *Dufresne* (1812). 13 R. R. 463, 15 East, 275.)

Dishonour by Non-payment. — **47.** (1.) A bill is dishonoured by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when presentment is excused and the bill is overdue and unpaid.

(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

(*Ex parte Moline* (1812), 1 Rose, 303.)

Notice of Dishonour and effect of Non-notice. — **48.** Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged,

(See Nos. 35 and 36, pp. 494, 498, *post.* *Turner* v. *Leech*, No. 39, p. 523, *post.*)

Provided that —

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(*Dunn* v. *O'Keefe* (1816), 17 R. R. 326, 5 M & S. 282.)

(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

Rules as to Notice of Dishonour. — **49.** Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules : —

(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(*Chapman* v. *Keane*, No. 34, p. 490, *post*; *Turner* v. *Leech*, No. 39, p. 523, *post.*)

(2.) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

(*Harrison* v. *Ruscoe* (1846), 15 M. & W. 231, 15 L. J. Ex. 110.)

(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(*Chapman* v. *Keane*, *supra.*)

(4.) Where notice is given by or on behalf of an indorser entitled to give notice as herein-before provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(*Ibid.*)

(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(Modifies the stringency of the law. Chalmers, p. 154, 4th ed.)

(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(The same.)

(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(Probably declaratory; but no English decision in point. Chalmers, p. 160, 4th ed.)

(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(Settles point not before expressly decided. Chalmers, p. 160, 4th ed.)

(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(So held in America. No English decision in point. Chalmers, p. 161, 4th ed.)

(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

(See Nos. 35 & 36, pp. 491, 498, *post*, and notes, pp. 503, 504. *post*.)

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless, —

(*a.*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(See *Ibid.*)

(*b.*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(See *Ibid.*)

(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. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(*Bray* v. *Hadwen*, cited in notes to Nos. 35 & 36, p. 503, *post.*)

(14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(*Wright* v. *Shawcross* (1819), 2 B. & Ald. 501, n.)

(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post-office.

(*Stocken* v. *Collen* (1841), 7 M. & W. 515, 10 L. J. Ex. 227.)

Excuses for Non-notice and Delay. — **50.** (1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(See Nos. 35 & 36, pp. 494, 498, *post*, and notes, p. 503, *post.*)

(2.) Notice of dishonour is dispensed with —

(*a.*) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:

(*Studdy* v. *Beesly*, No. 36, p. 498, *post.*)

(*b.*) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(*Phipson* v. *Kellner* (1815), 4 Camp. 285; *Woods* v. *Dean* (1862), 32 L. J. Q. B. 1.)

(*c.*) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:

(*Sharpe* v. *Bailey* (1879), 9 B. & C. 44; *Carew* v. *Duckworth* (1869), L. R, 4 Ex. 313, 38 L. J. Ex. 149.)

(*d.*) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

(*Caunt* v. *Thompson* (1849), 18 L. J. C. P. 125.)

Noting or Protest of Bill. — **51.** (1.) Where an inland bill has been dishonoured, it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

(*Gale* v. *Walsh* (1793), 2 R. R. 580, 5 T. R. 239.)

(3). A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4.) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(Perhaps modifies the law. See Chalmers, p. 173, 4th ed.)

(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6.) A bill must be protested at the place where it is dishonoured: Provided that —

(*a.*) When a bill is presented through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(The sub-section inserted in Committee. Chalmers, p. 174, 4th ed.)

(*b.*) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(Reproduces 2 & 3 Will. 4, c. 98.)

(7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify —

(*a.*) The person at whose request the bill is protested:

(*b.*) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct,

or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

(*Legge* v. *Thorpe* (1810), 12 East, 171.)

Duties of Holder as regards Drawee or Acceptor. — **52.** (1.) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(*Walton* v. *Mascall*, No. 33, p. 483, *post*, and notes, p. 488, *post*.)

(2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(*Smith* v. *Vertue*, No 9, p. 246, *post*.)

(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

(*Treacher* v. *Hinton* (1821), 4 B. & Ald. 413.)

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

(*Hansard* v. *Robinson* (1827), 7 B. & C. 90. *Per* Lord Tenterden, at p. 94.)

Liabilities of Parties.

Funds in Hands of Drawee. — **53**. (1.) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(*Hopkinson* v. *Forster*, No. 11 of "Banker," R. C. vol. 3, p. 755.)

(2.) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

Liability of Acceptor. — **54.** The acceptor of a bill, by accepting it —

(1.) Engages that he will pay it according to the tenor of his acceptance:

(2.) Is precluded from denying to a holder in due course:

(*a.*) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill:

(Nos. 47 & 48, pp. 622–634, *post*, and notes thereto, p. 643, *post.*)

(*b.*) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement:

(*Ibid.*)

(*c.*) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

(*Ibid.*)

Liability of Drawer or Indorser. — **55.** (1.) The drawer of a bill by drawing it —

(*a.*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken.

(See *per* PARKE, B., in *Whitehead* v. *Walker* (1842), 9 M. & W. 506, at p. 516, 11 L. J. Ex. 168, at p. 172.)

(*b.*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(See notes to Nos. 47 & 48, p. 634, *post.*)

(2.) The indorser of a bill by indorsing it —

(*a.*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken:

(See notes to No. 41, p. 546, *post.*)

(*b.*) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature, and all previous indorsements:

(Notes to Nos. 47 & 48, p. 634, *post.*)

(*c.*) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

(*Ibid.*)

Stranger signing Bill liable as Indorser. — **56.** Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

(*Steele* v. *M'Kinlay*, No. 7, at p. 234, *post*, 5 App. Cas. at p. 782.)

Measure of Damages against Parties to dishonoured Bill. — **57.** Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser —

(*a.*) The amount of the bill:

(*b.*) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

(Law modified. See Chalmers, p. 192, 4th ed.)

(*c.*) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(*In re General S. American Co.*, No. 43, p. 565, *post*, and notes, p. 573, *post*.)

(3.) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

(*Keene* v. *Keene* (1857), 3 C. B. N. S. 144, 27 L. J. C. P. 88, *per* WILLES, J.)

Transferor by Delivery and Transferee. — **58.** (1.) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2.) A transferor by delivery is not liable on the instrument.

(3.) A transferor by delivery who negotiates a bill thereby 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.

(*Gompertz* v. *Bartlett* (1853), 23 L. J. Q. B. 65.)

Discharge of Bill.

Payment in Due Course. — **59.** (1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

(*Morley* v. *Culverwell* (1840), 7 M. & W., *per* PARKE, B., at. p. 182, 10 L. J. Ex. 39 ; *Harmer* v. *Steele*, No. 38, and notes, pp. 515–521, *post.*)

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(*Ibid.*)

(2.) Subject to the provisions herein-after contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(*a.*) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill.

(*Williams* v. *James* (1850), 15 Q. B. 498, 505, 19 L. J. Q. B. 445, 447.)

(*b.*) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(*Callow* v. *Lawrence* (1814), 15 R. R. 423, 3 M. & S. 95, and cited in No. 42, p. 555, *post.*)

(3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

(*Cook* v. *Lister*, No. 42, p. 552, *post.*)

Banker paying Demand Draft whereon Indorsement is forged. **60.** — When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed

to have paid the bill in due course, although such indorsement has been forged or made without authority.

(Statutory. See notes to *Attwood* v. *Munnings*, No. 20, at p. 364, *post*.)

Acceptor the Holder at Maturity. — **61.** When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

(*Harmer* v. *Steele*, No. 38, p. 515, *post*. The words "in his own right" perhaps modify the common law. Chalmers, p. 211, 4th ed.)

Express Waiver. — **62.** (1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

(See *Cook* v. *Lister*, No. 42, p. 552, *post*.)

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(Law altered, to bring it into accordance with Scotch law. Chalmers, p. 213, 4th ed.)

(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

(*Ingham* v. *Primrose*, as cited in notes to *Whistler* v. *Forster*, No. 16, p. 336, *post*.)

Cancellation. — **63.** (1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(*Ralli* v. *Dennistoun*, No. 37, and notes, pp. 506–514 *post*.)

(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

(Notes to No. 37, at p. 514, *post*.)

Alteration of Bill. — **64.** (1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

(*Master* v. *Miller*, "Alteration," and notes, R. C. vol. 2, pp. 669, 692.)

Provided that —

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(Proviso mitigates rigour of common-law rule. See Chalmers, p. 215, 4th ed.)

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

(Notes to *Master* v. *Miller*, R. C. vol. 2, p. 692.)

Acceptance and Payment for Honour.

Acceptance for Honour supra Protest. — **65.** (1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2.) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3.) An acceptance for honour *supra* protest in order to be valid must —

(*a.*) be written on the bill, and indicate that it is an acceptance for honour:

(*b.*) be signed by the acceptor for honour.

(4.) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

(Brings law into accordance with mercantile understanding. Chalmers, p. 228, 4th ed.)

Liability of Acceptor for Honour. — **66.** (1.) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(See notes to *Steele* v. *M'Kinlay*, No. 7, p. 341, *post*.)

(2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

(See *Phillips* v. *Im. Thurm*, No. 48, at p. 632, *post*, L. R., 1 C. P. at p. 471.)

Presentment to Acceptor for Honour. — **67.** (1.) Where a dishonoured bill has been accepted for honour *suprà* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(*Hoare* v. *Cazenove*, cited in notes to No. 7, p. 242, *post*.)

(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity: and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(Statutory, reproducing 6 & 7 Will. 4, c. 58.)

(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4.) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

Payment for Honour suprà Protest. — **68.** (1.) Where a bill has been protested for non-payment, any person may intervene and pay

it *suprà* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(Compare s. 93, *post*, and see authorities cited in arguments of *Geralopulo* v. *Wieler*, No. 51, p. 654, *post*.)

(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3.) Payment for honour *suprà* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(Compare s. 93, p. 175, *post*.)

(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(See *In re Overend Gurney & Co., Ex parte Swan*, No. 22, p. 375, *post*.)

(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

(7.) Where the holder of a bill refuses to receive payment *suprà* protest he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

Holder's Right to Duplicate of lost Bill. — **69.** Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

(Statutory, reproducing 9 & 10 Will. 3, c. 17, s. 3.)

If the drawer on request as aforesaid refuses to give such a duplicate bill, he may be compelled to do so.

Action on Lost Bill. — **70.** In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

(Statutory, reproduces and extends, 17 & 18 Vict. c. 125, s. 125. Compare at common law, *Crowe* v. *Clay*, No. 50, 648, *post.*)

Bill in a Set.

Rules as to Sets. — **71.** (1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(See example in *Ralli* v. *Dennistoun*, No. 37, p. 506, *post.*)

(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(Probably declaratory. Chalmers, p. 236, 4th ed.)

(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4.) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(*Ralli* v. *Dennistoun*, No. 37, at p. 513, *post*, 6 Ex., at p. 496.)

(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Conflict of Laws.

Rules where Laws conflict. — **72.** Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made.

Provided that —

(*a.*) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(*b.*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(*Re Marseilles, &c. Co.* (1885), 30 Ch. D. 598, 55 L. J. Ch. 116.)

(2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill, is determined by the law of the place where such contract is made.

(*Allen* v. *Kemble*, *per* Lord KINGSDOWN, cited in *Rouquette* v. *Overmann*, No. 13, at p. 301, *post*, L. R., 10 Q. B., at p. 540.)

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(*Re Marseilles, &c. Co., ut supra.*)

(3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(Notes to Nos. 35 & 36, p. 503, *post.*)

(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of

the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(*Hirschfield* v. *Smith* (1866), L. R., 1 C. P. 340, at p. 353, L. J. C. P. 177, at p. 181.)

(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

(*Rouquette* v. *Overmann*, No. 13, pp. 287, 296, *et seq.*, *post*, L. R., 10 Q. B. at pp. 535–538.)

PART III.

Cheques on a Banker.

Cheque Defined. — **73**. A cheque is a bill of exchange drawn on a banker payable on demand.

(*McLean* v. *Clydesdale Banking Co.*, H. L. App. Scotland (1883), 9 App. Cas. 95, *per* Lord Blackburn, at p. 106.)

Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

(For distinctions generally see *per* Parke, B., in *Ramchurn*, &c., No. 30 at p. 465, *post*, 9 Moore, P. C. at p. 69.)

Presentment of Cheque for Payment. — **74**. Subject to the provisions of this Act —

(1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(New, modifying rigour of common-law rule. Chalmers, p. 247, 4th ed.)

(2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(Modifies common-law rules. Chalmers, p. 248, 4th ed.)

(3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

(New, consequential on sub-sec. 1.)

Revocation of Banker's Authority. — **75**. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by —

(1.) Countermand of payment:

(See *Cohen* v. *Hale* (1878), 3 Q. B. D. 371, 47 L. J. Q. B. 496.)

(2.) Notice of the customer's death.

(*Rogerson* v. *Ladbroke* (1822), 1 Bing. 93.)

Crossed Cheques.

General and Special Crossings defined. — **76**. (1.) Where a cheque bears across its face an addition of —

(*a*.) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable;" or

(*b*.) Two parallel transverse lines simply, either with or without the words "not negotiable;"

that addition constitutes a crossing, and the cheque is crossed generally.

(Statutory, reproducing Crossed Cheques Act 1876. Compare Nos. 27 & 28, pp. 436, 440, *post*.)

(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

(The same.)

Crossing by Drawer or after Issue. — **77**. (1.) A cheque may be crossed generally or specially by the drawer.

(New. Chalmers, p. 255, 4th ed.)

(2.) Where a cheque is uncrossed, the holder may cross it generally or specially.

(Statutory, as above.)

(3.) Where a cheque is crossed generally the holder may cross it specially.

(The same.)

(4.) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(The same.)

(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(The same.)

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

(New.)

Crossing a Material Part of Cheque. — **78.** 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.

(Statutory, as above.)

Duties of Banker as to Crossed Cheques. — **79.** (1.) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(The same.)

(2.) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays 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, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

(The same.)

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, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom

the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

(The same.)

Protection to Banker and Drawer where Cheque is crossed. — **80.** Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

(The same.)

Effect of Crossing on Holder. — **81.** Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

(The same.)

Protection to collecting Banker. — **82.** 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.

(The same, and affirming interpretation in *Matthiesson* v. *London & County Bank* (1879), 5 C. P. D. 7, 48 L. J. C. P. 529.)

PART IV.

Promissory Notes.

Promissory Note defined. — **83.** (1.) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(Nos. 1 & 2, pp. 180, 184, *post.*)

(2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(*Wise* v. *Charlton* (1836), 4 A. & E. 786.)

(4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

Delivery necessary. — **84.** A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Joint and Several Notes. — **85.** (1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(*Penkivil* v. *Connell* (1850), 5 Exch. 381, 19 L. J. Ex. 305, see *per* POLLOCK, C. B.)

(2.) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

(*Monson* v. *Drakeley* (1873), 16 Amer. R. 74.)

Note payable on Demand. — **86.** (1.) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(*Chartered Mercantile Bank of India* v. *Dickson* (1871), L. R., 3 P. C. 574, at p. 579.)

(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(*Chartered Mercantile Bank of India* v. *Dickson*, as cited in notes to Nos. 23 & 24, p. 405, *post*.)

(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

(*Brooks* v. *Mitchell*, No. 23, p. 399, *post*.)

Presentment of Note for Payment. — **87.** (1.) Where a promissory note is in the body of it made payable at a particular place, it must

be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(*Sands* v. *Clarke*, *Masters* v. *Baretto*, cited in notes to No. 31, p. 476, *post*.)

(2.) Presentment for payment is necessary in order to render the indorser of a note liable.

(*Gibb* v. *Mather*, No. 31, at p. 467, *post*, 2 Cr. & J., pp. 262, 263.)

(3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

(*Roche* v. *Campbell*, *Saunderson* v. *Judge*, cited in notes to No. 31, pp. 476, 477, *post*.)

Liability of Maker. — **88**. The maker of a promissory note, by making it —

(1.) Engages that he will pay it according to its tenor;

(2.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(*Drayton* v. *Dale* (1823), 2 B. & C. 293.)

Application of Part II. to Notes. — **89**. (1.) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(*Heylyn* v. *Adamson*, No. 29, p. 445, *post*, and notes, p. 455, *post*.)

(2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(*Ibid.*)

(3.) The following provisions as to bills do not apply to notes; namely, provisions relating to —

(*a*.) Presentment for acceptance:

(*b*.) Acceptance:

(*c*.) Acceptance *supra* protest:

(*d*.) Bills in a set.

(4.) Where a foreign note is dishonoured, protest thereof is unnecessary.

(*Bonar* v. *Mitchell* (1850), 5 Exch. 415, 19 L. J. Ex. 302.)

PART V.

Supplementary.

Good Faith. — **90.** A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

Signature. — **91.** (1.) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(See *Harrop* v. *Fisher*, No. 17, p. 338, *post*, and notes, p. 343, *post.*)

(2.) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

(Settles doubtful point. Chalmers, p. 278, 4th ed.)

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

Computation of Time. — **92.** Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this Act mean —

(*a.*) Sunday, Good Friday, Christmas Day:

(*b.*) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it:

(*c.*) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

When Noting equivalent to Protest. — **93.** For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

(*Geralopulo* v. *Wieler*, No. 51, p. 654, *post.*)

Protest when Notary not Accessible. — **94.** Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

(Statutory. Chalmers, p. 280, 4th ed.)

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

Dividend Warrants may be Crossed. — **95.** The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

(New. — By s. 17 of "The Revenue Act, 1883," these provisions are further extended 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.")

Repeal. — **96.** The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings. — **97.** (1.) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2.) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of Exchange, promissory notes, and cheques.

(3.) Nothing in this Act or in any repeal effected thereby shall affect —

(*a.*) The provisions of the Stamp Act, 1870 (33 & 34 Vict. c. 97), or Acts amending it, or any law or enactment for the time being in force relating to the revenue:

(*b.*) The provisions of the Companies Act, 1862 (25 & 26 Vict. c. 89), or Acts amending it, or any Act relating to joint stock banks or companies:

(*c.*) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

(*d.*) The validity of any usage relating to dividend warrants, or the indorsements thereof.

Saving of Summary Diligence in Scotland. — **98.** Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

Construction with other Acts, &c. — **99.** Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

Parole Evidence allowed in certain Judicial Proceedings in Scotland. — **100.** In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

SCHEDULES.

FIRST SCHEDULE.

SECTION 94. — Form of protest which may be used when the services of a notary cannot be obtained.

Know all men that I, A. B. [householder], of in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of 188 at , demand payment [*or* acceptance] of the bill of exchange hereunder written, from E. F., to which demand he made answer [state answer, if any] wherefore I now, in the presence of G. H. and J. K. do protest the said bill of exchange.

(Signed) A. B.
G. H. } Witnesses.
J. K. }

N. B. The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

SECOND SCHEDULE.

Enactments repealed.

Session and Chapter.	Title of Act and extent of Repeal.
9 Will. 3, c. 17	An Act for the better payment of Inland Bills of Exchange.
3 & 4 Anne, c. 8 . . .	An Act for giving like remedy upon Promissory Notes as is now used upon Bills of Exchange, and for the better payment of Inland Bills of Exchange.
17 Geo. 3, c. 30	An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England.
39 & 40 Geo. 3, c. 42 . .	An Act for the better observance of Good Friday in certain cases therein mentioned.
48 Geo. 3, c. 88	An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum in England.
1 & 2 Geo. 4, c. 78 . .	An Act to regulate Acceptances of Bills of Exchange.
7 & 8 Geo. 4, c. 15 . .	An Act for declaring the law in relation to Bills of Exchange and Promissory Notes becoming payable on Good Friday or Christmas Day.
9 Geo. 4, c. 24	An Act to repeal certain Acts, and to consolidate and amend the laws relating to Bills of Exchange and Promissory Notes in Ireland, in part; that is to say, Section two, four, seven, eight, nine, ten, eleven.
2 & 3 Will. 4, c. 98 . .	An Act for regulating the protesting for non-payment of Bills of Exchange drawn payable at a place not being the place of the residence of the drawee or drawees of the same.
6 & 7 Will. 4, c. 58 . .	An Act for declaring the law as to the day on which it is requisite to present for payment to Acceptor, or Acceptors *supra* protest for honour, or to the Referee or Referees, in case of need, Bills of Exchange which have been dishonoured.
8 & 9 Vict. c. 37 . . . in part.	An Act to regulate the issue of bank notes in Ireland, and to regulate the repayment of certain sums advanced by the Governor and Company of the Bank of Ireland for the public service, in part; that is to say, Section twenty-four.
19 & 20 Vict. c. 97 . . in part.	The Mercantile Law Amendment Act, 1856, in part; that is to say, Sections six and seven.
23 & 24 Vict. c. 111 . . in part.	An Act for granting to Her Majesty certain duties of stamps, and to amend the laws relating to the stamp duties, in part; that is to say, Section nineteen.
34 & 35 Vict. c. 74 . .	An Act to abolish days of grace in the case of Bills of Exchange and Promissory Notes payable at sight or on presentation.
39 & 40 Vict. c. 81 . .	The Crossed Cheques Act, 1876.
41 & 42 Vict. c. 13 . .	The Bills of Exchange Act, 1878.

Enactment repealed as to Scotland.

19 & 20 Vict. c. 60 . . in part.	The Mercantile Law (Scotland) Amendment Act, 1856, in part; that is to say, Sections ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen.

Section I. — *Nature and Construction of the Contract.*

No. 1. — CARLOS *v.* FANCOURT.

(EX. CH. 1794.)

No. 2. — COLEHAN *v.* COOKE.

(1742.)

RULE.

An instrument creating a liability to payment upon a contingency cannot be a negotiable bill of exchange or promissory note.

But *contrà* if the instrument makes a sum payable upon a future event which is certain to happen, although the time of its happening is uncertain.

Carlos v. Fancourt.

5 T. R. 482–487 (s. c. 2 R. R. 647–650).

[482] This was an action upon promises, and was brought in the Court of Common Pleas. The first count of the declaration alleged that the defendant (below) in the lifetime of A. Fancourt, the late wife of the plaintiff (below), on the 27th of July, 1786, [*483] made and signed his certain note in writing, *commonly called a promissory note, and thereby promised to pay to the said A. Fancourt, then being the plaintiff's wife, the sum of £10 "out of his the said defendant's money that should arise from his reversion of £43 when sold," and delivered the said note to the said A. F.; whereby and by reason of which several promises, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note; and being so liable, the said defendant, in consideration thereof, afterwards, &c., promised to pay, &c., yet that he did not, &c., although often requested, &c., and although the said reversion of the said £43 was sold before the suing forth of the original writ, &c. The declaration contained other counts, for work and labour; money paid; &c., &c.

No. 1. — Carlos v. Fancourt, 5 T. R. 483, 484.

The defendant suffered judgment to go by default; and a general judgment was entered up on the whole declaration. A writ of error was then brought; and the plaintiff in error assigned for error, that there was a general judgment on all the counts in the declaration, the first of which was founded on a supposed promissory note, as a note within the statute made concerning promissory notes, whereas it was not a note within the statute, but a contingent note; and on which, as stated in the declaration, it appeared to be uncertain whether or not the money therein specified would ever become payable, and was therefore void in law; and that it did not appear that the note was given for value received or for any valuable or legal consideration whatever, &c.

Morgan for the plaintiff in error. — The note declared upon is void, and not negotiable within the stat. 3 & 4 Anne, c. 9., because it is payable only on a contingency, on an uncertain event which may never happen, and out of an uncertain fund, which may not be sufficient to answer it; and being void in its creation, it cannot be made good by the subsequent event of the sale of the reversion of the £43. That a bill of exchange, payable on a contingency, is not good, has been determined in a variety of cases; particularly in *Dawkes* v. *The Earl of Deloraine*, 2 Bl. Rep. 782, and 3 Wils. 207, and in *Kingston* v. *Long*, Bailey on Bills of Exchange, 71, 4 Dougl. 9, M. 25 G. III. B. R. Then if a bill of exchange payable on a contingency be not good, neither can a promissory note, which is put on the same *footing with bills of [*484] exchange by the 3 & 4 Anne, c. 9. But this does not rest merely on the analogy to bills of exchange, the same point having been decided with regard to promissory notes, *Pearson* v. *Garret*, Skin. 398, and Comb. 227; *Beardesley* v. *Baldwyn*, 2 Str. 1151; *Roberts* v. *Peake*, 1 Burr. 325; and the same doctrine was laid down by Lord MANSFIELD in another case, where the objection that the note was contingent was overruled; "indeed his Lordship said a contingent note, where it is uncertain whether the money shall ever become payable at all or not, is another case: such a note is not within the statute." *Goss* v. *Nelson*, 1 Burr. 227.

Wood, *contrà*, admitted that a bill of exchange, payable out of a particular fund, was not a bill within the custom of merchants, but contended that promissory notes were not governed by all the rules which applied to bills of exchange, their origin being different; the latter depending on the custom of merchants, which

does not extend to contingent bills; the former on the statute of Anne, which makes promissory notes in general assignable, without distinguishing between those which are payable at all events, and such as are only payable on a contingency. That the cases cited on bills of exchange were not therefore applicable to this case. That in *Andrews* v. *Franklin*, 1 Str. 24, where an action was brought upon a promissory note, payable two months after such a ship was paid off, and the plaintiff declared upon it as a note within the statute, and where this very objection was taken that it was not negotiable, because it was payable only on a contingency which might never happen, the Court decided that it was negotiable as a promissory note. That in *Dawkes* v. *Lord Deloraine* the Court recognized the case of *Andrews* v. *Franklin*, and distinguished between the case of a bill of exchange and a promissory note; they said "that was a promissory note, and not a bill of exchange; and a note may be certainly payable on a future event." That in *Pearson* v. *Garret* the note was declared on as "within the custom of merchants," and therefore bad; besides which, that case happened before the statute of Anne. But that, even if the note in this case were not a good one within the statute of Anne, the words in the declaration "by force of the statute," &c. might be rejected; and that as this note had not been negotiated, at least as between these parties, the action might be sustained.

[*485] Lord KENYON, C. J. The question in this case is not whether the plaintiff in error, who may have promised for a valuable consideration to pay to the defendant a certain sum of money on an event which has since happened, is or is not bound to perform that promise? If this promise were made on a consideration, there is no doubt but that an action might be maintained on it, as on a special agreement: but the question now before the Court is, whether or not the note set forth upon the record can be declared on as a negotiable security under the statute 3 & 4 Anne, c. 9.? The object of that Act was to put promissory notes on the same footing with bills of exchange in every respect. *Brown* v. *Harraden*, 4 T. R. 148. It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be

reduced to a certainty. It has been admitted, in the argument, that if this were a bill of exchange the declaration could not be supported: many cases indeed were cited by the counsel on the other side to prove that position, to which may be added another in Lord RAYMOND, *Jenny* v. *Herle*, 2 Lord Raym. 1361, where it was decided that a bill, which was not payable at all events, could not be considered as a bill of exchange: and this admission by the counsel for the defendant in error is decisive of this case; for there is no difference in this respect between promissory notes and bills of exchange; they both stand *in pari ratione*. If we were to render this point in the least doubtful, we should shake the foundation of that which has been considered as clear law ever since the time of Lord HOLT. I am therefore clearly of opinion that this note cannot be declared upon as a negotiable instrument; at the same time I have no doubt but that an action might be framed on it as on a special agreement. The justice of the case is certainly with the defendant in error: but we must not transgress the legal limits of the law, in order to decide according to conscience and equity. We need have no reluctance in reversing the judgment of the Common Pleas, because as this was a judgment by default, that Court had no opportunity of exercising their judgment upon the question.

ASHHURST, J. Before the statute of Anne promissory notes were not assignable as *choses in action*, nor could actions * have been brought on them, because the considerations [*486] do not appear on them; and it was to answer the purposes of commerce that those notes were put by the statute on the same footing with bills of exchange. Then they cannot rest on a better footing than bills of exchange, but must stand or fall on the same rules by which bills of exchange are governed. Certainty is a great object in commercial instruments; and unless they carry their own validity on the face of them, they are not negotiable: on that ground bills of exchange, which are only payable on a contingency, are not negotiable, because it does not appear on the face of them whether or not they will ever be paid. The same rule then that governs bills of exchange in this respect must also govern promissory notes. And therefore, though this might have been declared on as a special agreement, stating the consideration for the promise, and the sale of the reversion of £43, yet this action cannot be maintained. This does not come within the

custom of merchants respecting bills of exchange, nor is it a negotiable instrument within the statute of Anne, because as a bill of exchange it would not be good.

Grose, J. The plaintiff below could only declare either on this instrument, as a note under the statute of Anne, or on the special contract that existed between the parties. He has declared on the former: but this is not a negotiable instrument, because it is not payable at all events. It has been said, however, that there is a difference in this respect between promissory notes and bills of exchange: but no decision has been cited to warrant such a distinction; and without such an authority I think that we ought not to establish it; for the words of the statute of Anne are, "therefore to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner," &c. It clearly appears therefore to have been the intention of the Legislature to put promissory notes on the same foundation as bills of exchange. Now if this had been a bill of exchange, the declaration drawn on it as on a bill within the custom of merchants would have been bad, because the money was only to be paid on a contingency. Then if the plaintiff below had declared on this as on a special contract, he should have shown not only that there was a consideration for the promise, but also that the reversion was sold for at least £10; whereas here it is merely averred that the reversion was sold, without saying for [* 487] how much. * In whatever way therefore this question is considered, I think the declaration cannot be supported.

Judgment reversed.

Colehan v. Cooke.

Willes, 393–399.

[393] The following opinion of the Court was delivered by Willes, Lord Chief Justice. — Motion in arrest of judgment. The first count is on a promissory note dated 27th of May, 1732, whereby the defendant promised to pay to Henry Delany or order 150 guineas ten days after the death of his father, John Cooke, for value received; which note after the death of the father (which is laid to be the 2d of April, 1741) was duly indorsed by Delany to the plaintiff. The second count is on a promissory note dated the 15th of July, 1732, whereby the defendant promised to pay to

No. 2. — Colehan v. Cooke, Willes, 393, 394.

H. Delany or order six weeks after the death of his father 50 guineas for value received; the like indorsement laid after the death of the father as before. The third count is for money had and received, &c., £250: but this is out of the case. The damage is laid at £300; and a general verdict for the plaintiff on both notes.

It was insisted on for the defendant in arrest of judgment that these notes are not within the stat. 3 & 4 Anne, c. 9; and * if not, that they are not indorsable or assignable, and [*394] consequently that the plaintiff who brings this action as indorsee cannot recover at law. To show that these notes are not within the statute a great many things were said on the arguing of the case, and a great many cases and authorities cited both out of the common and civil law books. But I think that all the objections that were made may be reduced to these two general positions;

1st, That the Act of Parliament only intended to put promissory notes on the same foot as bills of exchange; and that therefore, if bills of exchange drawn in this manner would not be good and consequently not assignable, it follows that notes drawn in this manner are not made indorsable or assignable by the statute.

2dly, That the Act was made for the advancement of trade and commerce, and consequently was intended to extend only to such notes as are in their nature negotiable, and that these notes are not so.

Before I consider these objections, I will state the words of the Act of Parliament on which the question must depend, 3 & 4 Anne, c. 9, entitled "An Act for giving like remedy on promissory notes as is now used on bills of exchange, and for the better payment of inland bills of exchange." Whereas it hath been held that notes in writing signed by the party who makes the same, whereby such person promises to pay to any other person or his order any sum of money therein mentioned, are not assignable or indorsable over within the custom of merchants, and that any person to whom such note shall be assigned, indorsed or made payable could not within the said custom maintain any action on such note against the person who first drew and signed the same, therefore to the intent to encourage trade and commerce which will be much advanced if such notes shall have the same effect as inland bills of exchange and shall be negotiated in like manner, be it enacted

that all notes in writing which shall after, &c., be made and signed by any person or persons, &c., whereby such person or persons do or shall promise to pay to any other person or persons, &c., his, her or their order, or unto the bearer, any sum of money mentioned in such note, shall be taken and construed by virtue thereof due and payable to any such person or persons, &c., to whom the [*395] same is made payable, * and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants, and that the person or persons, &c., to whom the sum of money is made payable by such note shall and may maintain an action for the same in such manner as he, she or they may do upon any inland bill of exchange, &c.; and that the person or persons, &c., to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her or their action for such money either against the person or persons who signed such note, or against any of the persons who indorsed the same, in like manner as in case of inland bills of exchange. The title of the Act seems to refer to bills of exchange, and they are likewise referred to in the preamble, and the remedy is to be the same.[1] But in the description of the notes which are to be made assignable there is no reference to bills of exchange; but the words are very general, and I never understood that the plain words of an enacting clause are to be restrained by the title or preamble of an Act.[2] It has indeed been often said, and I think very rightly, that if the words of an Act of Parliament be doubtful, it may be proper to have recourse to the preamble to find out the meaning of the Legislature: but where the words of the enacting part are plain and express, I do not think that they ought to be restrained by the preamble; for the preamble may only recite some particular mischiefs which have happened, but the

[1] It was taken for granted in *Tindal* v. *Brown*, 1 T. R. 167, 2 T. R. 186, 1 R. R. 471, both in the Court of King's Bench and in the Exchequer Chamber, and solemnly decided in the cases of *Brown* v. *Harraden*, 4 T. R. 148, and *Smith* v. *Kendal*, 6 T. R. 123 (in which the *dictum* of Denison, J., in *Derlanx* v. *Hood*, Bull. N. P. 274, and the determination in *May* v. *Cooper*, Fost. 376, to the contrary, were overruled) that three days' grace are allowed on a promissory note (though it be a note payable to A. without adding "or to his order, or to bearer," *Smith* v. *Kendal*, 6 T. R. 123,) as well as on a bill of exchange, by reason of the stat. 3 & 4 Anne, c. 9, which puts them both on the same footing in all respects.

[2] Vid. *Copeman* v. *Gallant*, 1 P. Wms. 320; *Mace* v. *Cadell*, Cowp. 232, p. 58, *ante*; *Pattison* v. *Bankes*, Cowp. 543; *Cox* v. *Liotard*, II. 24 Geo. III. Dougl. 167 n. (55), oct. ed.; and *Bradley* v. *Clarke*, *per* Buller, J., 5 T. R. 201.

enacting clause may not only be calculated to prevent those mischiefs but others also of a like nature. Now the words of the enacting part of this Act are plain and clear and very general; and in order to bring a note within the description of that clause, it is only necessary,

* 1st, That the note should be in writing; [*396]

2dly, That it should be made and signed by the person promising to pay;

And 3dly, That there be an express promise to pay to another or his order or bearer. But as to the time of payment, the Act is silent, nor is there any particular form prescribed.

And therefore, as to the first objection, that if a bill of exchange had been drawn in this manner it would not have been good; supposing it to be true, I do not think that it follows that these promissory notes may not be within the general words of the statute, if they answer all the descriptions therein contained. However for argument's sake I will suppose that this consequence would hold; but we do not think that a bill of exchange drawn in this manner would be bad. Upon this head it would be but misspending time to run over all the passages which have been cited out of the civil-law books in relation to bills of exchange, because I put a question to the counsel which will I think determine this point: Whether there is any limited time mentioned in any of the books beyond which if bills of exchange are made payable they are not good; and it was agreed by the counsel that they could find no such rule, and I am sure I can find none. But if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill. There is but one passage in the books wherein any notion to the contrary is so much as hinted at; and that is in Scacchius de Commerciis, where it is said that it had been formerly an objection against a bill of exchange, as contrary to the nature of it, that it was made payable at the end of seven months: but by his making use of the word "formerly," it is plain that in his opinion the law was then held to be otherwise. If therefore the distance of time would not have made a bill of exchange bad if drawn in this manner, since it is drawn at a time which must come, the only other objection that was made on this head was that in all bills of exchange there must be a *par pro pari*, which there cannot be in this case, because the value cannot be ascertained. But I shall show plainly that the

value may be ascertained, when I come to the other objection that these are not negotiable notes.

Secondly; Having answered the objections against these notes considering them on the same foot as bills of exchange, I [*397] come *now to the second objection, arising from the words and intent of the statute. And first I think that they are plainly within the words. They are made in writing; they are signed by the person promising to pay, and there is an express promise to pay to another or his order; and as no time of payment is mentioned in the statute, the distance of time is no objection within the words of the Act.

Let us see, therefore, in the next place, whether any objection arises against them from the design and intent of the Act; though I think it would be pretty hard to construe a note to be not within the intent of an Act when it is manifestly within the words of it, and the words of the Act are plain and express. When the words of an Act are doubtful and uncertain, it is proper to inquire what was the intent of the Legislature; but it is very dangerous for Judges to launch out too far in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words. However, we think that these notes are within the intent as well as the words of the Act. And to show that they are so, I will here take notice of all the cases which were cited to the contrary, and will show that they all stand on a different foot and are plainly distinguishable from the present. For they are all of them cases where either the fund out of which the payment was to be made is uncertain, or the time of payment is uncertain and might or might not ever happen; whereas in the present case there is no pretence that the fund is uncertain, and the time of payment must come, because the father, after whose death they are made payable, must die one time or other. The case of *Pearson* v. *Garret*, 4 Mod. 242; Comb. 227, was thus: the defendant gave a note to pay sixty guineas when he married B., and judgment was given for the defendant, because it was uncertain whether he would ever marry her or not, so the time of payment might never come. In the case of *Jocelyn* v. *Le Serre*, P. 1 Geo. I. B. R.,[1] the bill was drawn on Jocelyn to pay so much every month out of his growing subsistence; how long that would last no one could tell, or whether

[1] Reported in 10 Mod. 294 and 316; and cited in 2 Lord Raym. 1362, and in 8 Mod. 364

it would be sufficient for that purpose; and therefore the bill was holden not to be good, because the fund was uncertain. In the case of *Smith* v. *Boheme*,[1] M. *1 Geo. I. B. R., the [* 398] promise in the note was to pay £70 or surrender a person therein named; if, therefore, he surrendered the person, there was no promise to pay anything, and therefore the note was uncertain and not negotiable. In the case of *Appleby* v. *Biddulph*, P. 2 Geo. I.,[2] a promise to pay if his brother did not pay by such a time; held not to be within the statute, because it was uncertain whether the drawer of the note would ever be liable to pay or not. In the case of *Jenny* v. *Herle*,[3] Tr. 10 Geo. I., a promise to pay such a sum out of the income of the Devonshire mines, held not a promise within the statute, because it was uncertain whether the fund would be sufficient to pay it. So in the case of *Barnsley* v. *Baldwyn*, P. 14 Geo. II. B. R.,[4] the promise was, as in the case of *Pearson* v. *Garret*, to pay such a sum on marriage; and held not to be within the statute for the same reason. And as these notes are plainly not within the intent of the statute because not negotiable *ab initio*, so when the words themselves come to be considered they are not within the words of it, because the statute only extends to such notes where there is an absolute promise to pay and not a promise depending on a contingency, and where the money at the time of the giving of the note becomes due and payable by virtue thereof (so are the words of the statute), and not where it becomes due and payable by virtue of a subsequent contingency which may perhaps never happen, and then the money will never become payable at all. And it can never be said that there is a promise to pay money, or that money becomes due and payable by virtue of a note, when unless such subsequent contingency happen the drawer of the note does not promise to pay anything at all.[5]

But the present notes, and those cases where such notes have been holden to be within the statute, do not depend on any such contingency, but there is a certain promise to pay at the time of the giving of the notes, and the money by virtue thereof will certainly become due and payable one time or other, though it is

[1] Cited in 2 Lord Raym. 1362.

[2] Cited in 8 Mod. 363.

[3] Reported in 2 Lord Raym. 1361.

[4] Reported in 7 Mod. 417; and in 2 Str. 1151, by the name of *Beardesley* v. *Baldwin*.

[5] But there may be a conditional acceptance of a bill of exchange. *Smith* v. *Abbot*, 2 Str. 1152; *Julian* v. *Shobrooke*, 2 Wils. 9; *Pierson* v. *Dunlop*, Cowp. 574; and *Sproat* v. *Matthews*, 1 T. R. 182.

uncertain when that time will come. The bills, therefore, [*399] of *exchange commonly called *Billæ nundinales* were always holden to be good, because though these fairs were not always holden at a certain time, yet it was certain that they would be held. The case of *Andrews* v. *Franklin* (1 Str. 24), H. 3 Geo. I. B. R., depends on the same reason; for there the note was to pay such a sum two months after such a ship was paid off; and held good, because the ship would certainly be paid off one time or other. The case of *Lewis* v. *Ord* (Cunningh. Bills of Exchange, 113), T. 8 & 9 Geo. II. B. R., was exactly the like case, and determined on the same reason. As to the objection that these are not negotiable notes, because the value of them cannot be ascertained, the argument is not founded on fact, because the value of a life, when the age of a person is known, is as well settled as can be; and there are many printed books in which these calculations are made. But if it were otherwise, the life of a man may be insured, and by that the value will be ascertained. And the same answer will serve to the objection which I before mentioned against such bills of exchange.

There was another objection taken, that the drawer might have died before his father, and then these notes would have been of no value: but there is plainly nothing in this objection, for the same may be said of any note payable at a distant time, that the drawer may die worth nothing before the note becomes payable.

We do not think that the averment of the death of the father before the indorsement makes any alteration, because we are of opinion that if the notes were not within the statute *ab initio*, they shall not be made so by any subsequent contingency. But for the reasons aforesaid we are of opinion (and so was the Lord Chief Baron PARKER) that the plaintiff is entitled to his judgment;[1] and therefore the rule for arresting the judgment must be discharged.[2]

[1] This judgment was afterwards affirmed in the Court of King's Bench on a writ of error. 2 Str. 1217.

[2] See the following cases, in which the notes or bills of exchange (for they are both on the same footing) were holden not to be good notes or bills because they were payable out of a particular fund or on a contingency: *Banbury* v. *Lissett*, 2 Str. 1211; *Dawkes* v. *Lord Deloraine*, 2 Bl. Rep. 782; 3 Wils. 207; *Roberts* v. *Peake*, 1 Burr. 323; *Kingston* v. *Long*, M. 25 Geo. III. B. R., Bayley's Bills of Exchange, 71; and *Carlos* v. *Fancourt*, 5 T. R. 482; 2 R. R. 647, p. 180, *ante*. In these, the notes were holden to be good because they were payable at all events. *Burchell* v. *Burchell*, 2 Lord Raym. 1545; *Evans* v. *Underwood*, 1 Wils. 262; *Poplewell* v. *Wilson*, 1 Str. 264; *Chadwick* v. *Allen*, ib. 706; *Goss* v. *Nelson*, 1 Burr. 226; and *Haussoullier* v. *Hartsinck*, 7 T. R. 733; 4 R. R. 561.

ENGLISH NOTES.

See Bills of Exchange Act 1882, section 3.

No particular form of words is necessary to a bill of exchange provided it is made clear that it directs one person to pay a certain sum of money to, or to hold that sum at the disposal of another. Thus "credit A. B." is for this purpose equivalent to "pay A. B." *Ellison* v. *Collingridge* (1850), 9 C. B. 570. So "I promise to pay or cause to be paid to A. B." has been held to be a promissory note. *Lovell* v. *Hill* (1833), 6 C. & P. 238.

An order for money drawn so as to be payable upon the arrival of a ship is not a bill, for the ship may never arrive, and if it does not, the document is mere waste paper. *Palmer* v. *Pratt* (1824), 1 Bing. 185.

In *Jenny* v. *Herle* (1723), 2 Lord Raym. 1361, referred to in the principal cases, it was decided that an order to pay money out of a particular fund is not a bill of exchange. This is embodied in sub-sect. (3) of sect. 3 of the Bill of Exchange Act 1882. As an instance of an order or a promise to pay out of a fund the existence or sufficiency of which depends on a contingency, it may be sufficient to cite *Hill* v. *Halford* (Ex. Ch. 1801), 2 Bos. & P. 413, 5 R. R. 632. Such an instrument is clearly not a bill or promissory note. But such an instrument may be valid as an equitable assignment. *Brice* v. *Bannister* (C. A. 1878), 3 Q. B. D. 569; 47 L. J. Q. B. 722; 38 L. T. 739. For the proposition that an unqualified order to pay coupled with an indication of a particular fund, &c. (in sub-sect. (3), of sect. 3 of Bill of Exchange Act 1882), it may suffice to mention as authorities, *Macleod* v. *Snse* (1728), 2 Str. 762, and *In re Boyse, Crofton* v. *Crofton* (1886), 33 Ch. D. 612; 56 L. J. Ch. 135; 55 L. T. 391.

The law raises a *primâ facie* presumption of consideration; and therefore it is not necessary (though it is usual) to express on the face of the bill that value has been given. *Hatch* v. *Trayes* (1840), 3 P. & D. 408; 11 A. & E. 702 (Bill of Exchange Act 1882, sect. 3, sub-sect. 4 *b*). The words "value received" in a bill drawn upon a third party have been construed as *primâ facie* meaning value received by the drawer. *Grant* v. *Da Costa* (1815), 3 M. & S. 351. But where the bill is made payable to the drawer's own order "value received," the words have been construed to mean value received by the drawee. *Highmore* v. *Primrose* (1816), 5 M. & S. 65.

It is to be observed that although a bill may not be drawn in terms importing a condition, it may be accepted conditionally. Bill of Exchange Act, 1882, sect. 19 (2) (*a*); *Julian* v. *Shobrooke* (1753), 2 Wils. 9; *Smith* v. *Vertue* (1860), 9 C. B. (N. S.) 214; 30 L. J. C. P. 56; 3 L. T. 583. No. 9, *post*, p. 246.

AMERICAN NOTES.

The doctrine of the two ruling cases is the general law in the United States. See 1 Daniel on Negotiable Instruments, sec. 41 *et seq.*, and sec. 46, citing the second principal case.

The following conditions as to time of payment have been held to render a bill unnegotiable: That a railroad be built to a certain point, *Blackman* v. *Lehman*, 63 Alabama, 547; 35 Am. Rep. 57; *Eldred* v. *Malloy*, 2 Colorado, 320; that a certain receipt be produced, *Mason* v. *Metcalf*, 4 Baxter (Tennessee), 440; or that a certain ship shall arrive, *Coolidge* v. *Ruggles*, 15 Massachusetts, 387; or the maker shall be able, *Salinas* v. *Wright*, 11 Texas, 572; "on account of contract when completed and satisfactory," *Home Bank* v. *Drumgoole*, 109 New York, 63; or that one person shall first pay another a certain sum, *Chapman* v. *Wight*, 79 Maine, 595; when a certain suit is determined, *Shelton* v. *Bruce*, 9 Yerger (Tennessee), 24; when a certain sale is made, *De Forrest* v. *Frary*, 6 Cowen (New York), 151; when certain dividends are declared, *Brooks* v. *Hargreaves*, 21 Michigan, 255; "upon completion of work to be done on a dwelling-house," *Chandler* v. *Carey*, 64 Michigan, 237; 8 Am. St. Rep. 814; "not to be paid unless I shall have the use of certain premises," *Jennings* v. *First Nat. Bank*, 13 Colorado. 417; 16 Am. St. Rep. 210; when a certain amount is collected, *Corbett* v. *State of Georgia*, 24 Georgia, 287; *Martin* v. *Shumatte*, 62 Texas, 189; when a certain estate is settled up, *Husband* v. *Epling*, 81 Illinois, 172; 25 Am. Rep. 273; "after arrival and discharge of coal by brig A," *Grant* v. *Wood*, 12 Gray (Massachusetts), 220; *The Lykus*, 36 Federal Reporter, 922; "subject to this policy," *American Exchange Bank* v. *Blanchard*, 7 Allen (Massachusetts), 333; "per agreement," *Bank of Sherman* v. *Apperson*, 4 Federal Reporter, 25; "given as collateral security with an agreement," *Costello* v. *Crowell*, 127 Massachusetts, 293; 34 Am. Rep. 367; unless a certain other note shall not be paid, *Grimison* v. *Russell*, 14 Nebraska, 521; 45 Am. Rep. 126; "and the return of my guarantee of a certain note," *Blood* v. *Northup*, 1 Kansas, 29; "as soon as the crop can be sold or the money raised from any other source," *Nunez* v. *Dautel*, 19 Wallace (United States Supr. Ct.), 560; "or sooner at the option of the mortgagee," *Mahoney* v. *Fitzpatrick*, 133 Massachusetts, 151; 43 Am. Rep. 502. So an order on a savings bank, with direction "return notice ticket with this order," and condition "deposit book must be at bank before money can be paid," is not negotiable. *Iron City Nat. Bank* v. *McCord*, 139 Pennsylvania State, 52; 11 Lawyers' Rep. Annotated, 559. In *Costello* v. *Crowell*, *supra*, the American rule is well stated thus: "It is settled, by an uninterrupted series of decisions, that any language put upon any portion of the face or back of a promissory note by the maker before delivery is part of the contract; and if by any such language the payment of it is not necessarily to be made, at all events, and of the full sum in lawful money, and at a certain time to arrive, and subject to no contingency, the note is not negotiable." A condition in the note that it shall be renewed at maturity destroys its negotiability. *Citizens' Nat. Bank* v. *Piollet*, 126 Pennsylvania State, 191; 4 Lawyers' Rep. Annotated, 190; 12 Am. St. Rep. 860. So of a condition that it shall be surrendered to the maker as soon as the

amount is received by the payee. *Hubbard* v. *Mosely*, 11 Gray (Massachusetts), 170; 71 Am. Dec. 698. (See also *Cook* v. *Satterlee*, 6 Cowen (New York), 108; 16 Am. Dec. 432.) So of a note payable out of the net proceeds of a certain ore bed. *Worden* v. *Dodge*, 4 Denio (New York), 159; 47 Am. Dec. 247. So of a note for $60 conditioned that if $50 be paid by a certain day it shall cancel it. *Fralick* v. *Norton*, 2 Michigan, 130; 55 Am. Dec. 56. So of a note payable when K. shall arrive at age. *Kelley* v. *Hemmingway*, 13 Illinois, 604; 56 Am. Dec. 474, citing the second principal case. So of a note conditioned that the possession of the property for which it is given shall remain in the seller until the note is paid. *Dominion Bank* v. *Wiggins*, 21 Ontario Appeals, 275. So of a condition that if the property be returned or taken back, all payments may be reclaimed. *First Nat. Bank of Alton* v. *Webster*, 60 Connecticut, 402. See Bigelow on Bills and Notes, p. 18.

The doctrine of *Alexander* v. *Thomas*, 16 Q. B. 333, that an order for a sum payable "ninety days after sight or when realized" is not negotiable, is discountenanced in this country. *Charlton* v. *Reed*, 61 Iowa, 166; 47 Am. Rep. 808, where a note was payable "twelve months after date, or before, if made out of the sales." Citing *Walker* v. *Woollen*, 54 Indiana, 164; 23 Am. Rep. 639; *Ernst* v. *Steckman*, 74 Pa. St. 13; 15 Am. Rep. 542; *Capron* v. *Capron*, 44 Vermont, 410; *Cota* v. *Buck*, 7 Metcalf (Massachusetts), 588; 41 Am. Dec. 464; *Palmer* v. *Hummer*, 10 Kansas, 464; 15 Am. Rep. 353.

The following conditions as to time of payment have been held not to render a bill unnegotiable: "To have more time to pay if not enough realized," the note being payable "one year from date, with interest annually," *Capron* v. *Capron*, 44 Vermont, 412; "as soon as collected from my accounts at P.," *Ubsdell* v. *Cunningham*, 22 Missouri, 124; "by 20th of May, or when he completes the building according to contract," *Stevens* v. *Blunt*, 7 Massachusetts, 240; "against the 19th of December, or when the home John Mayfield has undertaken to build for me is completed," *Goodloe* v. *Taylor*, 3 Hawks (North Carolina), 458; same principle, *Kiskadden* v. *Allen*, 7 Colorado, 206; *Palmer* v. *Hummer*, 10 Kansas, 404; 15 Am. Rep. 353; *Dobbins* v. *Oberman*, 17 Nebraska, 165; on or before a certain day, *Chicago, &c. Co.* v. *Merchants' Bank*, 136 United States, 268; *Mattison* v. *Marks*, 31 Michigan, 421; 18 Am. Rep. 197; *Jordan* v. *Tate*, 19 Ohio State, 586; *Curtis* v. *Horn*, 58 New Hampshire, 504; *Smith* v. *Ellis*, 29 Maine, 422; *Dorsey* v. *Wolff*, 142 Illinois, 589; 34 Am. St. Rep. 99; "when convenient" (held payable in a reasonable time), *Works* v. *Hershey*, 35 Iowa, 340; *Lewis* v. *Tipton*, 10 Ohio State, 88; 75 Am. Dec. 498; "as soon as I can," *Kincaid* v. *Higgins*, 1 Bibb (Kentucky), 396; payable in nine months, "or as A.'s horse earns the money in the cavalry service," *Gardner* v. *Barger*, 4 Heiskell (Tennessee), 669; twelve months after date, "or sooner if made out of a certain sale," *Ernst* v. *Steckman*, 74 Pennsylvania St. 13; 15 Am. Rep. 542; and similarly in *Cisne* v. *Childester*, 85 Illinois, 523; *Noll* v. *Smith*, 64 Indiana, 511; 31 Am. Rep. 131; from avails of logs when a sale is made, *Sears* v. *Wright*, 24 Maine, 278; "when I sell my place where I now live," *Crooker* v. *Holmes*, 65 Maine, 195; 20 Am. Rep. 687, the latter two being held payable in a reasonable time. So "on the return of this certificate," *Smilie* v. *Stevens*, 39 Vermont, 316; "on the return of this receipt,"

Frank v. *Wessels*, 64 New York, 158; at or within a certain time after one's death. *Conn* v. *Thornton*, 46 Alabama, 587; *Bristol* v. *Warner*, 19 Connecticut, 7; *Worth* v. *Case*, 42 New York, 362; a stock note payable as demanded within thirty days after demand. *Protection Ins. Co.* v. *Bill*, 31 Connecticut, 531; *Stillwell* v. *Craig*, 58 Missouri, 24; *Washington County M. Ins. Co.* v. *Miller*, 26 Vermont, 77.

In Frank v. *Wessels*, *supra*, the Court observe: "In the case of *Patterson* v. *Poindexter*, 6 Watts & S. 227 (Pennsylvania), there was an express promise to pay; and the intimation as to effect of the clause requiring a return is not authoritative, and has not been followed in this State or elsewhere. Pars. Bills and Notes, 26, and cases cited."

A statement in the note that it is accompanied by collateral security does not destroy its negotiability. *Valley Nat. Bank* v. *Crowell*, 148 Pennsylvania State, 284; 33 Am. St. Rep. 824. *Contra*, *Costello* v. *Crowell*, 127 Massachusetts, 293; 34 Am. Rep. 367.

The negotiability of a note given for land is not affected by the recital in it of the fact that it is secured by a lien on the land. *Duncan* v. *Louisville*, 13 Bush (Kentucky), 378; 26 Am. Rep. 201; *Webb* v. *Hoselton*, 4 Nebraska, 308; 19 Am. Rep. 638.

A note given for goods is not rendered non-negotiable by its recital that title, ownership, and possession of the goods does not pass till payment. *Heard* v. *Dubuque Co. Bank*, 8 Nebraska, 10; 30 Am. Rep. 811. But see *Kimball Co.* v. *Mellon*, 80 Wisconsin, 133, holding that a provision for the sale, before its maturity, of collateral securities, and the application of the proceeds to the payment of the note, the balance, if any, to become due immediately, destroyed the negotiability of a note. See 1 Daniel Negotiable Instruments, § 52.

Mr. Daniel says (1 Negotiable Instruments, sec. 46) that the doctrine of *Andrews* v. *Franklin*, 1 Strange, 24, and *Evans* v. *Underwood*, 1 Wils. 262, that a note payable at a certain time after a government ship is paid off is negotiable, because government is sure to pay, "has been justly criticised and distrusted," citing 1 Parsons on Bills and Notes, 40; Edwards on Bills, 142.

No. 3. — ABREY *v.* CRUX.

(1869.)

No. 4. — BELL *v.* LORD INGESTRE.

(1848.)

RULE.

When a bill of exchange has been signed and delivered by a person with the intention that he should be liable upon it, the bill constitutes a contract in writing, and parol evidence is not admissible to contradict or vary the terms

of the liability. But parol evidence is admissible as between the immediate parties to the transaction — (*a*) to impeach the consideration for the bill, or — (*b*) to show that the delivery was not made with the intention that the bill should operate as a contract; or was conditional, that is to say, made with the intention that the liability should arise only upon a condition precedent.

Abrey v. Crux.

L. R., 5 C P. 37–46 (s. c. 39 L. J. C. P. 9–13).

Action by the payee against the drawer of a bill of exchange for £200 accepted by one Arthur Crux, payable to the order of the plaintiff twelve months after date. [37]

Third plea, that the defendant drew the bill and delivered the same to the plaintiff for the accommodation of one Arthur Crux, and as surety for him for the payment of the said bill; that, save as aforesaid, there never was any value or consideration for the drawing, delivery, or payment, of the bill by the defendant; that, at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed by and between the plaintiff and defendant and Arthur Crux, that Arthur Crux should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and, in case the bill should not be duly paid, that the plaintiff should sell and dispose of the securities, and apply the proceeds thereof in payment and liquidation of the bill, and that, until the plaintiff should have so sold and disposed of the securities, the defendant should not be liable for or be sued upon the bill; that Arthur Crux deposited the securities as aforesaid with the plaintiff, and he received and had the same for the purpose and on the terms aforesaid; and that the plaintiff did not * before the commencement of the suit sell, realise, or [* 38] dispose of the securities or any part thereof, and the plaintiff still held the same. Issue thereon.

At the trial before KEATING, J., at the sittings in Middlesex after last Easter Term, it was objected on the part of the plaintiff that the agreement alleged in the third plea (assuming it to have been made), not being in writing, did not sustain the plea, and that oral evidence of it was inadmissible: and *Young* v. *Austen*, L. R., 4 C. P. 553; 38 L. J. C. P. 233 was cited

For the defendant, reliance was placed on *Pike* v. *Street*, M. & M. 226.

The learned Judge rejected oral evidence of the agreement, and a verdict was taken for the plaintiff for the amount of the bill, with leave for the defendant to move for a new trial if the Court should be of opinion that oral evidence was admissible to prove the plea; it being agreed that, if the point of law should be decided in the defendant's favour, a new trial should be had (for the purposes of costs to be treated as an adjournment) in order to try whether or not such an agreement was made as alleged.

H. James, Q. C., in Trinity Term, obtained a rule *nisi*.

Channell (Huddleston, Q. C., with him), showed cause. The oral evidence was rejected upon the authority of *Young* v. *Austen*, where this Court held a plea, setting up a similar condition in answer to an action upon the bill, to be good only upon the ground that the contemporaneous agreement must be assumed to have been in writing. The only possible distinction between that case and the present is, that there the action was against the acceptor, and here against the drawer. That this distinction makes a difference, however, is not suggested in *Hoare* v. *Graham*, 3 Camp. 57; 13 R. R. 752; *Free* v. *Hawkins*, 8 Taunt. 92; *Moseley* v. *Hanford*, 10 B. & C. 729; or *Foster* v. *Jolly*, 1 C. M. & R. 703; 4 L. J. (N. S.) Ex. 65, — the authorities which are mainly relied on in Byles on Bills, 9th ed. 96, for the position that "no mere oral agreement can have any effect at law in controlling the instrument, if contemporaneous with the making of it; for that would be to allow oral evidence to vary a written contract." The only case which bears a [* 39] different * aspect is *Pike* v. *Street*. In Bayley on Bills, 6th ed., by Dowdeswell, p. 497, n., the case is thus observed on: "This case seems to be at variance with *Hoare* v. *Graham*; but, as a verdict was found for the plaintiff, possibly the evidence of the agreement was of a very unsatisfactory nature, and therefore Lord TENTERDEN preferred leaving the matter to the jury. In *Foster* v. *Jolly*, PARKE, B., refers this case to the class in which the consideration has been contradicted, and observes that evidence of the agreement was admissible, inasmuch as it negatived consideration between the indorser and indorsee. On these grounds it should not be regarded as a case impugning the position in the text." If there be a contract between the plaintiff and the defendant, it can only be the contract which appears on the face of the bill. In Byles on

Bills, 187, 9th ed., citing *Hoare* v. *Graham*, 3 Camp. 57; 13 R. R. 752; *Adams* v. *Wardley*, 1 M. & W. 374; 5 L. J. (N. S.) Ex. 158; *Besant* v. *Cross*, 10 C. B. 895; 20 L. J. C. P. 173; and *Bowerbank* v. *Monteiro*, 4 Taunt. 844; 14 R. R. 679, it is said: "A mere oral condition (at least, if contemporaneous with the acceptance) is inadmissible in evidence to qualify the absolute written engagement, even between the original parties. 'This would be,' says Lord ELLENBOROUGH, 'incorporating with a written contract an incongruous parol condition, which is contrary to first principles.' And, though the condition be written on a distinct paper, it cannot be available against an indorsee ignorant of the existence of such a paper." It being clearly settled that, as against the acceptor, the contract cannot be varied by a contemporaneous oral agreement, the only question is whether the same reasoning does not apply to any other party to the bill.

H. James, Q. C., in support of the rule. The evidence tendered was admissible upon two grounds; first, in order to show what was the real consideration as between the parties; secondly, that the contract of the defendant as drawer and indorser was suspended until certain events mentioned in the plea had happened. The condition of a drawer or indorser is precisely the same: both are immediate parties. The drawer makes no contract in writing on the terms appearing on the face of the bill. He is simply a person writing a letter. He does not in terms contract to pay the *indorsee; as between them, the only contract which is [*40] implied is one of suretyship. Both drawer and indorser are but sureties. The position of the drawer with regard to the payee is the same as that of the indorser with reference to any subsequent indorsee. The general doctrine is thus laid down by MAULE, J., in *Castrique* v. *Buttigieg*, 10 Moo. P. C. 94, 108: "The liability of an indorser to his immediate indorsee arises out of a contract between them; and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question; but that contract arises out of the written instrument itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either written or spoken, of the parties, and the circumstances (such as the usage of the place, the course of dealing between the parties, and their relative situations) under which the delivery takes place:

thus, a bill with an unqualified written indorsement may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser, or to enable the indorsee to raise money for his own use on the credit of the signature of the indorser, or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser, who agrees to sell his claim against the prior parties, but stipulates not to warrant their solvency. In all these cases, the indorser is not liable to the indorsee; and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law." There are many authorities to show that the intention of the parties to a contract may be shown by a contemporaneous agreement, whether oral or written, provided such contemporaneous agreement does not vary or contradict or operate in defeasance of the contract declared on, but merely suspends the commencement of the obligation; such as *Davis* v. *Jones*, 17 C. B. 625; 25 L. J. C. P. 91; *Pym* v. *Campbell*, 6 E. & B. 370; 25 L. J. Q. B. 277; *Wallis* v. *Littell*, 11 C. B. N. S. 369; 31 L. J. C. P. 100. In *Thompson* v. *Clubley*, 1 M. & W. 212; 5 L. J. (N. S.) Ex. 114, in an action by indorsee against ac-

[* 41] ceptor, * it was held competent to the latter to show that at the time of the acceptance it was agreed that the bill when due should be taken up by the plaintiff, — on the ground that it was a collateral agreement that the plaintiff would not enforce the contract upon the bill. In *Lloyd* v. *Howard*, 15 Q. B. 995; 20 L. J. Q. B. 1, the jury found that the drawer wrote his name on the bill and handed it to one Milton that Milton might get it discounted, which was not done, and that the plaintiff received the bill from Milton when overdue, and without consideration; and it was held that this was no indorsement. In Byles on Bills, 9th ed. 147, it is said, upon the authority of *Pike* v. *Street* and other cases, that, "if there be a written or even a verbal agreement between an indorser and his immediate indorsee that the indorsee shall not sue the indorser, but the acceptor only, it has been held that such an agreement is a good defence on the part of the indorser against his immediate indorsee suing in breach of the agreement." "Indeed, the contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement, though that indorsement be a necessary part of it. The contract consists partly

of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written," &c. In the 5th American edition of Byles on Bills, p. 175, some American authorities are cited to show that such evidence as this may be given.

[WILLES, J. If the agreement is void, what becomes of the securities ?]

Channell. The surety paying, he would be entitled to them. See *Pearl* v. *Deacon*, 24 Beav. 186 ; *Ewart* v. *Latta*, 4 Macq. 983.

BOVILL, C. J. I am of opinion that the oral evidence of the agreement mentioned in the third plea was properly rejected, and that the rule must be discharged. The contract entered into by the defendant was a contract in writing by his signature to the bill as drawer, which imports a liability on the defendant to pay the amount on default of the acceptor and notice to the defendant of * such default. That which the plea attempts to [*42] set up is, that the defendant, at the time he signed the bill as drawer, entered into a contract under which the payment was to be made at a different time and in a different manner from that which the bills imports, — an agreement, in short, which contradicts the written contract, and oral evidence of which is inadmissible, according to the authority of numerous decisions ; amongst others, *Hoare* v. *Graham*, 3 Camp. 57 ; 13 R. R. 752, and *Free* v. *Hawkins*, 8 Taunt. 92, which were confirmed by *Moseley* v. *Hanford*, 10 B. & C. 729, and other cases, and adopted in the recent case in this Court of *Young* v. *Austen*, L. R., 4 C. P. 553 ; 38 L. J. C. P. 233. Mr. James in his argument relied mainly upon two authorities, viz. a passage in the judgment of MAULE, J., in the Privy Council, in *Castrique* v. *Buttigieg*, 10 Moo. P. C. 94, 108, and the case of *Wallis* v. *Littell*, 11 C. B. N. S. 369 ; 31 L. J. C. P. 100. The facts of *Castrique* v. *Buttigieg* did not raise the precise point which arises here. Certain general principles are there laid down, in which I fully agree. The mere signature does not make a contract. To constitute a contract, there must be a delivery over of the instrument by the drawer or indorser for a good consideration : and as soon as these circumstances take place the contract is complete, and it becomes a contract in writing. The question there was,

whether an agent who received money abroad for his principal here, remitting it to him by means of bills of exchange which he indorsed without reservation, was liable to his principal on such indorsements, on failure of the acceptors to pay the bills. Upon the facts and correspondence it was found that the agent put his name on the bills, not intending his signature to operate as an indorsement in the ordinary way, but merely for the purpose of their more convenient and safe transmission. In reality, the facts showed no consideration. The case therefore is essentially different from the present, where the bill was drawn and delivered over to the payee with the intent that the drawing should be operative as the drawing of a bill. The ground of the decision in the other case relied on, *Wallis* v. *Littell*, was, that, upon the facts, the oral agreement set up was not a variation or defeasance of the written agreement declared on, but was merely offered to show that [* 43] the * written agreement was not to take effect until the happening of a given event. But, in the course of the judgment, Erle, C. J., says that, if the oral agreement was a defeasance merely, it would have been in contradiction of the written agreement, and therefore would not have been admissible in evidence. The present case consequently stands unaffected by any adverse authority. The evidence offered would clearly vary the contract which appeared on the face of the bill, and was properly rejected. The rule must, I think, be discharged.

Willes, J. I must confess I should have been better satisfied if the Court could have arrived at another conclusion in this case; for I entertain great doubt as to the propriety of excluding the parol evidence. This does not fall within that class of cases where there has been a collateral agreement that the bill shall not be paid at maturity, or postponing the payment under circumstances which do not affect the original consideration. The bill was in fact drawn and delivered by the defendant for the debt of the acceptor and as his surety. It does not clearly appear on the face of the plea whether or not the plaintiff knew that the defendant drew the bill as a surety; but probably he did know it, as he took certain securities from the acceptor. The agreement alleged in the third plea is, that, if the bill should not be duly paid, the plaintiff would sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be sued upon the bill. That is not

like the agreement set up in *Hoare* v. *Graham*, or in *Young* v. *Austen*, where the agreement was that the bill should be renewed: nor is it like the agreement in *Free* v. *Hawkins*, which was set up for the purpose of postponing the time for payment out of a fund within the control of the maker of the note, and not, as here, under the control of the plaintiff, and providing for a means of payment of the bill. So, *Foster* v. *Jolly* was a case where it was attempted to set up an agreement that the payment of the bill was to be contingent on the happening of a certain event, and the case did not turn on the payment being out of a fund which was
* under the control of the plaintiff himself. These cases are [* 44]
all distinguishable, inasmuch as they were cases where the defendants were held not to be entitled to contradict by parol evidence a written contract which was as complete at the time it was entered into as it ever was intended to be, for, as Lord Ellenborough says, it would be contrary to first principles to incorporate with a written contract an incongruous parol condition. This, however, is a case in which I should have wished to uphold the agreement; not, perhaps, exactly as is put in the plea, viz. an agreement to provide a fund out of which the bill was in a certain event to be satisfied, but rather as a pre-arranged mode of payment of the bill out of the proceeds of the securities mentioned, with an agreement that until the plaintiff should have made those securities available it was not to be a bill enforceable against the defendant at all. I see nothing in that which is at all inconsistent with any principle of law. And I do not see why we should not make a precedent, to meet the circumstances and the merits of the particular case. The law as to bills of exchange constitutes an exception to that relating to ordinary contracts, with respect to the discharge by parol of the obligation created thereby; as is exemplified by the case of *Foster* v. *Dawber*, 6 Ex. 839; 20 L. J. Ex. 385. I do not see why we should not, in a novel case to which no distinct law is applicable, rather follow the justice of the case than strive to bring the case within a principle which will defeat justice. For these reasons, I entertain great doubt, though I do not feel so strongly on the subject as absolutely to dissent from the judgment of the rest of the Court.

Keating, J. I should have been desirous, like my Brother Willes, if we could consistently have done so, to decide in favour of the admissibility of this evidence, because it is excluded only by

reason of a rigid rule of law laid down for the general benefit of suitors, but which nevertheless in some cases works hardship. As far, however, as I am aware, upon the authorities on the subject of bills of exchange, it has always been laid down as an inflexible rule that you cannot by parol evidence contradict the terms of the written contract, though you may negative the consideration, as between the immediate parties. The bill here was drawn [*45] by the * defendant upon Arthur Crux, payable to the plaintiff. The plea is, that, at the time the defendant drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and Arthur Crux that Arthur Crux should deposit certain securities with the plaintiff, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be called upon to pay the bill. It seems to me that that does not touch the consideration, but sets up an agreement for the postponement of the defendant's liability contrary to the contract on the face of the bill. I am not aware of any case where it has been held that parol evidence is admissible for that object: and there are many cases to the contrary. In *Foster* v. *Jolly*, it was sought to give evidence to qualify the defendant's liability on a note by showing an agreement that it was not to be paid if a verdict was obtained in an action then pending between other parties, — an agreement not very dissimilar to the present. But PARKE, B., said, 1 C. M. & R. at p. 708: "The general rule is, that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract to pay at a specified time." That is precisely what this plea seeks to do. The defendant says he is not liable to pay at the expiration of the twelve months stipulated by the bill, but only upon the happening of an event which is altogether collateral to and independent of the contract created by the bill. None of the cases referred to in Byles on Bills warrant this contention. The only authority which looks at all like an exception is *Pike* v. *Street*, M. & M. 226. But the observation of PARKE, B., in *Foster* v. *Jolly*, shows that that in truth is not an exception at all. Under these circumstances, I feel reluctantly constrained to come to the conclusion that the evidence offered was not admissible, and that the rule must be discharged.

Brett, J. I agree that the evidence was not admissible because it did not impeach the consideration for the bill, or show that it had failed, or set up any agreement to suspend the commencement of * the defendant's liability. It attempts to [* 46] alter or limit the defendant's liability as it appears on the face of the bill, viz. to pay the bill at maturity in the event of the acceptor failing to do so. The plea in substance is that the defendant agreed with the plaintiff that he should not be called upon to pay the bill until the plaintiff should have realized certain securities which the acceptor had deposited with him. The consideration for the defendant's becoming the drawer of the bill probably was that the plaintiff should forbear to sue Arthur Crux for a debt then due, or should discount the bill for Arthur Crux. The fact of security being given, or of the plaintiff's failure to realise the security, does not alter or impeach the consideration. The parol agreement does not postpone the liability of the defendant as drawer of the bill, but limits his liability as defined by the bill. There are many authorities to show that an acceptor cannot do this; and, though there is no express decision upon the point, I am not aware that there is any distinction between the case of an acceptor and that of a drawer or an indorser. The contract of the drawer is as much a contract on the face of the bill as that of the acceptor. I agree that *Young* v. *Austen* is not an authority on the subject. It did not decide whether the agreement to vary the terms of the bill must be in writing or not; but only that, if the law required it to be in writing, it must be assumed on the pleadings there that it was in writing. The present case raises the precise question; and I agree with my Lord and my Brother Keating that the agreement must be in writing.

Rule discharged.

No. 4. — Bell v. Lord Ingestre.

12 Q. B. 317–320 (s. c. 19 L. J. Q. B. 71–72).

Assumpsit upon two bills of exchange, drawn by one [317] Edwards, the one for £2000, the other for £2118 10*s*., accepted by defendant, and by Edwards indorsed to the Newcastle upon Tyne Joint Stock Banking Company. Pleas (among others), traversing the indorsements respectively.

On the trial, before Wightman, J., at the Liverpool summer assizes, 1847, the plaintiff proved Edwards's handwriting to

[* 318] the indorsements. The defendant, in * answer, gave evidence that, on the 8th of April, 1845, on which day the bills bore date, Edwards was liable to the Banking Company to the amount of about £4000 on several overdue bills; that Edwards on that day procured defendant's acceptance to the two bills in question, and transmitted them by letter to the Company with his name indorsed upon them, for the express purpose of retiring the overdue bills, and on the express condition that such last mentioned bills should be returned to him by the next post; which condition had never been complied with. Under these circumstances it was contended that the defendant was entitled to the verdict upon the issues as to the indorsements. The learned Judge ruled that the defence should have been specially pleaded, and was not admissible in support of pleas merely traversing the indorsement. Verdict for plaintiff, with leave to move to enter a verdict for defendant. Martin, in Michaelmas term last, obtained a rule *nisi* accordingly.

Knowles, Watson, and Unthank now showed cause. It may be conceded that, if a person indorse a bill for a particular purpose, and the indorsee negotiate it without consideration, and in contravention of such purpose, trover may be maintained for the bill. *Goggerley* v. *Cuthbert*, 2 Bos. & P. (N. R.) 170; 9 R. R. 632. But such circumstances would not support a plea traversing the indorsement. In the present case the condition of the indorsement has been broken; and the title to the bill is thereby revested in the indorser; but it cannot be said that he did not indorse. *Marston* v. *Allen*, 8 M. & W. 494, 11 L. J. Ex. 122, and *Adams* v. *Jones*, 12 [* 319] A. & E. 455, 9 L. J. Q. B. 407, are * distinguishable; for in those cases there was no intention to indorse at all to the alleged indorsee.

Martin (with whom was F. Robinson), *contrà*. The condition of the indorsement was a condition precedent; there was no intention to indorse, in the sense given to the word "indorse" in *Marston* v. *Allen*, *Adams* v. *Jones*, and *Goggerley* v. *Cuthbert*. When the bills were sent by Edwards to the Company, with his name on the back of them, he, in effect, said, "until you give back the old bills, you are not to have any interest in the new bills." The bills were delivered as a mere escrow, as was said by HEATH, J., in *Goggerley* v. *Cuthbert*. If Edwards had been sued on them and had pleaded specially, the plea would have been an argumentative traverse of the indorsement. (He was then stopped by the Court.)

Lord DENMAN, C. J. I think it impossible to distinguish this case from *Marston* v. *Allen* and *Adams* v. *Jones*. It is a singular sort of escrow; for the bills were delivered to the parties who, in the event of their performing a certain act, were to be benefited by them. But still I think they were delivered to them as mere trustees, and that the same principle applies.

PATTESON, J. I think this case is within the principle of *Marston* v. *Allen* and *Adams* v. *Jones*. The facts here are of a different character in some respects; for in those cases it was not intended that the transferee should ever take any interest in the bills. But I * think that makes no difference; for [* 320] here it was not intended that the transferees should take any interest until the old bills were returned; and, until that time, it is the same thing, in principle, as if it had been intended that no interest should pass at any time. The bills were received on terms which were not satisfied; and there was no indorsement.

COLERIDGE, J. If there had been in this case the intervention of a third party as agent between the transferor of the bills and the transferees, for the purpose of handing the bills over on performance of the condition, there would have been no difficulty. But, in principle, it is the same thing; for, until the condition was performed, no interest was to pass to the transferees.

WIGHTMAN, J. I have had great doubt whether the defence was admissible under the issue; for this case, in its facts, seems to go farther than the cases cited. But, in principle, I find it difficult to distinguish it from *Marston* v. *Allen*. The analogy of the escrow would be perfect, if the delivery of the bills had been to an agent. The principle of *Marston* v. *Allen* is that, on a plea traversing the indorsement of a bill, its delivery with intent to transfer an interest is put in issue.

Rule absolute.

ENGLISH NOTES.

See Bills of Exchange Act 1882, section 21 (2).

The rule applies to bills of exchange the ordinary principle established in regard to written contracts; namely, that oral evidence is inadmissible to contradict or vary the effect of the writing. But parol evidence is admissible, as is well expressed by Chalmers (4th ed. p. 57) — "(*a*) to show that what purports to be a complete contract has never come into operative existence; or (*b*) to impeach the consideration for

the contract; or (*c*) to show that the contract has been discharged by payment, release, or otherwise."

So, where a bill was on the face of it payable at six months, the acceptor was not allowed to set up a parol agreement to pay by instalments, one of which did not become payable until after the due date of the bill. *Besant* v. *Cross* (1851), 10 C. B. 895, 20 L. J. C. P. 173.

So parol evidence has been held inadmissible to prove a note expressed to be a security for £500 and interest, to have been intended to secure the interest only. *Hill* v. *Wilson* (L. JJ. 1873), L. R., 8 Ch. 888; 42 L. J. Ch. 817; 29 L. T. 238.

And so a parol agreement contemporaneous with a promissory note, to the effect that the note though payable on demand should not be enforced for three years, has been held inoperative. *Stott* v. *Fairlamb* (1883), 52 L. J. Q. B. 420; 48 L. T. 574; following *Woodbridge* v. *Spooner* (1819), 3 B. & Ald. 233. (The judgment of Denman, J., in that case was reversed by the Court of Appeal [Nov. 24, 1883], 53 L. J. Q. B. 47, 49 L. T. 525, upon a ground not relating to this point of the judgment.)

But a contemporaneous agreement in writing varying the terms may be given effect to, *e. g.* a written agreement to renew the bill on request. *Maillard* v. *Page* (1870), L. R., 5 Ex. 312; 39 L. J. Ex. 235; 23 L. T. 80.

It has long been settled law, consistently with the general law of contracts (*Wake* v. *Harrop* (1861), *per* Bramwell, B., 6 H. & N. 775, 30 L. J. Ex. 273, at p. 277), that the delivery of a bill of exchange or promissory note may be conditional, and that the condition will be given effect to.

Thus it was decided by Eyre, J. (at *Nisi Prius*, 1725), in *Jeffries* v. *Austin*, 1 Str. 674, that an action would not lie upon a promissory note which had been delivered upon a condition, and the condition not fulfilled. The note in question had been delivered as a reward in case the plaintiff procured the defendant to be restored to an office, which he did not effect.

In *Seligmann* v. *Huth* (C. A. in Bank'cy. 1877), 37 L. T. 488, the Court held that the plaintiffs were entitled to recover the proceeds of certain bills which the defendants had negotiated, — those bills having been sent them on the faith that they would accept the bills, which they did not. The principle is similar to that of the well known case of *Shepherd* v. *Harrison* (1869, 1871), L. R., 4 Q. B. 196, 493, L. R., 5 H. L. 116, 40 L. J. Q. B. 148, 24 L. T. 857; where bills of lading were sent in a letter requesting acceptance of bills of exchange, which the Courts construed as a delivery of the bills of lading with the intention of making a conditional transfer of the property in the goods.

The nature of the contract entered into by indorsement will be more fully considered under *McDonald* v. *Whitfield*, No. 41 and notes *post*. As the contract by the indorser is not fully expressed upon the instrument itself, there is more room for the admission of parol evidence, as to what is the contract represented by the transaction. But where the intention is that the indorsement and delivery should only operate conditionally, the principle appears to be the same as that which applies to the delivery by the drawer or acceptor. And where the bill is indorsed and delivered by the indorser upon a condition, the condition will, except against a *bonâ fide* holder for value, be given effect to. *Goggerley* v. *Cuthbert* (1806), 2 Bos. & P. (N. R.) 170, 9 R. R. 632 (*per* Heath, J.); *Ex parte Toogood* (1812), 19 Ves. 229, 12 R. R. 178; *Marston* v. *Allen* (1841), 8 M. & W. 494, 11 L. J. Ex. 122; *Lloyd* v. *Howard* (1850), 15 Q. B. 995, 20 L. J. Q. B. 1; *Denton* v. *Peters* (1870), L. R., 5 Q. B. 475, 23 L. T. 281. It was formerly held that if a bill was expressed to be indorsed conditionally, the acceptor paid it at his peril, if the condition were not fulfilled. Chalmers, 4th ed. p. 110; *Robertson* v. *Kensington* (1811), 4 Taunt. 30. But this is altered by Bills of Exchange Act 1882, sect. 33.

The case expressed in sect. 21 (2) (*b*) of the Bills of Exchange Act 1882, where the delivery is "for special purposes only," is perhaps an unnecessary addition to the terms "conditional delivery." An instance of the principle applied to an indorsement for a special purpose is *Lloyd* v. *Howard* (1850), 15 Q. B. 995, 20 L. J. Q. B. 1.

As to the construction of a bill where the marginal figures differ from the sum in the body of the instrument, see *Garrard* v. *Lewis* (1882), 10 Q. B. D. 30, mentioned in notes to *Master* v. *Miller*, "Alteration," 2 R. C. 693.

AMERICAN NOTES.

The doctrine of the principal cases prevails generally in this country.

The first branch of the Rule is elementary. Such a contract is no more to be varied by parol than any other written contract. See 1 Daniel on Negotiable Instruments, § 80; Browne on Parol Evidence, § 67; *Burnes* v. *Scott*, 117 United States, 582; *Whitwell* v. *Winslow*, 131 Massachusetts, 313; *McGrath* v. *Barnes*, 13 South Carolina, 328; *Kelsey* v. *Chamberlain*, 47 Michigan, 241; *Kulenkamp* v. *Groff*, 71 Michigan, 675; 15 Am. St. Rep. 283, and other cases cited in the last-named text-book. This extends even to the immediate parties, as held in many cases.

Branch (*a*) of the second part of the Rule, touching the impeachment of the consideration, is sustained by a great many cases in this country. See 1 Daniel on Negotiable Instruments, §§ 174, 177 *et seq.*: Browne on Parol Evidence, § 70; Bigelow on Bills and Notes, p. 171; *Stackpole* v. *Arnold*, 11 Massachusetts, 27; 6 Am. Dec. 150; *Folsom* v. *Mussey*, 8 Greenleaf (Maine), 400; 23 Am. Dec. 522; *West* v. *Kelly*, 19 Alabama, 353; 54 Am. Dec. 192; *Foster* v.

Clifford, 44 Wisconsin, 569; 28 Am. Rep. 603; *Ingersoll* v. *Martin*, 58 Maryland, 67; 42 Am. Rep. 322; *Gunning* v. *Royal*, 59 Mississippi, 45; 42 Am. Rep. 350; *Carrington* v. *Waff*, 112 North Carolina, 115; *Chenault* v. *Bush*, 84 Kentucky, 528; *Arnold* v. *Wilt*, 86 Indiana, 368.

This doctrine extends to subsequent parties who had notice of the defect before taking the paper. *Braly* v. *Henry*, 71 California, 481; 60 Am. Rep. 543.

It may be shown that the consideration was illegal. *Buck* v. *First Nat. Bank*, 27 Michigan, 293; 15 Am. Rep. 189; *Woods* v. *Armstrong*, 54 Alabama, 150; 25 Am. Rep. 671; *Henderson* v. *Palmer*, 71 Illinois, 579; 22 Am. Rep. 117. *Contra*, and questionable, *Bibb* v. *Hitchcock*, 49 Alabama, 468; 20 Am. Rep. 288.

It may be shown that the consideration was fraudulent. *Harris* v. *Alcock*, 10 Gill & Johnson (Maryland), 226; 32 Am. Dec. 158; *Larrabee* v. *Fairbanks*, 24 Maine, 363; 41 Am. Dec. 389; *Hunt* v. *Rumsey*, 83 Michigan, 136; 9 Lawyers' Rep. Annotated, 674.

Or that the maker was at liberty to return the goods for which the obligation was given. *Barnes* v. *Shelton*, Harper (So. Carolina), 33; 23 Am. Dec. 642.

Or that it was extorted by duress. *Clark* v. *Pease*, 11 New Hampshire, 414; *Griffith* v. *Sitgreaves*, 90 Pennsylvania State, 161.

It may be shown that an indorsement was merely for collection. *Hazzard* v. *Duke*, 64 Indiana, 220. Or by principal to agent for use for a special purpose. *Dale* v. *Geur*, 38 Connecticut, 15; 9 Am. Rep. 353; *Chaddock* v. *Vanness*, 35 New Jersey Law, 517; 10 Am. Rep. 256.

It may be shown that the instrument was intended as a mere receipt. *Smith* v. *Rowley*, 34 New York, 367. (*Contra*, *City Bank* v. *Adams*, 45 Maine, 455.) Or as an advancement. *Brook* v. *Latimer*, 44 Kansas, 431; 21 Am. St. Rep. 292. Or as collateral security. *Mancely* v. *M'Gee*, 6 Massachusetts, 143; *Leighton* v. *Bowen*, 75 Maine, 504. Or for the surrender of old notes. *Chrysler* v. *Renois*, 43 New York, 209.

The real consideration may be shown. *Miller* v. *McKenzie*, 95 New York, 575; *Fort* v. *Orndoff*, 7 Heiskell (Tennessee), 167; *Wolford* v. *Powers*, 85 Indiana, 294; 44 Am. Rep. 16; *Martin* v. *Stubblings*, 126 Illinois, 387; 9 Am. St. Rep. 620.

And a diversion from the intended purpose may be shown. *Merchants' Nat. Bank* v. *Comstock*, 55 New York, 24; 14 Am. Rep. 168.

On the other hand, it has been held that parol evidence is not admissible to show that the obligation was not to be enforced if the horse for which it was given should die before the end of the season. *Gatlin* v. *Kilpatrick*, 1 Carolina Law, 534; 6 Am. Dec. 557. Or to show that the obligation was to furnish a horse, and not to pay money, and was signed as a mere form. *Ziegler* v. *McFarland*, 147 Pennsylvania State, 607.

The second part of the Rule, branch (*b*), is abundantly sustained in this country. Browne on Parol Evidence, § 68; *Sweet* v. *Stevens*, 7 Rhode Island, 375; *Couch* v. *Meeker*, 2 Connecticut, 302; *Taylor* v. *Thomas*, 13 Kansas, 217; *Alexander* v. *Wilkes*, 11 Lea (Tennessee), 221.

It is not necessary that the instrument should be delivered as an escrow to

a third party. The delivery may be conditional even to the payee. *Benton* v. *Martin*, 52 New York, 574; *Westman* v. *Krumweide*, 30 Minnesota, 313; *Goff* v. *Bankston*, 35 Mississippi, 518 (sealed note). In *Benton* v. *Martin*, *supra*, the Court observed: "Instruments not under seal may be delivered to the one to whom on their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties, or others having notice. It needs a delivery to make the obligation operative at all; and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so also, as between the original parties, and others having notice, the want of consideration may be shown." So in *McFarland* v. *Sikes*, 54 Connecticut, 250; 1 Am. St. Rep. 111, evidence was allowed to show the delivery of a note by defendant to plaintiff on condition that it should be returned on a certain day, if demanded, and a breach thereof, citing and approving *Benton* v. *Martin*, *supra*, observing, "Such evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery." So in *Bissenger* v. *Guiteman*, 6 Heiskell (Tennessee), 277, evidence was admitted of an agreement that the note should be held for nothing on the happening of a certain event. So in *Miller* v. *Gamble*, 4 Barbour (New York Supreme Ct.), 146, evidence was allowed that defendant signed on condition that another should sign above him. (*Contra*, as to third parties without notice, *Ward* v. *Hackett*, 30 Minnesota, 150.)

Mr. Daniel (1 Negotiable Instruments, § 81 *a*) would limit this doctrine to cases of failure of consideration in consequence of the non-fulfilment of the condition, — "Evidence is admissible to deny the receipt of value, but not to vary the engagement." To which it may be answered, there is no engagement except subject to the conditional delivery.

This doctrine recently receives very authoritative support in *Burke* v. *Dulaney*, 153 United States, 228, where it was held, in a suit by the payee, that the maker might show that it was to take effect only on a contingency which never happened. Mr. Justice HARLAN cited many authorities, and observed: —

"The evidence offered by the appellant, and excluded by the Court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor, according to its terms, from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not — except in a named contingency — to become a contract, or a promissory note, which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there

never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is undoubtedly *primâ facie* — indeed, should be deemed strong — evidence that the instrument came to the hands of the payee as an obligation of the maker, enforceable according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing as the promissory note of the maker, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract."

To the same doctrine of conditional delivery may also be cited, *Reynolds* v. *Robinson*, 110 New York, 654; *Blewitt* v. *Boorum*, 142 New York, 357 (sealed instrument not relating to land); *Branson* v. *Oregonian Ry. Co.*, 11 Oregon, 161; *Beall* v. *Poole*, 27 Maryland, 645; *Sharp* v. *United States*, 4 Watts (Pennsylvania), 21; *Sweet* v. *Stevens*, 7 Rhode Island, 375.

Bell v. *Lord Ingestre* is cited in *Woodward* v. *Foster*, 18 Grattan (Virginia), 200; *Brackett* v. *Barney*, 28 New York, 333; 1 Daniel on Negotiable Instruments, § 721. See ibid., § 720 *a*.

No. 5. — FORSTER *v.* MACKRETH.

(1867.)

RULE.

A POST-DATED cheque is for most practical purposes a bill of exchange payable on a future day; and when intentionally so dated, and issued without the authority of the firm by a partner who has a general authority only to draw cheques properly so called, does not bind the firm in an action by a person who has taken the cheque before the date.

Forster v. Mackreth.

36 L. J. Ex. 94–96 (s. c. L. R., 2 Ex. 163; 16 L. T. 23; 15 W. R. 747).

[95] The first count of the declaration was upon a bill of exchange for £18, indorsed by the defendant to the plaintiff. The second count was upon a cheque for £90, drawn by the defendant,

payable to bearer. There were also counts for money lent and upon accounts stated.

The defendant denied the indorsement of the bill and the making of the cheque, and also pleaded to the first count — That the said bill never was indorsed by the defendant, except by one Tucker in the name of a firm wherein the said Tucker and the defendant were partners, and by virtue of the authority of the said Tucker as such partner, and that the said Tucker fraudulently, and in breach of good faith, and without the consent or authority of the defendant, indorsed the said bill with the name of the said firm, which was the alleged indorsement by the defendant, and the said Tucker indorsed the said bill as aforesaid, not on account of any of the purposes of the said partnership, but for other and indifferent purposes, and not in respect of any claim or demand on the said partnership, and that at the time when the said bill was so indorsed to the plaintiff as aforesaid the plaintiff had notice of the premises.

There was a similar plea to the second count, as to the making of the cheque.

Issues thereon.

At the trial, in Middlesex, before MARTIN, B., in Michaelmas Term, 1866, it appeared that the defendant and Tucker carried on business together as attorneys, and that the cheque for £90 mentioned in the second count was drawn by Tucker in the name of the firm, and was dated the 20th of July, but that Tucker delivered it to the plaintiff on the 13th of July, taking in exchange the plaintiff's cheque for £80, which sum he asked the plaintiff to advance, saying that the money was wanted to lend to a client of the firm. It was also in evidence that transactions of a similar kind had taken place between the parties before. There was no evidence of any general authority for one partner to draw, accept, or indorse bills of exchange in the name of the firm, or to indorse the particular bill mentioned in the first count, but there was evidence that both partners had authority to draw cheques in the ordinary way in the name of the firm, and that they constantly did so when occasion required.

MARTIN, B., ruled that the defendant was not liable on the bill, but directed the jury to find a verdict for the amount of both bill and cheque, reserving leave to the defendant to move.

Hayes, Serj., accordingly obtained a rule for a nonsuit, or to enter the verdict for the defendant.

No. 5. — Forster v. Mackreth, 36 L. J. Ex. 95, 96.

Gates showed cause (Jan. 31). — The defendant's partner had authority to draw cheques, and all that the plaintiff was concerned with was the date appearing on the cheque itself. In *Williams* v. *Jarrett*, 5 B. & Ad. 32, the date of a bill was held to be the time expressed on the face of the bill, and not the time when the bill was issued. So here, we have nothing to do with any circumstances showing this cheque to have been post-dated. Besides, a post-dated cheque is not void for all intents and purposes. Byles on Bills, p. 16. If taken without fraud, the receiver can sue upon it. *Austin* v. *Bunyard*, 34 L. J. Q. B. 217; 8 L. T. 452. Here there is no imputation of any fraud whatever. Similar transactions had taken place before in the course of the partnership business, and this very cheque was declared to be given for the purpose of obtaining a loan for a client of the firm. It was clearly within the authority of Tucker to draw the cheque in the name of the firm, and the defendant must therefore be held liable upon it. Whether post-dated or not, it was a cheque, and if it had been presented immediately the banker would have paid it.

Hayes, Serj., and J. M. Howard, in support of the rule — In *Austin* v. *Bunyard* the cheque was taken in ignorance that it was post-dated, which makes all the difference. Here the whole transaction was based upon the intention that the cheque should be held for several days. Any authority which Tucker had to draw cheques for the firm was limited to drawing cheques, properly so called, for the purposes of the partnership. This post-dated [* 96] cheque is * really a bill of exchange (*Allen* v. *Keeves*, 1 East, 435), which the plaintiff discounted for Tucker. That was, in fact, the effect of the transaction between them; and an attorney is not liable on a bill indorsed or accepted by his partner in this manner. There is no implied authority for an attorney in partnership to accept or indorse bills for the firm, *Greenslade* v. *Dower*, 7 B. & C. 635, *Hedley* v. *Bainbridge*, 3 Q. B. 316; 11 L. J. Q. B. 293; *Yates* v. *Dalton*, 28 L. J. Ex. 69; and the defendant is not bound by such a bill, in the absence of proof that it was accepted or indorsed in the ordinary course of the practice of the parties. *Hasleham* v. *Young*, 5 Q. B. 833; 13 L. J. Q. B. 205.

Cur. adv. vult.

Judgment was given on February 12 as follows: —

MARTIN, B. In this case there was no evidence of any author-

ity on the part of Tucker to indorse the particular bill of exchange declared upon, and no evidence of any general authority to accept, indorse, or draw bills of exchange, nor was there any evidence of any recognition of this particular bill; and in such a state of things *Hedley* v. *Bainbridge* shows that no action is maintainable against one partner in a firm of attorneys, upon a bill indorsed by another, because neither partner has any implied authority to draw, accept, or indorse bills in the name of the partnership firm, so as to bind his partners.

The second count was on a cheque, and there was abundant evidence that both the partners had authority to draw cheques in the name of the firm, and that both of them drew cheques when occasion required it, in the name of the firm. But this particular cheque was a post-dated cheque; it was dated the 20th of July, but delivered to the plaintiff upon the 13th of July, that is, seven days before it would fall due and be payable according to its tenor. It was brought by one of the partners to the plaintiff, and was exchanged by him for a cheque for £80, it being stated by the partner who took it to the plaintiff that he desired to raise a sum of money for the purposes of a client of the firm, whom he named. It was then agreed that he should receive £80 in lieu of this post-dated cheque. That was the entire transaction, and, as far as we can see, there is no ground to impute fraud to the plaintiff. He appears to have acted *bonâ fide*, and to have given the money; and it was also stated to be an ordinary transaction between him and the firm. In point of fact, the transaction was, however, the same as if Tucker had given the plaintiff a bill of exchange at seven days' date, the intention of both parties being that it should be held over for the seven days, and should then be presented for payment.

We have considered the matter very carefully. It is by no means clear; but I believe we are all [1] unable to distinguish the giving of this cheque from giving a bill of exchange at seven days' date, and, that being our judgment, the claim upon the cheque fails, as well as the claim upon the bill of exchange, and therefore the rule must be made absolute.

Kelly, C. B. — I merely wish to add that it involves a question of considerable importance, not merely to firms of attorneys, but to all cases where a member of a co-partnership possesses but a

[1] The case was argued before Kelly, C. B., Martin, B., Channell, B. and Pigott, B.

limited authority. I am glad to find that my Brother MARTIN, who tried the cause, has entirely discarded the idea of any fraud on the part of the plaintiff in respect of his transaction with the partner who obtained and put this cheque in circulation. Under those circumstances, it is unnecessary to say more than that we think a post-dated cheque is, in effect, for all practical purposes, a bill of exchange, if it be post-dated deliberately and intentionally, so as to make it have the legal and practical effect of a bill at so many days' date. I entirely concur in the judgment delivered by my Brother MARTIN, though I regret that, under such circumstances, the plaintiff, against whom no imputation can be suggested, should lose a sum of money to which he is fairly and justly entitled.

Rule absolute.

ENGLISH NOTES.

By section 73 of the Bills of Exchange Act 1882, a cheque is described as a bill of exchange drawn on a banker payable on demand. This of course implies that the instrument is in such form that, if presented to the banker, he would, in the ordinary course of business, pay it immediately if the customer's account is in order. Therefore until the date borne by a post-dated cheque arrives, the instrument is not, properly speaking, a cheque; and the expression of KELLY, C. B., that it is, "for all practical purposes a bill of exchange," is too strong, unless he meant the expression only to apply where (as in the case in point) it was not expected that the cheque would be negotiated. For it could hardly be maintained that a person taking the cheque before the apparent date would not be put upon inquiry, or would have any better title than the person from whom he received it.

But if presented to the banker on or after the date, the banker paying the cheque would be entitled to charge the customer in the same way as any other drawee of a bill payable on demand. And any other person taking the cheque for value (within a reasonable time) after the date would doubtless be entitled to treat it as a bill of exchange payable on demand. And, in any case, the person liable upon the instrument would be bound to make his arrangements to meet it, as if it were a bill payable on demand on or after the day of its date. In these respects the instrument is practically a bill of exchange.

The law relating to cheques properly so called, so far as not applicable to bills of exchange generally, is contained in part III. of the Act (ss. 73–82); some of the points having special relation to the duty of the banker are dealt with in R. C. vol. 3., p. 757 *et seq.*, under the article "Banker," Nos. 10 & 11.

No. 5. — Forster v. Mackreth. — Notes.

By section 13 (2) of the Bills of Exchange Act 1882, a bill (or cheque) is not invalid by reason of its being post-dated. The former stamp law (55 Geo. III., c. 184, s. 13), which imposed a penalty on the issue of such cheques, is repealed by the Stamp Act 1870. And it has been decided that for the purposes of the stamp laws such a cheque is not a bill of exchange payable after date, — the criterion being the form of the instrument and not the use which may be made of it. *Gutty* v. *Fry* (1877), 2 Ex. D. 265, 46 L. J. Ex. 605, 36 L. T. 182.

AMERICAN NOTES.

Checks not purporting to be payable immediately possess all the qualities of a bill of exchange, whether payable on a precise day named or at so many days after sight. 2 Daniel on Negotiable Instruments, § 1574; *Irory* v. *Bank*, 36 Missouri, 475; *Harrison* v. *Nicollet Nat. Bank*, 11 Minnesota, 488; 5 Lawyers' Rep. Annotated, 716; 16 Am. St. Rep. 718. In the latter case the paper was dated March 27, 1888, and was payable April 14, 1888. The Court observed: "The two principal authorities holding such an instrument a check are *In re Brown*, 2 Story (United States Circ. Ct.), 502, and *Champion* v. *Gordon*, 70 Pennsylvania St. 471. Both of these are entitled to great weight, but they stand almost alone; the Supreme Court of Rhode Island (*Westminster Bank* v. *Wheaton*, 4 Rhode Island, 30), and perhaps of Tennessee, being, so far as we know, the only ones which have adopted the same view. All other Courts which have passed upon the question, as well as the text-writers, have almost uniformly laid it down that such an instrument is a bill of exchange, and that an essential characteristic of a check is that it is payable on demand. This was finally settled, after great conflict of opinion in New York, the great commercial State of the Union, in the case of *Bowen* v. *Newell*, several times before the Courts, 5 Sandf. 326; 2 Duer, 584; 8 New York, 190, and 13 New York, 290; 64 Am. Dec. 550." This is the doctrine of *Morrison* v. *Bailey*, 5 Ohio St. 13; 64 Am. Dec. 632; *Henderson* v. *Pope*, 39 Georgia, 361; *Hawley* v. *Jette*, 10 Oregon, 31; 45 Am. Rep. 129; *Minturn* v. *Fisher*, 4 California, 36; Morse on Banking, 243. *Way* v. *Towle*, 155 Massachusetts, 374, is to the contrary.

In respect to a post-dated check, and not one payable at a certain time after date or sight, Mr. Daniel thinks (2 Daniel on Negotiable Instruments, § 1578) that "the uniform understanding is" that it is payable on the day of its date, without grace. Citing *Taylor* v. *Sip*, 30 New Jersey Law, 284; *Salter* v. *Burt*, 20 Wendell (New York), 205; 32 Am. Dec. 530. He also observes that "Independent of the Stamp Act, the rule is likewise in England."

In some States, as in New York, the matter is regulated by statute.

The weight of American authority being in harmony with the English as to the nature of the paper, it follows here also that one partner in a firm of lawyers would have no implied authority to bind his copartners by a post-dated check; certainly so, unless it was necessary or usual. 1 Daniel on Negotiable Instruments, § 358*a*; *Marsh* v. *Gold*, 2 Pickering (Massachusetts), 285; *Smith* v. *Sloan*, 37 Wisconsin, 285; 19 Am. Rep. 757; *Friend* v. *Duryee*, 17 Florida, 111; 35 Am. Rep. 89; *Nat. State Cap. Bank* v. *Noyes*, 62 New Hampshire, 35.

No. 6. — Mutford v. Walcot, 1 Lord Raym. 574, 575. — Rule.

No. 6. MUTFORD *v.* WALCOT.

(1698.)

RULE.

An acceptance made after the time when the bill would be due according to its tenor, is an acceptance binding the acceptor as if the bill were payable on demand.

Mutford v. Walcot.

1 Lord Raym. 574–575.

[574] In assumpsit the plaintiff declared upon a bill of exchange drawn the twenty-eighth of October at double usance for seven hundred ducats payable at Amsterdam, which the defendant accepted the thirty-first of December following, *per quod devenit onerabilis* to pay the bill, *et in consideratione inde* the same day and year he assumed to pay it *secundum tenorem et formam billae praedictae*. Upon *non assumpsit* pleaded, verdict for the plaintiff. Sir Bartholomew Shower moved in arrest of judgment, that the time of payment of the bill being expired at the time of the acceptance, it was impossible that the defendant should assume to pay it *secundum tenorem billae*, for that was out of his power. And though this acceptance was within the three days of grace, viz. the last day within which time payment is good, and no protest for want of payment can be made, until the said days are elapsed; yet it is a breach, not to have paid the money within the usance: and the plaintiff has no need to say in his declaration upon a bill of exchange, that he did not pay it within the days of grace: but if the fact was that it was then paid, it ought to be shown of the other side. So that here the time of payment was elapsed at the time of acceptance; and therefore it was impossible to accept it then, to be paid *secundum tenorem billae*. And this objection is the [* 575] * stronger in respect of the distance of the place; for admitting that payment within any of the three days of grace would be according to the tenor of the bill, yet when the acceptance here was upon the last of the said days, it was impossible to pay the money the same day to the plaintiff at Amsterdam. 2. The acceptance here is not good, because no house is mentioned where the bill should be paid. Mr. Hall for the plaintiff cited the case of

Jackson v. *Pigot*, 1 Lord Raym. 364, as a case adjudged in point. And Mr. Northey for the plaintiff said, that there might be some difficulty, if the action had been brought against the first drawer, but none where the defendant is chargeable by his own acceptance; for a man may tender a bill to be accepted after the time of payment is expired, to oblige the acceptor, if he will accept it, but not to affect the drawer.

Per HOLT, Chief Justice. There must be such acceptance as will bind the acceptor, and that is sufficient. As if a bill of exchange be payable at London, and the person upon whom it is drawn accepts it, but names no house where he will pay it, the party that has the bill is not bound to be satisfied with this acceptance, but nevertheless if he will be content with it, it will bind the acceptor. So if A. draws a bill upon B., B. refuses to accept it, C. rather than it shall be protested accepts it for the honour of A., this acceptance will bind C. So if a man offer to B. a bill of exchange payable in Amsterdam, B. refuses to accept it unless some merchant in London will sign it; if the merchant signs it, he becomes acceptor for the honour of the drawer. Acceptance after the day of payment is common, and there is no inconvenience in it. And HOLT, Chief Justice, said, that he remembered a case where an action was brought upon a bill of exchange, and the plaintiff declared upon the bill, where it was negotiated after the day of payment; and a question was made, whether the plaintiff could declare upon the bill, or whether he ought to bring *indebitatus assumpsit?* and he said, that he had all the eminent merchants in London with him at his chambers at Serjeant's-Inn in the long vacation about two years ago, and they all held it to be very common, and usual, and a very good practice. And as to the matter of the *secundum formam*, &c., it is the payment of the money that is the substance of the promise; and so it was held in the case of *Jackson* v. *Pigot*. GOULD, Justice accord. And judgment was entered for the plaintiff.

Note: HOLT, Chief Justice, and Northey agreed the matters said by Sir Bartholomew Shower concerning the days of grace, and the manner of reckoning in such cases. *Ex relatione* M'ri Jacob.

ENGLISH NOTES.

See Bills of Exchange Act 1882, s. 10 (2).

The above clause of the Act extends to the indorser who indorses after maturity, the same rule which by the principal case was established as

to the acceptor. Chalmers (4th ed. p. 29) mentions that before this enactment the English law (*scil.* as to the case of the indorser) was obscure; and that the clause gives effect to the American rule.

The principal case was followed by Lord Ellenborough in *Wynne* v. *Raikes* (1801), 5 East, 513. The acceptance in that case was by a separate letter, which was at that time, and until 19 & 20 Vict. c. 97, s. 6 (see now Bills of Exchange Act 1882, s. 17 (2)), a sufficient acceptance.

AMERICAN NOTES.

Acceptance after maturity binds the acceptor. 1 Daniel, Negotiable Instruments, §§ 490, 491 (citing the principal case); *Williams* v. *Winans*, 2 Green (New Jersey Law), 339; *Mechanics' Bank* v. *Livingston*, 33 Barbour (New York Supr. Ct.), 458; *Bank of Louisville* v. *Ellery*, 34 ibid. 630; *Spaulding* v. *Andrews*, 18 Pennsylvania State, 113; *Stockwell* v. *Bramble*, 3 Indiana, 128; *Allwood* v. *Haseldon*, 2 Bailey (South Carolina), 157; *Bishop* v. *Dexter*, 2 Connecticut, 419; *Berry* v. *Robinson*, 9 Johnson (New York), 121; 6 Am. Dec. 267; *Leavitt* v. *Putnam*, 3 New York, 494; 53 Am. Dec. 322, citing the principal case.

No. 7. STEELE *v.* M'KINLAY.

(H. L. Sc. 1880.)

RULE.

To constitute acceptance of a bill there must be a signature by the drawee showing his assent to the order of the drawer. No other person writing his name on the bill can thereby render himself liable to the drawer on the bill.

Steele v. M'Kinlay.

5 App. Cas. 754–786 (s. c. 43 L. T. 358; 29 W. R. 17).

[755] Appeal from the Court of Session, Scotland.

In 1874, William and Thomas M'Kinlay commenced business as timber-merchants at Strabane, Ireland, under the name of W. & T. M'Kinlay. Requiring funds, they commissioned their father, the late James M'Kinlay, horse-dealer in Glasgow, to obtain them an advance of £1000. He entered into communication with John E. Walker, coach proprietor in Glasgow, the result being that Mr. Walker signed as drawer a bill bearing date the 25th of May, 1874, for £1000 at twelve months, addressed to "Messrs. Wm. & Thos. M'Kinlay, wood-merchants, Strabane," which he handed to James M'Kinlay. The latter sent it to his sons in Ireland, who returned

No. 7. — Steele v. M'Kinlay, 5 App. Cas. 755, 756

it duly accepted in their firm's name. James M'Kinlay then wrote his own signature across the back of the bill, and handed it to Mr. Walker, who remitted its amount, less discount, to the drawees. In March, 1875, Mr. Walker discounted the bill with the National Bank of Scotland, but W. & T. M'Kinlay failing to pay it when due, he retired it.

James M'Kinlay died in September, 1874, and his representative is the respondent Alexander M'Kinlay. J. E. Walker died in * September, 1875, and the appellants are his [* 756] trustees. Several questions arose between the parties in Scotland, and there was an action and a counter-action, which were heard together. But the sole question in this appeal was whether the appellants, the trustees, could recover from the respondent, as representing his father, the sum of £1000, the amount of the bill of exchange.

The bill of exchange was in the following form: —

Stamp 10*s*. Due 28th May, 1875.

£1000 stg.

Glasgow, 25th May, 1874

Twelve months after date pay to me or my order at the National Bank of Scotland's office, Queen Street, Glasgow, the sum of one thousand pounds sterling, value received.

John E. Walker,
W. & T. M'Kinlay.

To Messrs. William & Thomas M'Kinlay,
Wood-merchants, Strabane.

The bill was indorsed on back as follows: —

James M'Kinlay,
John E. Walker.

There were upon the pleadings, statements, and counter-statements as to facts from which inferences might be drawn as to the purpose for which James M'Kinlay put his name upon the back of the bill. The effect of these statements and the evidence so far as material, sufficiently appears from the considered judgments of Lord Blackburn and Lord Watson.

The Court of Session in the interlocutor (or judgment) appealed against, by a majority of five judges to two, in a Court composed of both divisions, held that James M'Kinlay's signature constituted

no liability against him, and therefore none against the respondent, his representative.

The appeal having been fully argued, —

[764] The Law Peers, having considered their judgment, delivered the following opinions: —

Lord BLACKBURN: —

My Lords, this is an appeal against that part of the interlocutor of the 1st of July, 1879, by which the first Division of the Court of Session, in conformity with the opinion of the majority of the seven Judges who heard the case argued, found "that the document founded on No. 6 of process constituted no obligation against the late James M'Kinlay, and therefore constitutes none against

[* 765] * the defender, Alexander M'Kinlay." The document in question is a bill of exchange in the following form: — [His Lordship read the bill as given above, and continued: —]

I have come to the conclusion that this interlocutor is right. But I have not come to this conclusion on quite the same grounds as any one of the Judges below. And as all cases relating to the form and effect of bills of exchange are in this commercial country of very great consequence, I think it desirable to state my reasons fully. I will first state what, according to my view of it, is the effect of the evidence produced. James M'Kinlay, the person whose signature appears on the back of the bill, was the father of William and Thomas M'Kinlay, and had assisted in setting them up in business as wood-merchants at Strabane. William M'Kinlay is the only witness who knows anything about the arrangements between his deceased father and his firm of W. & T. M'Kinlay; and his evidence, which is in no way contradicted, is as follows: "It was not intended originally that this money should be advanced by my father. My father promised to arrange a loan for me after delivering over the premises, and I signed this £1000 bill as a preliminary transaction; but in what way he intended to do it at that time I was not aware. Whether I signed the bill blank, or not, I don't remember the contents of it; but it was my father who got it. My father was not to become responsible for the loan, either by giving it himself, or becoming liable to the party who should ultimately advance it. It was intended to obtain the money on security of a mortgage. In giving the bill, I did not understand that my father would become a party to it. I knew by the letter remitting the money

No. 7. — Steele v. M'Kinlay. 5 App. Cas. 765, 766.

that Mr. Walker was the party who had advanced it. I had no doubt that was the money for the bill in question. I knew that the money came from him, but under what circumstances I did not understand." James M'Kinlay did enter into a negotiation with John E. Walker respecting an advance of money to W. & T. M'Kinlay. Both James M'Kinlay and J. E. Walker are dead. And what passed between them, except so far as it was reduced into writing, must be to a great extent a matter of inference. Some things are perfectly clear. J. E. Walker remitted to William & Thomas M'Kinlay £949 on the 1st of June, 1874, in the * following letter: "1st June, 1874. I send you [*766] herewith letter of credit in your favour for £949 0s. 4*d.*, being proceeds of your acceptance as under noted, of which you will be kind enough to acknowledge receipt. Note.

Amount of acceptance				£1000	0	0
Interest	£50	0	0			
Stamp	0	10	0			
Bank Commission	0	9	8			
				50	19	8
Remitted by L. C.				£949	0	4"

And this document, described in the letter as "your," *i. e.*, William & Thomas M'Kinlay's, acceptance, was the document No. 6 of process in the interlocutor mentioned. And it is also clear from the extract from J. E. Walker's ledger that on various days, beginning on the 12th of May and ending on the 14th of October, 1874, Walker also advanced to them £1600; for which sum, with interest and stamps, in all £1676 3*s.* 6*d.*, William & Thomas M'Kinlay, on the 30th of November, 1874, accepted three bills for £558 14*s.* 6*d.* each. And there is nothing to show that James M'Kinlay, whose death took place in September, 1874, ever made himself liable for or was considered by J. E. Walker to have made himself liable for this £1600 or any part of it. And it is material here to observe that £300 was advanced on the 12th of May, 1874, a fortnight before the bill for £1000 was drawn. That sum, at least, must have been advanced to William & Thomas M'Kinlay on their own credit, or on the faith of the mortgage to secure £5000, which, though not executed till the 3rd of February, 1875, must have been arranged for some time before; it does not anywhere appear when. But, as far as regards the £1000 bill of the 25th of May,

1874, there does appear on the back of it the indorsement of James M'Kinlay.

It appears from the evidence of Mr. Black, Walker's bookkeeper, that he, by Walker's directions, drew the bill in question, the body of which is in his writing, that he gave it to J. E. Walker, who himself sent it out for acceptance. This bill, as prepared by [* 767] Black, was not in any way addressed to James * M'Kinlay. The next thing this witness speaks to is that Walker told him that he had received back the bill accepted, and directed him to remit the money, which he did by the letter which I have already read. He further states: "I entered the bill in Mr. Walker's books, some time in June, 1874, to the debit of W. and T. M'Kinlay. The name of James M'Kinlay was not entered at all in connection with it. Mr. Walker was in the habit of looking at the books every morning, and must have seen the entry as to the bill. I remember a mortgage being granted by W. and T. M'Kinlay to Mr. Walker. It was not entered in the books. Mr. Walker said to me that what sums he had advanced to W. and T. M'Kinlay were covered by the mortgage. *Q.* Was the sum in the bill covered by the mortgage? — *A.* It was understood. *Q.* Did Mr. Walker say so? — *A.* Decidedly. There were subsequent bill transactions with W. and T. M'Kinlay, the sums in which also went into the mortgage."

Now it seems to me, with great respect to the Judges below who find the fact otherwise, that it is not a proper inference of fact that Walker drew the bill, and sent it to James M'Kinlay in order that he might accept it, or treated the signature of James M'Kinlay, after he got it, as an acceptance. If that had been so, he would surely have caused Black to draw the bill on James M'Kinlay, and he would have caused James M'Kinlay's name to be entered in his books. But, no doubt, when James M'Kinlay put his name on the back of the bill, and handed it to Walker, he must have done so for some object, and it may be conjectured that it was in consequence of some request from Walker, which, as there is no writing proved, must be taken to have been verbal. But this, I think, is only conjecture. The only evidence produced bearing on this point is that of George Steele. Taking that to be all accurate, it leads to the conclusion that Walker was very glad to get the signature of the old man, which he thought made his security better; and, if I were to indulge in conjecture, I should think it probable Walker

had said something to him about this being a large sum to advance on the faith of a mortgage being executed hereafter, which was not yet prepared, and that James M'Kinlay promised that, if for any reason that mortgage went off, he would see that bill paid.

I * certainly cannot, especially after seeing that £300 had [* 768] been already advanced on the 12th of May, and that £1300 more was advanced afterwards, draw the conclusion which is drawn by Lord SHAND, that the money was advanced particularly on the faith of the signature of J. M'Kinlay, without which the loan would not have been given.

This brings us to the question whether there was, under such circumstances, according to the law of Scotland, any obligation constituted against J. M'Kinlay in his lifetime.

The Mercantile Law (Scotland) Amendment Act, 19 & 20 Vict. c. 60, and the Mercantile Law (England) Amendment Act, 19 & 20 Vict c. 97, were passed for the purpose of remedying a mischief recited in the preambles of both Acts in the same language: "Whereas inconvenience is felt by persons engaged in trade by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence."

Now, by the Common Law of England a contract to answer for the debt of another person might be proved in the same manner as any other contract. And I agree with what Lord GIFFORD in this case intimates, that there is no reason, either of justice or equity, why, when such a contract is proved to have been entered into by word of mouth, it should not be carried out by law. But he proceeds to say that there is no statute against it; and there I must differ from him. It was thought by the English Legislature that there was danger of contracts of particular kinds being established by false evidence, or by evidence of loose talk, when it never was really meant to make such a contract; and therefore it was provided by the Statute of Frauds, 29 Car. 2, c. 3, s. 4, that no action should be brought *inter alia* "upon any special promise to answer for the debt, default, or miscarriage of another person," "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This enactment compels the Courts to refuse to enforce such a

promise, however clearly it may be proved, unless there be the statutable evidence.

[*769] * There are constantly cases occurring in which it is felt that it is morally very wrong to set up such a defence, and in which, as has been sometimes said, the statute for the prevention of frauds operates as a statute to facilitate fraud; nevertheless, on grounds not, I take it, of justice but of expediency, this statute has been not only kept in force, but extended. It did not, however, before 1856, apply to Scotland. And the consequence was that the validity of such an agreement depended upon whether it was to be determined according to English or Scotch law. This fell precisely within the inconvenience recited in the preambles of 19 & 20 Vict. c. 60, and 19 & 20 Vict. c. 97. The Legislature might have remedied it by, in 19 & 20 Vict. c. 97, altering the law of England so as to make it similar to that of Scotland or by altering both laws so as to make something new be the law in both countries. What they did do was by 19 & 20 Vict. c. 60, s. 6, to extend the law of England to Scotland. By the general law of merchant adopted with some modifications, I believe in every civilized country, and certainly in both England and Scotland, the acceptor of a bill of exchange comes under an obligation to any one who becomes the holder to pay him, and the drawer comes under an obligation to the holder to pay him, if the person on whom the bill is drawn does not accept and pay the bill, and the drawer has due notice of the dishonour. And any one who indorses that bill comes under an obligation to all subsequent holders of the bill precisely similar to that of the drawer, but he does not come under any such obligation to prior parties to the bill.

Pothier, Contrat de Change, No. 79, speaking of the contract by the indorser to his indorsee, says, "Ce contrat est entièrement semblable à celui qui intervient entre le tireur et le donneur de valeur. Il produit entre l'endosseur et celui à qui l'ordre est passé, soit en cas de refus de paiement, soit en cas de refus d'acceptation, les mêmes obligations et les mêmes actions que la lettre de change produit entre le tireur et le donneur de valeur." (Works of Pothier, by Dupin, vol. iii. p. 155.) There have been some expressions in English cases to the effect that an indorser is a new drawer. Speaking of these in *Gwinell* v. *Herbert*, 5 Ad. & E. 439, Justice LITTLEDALE says, "It is said that in the case of a bill of

exchange * every indorser is a new drawer. But even that [* 770] requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be considered a new drawer in all respects. It may be correct to say that an indorsement of a bill is in the nature of a new drawing." This obligation incurred under the custom of merchants is not affected by the Statute of Frauds; and it has been very properly decided in *Macdonald* v. *Union Bank of Scotland*, Court Sess. Cas. 3rd Series, vol. ii. p. 963, that it is not affected by the 6th section of 19 & 20 Vict. c. 60. The motive or object of the party who incurs the obligation on the bill may be to guarantee a third person: and that may be known to the person who gives value for the bill, but the obligation is, by the custom of merchants, on the bill.

But I think that since 19 and 20 Vict. c. 60, s. 6, the law of Scotland is as the law of England was before, that no undertaking to answer for the debt of a third person is enforceable unless there is a writing signed as the statute requires. The question, therefore, is in my mind whether there is an obligation under the custom of merchants, as modified in Scotland, incurred on the bill by J. M'Kinlay to J. E. Walker.

The acceptor does incur such an obligation to the drawer. This bill was drawn by J. E. Walker on William and Thomas M'Kinlay, and accepted by them, and J. M'Kinlay then wrote his name on it. Can he be treated as an acceptor? Even if he had expressly written, "Accepted, J. M'Kinlay," he could not have been so treated according to English law. This was expressly decided in *Jackson* v. *Hudson*, 2 Camp. at p. 448; 11 R. R. 763; Lord ELLENBOROUGH says, "The acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for the honour of the drawer." I observe that Mr. Bell, in his Commentaries, vol. i. (7th ed.) p. 425, falls into an error here as to the English law. He says that by it there can be no proper acceptance except by a drawee, "but a signature as acceptor will raise a collateral undertaking." Lord ELLENBOROUGH did not say so. He said that the facts which the counsel offered to prove might have * been [* 771] evidence of a collateral undertaking, if the declaration had been so framed. And so, no doubt they would have been; and if there had been, in addition, a letter signed by Hudson, which

could be construed as a memorandum of the contract, he would, on proof of them, have recovered. But Lord Ellenborough did not say that the writing of the words, "Accepted, J. Hudson," across the bill drawn upon Irving, was in itself a collateral undertaking, nor that it was in itself a sufficient memorandum within the Statute of Frauds. And I apprehend that neither position would have been tenable. Mr. Bell proceeds to say, "In Scotland a different view has been adopted, and, instead of a collateral undertaking, the subscription has been held to import a joint undertaking as acceptor of the bill or maker of the note." For this he cites three cases decided in Scotland, from which he draws that conclusion. He disapproves of it, and says, "The English doctrine is consistent with mercantile practice and understanding, but not quite so with the Stamp Law; the Scottish doctrine is not quite reconcilable to either." All the seven Judges below agree that the signature of J. M'Kinlay in this case could not operate as an acceptance; Lord Gifford and Lord Shand being of opinion that he, not being the drawee, and not intending to be an acceptor, did not become an acceptor at all. And Lord Shand examines at length the four cases, and it appears that there are no more, which are supposed to support the doctrine that such a writing of the name by one not a drawee might, in Scotland, operate as an acceptance, and shows that they do not support it, and my noble and learned friend opposite (Lord Watson) in his opinion, which I have had the advantage of reading, does the same, I shall say no more than that I am quite satisfied by their explanation of these cases. This is the reason on which I base my judgment, that the signature was not and could not be an acceptance. The other four Judges hold that before 19 & 20 Vict. c. 60, s. 11, this name so written might have been treated as an acceptance, but that since that Act it can no longer be so. I should have great difficulty in agreeing in this reasoning, after the passing of 41 Vict. c. 13, which not only enacts what the true construction of the Act shall in future be, but declares what it always has been. However, though not for the same reasons, all seven Judges
[* 772] * agreed that this signature could not operate as an acceptance; and I agree with them in that result.

But Lord Shand takes another view of the effect of writing the name, namely, that it operated as an indorsement by J. M'Kinlay to E. Walker, the drawer of the bill.

No. 7. — Steele v. M'Kinlay, 5 App. Cas. 772, 773.

An indorsement in general is a transfer in writing by the holder of the bill to a new holder on whom the property is thereby conferred; and it is clear that J. M'Kinlay was not such an indorser. But I quite agree that by the custom of merchants, as modified by English law, there may also be an indorsement by a person, not a holder of the bill, who puts his name on the bill to facilitate the transfer to a holder. By the old foreign law, not in this respect entirely adopted by the English law, this might be done by what was called an *aval* (said to be an antiquated word signifying "underwriting"), either on the bill itself or on a separate paper; and if such an *aval* was given by any one, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the *aval* was given.

It appears from Pothier, Du Contrat de Change, Part. I., chap. 4, Article VII., *De l'obligation qui naît des avals*, Works of Pothier, by Dupin, vol. iii. p. 174, that the *aval* might be made by one who gave his name, either by way of incurring responsibility for the drawer, placing the signature under the name of the drawer, or for the indorser, placing it under the indorsement, or for the acceptor, placing it under that of the acceptance. An *aval* for the honour of the acceptor, even if on the bill, is not effectual in English law, as appears by *Jackson* v. *Hudson*. That case cannot now be questioned after the lapse of so many years, even if it could have been successfully impugned at the time, which I do not think it could. But the indorsement by a stranger to the bill on it to one who is about to take it is efficacious in English law, and has the same effect as an *aval*. The effect, according to English law, of such an indorsement is recognised by Lord Holt, in *Hill* v. *Lewis*, 1 Salk. at p. 133, and again in *Penny* v. *Innes*, 1 C. M. & R. 439; 4 L. J. Ex. 12; such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently. It is not a collateral
* engagement, but one on the bill; and it is for that reason, [* 773]
and because the original bill, by the custom of merchants, has incident to it the capacity of an indorsement in the nature of an *aval* on it, that such an indorsement requires no new stamp. The law of Scotland also gives effect to such an indorsement. Indeed, no better example of an indorsement having the effect of an *aval* for the drawer of a bill can be given than is afforded by *Macdonald* v. *Union Bank of Scotland*, where the cashier of the

Union Bank, having refused to give cash on the credit of a cheque drawn on another bank, agreed to give it on Macdonald indorsing his name on it. This was held to make Macdonald liable as indorser to the Union Bank. In *Penny* v. *Innes*, it appeared that Innes (who, as I think we must understand the facts, had agreed with the plaintiff to become indorser in the nature of an *aval* for Wilson, the drawer of the bill, who was about to transfer the bill to the plaintiff) did not actually write his name on the bill till after Wilson, the drawer, had written his, and it was decided that the order in which the names were written was immaterial.

The case of *Matthews* v. *Bloxsome*, 33 L. J. Q. B. 209, was much, and properly, relied upon by the counsel for the appellants. It was one very peculiar in its circumstances: The defendant had written to one of the plaintiffs a letter in these terms: "Sir, my brother Richard wishes me to join security with Mr. Edmands for the sum of £150. I beg to say I am quite agreeable to do so, on the conditions entered into between you and him. J. Bloxsome." This, it appears, was thought by the Court not to be a sufficient memorandum in writing signed by J. Bloxsome to satisfy the Statute of Frauds, because the conditions were never put in writing. But Richard Bloxsome procured three bill stamps of an amount sufficient to cover £50 each. On the back of these Edmands and J. Bloxsome indorsed their names in order to enable him to obtain the £150 from the plaintiff. Richard Bloxsome wrote across them, "Accepted, Richard Bloxsome," and delivered them in that state to the plaintiffs, who gave him the £150. It was perfectly manifest that the defendant gave authority to fill up the blank stamp paper in such a way as [* 774] would make him liable as indorser * to the plaintiffs, and meant that to be done; if the blanks had been filled up by the plaintiffs with the name of one of their clerks as drawer of a bill payable to bearer, there could have been no defence. But by a blunder of the plaintiffs, it was filled up inserting their own names as drawers. No one could help wishing to baffle such a defence. I was a party to the judgment of the Queen's Bench by which they did so, but I greatly doubt if it was sound. It seems to me to be a very violent thing to construe a document which, on the face of it, purported not to be drawn by the plaintiffs, and indorsed for them by the defendant, who purported to be the drawer, as being, in consequence of extrinsic evidence, in legal effect drawn by the defendant, and indorsed to the person who purported on it to be drawer.

But that case, if good law, can only be an authority for considering a bill as if it were amended so as to be what it was intended to be, when the evidence is clear what the intention was, and that the bill was drawn up in its actual form by blunder. In the present case the bill on the face of it purports to be drawn by J. E. Walker on William and Thomas M'Kinlay, and to be payable to J. E. Walker's order. So far is that from a blunder, that I think it clear it was what was intended from the beginning. J. M'Kinlay wrote his name on the back, and any one who afterwards took the bill would have the right to hold J. M'Kinlay liable to him as an indorser, in the nature of an *aval* for the drawer. But it does not purport to be an indorsement to Walker, who was drawer, but the contrary. Even if it was intended, which I think is not clearly made out, that J. M'Kinlay was to bind himself as a surety for his sons to J. E. Walker, and wrote his name on the back of the bill with that intent, he did not carry out his intention. And to construe the bill, by the aid of the extraneous evidence, as operating as a drawing by J. M'Kinlay on William and Thomas M'Kinlay, and an indorsement by him as drawer to Walker would not be a rectifying a blunder made in drawing up the instrument, so as to construe it as if drawn up according to the original intention, but a making of a new instrument, because, owing to their mistakes of law, the instrument which they drew up did not operate as was wished. I therefore come to the conclusion that what was done cannot be effectual as a guarantee for William and T. M'Kinlay * for want of a writing signed, and that it can- [* 775] not be effectual as an obligation on the bill, either as an acceptance or as an indorsement to E. Walker, who, on the face of the bill, purports to be the drawer, who would *primâ facie* be liable to indorsers, and not entitled to sue them.

The result is that I think the appeal should be dismissed.

Lord HATHERLEY: —

My Lords, in considering this case I had no doubt, immediately after the hearing, that no case could be made out upon this claim by treating the document signed by M'Kinlay the elder as a document with a guarantee, owing to the statute in the way of such a construction. The point on which I did entertain some doubt was as to what was the effect of the writing by M'Kinlay of the name upon the bill, seeing that it was necessary, as far as one could, to attribute some force and effect to the signature which he so added

to the bill. But I had the advantage, whilst considering the case, of seeing the opinion of my noble and learned friend opposite (Lord BLACKBURN), who has just delivered that opinion to your Lordships, and it appeared to me to put the matter in so clear and precise a way that it would be an idle form and ceremony if I went over the same ground again; and also if I did so I might be appearing to give as the result of my own reasoning that which I have in fact finally and decisively been led into entirely by that opinion. Therefore I am quite content to rest my judgment, which coincides with that of my noble and learned friend opposite, upon the reasons which he has given in the opinion which he has now delivered to the House.

Lord WATSON: —

My Lords, in February, 1874, William and Thomas M'Kinlay commenced business as timber merchants at Strabane, in Ireland, under the firm of W. & T. M'Kinlay; and shortly thereafter they commissioned their father, the late James M'Kinlay, to procure for them in Glasgow, where he resided, an advance of £1000 on the personal credit of the firm. Some communings then took place between James M'Kinlay and the late James Ewing Walker, coach proprietor, in Glasgow, the result of which was that Mr.
[* 776] Walker * signed, as drawer, a bill bearing date the 25th of May, 1874, for £1000 at twelve months, addressed to "Messrs. Wm. & Thos. M'Kinlay, wood-merchants, Strabane," which he handed to James M'Kinlay. The latter forwarded the bill to his sons, who returned it duly accepted in their firm's name. James M'Kinlay then wrote his own signature across the back of the bill, and delivered it to Mr. Walker, who, on the faith of the document thus completed, remitted its amount, less discount, to the drawees. The drawer kept the bill until the 10th of March, 1875, when he discounted it with the National Bank of Scotland, signing as indorser. The drawees failed to pay the bill at maturity, and it was retired by Mr. Walker.

James M'Kinlay died in September, 1874, and Mr. Walker in September, 1875. The action in which the present appeal is taken was raised by the testamentary trustees of Mr. Walker (the appellants) against Alexander M'Kinlay (the respondent) as representing his father, the deceased James M'Kinlay: and its conclusions are for payment of the amount of the bill and interest, subject to certain specified deductions. Besides detailing the circumstances in

which the bill was signed by the various parties whose names appear upon it, the appellants endeavour to indicate, in their pleadings in the Court below, the character in which, and the purpose for which, James M'Kinlay adhibited his signature before delivering the bill to the drawee. Their record appears to me to be framed upon the footing that, in signing his name, James M'Kinlay intended to undertake, and did incur a direct obligation to the drawee in the event, which has occurred, of non-payment by the drawees; but its framers were obviously in great uncertainty as to the precise legal category to which that obligation ought to be assigned. In their summons the appellants libel upon the bill as "indorsed by the said James M'Kinlay," in the condescendence they state that "he so indorsed it as joint obligant with the acceptors and co-acceptor with them for payment of its contents;" and again, in their answer to the separate statement of facts for the respondent they aver that his name was "put upon the bill as an acceptor or joint obligant by arrangement." It has been contended by the respondents, and several of the Judges in the Court below have held, that the only case made on record by *the ap- [*777] pellants is that James M'Kinlay was an acceptor, and consequently that their action must fail if that allegation is irrelevant or is not established. I think that is far too technical a view of the appellants' pleadings. I adopt Lord SHAND's reasoning upon this point, and concur with his Lordship in holding that the record fairly raises a more general issue, and that the case as it stands must be decided on the merits of the question whether M'Kinlay undertook liability to Mr. Walker for payment of the bill.[1]

. . . . . .

Various important decisions were raised and argued at [778] your Lordship's bar, but the only question which, in my opinion, the House requires to determine is this; What liability, if any, did James M'Kinlay undertake to James Ewing Walker, the drawer of the bill?

In considering that question, it is necessary to distinguish between the liabilities which the law merchant attaches to a person who, by signing, has become party to a bill, and those liabilities which may arise out of an understanding or agreement of parties extrinsic of the bill. In some cases the precise character and con-

[1] The passage here omitted merely states the proceedings in the Court of Session.

sequent liabilities of parties to a bill are conclusively fixed by the tenor of the document. The person who draws a bill of exchange, and his addressee who accepts it, can never, according to the principles of the law merchant, be liable otherwise than in their [* 779] respective characters of drawer and acceptor. * In other cases the character and liability of parties to a bill cannot be ascertained without the aid of proof, as, for instance, when a dispute arises in regard to the order of time in which indorsements were made upon a bill. But such proof, when it is admissible, must be strictly limited to facts and circumstances attendant upon the making, issue, or indorsement of the bill. On the other hand, it is undoubtedly competent for parties to a bill, by contract *inter se*, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant. The drawer and acceptor of a bill may agree that, as between themselves, the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor, and that agreement when proved will be binding upon them both, although it can have no effect upon the obligations to third parties interested in the bill imposed upon them by the law merchant.

This leads me to consider whether the late James M'Kinlay, as a party to the bill in the sense of the law merchant, was under obligation, failing payment by his two sons or their firm, to pay the contents to Mr. Walker; and in so doing, I assume as legitimate materials for inference all those facts connected with the making, issuing, and discounting of the bill to which I have already adverted.

The tenor of the bill is, in my opinion, conclusive against the view that James M'Kinlay was an acceptor. Save in the case of acceptances for honour or *per* procuration, no one can become a party to a bill *quà* acceptor who is not a proper drawee, or, in other words, an addressee. That a person, not an addressee, who signs in the same circumstances as James M'Kinlay, thereby becomes an acceptor, has however, been held in the Court below to be authoritatively settled in the law of Scotland. To that proposition, which depends upon the accuracy of a statement in the Commentaries of Mr. Bell (Bell, Com. vol. i., 7th ed. p. 425), and which is repeated by Mr. Thomson in his Treatise on Bills of Exchange, I cannot assent. Mr. Bell infers, from the cases of *Don* v. *Watt*, 26th of May, 1812; Fac. Col. vol. xvi. p. 647, and

Watters, Petitioner, 7th of March, 1818; Fac. Col. vol. xix. p. 489, that in Scotland a signature as an acceptor by a person not a drawee "is held to import a joint undertaking as acceptor * of the bill or maker of the note;" but the learned author [*780] frankly concedes that the doctrine is not quite reconcilable with mercantile practice and understanding. It is, in my opinion, unnecessary to consider how much authority this House ought to require before sanctioning such a departure from the principles of the law merchant, because the cases cited by Mr. Bell do not appear to me to support the doctrine which he deduces from them.

The case of *Don* v. *Watt* related not to a bill of exchange, but to a promissory note; and there is obviously no principle of the law merchant which can prevent any number of persons becoming bound as promisors along with the original grantor of the note. This distinction, which is a very material one, was not adverted to by the Court, who in this and the subsequent case of *Watters* seem to have dealt with the cases of an acceptor and of a promisor as identical. But, assuming that the Court did deal with the promissory note upon principles which they hold to be equally applicable to bills of exchange, it does not appear upon what footing they held the defender liable, whether as a party promisor or as bound by implied agreement to the payee. The Lord Ordinary expressly found that he was liable as indorsee, but the Inner House recalled that finding and decerned against him in general terms without specifying in what character liability attached to him.

There are only two very meagre reports of the case of *Watters*. One of these is in the form of a note by Baron Hume, which runs thus: "A person who was meant to be a joint acceptor with two others put his name on the back of the bill. He is found liable nevertheless as joint acceptor, the purpose being plain. The bill came in place of a former, to which he was one of three acceptors." The other report is in the Faculty Collection, and the whole information given by the reporter as to the facts of the case is that Watters, along with two others, accepted a bill drawn upon them by one Robert Barrie; and then he adds: "Upon becoming due it was renewed, but Watters wrote his name upon the back of the bill." It is by no means clear that the renewed bill was not addressed to all the three acceptors of the original bill

[* 781] including * Watters; and the probability that he was a drawee is strengthened by the report of the argument for the petitioner, who did not defend himself on the ground that, not being a drawee, he could not by his subscription become an acceptor. The only plea urged in defence was that the petitioner was liable as an indorser, "because he had signed on the back of the bill," a very special plea, and one which seems to involve an admission that he would have been liable as acceptor if he had signed on the face of the document. But, be that as it may, the interlocutor of the LORD ORDINARY, which became the judgment of the Inner House, and which is quoted at length in the opinion of Lord SHAND, contains articulate findings which make it perfectly plain that the decision went upon considerations quite independent of Watters's position as a party to the bill.

Neither of the cases of *Sharp*, 1808, Morr. Dict. App. *voce* Bill of Exchange, No. 22, and *Macdougall*, 13th of Feb. 1810; Fac. Col. vol. xv. p. 579, which were cited in argument, has any bearing upon the doctrine in question. These are cases relating to the liability of a drawee who, in accepting, added to his signature the words "as cautioner;" and Mr. Bell, Com. vol. i. (7th ed.) p. 424, thus correctly states their import: "Acceptance as a cautioner is deemed absolute acceptance; and the qualification, whatever effect it may have in a question of relief between the parties themselves, has none at all as against the holder of the bill."

If James M'Kinlay cannot be regarded as an acceptor, no question can arise in regard to the Mercantile Law Amendment (Scotland) Act, 1856, and the Bills of Exchange Act, 1878. But I cannot help saying that if James M'Kinlay, apart from the provisions of these statutes, could or did become an acceptor according to the law of Scotland, I could not have agreed with the learned Judges of the majority in holding that his acceptance was invalid by reason of the provisions of sect. xi. of the Act of 1856. It appears to me that in construing the two Acts together their Lordships have misapprehended the true character and effect of the Act of 1878. They have dealt with that statute as if it were a repealing, and not, as it professedly is, a declaratory Act. [* 782] They * assume that the case of *Hindhaugh* v. *Blakey*, 3 C. P. D. 136, 47 L. J. C. P. 345, was well decided, and that sect. xi. of the Act of 1856 requires in order to due acceptance, not only the signature of the acceptor, but words of acceptance to

which the signature must be appended, and they read the Act of 1878 as repealing the provisions of sect. xi. in so far only as these apply to acceptors who are also drawees, leaving them still operative in the case of acceptors such as they have assumed or held James M'Kinlay to be. Now the Act of 1878 seems to me to be equivalent to a declaration that the case of *Hindhaugh* v. *Blakey* was wrongly decided; and seeing that sect. xi. uses precisely the same language in regard to all acceptors falling within its scope, I should have found it impossible to read the clause as requiring words in the case of an acceptor in the position of James M'Kinlay which would not have been necessary had he been a drawee.

I am of opinion that the character in which James M'Kinlay did become a party to the bill was, both in fact and law, that of an indorser; and that in determining his legal position the circumstance that M'Kinlay's indorsement was written before the bill was delivered to the drawer and the money advanced by him is quite immaterial. No doubt a proper indorsement can only be made by one who has a right to the bill, and who thereby transmits the right, and also incurs certain well-known and well-defined liabilities. But it is perfectly consistent with the principles of the law merchant that a person who writes an indorsement with intent to become party to a bill, shall be held — notwithstanding he has not and therefore cannot give, any right to its contents — to be subject, as in a question with subsequent holders, to all the liabilities of a proper indorser. I fail to see upon what principle James M'Kinlay can be interpolated as a party to the bill in question between the drawer and the acceptor. To hold that a stranger to the bill who writes his name across the back of it, before it has passed out of the hands of the drawer, thereby becomes liable to the drawer, failing payment by the drawees, appears to me to be as inconsistent with the principles of the law merchant as to hold that there may be a drawer other than the original drawer and payee, or that there may be an acceptor other than the drawee or one who accepts as his agent or for his honour. It may be * convenient in some cases to describe [* 783] the liability of a person whose name is on a bill, and who is neither payee nor drawee, as being the liability of a drawer or acceptor, but in these cases liability cannot arise from such person being either a drawer or an acceptor in the sense of the law merchant, but from some agreement extrinsic of the bill itself.

No. 7. — Steele v. M'Kinlay, 5 App. Cas. 783, 784.

I should have had less difficulty in holding that James M'Kinlay, as party to the bill, was an indorser, and therefore not liable to pay to Mr. Walker, the drawer, when it was dishonoured by the acceptors, had it not been that the point seems to have been otherwise decided by the Court of Queen's Bench in *Matthews* v. *Blossome*, 33 L. J. Q. B. 209. The report of the case is not satisfactory, and leaves room for doubt whether the decision was intended to go so far as the report states. If it was, I cannot avoid the conclusion that the decision is at variance with sound principles, and that whatever may now be its value as a precedent in England, it ought not to be taken as a good authority in a Scotch appeal.

It still remains for consideration whether the transaction between Mr. Walker and James M'Kinlay was completed on the footing that the latter was to be bound to the drawer failing payment by the drawees. As a party to the bill he was not so bound; still the appellants would be entitled to decree if it were proved, by extrinsic evidence, that their author, Mr. Walker, advanced his money upon the faith of such an arrangement as they allege. But the appellants have, in my opinion, failed to adduce evidence either competent or sufficient for that purpose.

It appears to me that the arrangement which the appellants seek to prove is in effect an undertaking of guarantee, and accordingly that their proof, which so far as material consists of oral testimony, is excluded by the provisions of the 6th section of the Mercantile Law Amendment (Scotland) Act, 1856. I am not prepared to hold that an obligation to sign a bill as one of several drawees and acceptors necessarily constitutes an undertaking of guarantee; but in this case it is, to my mind perfectly clear that James M'Kinlay never agreed to be an acceptor. George Steele deposes that Mr. Walker, before he got the completed bill, told him that "the old man" (meaning M'Kinlay the father) [* 784] "was to * sign the bill along with his two sons," and, after he got the completed bill, that it was "all right;" that it was signed by the "old man." But there is no evidence whatever that M'Kinlay was to sign in the character of an acceptor. The form in which the bill was drawn and sent for acceptance by Mr. Walker contradicts that supposition, and the witness, George Steele, states that Mr. Walker, two or three weeks before he remitted the proceeds of the bill in question to Strabane, told him (Steele) "that James M'Kinlay had asked him to advance £1000

for them" (*i. e.*, his two sons, the drawees) "upon his security," and that he "had agreed to advance it." Had James M'Kinlay's signature been sufficient, according to the law merchant, to make him liable to the drawer, the provisions of sect. 6 of the Act of 1856 would have been inapplicable, notwithstanding the fact that his obligation was in substance a guarantee; but when it is proposed, as in the present case, to establish by extrinsic evidence an obligation which is substantially a guarantee, the Act applies, and parol proof is incompetent.

If the appellants' evidence were held to be competent, I am of opinion that it is not sufficient to establish any agreement or understanding on the part of M'Kinlay to the effect that he was to be liable to the drawer. There was apparently no third person present at their communings in regard to the bill, and there is no evidence of what passed between them except the indirect testimony of George Steele as to certain statements made to him by Mr. Walker. These hearsay statements through the decease of Mr. Walker became admissible in evidence, subject always to these qualifications: (1.) That they are to be received *cum notâ*, because the respondents had no opportunity of testing their weight or credibility by cross-examination of the person who made them: and (2.) That when ambiguous they must be read *contra proferentem*. Whilst these statements must be held to express Mr. Walker's view of the transaction, they do not necessarily represent the understanding of James M'Kinlay. There is nothing in the case to suggest that either of them was unfamiliar with bill transactions, and it is nowhere proved that the liability which M'Kinlay was to incur by signing his name was ever discussed or referred to in the course of their communings. It lay with the appellants to prove, and I think they have failed to prove, that *there ever was any mutual understanding or agreement as [*785] to that matter. The impression which careful perusal of the proof has left upon my mind is, that nothing more was agreed upon between the parties than that M'Kinlay should write his signature across the back of the bill, and that there was no *consensus in idem* as to the effect of the indorsement. The one agreed to give and the other to take his signature for what it was worth, M'Kinlay intending to resist and Walker to enforce liability, so far as the law would permit.

Being of opinion that James M'Kinlay was not, as a party to

the bill, under any obligation to the drawer, and that there is no competent or sufficient evidence of his agreement to undertake such an obligation, I think the appeal ought to be dismissed.

Lord SELBORNE, L. C.: —

My Lords, having had the advantage of seeing the written opinions of two of my noble and learned friends who have already addressed your Lordships, and finding in them everything which I could myself have desired to say with respect to this case, I might well content myself with simply expressing my entire agreement with them; but as the decision in the Court below was mainly rested upon the view taken by that Court of the proper construction of the Mercantile Law Amendment (Scotland) Act, 1856, s. 11, and the subsequent Act of 1878 (41 Vict. c. 13), I think it right to add the expression of my own clear opinion that the Act of 1878 is in effect a declaration by the Legislature that the decision of the English Common Pleas Division in the case of *Hindhaugh* v. *Blakey*, 3 C. P. D. 136, 47 L. J. C. P. 345, was erroneous; and, as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish Act between one kind of acceptance and another, I think that the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill (which was the actual case in *Hindhaugh* v. *Blakey*) is necessarily to displace the whole construction of the English statute on which that decision was founded.

[*786] If, therefore, I had agreed with the majority of the Judges in the Court below that James M'Kinlay ought to be held to have signed the bill in the present case as an acceptor, in the sense in which the term "acceptance" is used in the 11th section of the Mercantile Law Amendment (Scotland) Act, I should have been compelled to dissent from their conclusion in favour of the respondent. But, for the reasons which have been already stated in the opinions of my two noble and learned friends, I hold it to be quite clear that James M'Kinlay was not an acceptor, within the meaning of that section or otherwise in any true and proper sense of the word, and that his liability, as insisted upon by the appellants, could only be established by proof of a special contract to be answerable to the drawer for the acceptors, which contract, being different from that which the law merchant would infer from his mere signature as it appears upon the face of the bill, could only be proved by a writing properly signed under

the 6th section of the statute, which writing in the present case is absent.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 14th June, 1880.

ENGLISH NOTES.

It will be observed that although the statutes requiring an acceptance to be in writing, &c., were referred to, and formed the ground of the judgment of the majority in the Court below, the decision of the House of Lords was based on the broader ground expressed in the above rule. It may be, however, convenient here to recall the stages of legislation upon the requirement of an acceptance being in writing and signed. By the common law not only might an acceptance be by a separate letter, but it might be oral. And there are many cases in the old reports, as to the effect of equivocal acts and expressions relied on as acceptance. See *Harvey* v. *Martin* (1808), 1 Camp. 425, n.; *Jeune* v. *Ward* (1818), 1 B. & Ald. 653 (where the Court were divided); *Billing* v. *Deraux* (1841), 3 M. & G. 565; 11 L. J. C. P. 38; *Bank of Ireland* v. *Archer* (1843), 11 M. & W. 383; 12 L. J. Ex. 353. The requirement that the acceptance be in writing on the bill itself and signed, was introduced into the law both of England and Scotland in identical terms by the two Mercantile Law Amendment Acts of 1856, 19 & 20 Vict. c. 60, s. 11, and c. 97, s. 6. By the decision in the English Court of Common Pleas in *Hindhaugh* v. *Blakey* (1878), 3 C. P. D. 136; 47 L. J. C. P. 345; 38 L. T. 221, the Court held that the signature of the acceptor without the words of acceptance did not satisfy the statute. And to do away with the effect of this decision which was a surprise to the mercantile community it became necessary to pass, in 1878, the Act 41 Vict. c. 13, to the effect that the signature of the drawee without additional words should be sufficient. The effect of these statutory enactments is reproduced by the Bills of Exchange Act 1882, in sect. 17 (2).

It will be observed that in the principal case the question whether a person other than the drawee could by writing his name on the bill render himself liable as acceptor, was discussed with reference to some authorities upon Scotch law which seemed to indicate the contrary. The English authorities were already clear upon the point. *Jackson* v. *Hudson* (1810), 2 Camp. 447, 11 R. R. 762; *Davis* v. *Clarke* (1844), 6 Q. B. 17, 13 L. J. Q. B. 305. In the former case the bill had been accepted by the drawee, and another person, for the purpose of guaranteeing his credit, likewise accepted the bill in the usual form. The latter having been sued *as acceptor*, Lord Ellenborough said: "I

know of no custom or usage of merchants, according to which if a bill be drawn upon one man, it may be accepted by two. The acceptance of the defendant is contrary to the usage and custom of merchants." In the latter case Lord DENMAN, C. J., said: "There is no authority, either in the English law or the general law of merchants, for holding a party to be liable as acceptor upon a bill addressed to another." PATTERSON, J., in his judgment in the same case, referred to *Gray* v. *Milner* (1819), 8 Taunt. 739, as a case which went to the extremity of what was convenient. In that case no person was named as drawee, but the bill was made "payable at No. 1 Wilmot Street, opposite the Lamb, Bethnal-Green, London." DALLAS, C. J., giving the opinion of the Court, said that the bill being directed to a particular place could only mean to the person who resided there, and that the defendant by accepting it acknowledged that he was the person to whom it was directed, and the plaintiff was therefore entitled to retain his verdict.

In *Owen* v. *Van Ulster* (1850), 10 C. B. 318, 20 L. J. C. P. 61, the law is laid down that the acceptance of one when the bill is addressed to several, is sufficient to bind that one. The proposition, however, must imply that there was some presumption that the intention of the signature was that the acceptance should be binding at all events. In the actual case the bill was addressed to a company, and the defendant signed "for the company," and added to his signature the word "manager." The company consisted of four persons of whom the defendant was one. He submitted that the acceptance did not bind him because he had not the authority of the company to accept. But the Court held him liable on his signature as one of the persons addressed as drawees.

Where a bill addressed to A. B. was accepted under the signature of A. B. thus: "A. B. *per proc* X. Y. company," — the company being an unincorporated company of which A. B. was a member, A. B. was held personally bound by the acceptance. *Nicholas* v. *Diamond* (1853), 9 Ex. 154, 23 L. J. Ex. 1. PARKE, B., observed, "The legal effect of this acceptance is that the defendant accepts the bill in his own right as principal, and as agent for all the other members of the firm. If the firm consists of several other members, they would not be bound, for nothing is more clear, as a general rule, than this, that no person but the drawee of a bill is bound by the acceptance." In *Mare* v. *Charles* (1856), 5 El. & Bl. 978, 25 L. J. Q. B. 119, where a bill was addressed to A. B. "for value received in machinery supplied to the adventurers in X. mines," and accepted "for the company" under the signature "A. B., purser," the Court (Lord CAMPBELL, C. J., COLERIDGE, J., WIGHTMAN, J., and CROMPTON, J.), held that A. B. was personally bound by the acceptance. And in *Herald* v. *Connah* (1876), 34 L. T.

885, where the bill was addressed to "A. B., General Agent of" a foreign company, and accepted "A. B.," the Court of Exchequer held A. B. bound personally. It does not appear whether the company in either of the two last-mentioned cases was unincorporated, nor does it seem to have been thought material. The ground of the decision in *Mare* v. *Charles* is stated by Lord Campbell, C. J. (whose reasoning was adopted by the other Judges) as follows: "The bill is drawn on the defendant as an individual. He writes upon it 'accepted for the company,' and he signs it 'A. B., purser.' If the words of an instrument will reasonably bear an interpretation making it valid, we must not construe them so as to make it void. *Benignae faciendae sunt interpretationes ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire.* If a bill be drawn on me I must accept it so as to make myself personally liable or not at all; for no one but the drawee can accept. I think, therefore, that when a drawee accepts a bill, unless there be on the face of the bill a distinct disclaimer of personal liability, he must be taken to accept personally."

The rule is, in effect, applied by the Court of Appeal in *In Re Barnard, Edwards* v. *Barnard* (1886), 32 Ch. D. 451; 55 L. J. Ch. 935, 55 L. T. 40, where a bill of exchange was drawn on a firm, and was accepted by one of the firm who wrote the name of the firm and added his own. It was held that on the bankruptcy of the firm the holder of the bill was a joint creditor only, and that he could not enforce any claim as a separate creditor of the member of the firm who had signed it.

The 49th section of the Companies Act 1862, enacts that a promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed, on behalf of any company under the Act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company. Under this section, it has been held by the Court of Appeal that where a bill addressed to the company bore an acceptance signed by A. B. and C. D., "Directors" of the company, — it being admitted that the two directors had authority to accept on behalf of the company, — the acceptance was binding upon the company and not upon the directors personally. *Okell* v. *Charles* (C. A. 1876), 34 L. T. 822. Compare *Atkins* v. *Wardle* (1889), 58 L. J. Q. B. 377, where the directors signing were fixed with liability under sect. 42 of the Companies Act 1862.

The nature and effect of acceptance for honour, referred to in the principal case as an exception to the rule, is described in sections 66 and 67 of the Bills of Exchange Act 1882, and is considered in the

cases of *Hoare* v. *Cazenove* (1812), 16 East, 391, 14 R. R. 370; and *Williams* v. *Germaine* (1827), 7 Barn. & Cres. 468, 1 Man. & Ry. 403. Lord Tenterden, C. J., in the last-mentioned case, 7 B. & C. p. 477, says: "An acceptance for honour is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, 'Keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money.'"

AMERICAN NOTES.

"Except in cases of acceptance for honour, no one can accept a bill except the party on whom it is drawn, or his authorised agent." 1 Daniel on Negotiable Instruments, § 485; *May* v. *Kelly*, 27 Alabama, 497; *Heenan* v. *Nash*, 8 Minnesota, 409; *Smith* v. *Lockridge*, 8 Bush (Kentucky), 425. Mr. Daniel adds that there may be a binding second acceptance by way of guaranty, upon a sufficient consideration, citing several text-writers, but he also cites the principal case.

In the absence of statutory regulation (as in New York and several other States), the acceptor's signature need not be on the bill. It may be on a separate paper, as in a letter: *Cutts* v. *Perkins*, 12 Massachusetts, 206; *Hatcher* v. *Stalworth*, 25 Mississippi, 376; *Creele* v. *Parker*, 5 Wendell (New York), 414; *Read* v. *Marsh*, 5 B. Monroe (Kentucky), 8; 41 Am. Dec. 253; or by telegram: *Whilden* v. *Merchants and Planters' Nat. Bank*, 64 Alabama, 1; 38 Am. Rep. 1; *Brinkman* v. *Hunter*, 72 Missouri, 172; 39 Am. Rep. 492; *Franklin Bank* v. *Lynch*, 52 Maryland, 270; 36 Am. Rep. 375; *Lindley* v. *First Nat. Bank*, 76 Iowa, 629; 14 Am. St. Rep. 254; *Garrettson* v. *North Atchison Bank*, 39 Federal Reporter, 163; 7 Lawyers' Rep. Annotated, 428 (but this is revocable, *First Nat. Bank*, v. *Clark*, 61 Maryland, 400; 48 Am. Rep. 114); *Molson's Bank* v. *Howard*, 40 New York Superior Court, 15; or even oral: *Jarvis* v. *Wilson*, 46 Connecticut, 90; 33 Am. Rep. 18; *Grant* v. *Shaw*, 16 Massachusetts, 341; 8 Am. Dec. 142; *Phelps* v. *Northup*, 56 Illinois, 156; 8 Am. Rep. 681; *Nimocks* v. *Woody*, 97 North Carolina, 1; 2 Am. St. Rep. 268; *Scudder* v. *Union Nat. Bank*, 91 United States, 406; *Spaulding* v. *Andrews*, 48 Pennsylvania State, 411; *McCutchen* v. *Rice*, 56 Mississippi, 455; *Neumann* v. *Shroeder*, 71 Texas, 84; *Louisville R. Co.* v. *Caldwell*, 98 Indiana, 246; *Weinhauer* v. *Morrison*, 56 New York Supreme Court, 498; *Johnson* v. *Clark*, 39 New York, 216; *Walker* v. *Lide*, 1 Richardson Law (South Carolina), 219; 44 Am. Dec. 252, and note, 253; or by conduct indicating an intention to accept, and justifying the holder in that inference, as by paying part and issuing a certificate of deposit for the balance: *Andressen* v. *First Nat. Bank*, 2 Federal Reporter, 125; or by the drawee's procuring the discount and promising to pay the bill at maturity. *Bank of Rutland* v. *Woodruff*, 34 Vermont, 89. But mere detention of the bill for an unreasonable time without answer does not work acceptance. *Koch* v. *Howell*, 6 Watts & Sergeant (Pennsylvania), 350; *Colorado Nat. Bank* v. *Boettcher*, 4 Colorado, 185; 40 Am. Rep. 142; *Liggett* v. *Weed*, 7 Kansas, 273; *Holbrook* v. *Payne*, 24 N. E. Rep. 210.

No. 8. — FANSHAWE *v.* PEET.

(1857)

RULE.

An acceptance will, if possible, be construed as general and not qualified; and words introduced into the memorandum of acceptance which are contrary to the tenor of the bill, will, unless the intention is clear, be rejected as not forming part of the acceptance.

Fanshawe v. Peet.

26 L. J. Ex. 314-315 (s. c. 2 H. & N. 1).

Declaration against the defendant as the public officer of [314] the Union Bank of Manchester, for money lent and money had and received.

Plea, set-off by the bank as indorsees of a bill of exchange for £391 1*s.* 7*d.*, drawn by the plaintiff, payable four months after date, on Begbie, Wiseman & Co, and accepted by them and afterwards dishonoured, and issue thereon.

The case was tried, by Martin, B., without a jury, at the Liverpool Spring Assizes. The bill of exchange, the subject of set-off, was in this form: —

Manchester, Sept. 8, 1856.

Four months after date pay to the order of myself three hundred and ninety-one pounds one shilling and sevenpence value received.

G. A. Fanshawe.

Messrs. Begbie, Wiseman & Co. Glasgow. Payable in London.

Across the bill was written — "Accepted payable at Messrs. Overend, Gurney & Co. * London. No. 1,756. [* 315] Due 11th December, 1856. Begbie, Wiseman & Co."

The signature of the acceptors was in a different handwriting from the rest of the acceptance. The bill was indorsed to the plaintiffs before the 11th of December, 1856, who treated it as falling due on the 10th of January, 1857, the 11th being Sunday, and it was presented accordingly, and dishonoured.

For the plaintiff, it was contended that the bill became due on the 11th of December, on which day Messrs. Overend, Gurney &

Co. had funds of the acceptor in their hands sufficient to meet the bill.

The learned Judge directed the verdict to be entered for the defendant, with leave to the plaintiff to move.

Hugh Hill now moved accordingly. The bill was accepted payable on the 11th of December. An acceptor may diminish or vary his liability. *Rowe* v. *Young*, 2 B. & B. 165 (s. c. in H. L. 2 Bligh, 391).

Pollock, C. B. The words "Due 11th December, 1856," appear to be a mere memorandum by a clerk or some person who prepared the bill for the acceptor's signature. The acceptance of the bill is general according to its tenor. It is said there is something inconsistent with that, but the case was before my Brother Martin, who had the powers of a jury, and I think that he was right in deciding that the acceptance was according to the tenor of the bill. The rule must be refused.

Bramwell, B. I entirely agree with the decision of my Brother Martin at the trial, whether the question be one of fact or law. The bill is drawn at four months, and that bill is accepted. The figures inserted amount simply to an untrue statement of when the bill, as drawn, is payable.

Channell, B. I think the rule must be refused. It was necessary to establish that the figures "11th of December, 1856," formed part of the acceptance, and I am clearly of opinion that they formed no part of the acceptance.

Martin, B. I remain of the same opinion I entertained at the trial. I mentioned the point to my Brother Crompton, and he was clearly of opinion that I was right. Any alteration in an acceptance contrary to the tenor of a bill must be in the clearest language. *Rule refused.*

ENGLISH NOTES.

In the case of *Rowe* v. *Young* (1820), 2 B. & B. 165, 2 Bligh, 391, referred to in the argument in the above case, the question of general and qualified acceptances was much discussed. On the general principle of construction applying to an acceptance, Lord Eldon said (2 Bligh, 403): "I am ready to express my full assent to the doctrine, that where a bill is drawn generally, considering that it is an address to the person who is to accept it generally, because it is drawn generally, it is the duty of the acceptor who intends to give a special acceptance, to accept in such terms that the nature of his contract may be seen in the

terms he has used; that the acceptance may clearly appear to be qualified or special, which he insists is not general." The particular point in question in *Rowe* v. *Young* was whether an acceptance "payable at the house of P. & Co.," was a qualified acceptance, a question as to which there had been a diversity of opinion in the King's Bench and Common Pleas. The House of Lords decided that such an acceptance was a qualified one; but the law as so laid down was shortly afterwards altered by the Legislature by an enactment (1 & 2 Geo. IV., c. 78, s. 1), the effect of which — namely, that the acceptance payable at a particular place is general, unless it is expressed that the bill is to be paid there only — is now embodied in the Bills of Exchange Act 1882, section 19 (2) (c).

In *Russell* v. *Phillips* (1850), 14 Q. B. 891, 19 L. J. Q. B. 297, a bill drawn dated 28th Nov. 1836, forty-two months after date, was accepted, "on condition of its being renewed until the 28th Nov. 1844." It was held in an action by an indorsee against the drawer, that the plaintiff was at liberty to treat the acceptance as an extension of the time of payment specified in the bill, and to declare upon it accordingly.

The two ruling cases Nos. 9 and 10 (*Smith* v. *Vertue* and *Meyer* v. *Decroix*), which follow, further illustrate the principle of the rule.

AMERICAN NOTES.

The acceptance of an order payable "if in funds" is a conclusive admission that the acceptor has funds. *Kemble* v. *Lull*, 3 McLean, 272.

The doctrine of the principal case has been much discussed in this country in respect to acceptances payable at a particular place, and it is almost unanimously held here, contrary to the opinion of the House of Lords in *Rowe* v. *Young*, 2 Brod. & Bing. 165, that an acceptance will be considered general, unless the bill is drawn payable at a certain place, or is accepted payable at a certain place "only, and not otherwise or elsewhere." *Cox* v. *Nat. Bank*, 100 United States, 714; *Hills* v. *Place*, 48 New York, 520; 8 Am. Rep. 568; *Armistead* v. *Armisteads*, 10 Leigh (Virginia), 525; *Ruggles* v. *Patten*, 8 Massachusetts, 480; *McNairy* v. *Bell*, 1 Yerger (Tennessee), 502; 24 Am. Dec. 454; *Howard* v. *Boorman*, 17 Wisconsin, 459; *Montgomery* v. *Tutt*, 11 California, 307; *McIntyre* v. *Insurance Co.*, 52 Michigan, 188; *Lozier* v. *Horan*, 55 Iowa, 75; 39 Am. Rep. 167; *Insurance Co.* v. *Wilson*, 29 West Virginia, 543; *Yeaton* v. *Berney*, 62 Illinois, 61; *Brown* v. *Jones*, 113 Indiana, 16; 3 Am. St. Rep. 623.

But an acceptance payable at a different town from that implied or specified in the bill works a valid qualification. *Niagara Bank* v. *Fairman Company*, 31 Barbour (New York Supr. Ct.), 403.

This matter is regulated by statute in many States.

If however the intention to qualify the acceptance is clear it will prevail. *Shaver* v. *Western Union Tel. Co.*, 57 New York, 459; *Shackelford* v. *Hooker*, 54 Mississippi, 716; *Gibson* v. *Smith*, 75 Georgia, 34. As where the acceptance is made payable at a day different from that named in the bill. *Green* v. *Raymond*, 9 Nebraska, 298.

No. 9. — SMITH *v.* VERTUE.

(1860.)

No. 10. — MEYER *v.* DECROIX (DECROIX *v.* MEYER).

(H. L. 30 July, 1891.)

RULE.

Words importing a conditional or qualified acceptance will be construed most strongly against the restriction of the acceptor's liability; and to have effect must show in clear and unequivocal terms on the face of the bill that the acceptance is so qualified.

Smith v. Vertue.

30 L. J. C. P. 56–61 (s. c. 9 C. B. (N. S.) 214; 7 Jur. N. S. 395; 3 L. T. 583; 9 W. R. 146).

The question raised and decided in the case sufficiently appears from the judgments which were as follows: —

[* 59] Erle, C. J. The question raised in this case is, whether the plaintiffs, the holders of a bill of exchange, are entitled to recover from the acceptors, upon an acceptance in these terms: "Accepted payable, on delivering bill of lading, at the London and Westminster Bank;" the material fact which has led to the discussion being, that on the day of maturity the holders of that bill did not present it together with the bill of lading, but did on the following day; and the acceptors have contended that, under these circumstances, they are not liable. I am of a contrary opinion. The matter to be decided, according to my view of the case, is, the meaning of the qualified acceptance the defendants came under. I am clearly of opinion that it is a conditional acceptance. The words are, "accepted payable on the delivery of the bill of lading;" and I think the defendants could not be called upon to pay unless the bill of lading was delivered to them. But they contend that the qualification was, that the bill of lading should be delivered to them on the day on which the bill of exchange came to maturity, and that if not delivered to them on that day, they should be entirely

discharged from their liability. Now I do not so construe the words of the qualification which they have attached to their acceptance. It was within their power to have so stipulated. They might have said, "Accepted payable, if on the day of maturity the bill of lading is delivered." If they had so stipulated, I believe their contention would have been supported in any Court. The question is not what it would be the duty of the holder to do if he wished to have recourse to the drawer; for the contract here is the contract of the acceptor. Now, as a general rule, the contract of the acceptor is to pay on the day when the bill falls due; or on any future day when the holder chooses to call upon him. He in effect, by his acceptance, says, "I will have funds on the day of the maturity of the bill, and I will keep those funds ready for the holder of the bill when he shall choose to call for payment." That being the case with respect to an ordinary acceptance, many, which have been held to be qualified acceptances, are of the same nature; for instance, where the acceptor has said, "Accepted payable when I shall be in funds from such a ship," or "Accepted payable when I shall have received the proceeds of a certain cargo." In all those cases, I am inclined to think that where the acceptor intended that the holder should understand that the acceptor's liability was postponed until the funds came to the acceptor's hands, the contract did not stipulate for a presentment on any particular day; but that under a contract so qualified the acceptor would be bound, when the funds did come to his hands, to keep them for some time at least, during which the holder might resort to him. I think the holder would not be bound to come to him on the particular day on which the funds came to the acceptor's hand; for it could not be reasonable so to bind the holder, it being obvious that the holder might have no notice when the funds did come to the acceptor's hands. I felt a great deal the force of the argument of the defendants' counsel, that the condition here is a condition to be performed by the holder of the bill. That the acceptance is of this nature. "I will pay you provided you deliver to me the goods which are really the consideration for which I am making myself liable;" and there is no doubt that in mercantile transactions, — contracts for the purchase of a cargo, — time may very frequently be of the essence of the contract, and there * may be a great deal of reason for the [*60] defendants saying, as is said in the second plea, "We stipulated for receiving the cargo of clover-seed on the day of the maturity

of the bill. As the cargo was not delivered to us on that day we have been disappointed in delivering it to our sub-vendee; our speculation, therefore, is entirely thwarted through your delay in presenting the bill of exchange with the bill of lading; and for those reasons we refuse to pay." There seems to me to be a good deal of truth in that, but the inconvenience suffered does not, in my mind, authorize me to say that the words in which the defendants have expressed the qualification to their acceptance, are, "We will pay you provided the cargo and the bill of exchange are delivered to us on the very day when the bill falls due, and if you fail to deliver them to us on that day we shall be entirely discharged." I have, therefore, come to the conclusion, that the construction to be put upon this qualified acceptance is such as entitles the plaintiffs to our judgment.

Byles, J. I am of the same opinion, although I do not hold with Mr. Coleridge on his first point that this is not a conditional acceptance. For more than forty years the law has required that an acceptance of a bill of exchange should be in writing, and for the last three or four years the law has required that it should be in writing and signed, nevertheless the form of an acceptance remains as it ever was. Any words which stipulate that the drawee means to pay is a sufficient acceptance; anything in writing to that effect and signed by the acceptor. The simple meaning of an acceptance is, "I will pay." So translating the word "accepted," what is meant by saying "accepted payable on giving up bill of lading?" It is impossible, I think, to contend that this is not a conditional acceptance, a thing which may well be according to our law, though it is otherwise in the law of France. Then it is said, this being a conditional acceptance, and the condition being expressed in these words — "11th Jan. Accepted payable, on giving up bill of lading for seventy-six bags clover-seed, at the London and Westminster Bank," that the bill of lading must be handed over to the acceptor, the drawee, on the day when the bill falls due. Now, it seems to me that that is not so, but that the qualification merely qualifies the defendants' obligation throughout the whole extent of that obligation; and as between the holder and the drawee that obligation exists for six years at all events, and possibly, except for the limited duration of human life and other necessary limitations, is perpetual. It, therefore, simply comes to this, — the obligation of the acceptor, as it before existed, to pay this bill is now suspended

No. 10. — Meyer v. Decroix (Decroix v. Meyer), 1891, App. Cas. 520.

on condition of his having the bill of lading handed over to him when he is called upon to pay. That seems to me the reasonable construction of this qualified acceptance, and I quite agree with my Lord that, if the drawee of this bill had intended that the bill of lading should be handed over to him on the very day that the bill of exchange became due, and on no other day, it would have been very easy for him to have inserted that stipulation in so many words. As that stipulation is not inserted, we must suppose that the general obligation on the defendants at common law is suspended upon the condition expressed, and that no new condition hitherto unknown to our law is introduced.

KEATING, J. I am of the same opinion. I think it most important to these instruments that we should not extend qualifications in acceptances beyond the terms in which they are expressed; and I think if it were the case, that, under the terms of the qualification in this acceptance, the acceptor would be discharged unless the presentment took place on the day when the bill became due, most likely the point would have arisen before this on acceptances qualified before the statute of Geo. IV. by being made payable at a particular place, or since that statute "by being made payable at a particular place and not elsewhere." Neither of the defendants' counsel has been able to discover any such case, and the expressions relied on as attributed to Lord ELDON in the case of *Rowe* v. *Young*, 2 B. & B. 165 (s. c. in H. L., 2 Bligh, 391) do not, in my judgment, at all support the notion that it was intended, where an acceptance was qualified as to the place in which the presentment was to be made, that the non-presentment on the day on which the bill became due discharged the acceptor. Under these *circumstances, I think the rule ought to be dis- [*61] charged.

Rule discharged.
Judgment for the plaintiffs.

Meyer v. Decroix (Decroix v. Meyer).

1891, App. Cas. 520–531 (s. c. 61 L. J. Q. B. 205–209).

Appeal from an order of the Court of Appeal, 25 Q. B. [520] D. 343; 59 L. J. Q. B. 538, upon a special case of which the following are the material parts: —

The action was brought by the respondents as indorsees against

the appellants as acceptors of a bill of exchange. The bill was drawn by L. Delobbel Flipo upon the defendants, a company carrying on the business of merchants and agents in London, as follows: —

Roubaix, Sept. 12, 1889.

"On October 31st after date pay to order Mr. L. Delobbel Flipo £778 4*s.* 2*d.* Value received." The defendants accepted
[* 521] * the bill as follows: Across the face of the bill they stamped in printed letters the words "Accepted payable at Alliance Bank London for H. Meyer and Co. Limited." Then followed the signatures of two directors of the defendant company countersigned by the secretary. Above the word "accepted" the defendants wrote the words "In favour of Mr. L. Delobbel Flipo only," and between those words and the word "accepted" they wrote "No. 28." The word "order" was struck out, but when or by whom did not appear.

Flipo on receiving the bill sent it to the plaintiffs, bankers at Lille in France, who discounted it for him. It was not noticed by the plaintiffs that the bill had been accepted in any unusual form. They did not understand the English language, and their attention was not called to the form of the acceptance until after the dishonour of the bill at the Alliance Bank. It was not suggested that there is any custom amongst merchants upon which the acceptors could rely by which the addition of the words "In favour of Mr. L. Delobbel Flipo only" restricts the negotiability of the bill. The defendants relied solely on the provisions of the Bills of Exchange Act 1882. The question for the opinion of the Court was whether the plaintiffs were entitled to recover in the action. Judgment to be entered accordingly. The Divisional Court (Cave and A. L. Smith, JJ.) held that the acceptance was a qualified acceptance, rendering the bill not negotiable, and gave judgment for the defendants, the present appellants. The Court of Appeal (Lord Esher, M. R., Lindley and Bowen, L.JJ.) reversed that decision and entered judgment for the plaintiffs, the present respondents, for the amount claimed. 25 Q. B. D. 343, 59 L. J. Q. B. 538.

June 30. Sir R. E. Webster, A.-G., and Horne Payne, Q. C. (G. S. Bower with them), for the appellants: —

It cannot be disputed that an acceptance may be qualified so as to restrict the negotiability, and the only question is whether the acceptance in this case was so qualified. Before the Act of 1882

it was clear that an acceptor could qualify his acceptance by making the bill payable at a particular place. When so * accepted, the presentment must be at the named place and nowhere else: see *Rowe* v. *Young*, 2 B. & B. 165, where the question of qualified acceptances is discussed at length by Lord ELDON. The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) s. 8, sub-s. 1 says: "When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable." Formerly a bill payable to A. B. without more was not negotiable: see Byles on Bills (15th ed. pp. 93, 94, note (x)). But now such a bill is negotiable by sub-sect. 4, which says: "A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable." To restrict negotiability the qualification must no doubt be such that any reasonable person reading it would see that it was qualified. If it be not clear the construction most unfavourable to the acceptor must be taken. In this case it is submitted that the words "in favour of Mr. L. Delobbel Flipo" were plainly intended to have some meaning. They cannot be rejected as surplusage. What could they mean but that the bill was payable to Mr. L. Delobbel Flipo only? If they did not mean that they were unmeaning. The attention of any reasonable man would be struck on reading such an acceptance, so long, so expressed, and partly in writing and partly printed. Such a man would conclude that the acceptance was intended not to be general, not of the ordinary kind. Even if the effect of the words were doubtful, the striking out of the word "order" would make it clear that the acceptors intended to be liable on the bill to Flipo only, and not to an indorsee. Against indorsees the acceptors could not set off claims they might have against the drawer. To construe the contract binding the acceptors, the terms of the bill and the acceptance must be read together. The striking out the word "order," coupled with the word "only," destroyed the statutory presumption which — without the use of the word "only" — would make the words "Mr. L. Delobbel Flipo" equivalent to "Mr. L. Delobbel Flipo or order." "A general acceptance," says sect. 19, sub-sect. 2, * "assents without qualification to [* 523] the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn." If such an acceptance

as this is an assent without qualification, it is not easy to see how an acceptor who desires to reserve his rights against the drawer is to do so. The instances of a qualified acceptance given by sect. 19 are only instances, and are not intended to be an exhaustive list. In the present case the acceptance was prior to the drawer's indorsement. Flipo might have written to the acceptor for an unqualified acceptance, but for good reasons no doubt he was content to take any acceptance he could get.

Finlay, Q. C., and R. M. Bray for the respondents : —

The word "accepted" made the acceptance general and the bill negotiable. The words "in favour of Mr. L. Delobbel Flipo only. No. 28" have no effect except as a memorandum. "In favour of" is not the same as "payable to." Whether the words "in favour of" have any meaning at all may be doubtful, but at the highest they are ambiguous, and to restrict negotiability the qualification of an acceptance must be clear and unmistakeable.

They also referred to *Steele* v. *McKinlay*, No. 7, p. 218, *supra* ; 5 App. Cas. 754, 781, and *Smith* v. *Vertue*, No. 9, p. 246, *supra* ; 30 L. J. C. P. 56.

Sir R. Webster, A.-G., in reply.

The House took time for consideration.

July 30. Lord HALSBURY, L. C. : —

My Lords, I am of opinion that in this case the judgment of the Court of Appeal ought to be affirmed.

The action was brought by the plaintiffs, who are bankers at Lille, against the defendants, a limited company, carrying on business in London, upon a bill drawn by one Flipo, and accepted by the defendants. The only question is whether the bill, as accepted, was a negotiable instrument.

My Lords, I think it is impossible adequately to discuss the questions that arise in this case without having a facsimile [* 524] * of the bill before you. As to the form which purports to be the acceptance, no one can doubt that it was an ordinary mercantile form accepted and payable at the Alliance Bank with the proper signatures. But the question arises by reason of some words written above that which every mercantile man would look upon as the acceptance, and these words are "In favour of Mr. L. Delobbel Flipo only. No. 28." These words are written above what I have called the acceptance, and I think any mercantile man would regard the words I have quoted as something apart

from and not forming any portion of the acceptance itself. Nor is it easy to construe them as giving any qualification to the acceptance. I think much depends upon the exact form, an apparently complete stamped acceptance being found in its usual place on the bill.

A known mercantile instrument with the word "accepted" printed by a stamp, and in ordinary mercantile form, is sought to be cut down and qualified by some words written, it is true, on the same piece of paper, and above the acceptance, but which to my mind, even now that I have heard the argument, convey no particular meaning.

I am not certain that I understand what is the true meaning of the words, treated as separate writing, "In favour of Mr. L. Delobbel Flipo only." The form of the instrument so far as the ordinary mercantile language is concerned, is quite intelligible. The bill is accepted, payable at a particular bank. It is suggested in the argument that it was intended that these words should tell the holder of the bill, that it was only payable to the drawer himself. I am not certain that I can even now gather the meaning of the words themselves, but I am quite certain that any ordinary mercantile man, looking at the stamped acceptance in ordinary form and stamped across the bill, would assume that it was a clean acceptance, and that the words written above it, whatever the meaning they might convey to the immediate parties, would certainly not convey anything which would qualify or cut them down to a person who had nothing before him but the bill itself.

I am happy to think that the decision in this case involves nothing more than the proposition that if a person writes across a bill that which unqualified would, in ordinary course, import a * clean acceptance of a bill, and intends to qualify [* 525] its operation, he must do so by plain and intelligible language, and make that qualification sufficiently part of the acceptance itself to be intelligible in the ordinary course of business. If any other principle were laid down I think it would be fatal to the convenience of trade and the conduct of mercantile affairs, which demand for their transaction convenient and compendious forms, to which the law merchant has attached a definite meaning. Such ambiguous and inappropriate language as is sought to make here a qualification of an ordinary mercantile instrument would defeat the very object which mercantile instruments are intended to effect.

I move your Lordships that the judgment of the Court of Appeal be affirmed and this appeal dismissed with costs.

Lord WATSON: —

My Lords, a bill of exchange for £778 4*s.* 2*d.* was drawn in France by one L. Delobbel Flipo, in favour of himself as payee, and was accepted by the appellants in London, payable there at the Alliance Bank. When the bill matured, the appellants refused to make payment to the respondents, who are indorsees for value, upon the ground that, by the special terms of their acceptance, its contents were payable to Flipo only.

In this action, which has been brought by the respondents, the law of France is not pleaded by either party. The issue between them is raised by a special case, the fifth article of which states: "It is not suggested that there is any custom upon which the defendants can rely, by which the addition of the words 'in favour of L. Delobbel Flipo only' restricts the negotiability of the bill. The defendants rely solely on the provisions of the 'Bills of Exchange Act, 1882.'"

Clause 19, sub-s. 2 of that Statute enacts that "a qualified acceptance in express terms varies the effect of the bill as drawn." In order to produce that effect, the words of qualification must, in my opinion, be incorporated in the acceptance, or at least so connected with the acceptance as obviously to form part of it; and must also be such as to indicate clearly and unequivocally the nature of the restriction which they are meant to introduce.

[*526] *There is a clean acceptance by the appellants stamped in printed letters across the face of the bill; above that acceptance, on separate lines and forming a separate paragraph, appear the words "In favour of Mr. L. Delobbel Flipo only. No. 28." These words and figures are in writing, with the exception of the word "No.," which is stamped.

In the position which they occupy, I do not think the words "In favour of Mr. L. Delobbel Flipo only" can be regarded as part of the acceptance, or have the effect of qualifying its terms. They are not inserted in it, and are not grammatically connected with it, but occur as a preface to "No. 28," which forms no part of the acceptance. "No. 28" is a memorandum for the purpose of accounts kept between the acceptors and the drawers, or between the former and their bankers, and therefore relates to matters with which holders of the bill, or persons acquiring right to it, have no

concern. In my opinion, the preface would naturally be regarded as an integral part of that memorandum having no reference to the terms of the acceptance, and would not convey any intimation that the acceptance was meant to be restricted.

I am accordingly of opinion that the order of the Court of Appeal ought to be affirmed.

Lord BRAMWELL: —

My Lords, I consider what was written and printed by the defendants on the face of the bill as one — one thing only — an acceptance and no more, not an acceptance and something else. That being so, I am unable to see any difference between "In favour of Flipo only, accepted payable," &c., and "Accepted in favour of Flipo only, payable," &c. I do not know where the *body* of the acceptance begins, unless at the beginning of what is written. It is said that "In favour of Flipo only" does not necessarily mean the same as "accepted in favour of Flipo only." I think it does; but if not necessarily, what does it naturally mean? Especially when it is remembered that the word "order" was erased. That was no doubt unauthorised, if done by the drawees, but it clearly shows the intention of the drawees if done by them, and the knowledge by the drawer of that intention if *done by [*527] him. The striking out of "order" was not a memorandum for the use of the drawees. I cannot find that any other cause for what was done can be suggested.

As to the thing being clear and unequivocal, I begin to doubt if there is such a thing, but it is enough if words are intelligible. Can there be a doubt that this bill might have been protested for non-acceptance according to its tenor? I suppose from the form of the acceptance that the appellants thought they had, or might have, some cross-claim against Flipo. Flipo, probably, was glad to get anything from them, and so put up with the acceptance, and perhaps indorsed it in satisfaction of a bad debt to those glad to get anything from him.

Lord HERSCHELL: —

My Lords, the respondents in this case seek to recover from the appellants the amount of a bill of exchange accepted by them. The defence set up is that the acceptance was a qualified one, and restricted the right to require payment to the payee alone, and that the acceptors are therefore under no obligation to the respondents who took by indorsement from him.

No. 10. — Meyer v. Decroix (Decroix v. Meyer), 1891, App. Cas. 527, 528.

It was not disputed at the bar that the acceptor of a bill of exchange may make his acceptance a qualified one. If he do so the drawer may of course refuse to take such an acceptance, and treat the bill as dishonoured; but if he takes the bill, the obligation of the acceptor is not absolute, but subject to the qualification which he has introduced. I think further that it is beyond dispute that if an acceptor seeks to qualify his acceptance, and thus to modify the obligations which an acceptance ordinarily imposes, he must do so on the face of the bill in clear and unequivocal terms, and in such a manner that any person taking the bill, if he acted reasonably, could not fail to understand that it was accepted subject to an expressed qualification.

About these propositions I do not think there can be any difference of opinion; the difficulty lies in applying them to the facts of the particular case. The bill in question was drawn in France by a person named Delobbel Flipo upon the appellants, and forwarded to London for their acceptance. The bill is drawn on a [*528] printed form containing the word "order" *immediately preceding the name of Delobbel Flipo, which has been inserted as the payee of the bill. This word "order" has been erased, but by whom does not appear, nor do I think it material. If, as suggested, it was done by the acceptors, they were not justified in making the erasure, and in any case there would be nothing to show a person taking the bill that the word had not been struck out by the drawer at the time he inserted the name of the payee. I do not think, therefore, that the erasure of the word "order" can in any way assist the contention that the acceptance was a qualified one. That must be determined by a consideration of the effect of the words written across the bill by the acceptors.

For the purpose of accepting the bill the appellant company impressed upon it by means of a stamp the words "accepted payable at Alliance Bank, London," underneath which the signatures of two directors and the secretary were written. The acceptors wrote across the bill above the word "accepted" the words "In favour of Mr. L. Delobbel Flipo only:" between these words and the word "accepted" was written "No. 28." In considering whether the effect of the words "In favour of Mr. L. Delobbel Flipo only" was to make the acceptance a qualified one in the manner suggested, regard must be had both to the words used and to the situation in

which they are placed. It may be that if the same words had been found in the body of the acceptance following the word "accepted," they would have amounted to the qualification contended for. The presence of any words in the body of the acceptance would of itself suggest the idea that some qualification of it was intended; but where the words are not inserted in the body of the acceptance, I do not think the same impression is likely to be produced, though the words may, of course, be so clearly intended to qualify the acceptance and so incapable of any other reasonable construction that they would be as effectual for the purpose. But in the present case the words written above the acceptance are not "Payable to Delobbel Flipo only," which is the meaning sought to be attached to them, but "In favour of Delobbel Flipo only," which do not seem to me necessarily to bear the same meaning. The words "in favour of," when used in relation to a bill of * exchange, [* 529] do not ordinarily mean that it is payable only to the person in whose favour it is said to be drawn; the words are equally applied when the bill is made payable to his order. The words "In favour of," therefore, are properly paraphrased by "payable to, or to the order of;" but then it is said that the insertion of the word "only" after Flipo's name would show that this could not be the meaning intended. It must be remembered, however, that between these words and the acceptance "No. 28" was inserted, which separates the words which it is suggested qualify the acceptance from the acceptance itself.

Under these circumstances I do not think that it is impossible that a person taking the acceptance by way of indorsement might suppose that the words "In favour of Delobbel Flipo only" were, like the "No. 28," a mere memorandum inserted by a party to the bill, and not intended to affect the acceptance. It might be supposed to indicate that it was the 28th bill, or No. 28 of the bills accepted "in favour of Delobbel Flipo only," as distinguished from bills accepted in favour of Flipo and some other persons. I do not say that this would be the interpretation given to it by a person who carefully and critically considered it. But that is not the question. It is impossible, as I have said, to dissociate the words used from the position and collocation in which they are found, and if these be such as to suggest that the words are a mere memorandum, a person taking the bill, even if he exercised the ordinary care to be expected in such transactions, would not be likely to

examine or weigh them with the same care as if they were found in the body of the acceptance.

In my opinion the qualification was not made in clear and unequivocal terms, and in such a manner that any person taking the bill, if he acted reasonably, could not fail to understand that it was accepted subject to that qualification. I think, therefore, the judgment ought to be affirmed.

Lord MORRIS: —

My Lords, the respondents are French bankers and sue the appellants, who are a limited company carrying on business in London, to recover the amount due on foot of a bill of exchange [* 530] * for £778 4*s.* 2*d.*, dated the 12th of September, 1889, drawn by one L. Delobbel Flipo, accepted by the appellants and indorsed by Flipo to the respondents, who discounted the bill for Flipo. A fac-simile of the bill is set out in the special case. I assume that when drawn by Flipo and when sent by him for acceptance, it contained in the body of the bill the word "order;" but that before accepting the bill the appellants struck out the word "order," — by doing which the bill would, except for the Bills of Exchange Act, 1882, s. 8, sub-s. 4, be a bill payable to Flipo only, and would not be transferable. The appellants' case states that the bill was so altered in the body by the appellants when accepting, and it was not controverted by the respondents. I attach some importance to this, as an erasure of the word "order" in the body of the bill ought to have attracted the attention of the respondents and made them scan the acceptance carefully. It is stated that the respondents do not understand the English language, and that their attention was not called to the "form of the acceptance" until after the dishonour of the bill; but their not understanding English cannot avoid the natural and reasonable effect of the acceptance.

The Queen's Bench Division held that the bill was not negotiable. I concur in that judgment and in that of my noble and learned friend Lord BRAMWELL. I read the words "In favour of Mr. L. Delobbel Flipo only" as indicating an intention that the bill should not be transferable within the meaning of s. 8, sub-s. 1, of the Bills of Exchange Act, 1882, as equivalent to the words "payable to L. Delobbel Flipo only;" and I do not attribute any importance to the insertion of "No. 28" between the words qualifying the acceptance and the stamped acceptance. It is not adverted to in any of

the judgments in the Court of Appeal; it was most probably the number of bills that had been then accepted. But it is said the qualified acceptance should be plain and intelligible, and that, of course, there are several modes of expressing the qualification of the acceptance upon which no question could arise. That is so; but it does not solve the question here, whether in the present case the acceptance fairly and intelligibly indicated, not to a person who could not read it, but to one who could, that the acceptance was a qualified * one. The qualifying words "In [*531] favour of L. Delobbel Flipo only" immediately precede, are connected with, and control the stamped acceptance which follows. They should have attracted the respondents' attention, when they would have observed what in the Special Case is called "the form of the acceptance," that is, the qualifying form of the acceptance. The respondents ought to have observed it, and if they had they would have read the terms on which the appellants had affixed their stamped acceptance.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 30th July, 1891.

ENGLISH NOTES.

The notes to *Fanshawe* v. *Peet*, No. 8, pp. 244–245 *supra*, may be read as applying also to the rule exemplified by the above cases.

The judgment of Lord CAMPBELL, C. J., in *Mare* v. *Charles*, cited in the notes to No. 7, p. 241, *supra*, may also be referred to as illustrating a principle analogous to that of the above, and of the last preceding rule.

AMERICAN NOTES.

See notes *ante*, p. 245. The first principal case is cited in 1 Daniel on Negotiable Instruments, § 509.

No. 11. — THE YORKSHIRE BANKING COMPANY *v.* BEATSON AND MYCOCK.

THE LEEDS AND COUNTY BANKING COMPANY *v.* BEATSON AND MYCOCK.

(C. A. 1880.)

RULE.

THE holder of a bill bearing a signature which is common to an individual and a firm of which that individual is a partner, is not entitled to the option of suing either the firm or the individual.

Where the firm carries on business and the individual does not, there is a presumption *primâ facie* that the paper is the paper of the firm. But, if there is any such presumption, it may be rebutted by evidence that the paper was issued by the individual for his own purposes.

The Yorkshire Banking Company v. Beatson and Mycock.

The Leeds and County Banking Company v. Beatson and Mycock.

5 C. P. D. 109–128; (s. c. 49 L. J. C. P. 380; 42 L. T. 455; 28 W. R. 879).

[109] In these actions the respective plaintiffs appealed to the Court of Appeal against the judgment of DENMAN and LOPES, JJ., in favour of the defendants. It had been agreed that the second action should abide the event of the first.

The facts of the first action will be found fully stated in the judgment of the Court.

[110] The following authorities were referred to in the arguments: *Sutton* v. *Gregory*, Peake, 150; 4 R. R. 899; *Ex parte Buckley, In re Clarke*, 14 M. & W. 469; *Lloyd* v. *Ashby*, 2 B. & Ad. 23; *Smith* v. *Craven*, 1 C. & J. 500; *Ex parte Law, In re Bayley*, 3 Deac. 541; *Woodward* v. *Winship*, 12 Pickering (Mass.), 430; *Palmer* v. *Stephens*, 1 Denio (New York), 471.

Cur. adv. vult.

March 11. The judgment of the Court (BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.), was delivered by —

No. 11. — Yorkshire Banking Co. v. Beatson and Mycock, 5 C. P. D. 110, 111.

THESIGER, L. J. This is an action brought upon two bills of exchange of which the plaintiffs are the holders. The first is a bill for £276 15s., dated the 6th of March, 1878, drawn by R. R. Kelly & Co. upon and accepted by Messrs. J. & R. Wilson, payable to the order of the drawers four months after date, and bearing the successive indorsements, "R. R. Kelly & Co.," "Wm. Beatson," and "Josiah Carr & Son:" the second is a bill for £484 13s., dated the 13th March, 1878, drawn by Josiah Carr & Son, addressed, "Mr. William Beatson, Chemical Works, Rotherham," and accepted in the name "William Beatson," payable to the order of the drawers four months after date and indorsed by them. Both bills were discounted by the plaintiffs upon the 14th of March, 1878. The defendants to the action are Wm. Beatson and John Henry Mycock. The signature "Wm. Beatson" upon each of the bills was the signature of the defendant, Wm. Beatson. He has allowed judgment to go by default, and the action is defended by Mycock alone, who disputes his liability upon either of the bills

The circumstances of the case are as follows: Beatson, for many years prior to December, 1877, carried on business as a chemical manufacturer at certain works at Rotherham. At the end of the year 1873 and beginning of the year 1874, the plaintiffs made inquiries as to Beatson's commercial position of Josiah Carr, who was bringing them paper for discount with Beatson's name
* upon it, and, the result of the inquiries being satis- [* 111]
factory, they discounted such paper. Beatson and Carr had some trade transactions together, but apart from these trade transactions there was a series of accommodation transactions carried out by accommodation bills between Beatson and the other parties to the bills now sued upon, including Carr himself, and these accommodation bills were from time to time renewed.

Down to the end of the year 1877, Beatson had no partner; but upon the 11th of December in that year, a deed of partnership was entered into between him and the defendant Mycock. By its terms the partnership was to last for a period of five years with power of continuance; the value of the goodwill of the business, the works and premises where the same was carried on, and the machinery, plant, and effects belonging to it, was estimated at £25,000, and Mycock was to purchase a one-fifth share of the business by the payment of the sum of £5000. The business was to be carried on under the style of "William Beatson," the works

and premises were to remain vested in Beatson, who was to stand possessed of them for the purposes of the partnership, and the business was to be managed by Beatson, his partner not being required to attend to the business any further than he should think fit. By the 11th clause of the deed it was provided that neither of the partners, without the written consent of the other first obtained, should on the credit of the firm make any payment, advance, or other application of the money or effects of the said partnership or in any manner engage or use the same, or the name or credit of the partnership firm, except on account and for the benefit of the partnership and in the usual manner of carrying on the business; and by the 12th clause it was provided that neither of the partners should lend or deliver upon credit any of the moneys or effects belonging to the partnership to any person whom the other partner should previously have forbidden to be trusted, nor without the previous consent in writing of the other partner would become bail, surety, or security with or for any person whomsoever, or make, give, draw, accept, or indorse any bond, bill, promissory note, or other instrument, or enter into any obligation or engagement or make any default, whereby the estate and effects of the partnership might be made liable [* 112] for the * payment or satisfaction of any sum of money, for which the partnership should not have received a full and sufficient consideration.

The object, with which Mycock entered into this partnership was that of ultimately putting his son, who was then under age, into it, and, as a matter of fact, Mycock never interfered in any way with the management of the business, or occupied any other position or connection with it, than that of a dormant partner. Beatson concealed from him all information relating to his accommodation transactions, and for his frauds upon him in this and other matters connected with the inception of the partnership was ultimately prosecuted and convicted. The plaintiffs never knew of the partnership until July, 1878, at which date Beatson was a bankrupt.

For some time prior to the formation of the partnership Beatson had kept an account at the Sheffield and Rotherham Bank headed "William Beatson," and after the formation of the partnership that account was continued without any change in its heading, and into that account Beatson paid all moneys, whether moneys

No. 11. — Yorkshire Banking Co. v. Beatson and Mycock, 5 C. P. D. 112, 113.

belonging to the partnership or his own private moneys, and upon it he drew, whether for the purposes of the business or his own private purposes. Beatson himself was called as a witness for the plaintiffs, and in addition to proving the facts already mentioned gave evidence to the effect that he kept two cash books, of which one was as he stated a private book kept as manager at the place of business, the other a partnership cash book; that in the former he did not enter cash received on account of the partnership, but that in the latter all business payments were entered. With reference to his bill accommodation transactions generally he stated that none of them were brought into the ledger either before the partnership or after, that the cash transactions relating to these accommodation bills were entered in the private cash book to which Mycock had no access, and were never put into the partnership cash book to which Mycock might have had access. With reference to his particular transactions with Josiah Carr he stated that all trade transactions between them were over before the partnership, and that as regards the particular bills sued on they were bills drawn for his and Carr's accommodation not for Mycock's, although he added that they were in a degree for the business as * one way of finding capital, and that without the [*113] bill transactions there was not capital enough to work the business. He admitted that Mycock found the £5000 which he was to pay for his share in the business, that he never told Mycock that money was wanted, that he thought that he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions and did not enter them in the partnership books. He further said that he considered the bank book private, and that Mycock had left him to keep the banking account as he thought proper; that the proceeds of the accommodation bills were paid into the banking account, and that out of such proceeds goods supplied to the business and wages were sometimes paid. As regards the proceeds of the bills sued on, it appeared that a portion of them found their way into the banking account, but that upon the same day when this occurred Beatson drew out more than he paid in. On the part of Mycock an accountant was called who upon an examination of Beatson's books proved that apart from the accommodation bill transactions the business had during the period between the beginning of January and the end of May, 1878, a cash balance

to its credit, that the net result of the accommodation bills was to reduce the balance, and that Beatson had drawn out for his own purposes, independent of the business, about £4000.

Upon these facts taken from the notes of LINDLEY, J., before whom with a jury the case was tried, that learned Judge stated to the jury that the questions for them were, first: "Was the name (Wm. Beatson) put to the bills to denote the firm or to denote William Beatson?" Secondly, "Did the bank take the bills as the bills of the Chemical Works whoever the proprietors might be or as the bills of William Beatson only?" The jury retired and returning into court the foreman stated that as regards the bill for £484 13s., it having been drawn upon William Beatson at the Chemical Works, Rotherham, the jury agreed that William Beatson's acceptance of it must be held to denote the acceptance of the firm, but that as regards the other bill they found no evidence upon the point. Upon being asked by the learned judge to answer the question as regards that bill according to their judgment, the [* 114] jury conferred again, and subsequently stated that * from the fact of that bill being put in connection with the other they might take it as being the same thing, and to the second question they answered that the bank took the bills as the bills of the Chemical Works. Upon these findings a verdict and judgment was entered for the plaintiffs against the defendant Mycock. That judgment was subsequently set aside and judgment entered for Mycock by the Common Pleas Division, upon the ground stated shortly that in a case where the name of an individual is the name also of a firm, and that name is put to a bill, the presumption is that the signature is the signature of the individual and not of the firm; that consequently it lay upon the plaintiffs in this case to displace the presumption by showing the signature to the bills sued upon were respectively the signatures of the firm, and that Beatson was authorized to use the firm's name on the particular occasions and for the particular purposes, in other words, that the bills were given for partnership objects and as partnership acts, and that the plaintiffs had failed to discharge the burden cast upon them. 4 C. P. D. 204, 212; 48 L. J. C. P. 428. Against the judgment of the Common Pleas Division the present appeal is brought.

In support of the appeal it is contended for the plaintiffs either, first, that where as in this case a signature is common to an indi-

vidual and a firm, of which the individual is a member, it is open to the *bonâ fide* holder for value, without notice whose paper it is, of a bill with such signature upon it to sue either the individual or the firm; or secondly, that if this option is not open to the holder, there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member.

As regards the first of these two contentions, we think that it is not a well-founded one. The only authoritative sanction to it, upon which the learned counsel for the plaintiffs rely, is a case of *McNair* v. *Fleming* which appears to have been decided in the House of Lords in 1812, but which is not reported otherwise than in Montagu on Partnership, vol. i. p. 37, and in the opinion of Lord ELDON, C., delivered in the House of Lords in the case of *Davison* v. *Robertson*, 3 Dow. 218, at p. 229, and which without further knowledge of * the facts of the case, and [*115] the exact bearing of the judgment upon it, it is impossible to treat as an authority. Lord ELDON, indeed, does not quote it in support of so wide a proposition as that under consideration, but as bearing upon the proposition, that a joint adventure was as proper a partnership as any other, and one of the adventurers would be bound by the indorsement and acceptance of the other, a proposition which had been negatived by one of the interlocutors of the Scotch Court, finding that, whatever might be the case in a proper partnership, one person concerned in a joint adventure is not entitled by subscribing a firm to bind the other. While therefore there is really no authoritative sanction for this contention, there is abundance of authority against it in the numerous cases in the English and American Courts, where the liability of partners upon a bill, signed in a name common to the firm and an individual member of it, has come under consideration and has been discussed, not upon the footing of any right of election on the part of the holder of the bill, but upon the particular circumstances of each case and the presumptions applicable to them, cases which we shall have to refer to more in detail in connection with the plaintiff's second contention. Apart too from authority, it appears to us manifestly contrary to true principles of law that the holder of a bill bearing upon it a name, which *primâ facie* indicates an individual, and would naturally lead to credit being

given to the individual alone, should, upon discovery and proof that there is a firm of which the individual is a member carrying on business under his name, have the right of going against the firm, although at the same time that the proof is given, it is proved also that the bill was signed by the individual for himself and not for his firm, and for considerations entirely unconnected with any partnership purpose.

The second contention made on behalf of the plaintiffs is one of more weight, and apart from the intrinsic importance of the question involved in it, there is an additional importance derived from the fact that, if the contention be correct, it at least displaces the ground upon which the judgment of the Court below rests, although it will still remain to be considered whether the judgments may or not be rested upon another ground. As a matter of principle, there is considerable force in the arguments [* 116] both for * and against the contention. Against it it is said that when a signature to a bill is of a name, which in itself and *primâ facie* indicates an individual and would lead to credit being given to the individual, and the holder of the bill suing upon it is therefore compelled to give some proof that the name indicates a partnership, it is but just that he should be compelled to go the whole length of proving not only that a partnership existed under the particular name, and that the individual carried on no business separate from that carried on by the firm, but further that the bill was signed by the individual as a partnership act and for partnership objects. In support of the contention it is said that, inasmuch as a bill of exchange is ordinarily used as a trade instrument, there is a presumption that a bill having upon it a name common to the firm and to the individual is a trade bill, and therefore the bill of the firm, in a case where it is proved or admitted that there is no trading in the name except by the firm. In the absence of authority upon this question our opinion upon it would be in favour of the plaintiffs' contention. In point of convenience and expediency, and in the interests of trade, it has much to support it. The vast majority of bills given under the circumstances supposed would be really partnership bills, and yet it would be often difficult, if not impossible, for the holders of such bills to do more than prove that the only trade carried on under the individual name was the trade of a partnership, and if they were compelled to go further and prove that the particular

bill was a partnership bill, the effect might be that in many cases dormant partners, and in some cases ostensible ones too, might escape from just liabilities. On the other hand, the partners sought to be made responsible on the bills would in most instances be able to prove whether any particular bill sued on was or was not a partnership bill, and should, as it appears to us, at least have the onus of doing so thrown upon them when it is through their own act, in allowing the firm name to be the same as that of an individual in the firm, that difficulty and doubt arise.

But in the Court below it was considered that the American authorities clearly negative this view, and that the weight of English authorities is in favour of the American view of the law.

We propose to consider first the English authorities.

* In *Swan* v. *Steele*, 7 East, 210; 8 R. R. 618, two persons [*117] of the names of Wood and Payne were wholesale grocers in Liverpool trading under the firm of Wood & Payne, and also carried on under the same firm and at their counting-house the business of buying and selling cotton. The defendant Steele was a dormant partner with them in the latter business. It was held that he was liable upon an indorsement in the firm name of a bill which had been paid to Wood & Payne for cotton sold by the firm, but which had been delivered by them to provide for an acceptance in the firm name for sugar supplied to the grocery business. It is difficult to see how the case could have been otherwise decided, for the bill sued upon was admittedly a bill in which Steele was interested as indorsee and holder with his partners, and consequently the indorsement over of that bill, although improper under the circumstances, was still manifestly an indorsement in fact by the partnership, of which Steele was a member. The evidence showed what the facts were, and the judgment of Lord Ellenborough assumed that the indorsement was in the name of the partnership of which Steele was a member, and upon that assumption decided that, in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. *Emly* v. *Lye*, 15 East, 7; 13 R. R. 347, which is commented on in the judgment of the Court below as an authority in favour of the defendant upon the point under consideration, has really no bearing upon it. There, in an action upon several bills of exchange and for money had and received it was attempted to make the defendant liable either upon the bills or in respect of the money

received upon the discount of the bills, which was applied to partnership purposes, where the signature upon the bills was not in the firm name, which was George Lye & Son, but in the name of E. L. Lye, which was the individual name of the partner signing. The counts upon the bills were upon the argument abandoned, as it was obvious, as Lord Ellenborough said in his judgment, that "on a bill of exchange drawn by one only it cannot be allowed to supply by intendment the names of others in order to charge them;" and it was held that, on the mere discount of the bill, no right could arise against the defendant by reason of [* 118] the proceeds being used for partnership purposes; in * other words, that the transaction was nothing more than a purchase of the bills from the signing partner. The case of *Ex parte Bolitho*, 1 Buck's B. C. 100, is claimed as authority for the defendant. There Peter Blackburn was a secret partner in a business carried on by Isaac Blackburn in his own name, and was sought to be made liable as drawer in respect of bills drawn in the name of Isaac Blackburn by Isaac himself. Upon the affidavits it appeared that Peter Blackburn also carried on a separate business, and that after Isaac Blackburn had drawn and indorsed the bills, Peter Blackburn indorsed them also with his own hand for the purpose of getting them discounted. The Lord Chancellor stated that it was impossible for him upon the affidavits to decide between the parties, and that the case must be sent to a court of law for its determination, and he directed an issue whether the two Blackburns were jointly liable upon all or any of the bills. In the course of his judgment, however, he said: "If money is advanced to A. and B., and the lender takes a bill from one of them only, he cannot maintain an action upon the bill against the two. Now, if A. and B. are partners and also separate traders, and A. draws a bill and indorses it in his own name, and B. also indorses it, and they become bankrupts, what is there to prevent the holder of a bill from proving against the separate estate of each of them? And unless you can show that when A. drew the bill he drew it not as A., but as A. and B., there can be no legal contract upon the bill as against the two." In these remarks of Lord Eldon the introduction of the element of separate trading by A. and B., and of the further element of both A. and B. putting their names to the bills, so differs Lord Eldon's supposed case from the case we are considering of a bill signed in a name common to a firm and

an individual member of the firm, where there is no trading separate from the trading of the firm, and no signature to the bill but that of the common name, that *Ex parte Bolitho* appears to us rather to support the contention of the plaintiff's counsel than to assist the defendant Mycock. The case of the *Bank of South Carolina* v. *Case*, 8 B. & C. 427, was one in which three persons carried on business in partnership in England under the firm name of Crowder, Clough & Co. One of the partners, J. B. Clough, was * sent out to America to form a branch [* 119] house, which he did form under his own individual name. He was restricted under the partnership articles from transacting any business in America, except on the partnership account, and, as a matter of fact, as appears from the report, p. 432, he had no individual business, and the name of J. B. Clough was never used by him in trade or in drawing, indorsing, or accepting or negotiating bills of exchange, except for the benefit and on account of the partnership. Under these circumstances it was held that all the partners were liable as indorsees in respect of certain bills indorsed by Clough in the name of J. B. Clough, and which were connected with partnership transactions, although Clough in indorsing them disregarded certain specific instructions given him by his partners, and exceeded his authority. It is unnecessary to discuss whether the doubts raised by CROMPTON, J., in *Nicholson* v. *Ricketts*, 2 E. & E. 497; 29 L. J. Q. B. 55, as to the correctness of this decision are or are not well founded. It is sufficient for our present purpose to say that the decision proceeded upon all the facts of the case, and not upon any doctrine as to presumption or burden of proof. But the case of *Furze* v. *Sharwood*, 2 Q. B. 388; 11 L. J. Q. B. 119, is a distinct authority upon the point under consideration. There a business was carried on by trustees for creditors in the name of Samuel Maine, one of the persons who had previously carried it on in partnership. Maine had also for a time a separate business of his own. The plaintiff had discounted bills for the old partnership, and also had been accustomed to lend Maine money for the purposes of his private business. Maine after a time sold his separate business and ceased to carry it on, and having subsequently indorsed bills in the name "Samuel Maine," one of which had been discounted by the plaintiff and was sued on, and the proceeds of which were placed to his credit at his bankers, and were drawn upon indiscriminately for the purposes of the busi-

No. 11. — Yorkshire Banking Co. v. Beatson and Mycock, 5 C. P. D. 119, 120.

ness, in which he was agent, and for his own private purposes, the trustees were held liable as indorsers, and Lord DENMAN, C. J., in delivering the judgment of the Court, said, (2 Q. B. p. 418): "*Primâ facie*, therefore, the signature 'Samuel Maine' was their signature, and they would be bound by it. But it is said that Maine [* 120] carried on a separate business of his own, * and that the plaintiff was bound to show that the indorsements in question were on account of the business of the trustees, and not in his separate business. Now, it appears that the bills were discounted with persons who were in the habit of discounting for the former firm, who assigned their effects to the defendants as trustees; and moreover, that the bills in question were not discounted till after Maine had ceased to carry on his separate business. Under these circumstances we think that the *onus* of showing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, lay on the defendants. Several cases were cited which it is not necessary minutely to examine; it is sufficient to say that they are not inconsistent with this view of the present case. We are, therefore, of opinion that the defendants were bound by the indorsement of Maine, and that the plaintiff, on this ground of objection, would be entitled to our judgment." This decision is in no way shaken by that in *Nicholson* v. *Ricketts* where two firms with distinct trade names agreed to carry on joint exchange operations under such circumstances as to make them partners in them, and it was held that the signature to bills of one of the two firms drawn in the course of the exchange operations did not make both firms liable as drawers; for the decision proceeded simply on the ground that by the arrangements between the two firms the names of the two firms were to be used separately, the paper to be dealt in being drawn by one firm and accepted by the other (*per* CROMPTON, J., 2 E. & E. 527); and, as COCKBURN, C. J., said, at p. 523, it did not appear that the drawing firm had any authority, express or implied, to bind the defendants by drawing bills. The case of *In re Adansonia Fibre Co., Miles's Claim*, L. R., 9 Ch. 635: 43 L. J. Ch. 732, was substantially the same as that of *Nicholson* v. *Ricketts* and was decided upon the same considerations. In each of these cases the Court came to the conclusion, as a matter of fact, upon all the circumstances before it, that the name on the bill was not intended to be, and was not, the name of the partnership sought to be made liable upon it.

Upon this review of English authorities they appear to support * the view that where a name is common to a firm [* 121] and to an individual member of such firm and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted, or indorsed, in the common name is a bill drawn, accepted, or indorsed, for the partnership and for which the partnership is liable, and that it lies upon the defendants in an action against the partners upon such bill to get rid of the *primâ facie* case made against them. But, as the Court below relies much upon the American authorities as uniformly negativing this view, and those authorities have been much discussed in the argument before this Court, we think it desirable to refer to them.

The authorities specially cited in the judgment of the Court below are Parsons on Bills of Exchange, p. 131; Story on Partnership, pp. 106, 142; the decision in the Supreme Court of New York of *Oliphant* v. *Mathews*, 16 Barbour, 608; and the direction of Story, J., to the jury in *United States Bank* v. *Binney*, 5 Mason, 176, 184. The passage referred to in Parsons does not bear out the proposition for which it is cited. He says, "The burden of proof is upon the plaintiff to show that the paper was given in the business and for the use of the firm; for it will be intended *primâ facie* to have been given in the separate business of the partner signing it, and to be binding upon him alone, at least if he is also engaged in business on his own separate account." The views of STORY, J., are best to be taken from his ruling in *United States Bank* v. *Binney*. There in directing the jury he used this language: "In the present case the signature of John Winship may be on his own individual account as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof then is upon the plaintiffs to establish that it is a contract of the firm and ought to bind them." But there was evidence to go to the jury in that case that the partnership was limited to a soap and candle business, and that the accommodation notes which were sued on were given in respect of consignments of meat, which might have constituted, and it was contended did constitute, the separate business of Winship. It is doubtful, therefore, whether STORY, J., intended his proposition to extend to * a case where no separate [* 122] business could even be suggested as existing. On the

other hand, in the case of *Mifflin* v. *Smith*, 17 Serjeant & Rawle (Pennsylvania), 165, ROGERS, J., dealt with the doctrine of presumption in a case where the question was whether a loan of money, obtained by a member of a partnership carried on in his individual name, was obtained on the faith of the partnership business, or on the credit of private speculations of the individual partner; and he laid it down that the presumption was that it was made on the faith and credit of the business, saying, "If a retail merchant gets a note discounted, is it not to be presumed to be in the regular prosecution of his business?" and adding, "The difficulty arises from the name of the individual and the name of the firm being the same. That is the presumption, liable, however, to be rebutted if the jury believe from the evidence that was not the state of the fact." A motion to the Supreme Court of Pennsylvania, founded amongst other things upon the alleged errors of this direction, was refused. This case was decided in 1828. The case before STORY, J., was in 1823. In 1845 the question under consideration again arose in the Supreme Court of New York in the case of the *Bank of Rochester* v. *Monteath*, 1 Denio, 402, where the name of William Monteath, an agent of a firm, had been used as the firm name, and the Court said: "If William Monteath had also been in business on his own account, then the acceptance by writing his name on the face of the bills would have been an equivocal act, and it would have been necessary to show that he accepted on account of the partnership, and not in his own private business;" and after citing among the authorities for this proposition the *United States Bank* v. *Binney*, thus indicating that they must have thought that in that case there was a separate business carried on by the individual whose name was used, the Court added: "But there was no evidence that William Monteath was engaged in any other business than the affairs of this partnership. We must then regard these bills as drawn on and accepted by the house doing business in the name of William Monteath." In 1853 was decided, also in the Supreme Court of New York, the [* 123] case of *Oliphant* v. *Mathews*, * which is the second of the two cases cited in the judgment of the Court below. That case, when critically examined, will be found not to be inconsistent with the cases of *Mifflin* v. *Smith*, and the *Bank of Rochester* v. *Monteath*. It is true that the Court laid down in general terms that where a partnership is carried on in the name of an individual,

and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual and not of the partners; but the Court immediately qualified the generality of the proposition laid down, by saying that the presumption might be repelled and overcome (in other words the *onus* of proof might be shifted) by proof as to the business in which such person was engaged, and while citing *Mifflin* v. *Smith*, as explaining what proof would be sufficient, the Court pointed out that in the case before them it was proved that the individual did business and borrowed money on his own account, as well as on account of the partnership, and it was not shown that one was not constant and regular as the other. This case, therefore, is in no way inconsistent with the previous case decided in the same Court of the *Bank of Rochester* v. *Monteath*, and none of the other cases cited in the argument before us carry the doctrine of presumption in favour of the defendant further. It appears to us, therefore, that the American authorities are in accord with the English upon the point under consideration, and that both fail to support the view taken by the Court below, and are in favour of the second contention urged in this case on behalf of the plaintiffs.

Applying then the presumption for which the plaintiffs contend to the circumstances of the present case, the matter stands thus. The only business carried on in the year 1878 in the name of and by William Beatson was the business of the partnership, and both the bills sued upon have the appearance of trade bills. *Primâ facie*, then, the bills were bills indorsed and accepted respectively in the name and on account of the partnership; and if that *primâ facie* case were not displaced, Mycock would be liable upon them to the plaintiffs as *bonâ fide* holders for value without notice, even though they were so indorsed and accepted for private purposes of * Beatson, and in fraud of his part- [* 124] ner The nature of the partnership business was such as to give Beatson in respect to persons dealing with him in business an implied authority to bind his partner by bills of exchange, and his partner, although a secret one, must be held responsible upon any bill signed by Beatson in the name of the firm in favour of a holder whose title cannot be impeached, however much Beatson in signing that name may have exceeded the authority and broken the trust reposed in him by the agreement of partnership. As was

said by the Court in giving judgment in the case of *Wintle* v. *Crowther*, 1 C. & J. 316, at p. 318, "Where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached," and the authorities generally both English and American are uniform in support of this view. There is no difference in this respect between the dormant and the ostensible partner, and when once it is established that a name common to a firm and an individual member of it has been put to a bill as the name of the firm, there is no difference between the liability of partners carrying on business in such a name and the liability of partners carrying on business in a name which bears in itself the stamp and evidence of a partnership. It may perhaps be argued that in the latter case the *bonâ fide* holder without notice is induced by the name itself to trust a firm, and is therefore entitled to have the responsibility of all the members of that firm, while an individual name would suggest no responsibility other than that of the individual whose name it is; but when it is remembered that firm names are often used by individual traders while individual names are often used by firms, the argument practically comes to nothing, and a common principle applicable to both cases remains alone consistent with mercantile expediency and general law.

But assuming that there is no difference as matter of law between the two cases, there is as a matter of evidence a very real and very practical difference. A name in itself indicating a firm does not, except in rare instances of which the case of *Stephens* v. *Reynolds*, 5 H. & N. 513, is an example, leave open any [* 125] doubt as *to the meaning of a signature in such name; but a name which in itself indicates an individual is, notwithstanding the effect of any legal presumption, ambiguous, and there are likely to be few if any cases where the decision of the jury or of a Court will be rested upon the presumption alone. The present case is no exception to the rule, and the presumption in favour of the plaintiffs arising from the fact that Beatson carried on no business separate from that of the partnership, sinks into comparative insignificance by the side of the additional facts which are proved in the case. Upon those facts we have to decide, as the Courts in *Nicholson* v. *Ricketts*, 2 E. & E. 497; and *In re Adon-*

sonia Fibre Co., Miles's Case, L. R., 9 Ch. 635, 43 L. J. Ch. 732, were called upon to decide whether the signature to the bills, upon which the dispute arises, was intended to denote and did denote the partnership of which the defendant was a member. In the first place, it is clear that the bills were bills which, if signed by Beatson for the partnership, were so signed by him without the authority and in fraud of his partner, and in respect of which no action would have lain against Mycock if they had remained in the hands of Josiah Carr & Son, who took them with notice. In the second place, it is, we think, equally clear that as between Beatson and Mycock the bills were not treated as having been signed by Beatson on partnership account. They were not entered in any partnership book; and, indeed, even before the partnership as well as after it commenced, the accommodation transactions of Beatson were treated as not forming any part of the transactions of his business, and were excluded from the ledger. In the third place, the evidence establishes that the accommodation transactions of Beatson, after the commencement of the partnership, diminished rather than added anything even temporarily to the capital of the firm; and lastly, Beatson himself, called as a witness by the plaintiffs themselves, disproved, as it appears to us, the fact that in signing the bills in question he signed for the partnership. He stated that he thought he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions, and did not enter them in the partnership books. Can any inference be reasonably drawn from such evidence * than that Beat- [* 126] son in signing the bills intended to sign and did sign them for himself? We think that no other inference ought to be drawn, and that the jury in finding that the signature "William Beatson" upon each of the bills was intended to denote the firm, gave a verdict against the evidence and one which ought not to stand. The reason given in support of their finding by the jury that the one bill was addressed to the drawee or drawees as of the Chemical Works, Rotherham, and that the other was so connected with it as to stand or fall with it, might have been a good reason in a case where the evidence was in other respects doubtful, but is in the present case met to some extent by the very form of the bill itself, which, while addressed to the drawee or drawees at the partnership works, contains in the term "Mister," prefixed to the name

Wm. Beatson, an indication that the individual and not the firm was intended, and is entirely outweighed by the clear evidence to which we have referred; and we understand that the learned judge who tried the case was himself dissatisfied with the finding. The additional finding that the bank took the bills as the bills of the chemical works is clearly irrelevant, if the former finding is wrong; for, if the bills were in fact signed not in the name of the partnership but of William Beatson individually and for his private purposes, the fact that the plaintiffs, who were unaware that Mycock was a partner with Beatson, and never advanced any money on the faith of his credit, did at the same time give credit to the name of Beatson as being the name of the owner of the chemical works, can give them no more right against Mycock than if he had been a mortgagee of the works instead of a partner in them. The law by express enactment in the case of bankruptcy asserts a title in favour of the general body of creditors of a bankrupt to property, of which he may have been at the time of his bankruptcy in apparent possession with the consent of the true owner, and upon the faith of which he gained a false credit. But in actions founded upon purely personal contracts, the law does not recognise the mere moral right which a creditor may attempt to assert against one person in consequence of his having intrusted to another property, in the belief of his ownership of which the creditor may have contracted with him; in other words, in a case like [*127] the present * there is no conduct on the part of the dormant partner which makes it inequitable on his part to deny or estops him from denying his liability upon a contract to which he was in fact no party, from which he has derived no benefit, and in respect of which he was not held out to the person suing him as liable. As regards this point, nothing turns on the subject-matter of the action being negotiable instruments. Beatson by giving the use of his name to a partnership, of which he was a member and the only ostensible member, did not preclude himself from making contracts binding himself alone, and in any contract *de facto* made by him whether by parol or in writing the question, the answer to which would determine Mycock's liability or freedom from liability, would not be whether the other contracting party trusted Beatson because he supposed him to be sole owner of the chemical works, but whether Beatson, whom alone he knew and actually trusted, was acting as agent for the partner-

ship or in his individual capacity for himself. This kind of question was raised in the case of the *Bank of Scotland* v. *Watson*, 1 Dow. 40, 14 R. R. 11, where the bank and its agent carried on separate banking businesses at the same office, and the bank was unsuccessfully sued by a person who relied, in support of his claim against the bank, upon a receipt which bore the address of the common office.

One point only remains for decision. The verdict and judgment for the plaintiffs have been properly set aside by the Court below, but is it right that the judgment entered instead for the defendant Mycock should stand? We have entertained some doubt whether the case ought not to go to another jury to be decided upon the principles laid down in this judgment, but we have come to the conclusion that the Court ought not to put the parties to this expense. The case is one in which no additional facts remain to be proved, and in which upon the facts proved no jury would be justified in finding a verdict adverse to the defendant Mycock. It is one, therefore, in which, to use the words of Rule 10 of Order XL. of the General Rules of the Supreme Court, we have before us, as the Court below had, all the materials necessary for finally determining the question in dispute; and in this state of circumstances we think that the judgment of the Court * below [* 128] should stand, and that the appeal should consequently be dismissed.

Judgment affirmed.

ENGLISH NOTES.

The point decided in the principal case is not covered either by the Bills of Exchange Act 1882, or by the Partnership Act 1890. But it is consistent with both, and is cited by Chalmers, 4th ed., p. 67, as an illustration of section 23 (2) of the former Act; and by Sir F. Pollock (Partnership, 5th ed., p. 28), in a note in relation to section 5 of the latter Act. The cases bearing on the point are fully discussed in the principal case.

AMERICAN NOTES.

Mr. Daniel, citing the principal case, states the American doctrine (1 Daniel on Negotiable Instruments, § 363) to be that presumptively the paper is that of the individual signer alone, but that the contrary may be shown, and that the burden is on the holder. Citing *Cunningham* v. *Smithson*, 12 Leigh (Virginia), 43; *Macklin* v. *Crutcher*, 6 Bush (Kentucky), 401; 99 Am. Dec. 680; *Boyle* v. *Skinner*, 19 Missouri, 82; *Mercantile Bank* v. *Cox*, 38 Maine, 500; *Buckner* v.

Lee, 8 Georgia, 285; *Bank of Rochester* v. *Monteath*, 1 Denio (New York), 402; 43 Am. Dec. 681; *Manufacturers' Bank* v. *Winship*, 5 Pickering (Massachusetts), 11; *U. S. Bank* v. *Binney*, 5 Mason (U. S. Circ. Ct., by STORY, J.), 176; *Crocker* v. *Colwell*, 16 New York, 212. In the last case the plaintiff recovered upon showing that the firm kept its bank account and drew its checks in the name of one partner alone, and that the plaintiff did not deal on the individual credit of the signer.

Principal case cited, Bigelow on Bills and Notes, p. 136.

No. 12. — DUTTON *v.* MARSH.

(1871.)

RULE.

WORDS of description importing that the person signing a bill is an agent, without anything to show clearly that he makes himself liable in that character and not otherwise, do not exempt that person from being charged as personally liable on the bill.

Dutton v. Marsh.

L. R., 6 Q. B. 361–365 (s. c. 40 L. J. Q. B. 175; 24 L. T. 470, 19 W. R. 754).

[361] Declaration by the plaintiff, as payee, against the defendants as makers of a promissory note.

Plea: that the defendants did not make the note.

Issue thereon.

At the trial before CLEASBY, B., at the Liverpool Summer Assizes, 1870, it appeared that the plaintiff lent £1600 to the Isle of Man Slate and Flag Company, Limited, of which the defendant Marsh was a director and chairman, and the other defendants directors; and the following note, signed by the defendants, was handed to the plaintiff: —

ISLE OF MAN, 7th January, 1864.

We the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton, Esq., the sum of £1600 sterling, with interest at the rate of 6 per cent. per annum, until paid, for value received.

Witnessed by
(L. S.)
LESLIE LOCHART.

RICHARD J. MARSH, Chairman.
JOSEPH HIGGINS.
SAMUEL BROADBENT.
HENRY JOHNSON.

In the corner of the note the company's seal was affixed, with "Witnessed by Leslie Lochart."

Some letters and facts which took place between the parties when the money was borrowed were given in evidence, but the judgment of the Court renders it unnecessary to notice them.

The Judge directed a verdict for the plaintiff, with leave to move * to enter a verdict for the defendants, on the [* 362] ground that the defendants were not personally liable.

A rule having been obtained accordingly, —

May 6. Holker, Q. C., and Herschell, showed cause. — There is nothing on the face of this note to exclude the personal liability of the defendants, which *primâ facie* attaches to persons who sign their names as makers of a promissory note. Lord Ellenborough says in *Leadbitter* v. *Farrow*, 5 M. & S. 345, 349; 17 R. R. 345, 348, "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion?" And in all the cases in which the defendant has been held not liable, there has been some equivalent expression so as to exclude personal liability. On the other hand the defendant has always been held liable, unless some such words of exclusion have been used, although it may be apparent on the face of the instrument that he is signing as a director or other officer of a company. Thus in *Price* v. *Taylor*, 5 H. & N. 540; 29 L. J. Ex. 331, the defendants were held liable, although they were described as the trustees and secretary of a building society.

[Hannen, J. *Bottomley* v. *Fisher*, 1 H. & C. 211; 31 L. J. Ex. 417, was a similar decision.]

In *Marc* v. *Charles*, 5 E. & B. 978; 25 L. J. Q. B. 119, the drawee was held personally liable, although he had accepted "for the company." But in *Aggs* v. *Nicholson*, 1 H. & N. 165; 25 L. J. Ex. 348, the defendants, having expressly promised on "behalf of the company," were held not liable. In *Lindus* v. *Melrose*, 3 H. & N. 177; 27 L. J. Ex. 326, there were the words "for value received for and on account of the company." So in *Alexander* v. *Sizer*, L. R., 4 Ex. 102, 38 L. J. Ex. 59, the defendant signed "for" the railway company.

[Cockburn, C. J. The law is thus summed up in Smith's Leading Cases, notes to *Thomson* v. *Davenport*, 2 Sm. L. C., at p. 344,

No. 12. — Dutton v. Marsh, L. R., 6 Q. B. 362–364.

6th ed., and, I think, rightly: "In all these cases the question whether the person actually signing the contract is to be [* 363] * deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule that, where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally; and in order to prevent his liability from attaching, it must be apparent from the other portions of the document, that he did not intend to bind himself as principal." The question here is, Is not the putting of the company's seal to the note equivalent to saying "on behalf of the company"?]

Surely not; it cannot do more than show that, as between the directors and the company, the transaction is on behalf of the company; but it can be no intimation to the plaintiff that the directors are not to be held personally liable to him. In *Aggs* v. *Nicholson* the seal of the company was attached; but the Court acted only on the words "on behalf of the company" as excluding personal liability. In *Lindus* v. *Melrose*, Crompton and Willes, JJ., expressed considerable doubt as to the construction of the instrument, and they guarded themselves from being supposed, by concurring in the judgment, to throw any doubt upon the rule that an agent putting his name to a mercantile instrument is liable as principal, unless the instrument distinctly shows that he signs as agent, and in this the rest of the Court of Exchequer Chamber concurred.

Manisty, Q. C., and Edwards, in support of the rule. For what purpose could the seal of the company have been attached, but to show the note was drawn on behalf of the company, as was held in *Halford* v. *Cameron's Coalbrook, &c. Co.*, 16 Q. B. 442; 20 L. J. Q. B. 160? So in *Aggs* v. *Nicholson*, the Court, in giving judgment, took notice of the fact that the company's seal was attached. No case, therefore, has decided that the directors signing are personally liable on a bill or note to which the company's seal is attached. In *Alexander* v. *Sizer*, in which the Court held the defendant's liability to be excluded, Kelly, C. B., distinguishes the case of *Healey* [* 364] v. *Story*, 3 Ex. 3; 18 L. J. Ex. 8, on the * ground that in that case the defendants "jointly and severally" promised, which showed that, although "for" the company was added, they intended to make themselves personally liable; there are no such words in the present case. *Cur. adv. vult.*

May 8. The judgment of the Court was delivered by

COCKBURN, C. J. This case was argued before my Brothers MELLOR and HANNEN and myself. It was an action upon a promissory note in this form: "We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton the sum of £1600 sterling, with interest at the rate of 6 per cent. per annum until paid, for value received." This was signed by the defendant Marsh as chairman, and by the other defendants who were directors, and the seal of the company is affixed to the promissory note. The question is, whether the promissory note is binding upon the persons who signed it, or was binding not upon them, but upon the company.

Let us assume for the present that the seal was not affixed. The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing, — if they merely describe themselves as directors, but do not state that they are acting on behalf of the company,— they are individually liable. But, on the other hand, if they state they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus* v. *Melrose*, 3 H. & N. 177; 27 L. J. Ex. 326, fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented.

If, therefore, in this case it had simply stood that the defendants, described as directors, but without saying "on behalf of the company," signed the promissory note, it is clear they would have been *personally liable, and could not be considered [*365] as binding the company. But this case was rendered doubtful by the fact of the corporate seal being affixed to the document. It does not purport in form to be a promissory note made on behalf of or on account of the company. So far as the written portion of it goes it is totally without any such qualifying expression, but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms on the face of the note, that the note was signed by the per-

sons who put their names to it on behalf of the company, and not on behalf of themselves. But on consideration I agree with my learned Brothers that that effect cannot be given to the placing of the seal of the company upon the note. It may be that that was simply for the purpose of ear-marking the transaction, or, in fact, showing as to the directors that, as between them and the company, it was for the company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes the length of saying that the affixing of the seal, where the parties do not otherwise use terms to exclude their personal liability, would have that effect. We think it is going too far to say that the mere affixing of the seal has that effect. The rule, therefore, will be discharged.

Rule discharged.

ENGLISH NOTES.

See Bills of Exchange Act 1882, sect. 26.

The former sub-section (1) of this section is founded upon the common-law rule, which applies to other instruments as well as bills, but has been applied with special stringency to the latter, so as to fix the responsibility upon the person who actually signs his name. Mr. Chalmers (4th ed. p. 78) mentions that the section was re-drafted in committee, and perhaps somewhat modifies the rigour of the common-law rule. "The principle," he says "is this; the terms agent, manager, &c., attached to a signature are regarded as mere *designatio personae*. The rule is applied with peculiar strictness to bills because of the non-liability of the principal." A strong example of the application of this principle is furnished by a Scotch case, where three persons signing a promissory note expressed thus: "We, the undersigned, in the name and on behalf of the Reformed Presbyterian Church, Stranraer, promise to pay" —— were held personally liable on the note. *McMeekin* v. *Euston* (1889), Court of Session Cases, 4th series, Vol. II., p. 363.

The intention of the signature — whether to be binding on the subscriber personally or merely to bind some other person or body of persons for whom he acts as agent or in a representative character, is the criterion, in regard to other contracts as well as bills of exchange; but the construction favouring the former alternative has been less stringent. Thus in bought and sold notes the signature of a broker — "A. B., broker," — has been held as *primâ facie* not making the

broker personally a party. *Morris* v. *Cleasby* (1816), 4 M. & S. 566, 16 R. R. 544; *Fairlie* v. *Fenton* (1870), L. R., 5 Ex. 169, 39 L. J. Ex. 107, 22 L. T. 373. And a signature even without addition, where in the body of the document the sale is "to my principal," or "on account of" a person named, has been held not to import personal liability. *Southwell* v. *Bowditch* (C. A. 1876), 1 C. P. D. 374, 45 L. J. C. P. 630, 35 L. T. 196; *Gadd* v. *Houghton* (C. A. 1876), 1 Ex. D. 357, 46 L. J. Ex. 71; 35 L. T. 222. Where the agent acts for a foreign correspondent the presumption on the other hand has been held to be in favour of the agent being the responsible party in the contract. *Die Elbinger Actien-Gesellschaft* v. *Claye* (1873), L. R., 8 Q. B. 313, 42 L. J. Q. B. 151, 28 L. T. 405. As cases where the words importing agency have been held to be merely descriptive, see *Paice* v. *Walker* (1870), L. R., 5 Ex. 173, 39 L. J. Ex. 109, 22 L. T. 547, followed (notwithstanding some adverse *dicta* in *Gadd* v. *Houghton*, *supra*) in *Hough* v. *Manzanos* (1879), 4 Ex. D. 104, 48 L. J. Ex. 398.

As to the liability incurred by an agent by an implied warranty of authority, see *Collen* v. *Wright* (R. C. "Agency," No. 19, Vol. 2, p. 484), and notes there. As to the applicability of the doctrine to bills of exchange may be cited *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; and *West London Commercial Bank* v. *Kitson* (C. A. 1884), 13 Q. B. D. 360, 53 L. J. Q. B. 345, 50 L. T. 656. It is true that the judgment in the former case was based — and so to some extent were the judgments in the latter — on the ground of false representation; but in a similar case now the liability would probably be rested on the safer ground of implied warranty.

AMERICAN NOTES.

The principal case is cited in 1 Daniel on Negotiable Instruments, §§ 404, 408; Bigelow on Bills and Notes, p. 47.

There can be no doubt that in this country the agent signing apparently as agent, but not showing any intent to bind a principal except by the use of mere words of description, would be personally liable. See Browne's Parol Evidence, § 63, citing *Tannatt* v. *Rocky Mt. Bank*, 1 Colorado, 278; 9 Am. Rep. 156; *Sturdivant* v. *Hull*, 59 Maine, 172; 8 Am. Rep. 409; *Hypes* v. *Griffin*, 89 Illinois, 134; 31 Am. Rep. 71; *Liebscher* v. *Kraus*, 74 Wisconsin, 387; 17 Am. St. Rep. 171; 5 Lawyers' Rep. Annotated, 496; *Tarver* v. *Garlington*, 27 South Carolina, 107; 13 Am. St. Rep. 628; *Matthews* v. *Dubuque, &c. Co.*, 87 Iowa, —; 19 Lawyers' Rep. Annotated, 676 (two judges dissenting, and of doubtful correctness, the signature being "D. M. Co., J. K., Pt."). See *Caphart* v. *Dodd*, 3 Bush (Kentucky), 584; 96 Am. Dec. 258; *Casco Nat. Bank* v. *Clark*, 139 New York, 307; 36 Am. St. Rep. 705 (in this case the title of a corporation printed in the margin was held to be immaterial, the promise being simply "we," and the signature "J. C., Prest.")

No. 12. — Dutton v. Marsh. — Notes.

In *Means* v. *Swormstedt*, 32 Indiana, 87; 2 Am. Rep. 330, the promise was "we" and the signature "W. B. S., Secretary," and the corporate seal was attached; this was held a corporate note. Mr. Daniel distinguishes it from the principal case.

It has sometimes been held here, however, that where one accepts as "agent" he may show that it was the intention and agreement that he was to respond only from the principal's funds, although the bill was addressed to him as an individual. *Hardy* v. *Pilcher*, 57 Mississippi, 18; 34 Am. Rep. 432; *Laflin, &c. Co.* v. *Sinsheimer*, 48 Maryland, 411; 30 Am. Rep. 472; *Nat. City Bank* v. *Westcott*, 118 New York, 468; 16 Am. St. Rep. 772. But to the contrary, *Robinson* v. *Kanawha Valley Bank*, 41 Ohio State, 441; 58 Am. Rep. 829.

If the signing or the body of the instrument is ambiguous, parol evidence is competent to explain it. But the question then arises, what is an ambiguity? *Schmittler* v. *Simon*, 144 New York, 176; 11 Am. St. Rep. 621 (draft accepted by "S., executor"); *Carpenter* v. *Farnsworth*, 106 Massachusetts, 561; 8 Am. Rep. 360 (checks with "Etna Mills" printed on margin, and signed "T. D. F., treasurer," given for debt of mills, held not to bind signer); *Houghton* v. *First Nat. Bank*, 26 Wisconsin, 663; 7 Am. Rep. 107 ("G. B., cas.," on note not owned by bank, to enable payer to raise money to take up note held by bank); *Bean* v. *Pioneer Mining Co.*, 66 California, 451; 56 Am. Rep. 106 (note phrased "we promise," and signed "Pioneer Mining Co., John E. Mason, superintendent," held note of company alone; this is precisely contrary to *Matthews* v. *Dubuque, &c. Co.*, *supra*). To the same effect, *Haile* v. *Peirce*, 32 Maryland, 327; 3 Am. Rep. 139; *Richmond, &c. R. Co.* v. *Snead*, 19 Grattan (Virginia), 354; *Martin* v. *Smith*, 65 Mississippi, 2; *Hager* v. *Rice*, 4 Colorado, 90; 34 Am. Rep. 68; *McClellan* v. *Reynolds*, 49 Missouri, 314; *Pratt* v. *Beaupre*, 13 Minnesota, 190; *Vater* v. *Lewis*, 36 Indiana, 288; 10 Am. Rep. 29; *Reeve* v. *First Nat. Bank of Glassboro*, 54 New Jersey Law, 208; 16 Lawyers' Rep. Annotated, 143; *Kline* v. *Bank of Tescott*, 50 Kansas, 91; 34 Am. St. Rep. 107; *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheaton (United States), 326; *Castle* v. *Belfast Foundry Co.*, 72 Maine, 167; *Miller* v. *Roach*, 150 Massachusetts, 140; 6 Lawyers' Rep. Annotated, 71. So where the note recites the corporate promise, but is signed "B. F., gen. supt.," it may be shown to be the personal obligation of the signer. *Frankland* v. *Johnson*, 147 Illinois, 520; 37 Am. St. Rep. 234.

But in *McCandless* v. *Belle Plaine Canning Co.*, 78 Iowa, 161; 16 Am. St. Rep. 429, where a note read "we promise," and was signed "B. P. C. Co., A. J. H., Pres't, H. W., Sec'y," the signers were deemed personally liable, and parol evidence of intention was excluded.

See note, 13 Am. St. Rep. 631, 632, and 34 ibid. 110, the latter stating "Where there is nothing in the body of the instrument to show the nature of the obligation, parol evidence is admissible to determine its true character [citing *Kean* v. *Davis*, 1 Zabriskie (New Jersey), 683; 47 Am. Dec. 182; *Pease* v. *Pease*, 35 Connecticut, 131; 95 Am. Dec. 225; *Bean* v. *Pioneer Mining Co.*, 66 California, 451; 56 Am. Rep. 106], a note not in the corporate name, and not disclosing any agency from the corporation to make it, is *prima facie* not the note of the corporation, but evidence *aliunde* may be introduced to rebut

this presumption." Citing *Melledge* v. *Boston Iron Co.*, 5 Cushing (Massachusetts), 158; 51 Am. Dec. 59.

Mr. Daniel says (1 Negotiable Instruments, § 406): "The decisions are very conflicting, and the tendency is to restrain, rather than to enlarge, the constructive liability of corporations." Citing the principal case.

In *Swarts* v. *Cohen*, 38 N. E. Rep. 536, it is decided by the Appellate Court of Indiana that a note signed, "Nat. F. & I. Co., M. S., President," is ambiguous, and extrinsic evidence is admissible, under proper averments, to show that it is a note of M. S. The Court say: "In looking into the adjudications of other States we find that much conflict and confusion exist. In *Falk* v. *Moebs*, 127 United States, 597, it is said that this conflict amounts to almost anarchy of the authorities. In the following cases notes and bills of exchange similarly signed as the one in suit were held to be the obligation of the corporation alone. *Draper* v. *Steam Heating Co.*, 5 Allen, 338; *Rendell* v. *Harriman*, 75 Maine, 497; *Castle* v. *Foundry Co.*, 72 Maine, 167; *Sturdivant* v. *Hull*, 59 Maine, 172; *Carpenter* v. *Farnsworth*, 106 Massachusetts, 561; *Liebscher* v. *Kraus*, 74 Wisconsin, 387. Many other cases might be cited to the same effect. On the other hand, notes and bills somewhat similarly signed have been held to be the individual obligation of the person signing them, or the joint obligation of the corporation and the individual. *Chase* v. *Pattburg*, 12 Daly, 171; *Kean* v. *Davis*, 21 New Jersey Law, 683; *Fiske* v. *Eldridge*, 12 Gray, 474; *Manufacturing Co.* v. *Fairbanks*, 98 Massachusetts, 101; *De Witt* v. *Walton*, 9 New York, 571; *McClellan* v. *Reynolds*, 49 Missouri, 312; *Heffner* v. *Brownell*, 70 Iowa, 591; *Heffner* v. *Brownell*, 75 Iowa, 341; *McCandless* v. *Canning Co.*, 78 Iowa, 161. In many of the cases the decision of the Court turns on a very slight change in the terms of the instrument or the manner in which it is signed. If a written instrument is uncertain, or its meaning cannot be definitely determined upon its face, extrinsic evidence may, under proper averments, be given, not to vary the terms, but to clear up the ambiguity. This is especially true where the action is between the original parties to the contract. Daniel's Negotiable Instruments, § 418; Parsons on Notes and Bills, 168; *Haile* v. *Peirce*, 32 Maryland, 327; *Hardy* v. *Pilcher*, 57 Mississippi, 18; *Baldwin* v. *Bank*, 1 Wall. 234; *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326; *Metcalf* v. *Williams*, 104 United States, 93; *Brockway* v. *Allen*, 17 Wend. 40. Courts of equity will sometimes relieve against mistakes of law, and will reform a written instrument so as to make it conform to or speak the intention of the parties. This is particularly true when words are used to express a contract previously made. 1 Story Eq. Jr. § 115; 2 Pom. Eq. Jur. § 845. In *Lee* v. *Percival* (Iowa), 52 N. W. Rep. 513, suit was instituted upon a note as follows: 'Six months after date we promise to pay Lee Jameson or order three hundred and fifty dollars.' . . . signed as follows: 'Herndon Natural Gas & Land Company. F. A. Percival, President. Alexander Hastie, Secretary.' It was held that Percival and Hastie were *primâ facie* liable, but might have the note reformed so as to express the true intent of the parties, and that parol evidence was admissible for the purpose of showing that the note was the obligation of the corporation alone. So where a note was signed, 'W. T. Boutell, Pres.,' it was held proper for the signer to show by parol

that he was the president of a corporation, and signed for the corporation. *Collender Co.* v. *Boutell* (Minnesota), 47 N. W. Rep. 261. A note read: 'We promise to pay to the order of A. J. Boardman, treasurer. . . . [Signed] Minneapolis Engine & Machine Works, by A. L. Crocker, Secretary,' and indorsed 'A. J. Boardman, Treasurer.' The indorsement was held to be *primâ facie* the indorsement of Boardman, but extrinsic evidence was held admissible to show that he made it only in his official capacity as treasurer, and that the indorsement was that of the corporation alone. *Bank* v. *Boardman* (Minnesota), 48 N. W. Rep. 1116. In *Liebscher* v. *Kraus*, 74 Wisconsin. 387, the action was on a note in these words: 'Ninety days after date we promise to pay to Leo Leibscher or order the sum of six hundred and thirty-seven dollars and forty cents, value received. [Signed] San Pedro Mining and Milling Company. F. Kraus, President.' This was decided to be the note of the corporation alone, and not the joint note of the corporation and Kraus; there was no ambiguity, and parol evidence was inadmissible to show that Kraus did not sign the name of the company, but signed his own name as a joint maker. *In Heffner* v. *Brownell*, 75 Iowa, 341, and the same case in 70 Iowa, 591, the note was in substance as follows: '. . . We promise to pay Daniel Heffner or bearer two hundred dollars. . . . [Signed] Independence Mf'g Co. B. S. Brownell, Pres., D. B. Sanford, Secy.' This was held to be the joint note of the corporation and of the other persons signing the same; there was no ambiguity appearing upon the face of the instrument, and extrinsic evidence was inadmissible to show the intention of the parties. *Matthews* v. *Mattress Co.* (Iowa), 54 N. W. Rep. 225, was an action on a note very similar to the one in suit. It read as follows: 'Ninety days after date we promise to pay to the order of J. T. Matthews & Co. two hundred and ninety and eighty-seven one-hundredths dollars. Payable at the office of the Dubuque Mattress Co., Dubuque, Iowa. Value received. Accepted March 21, 1889, Dubuque Mattress Co. John Koff, Pt.' This was held to be the note of Koff as well as of the corporation, and that parol evidence was not admissible to show that the corporation was the only promisor. There is however an able dissenting opinion, in which the position is taken that the note is ambiguous on its face, and that parol evidence should have been admitted to clear up the ambiguity. We are of the opinion that the note in suit is ambiguous. It was upon that theory that the case proceeded, was tried, and determined in the Court below. The appellee declared in his complaint that the appellant executed the note. If John Doe should execute his promissory note in the name and style of Richard Roe, he would be liable thereon, and extrinsic evidence would be admissible to show the manner of the execution under proper averments in the pleadings. As was said by the Supreme Court in *Gaff* v. *Theis*, *supra*: 'A party may, we suppose, execute a note in any name other than his own, and yet be bound by it.' It is readily conceivable that the note in suit might have been executed by both the corporation and by Swarts, and be their joint obligation. In such a case, affixing the word 'president' to his name does not make it the note of the corporation only, but under proper averments it may be shown to be the obligation of the individual as well, and this may be made to appear by extrinsic evidence."

No. 13. — ROUQUETTE *v.* OVERMANN.

(1875.)

RULE.

THE obligations of the acceptor of a bill (so far at least as regards the date when the bill becomes due, and the consequential requirements as to notice of dishonour), are to be determined by the *lex loci* of performance.

The contract which a person transferring for value the property in a bill of exchange makes with the transferee, is that he engages as surety for the due performance by the acceptor of the obligations which the acceptor takes upon himself by the acceptance.

The obligations of the transferor are therefore likewise determined by the *lex loci* of performance.

Rouquette v. Overmann & Schou.

L. R., 10 Q. B. 525–544 (s. c. 44 L. J. Q. B. 221; 33 L. T. 333).

Case stated without pleadings, of which the following [525] are the material parts: —

The action is brought by the plaintiff as indorsee against the defendants, the drawers and indorsers of a bill of exchange, dated the 28th of June, 1870.

Plaintiff, at the time of the drawing of the bill was, and still is, an English subject carrying on business in London; and defendants are merchants carrying on business in Manchester.

Defendants had been in the habit of employing plaintiff to negotiate in London their drafts on Paris, on the terms that plaintiff should indorse and sell the bills, and remit to defendants the proceeds, less his commission of 1*s.* 4*d.* per cent. and brokerage of 1 per mille. There being no fixed rate of exchange between Manchester and Paris, the bills were drawn in English money at an exchange to be fixed by plaintiff's indorsement on the bills, and the bills were made payable to defendants' order and specially * indorsed to plaintiff, who having indorsed and [* 526] fixed the rate of exchange, sold them, remitting to defendants the proceeds less his commission and brokerage.

No. 13. — Rouquette v. Overmann, L. R., 10 Q. B. 526, 527.

On the 28th of June, 1870, defendants drew the following bill in three sets: —

Manchester, 28 June, 1870, for £345 15*s.* 2*d.* sterling. On 5th October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves, the sum of £345 15*s.* 2*d.* sterling, at the exchange, as per indorsement, for value received, which place to account as advised.

Overmann & Schot.

To Messrs. Magalhaes Frères, Rue Martel, 5, Paris.

Defendants as usual indorsed the bill specially to plaintiff and forwarded it to him; and he specially indorsed the bill: "Pay Messrs. Krauetler & Mieville or order, at the exchange of 25 francs $38\frac{3}{4}$ centimes p. £ sterling value of the same, London, 5 July, 1870;" and sold it on that day in London to Messrs. Krauetler & Mieville (they being English subjects resident in England) for £345 15*s.* 2*d.*; and remitted to defendants that sum minus commission and brokerage.

Messrs. Magalhaes were, at the time of the drawing of the bill, and up to the 5th of September, 1871, French subjects resident in Paris, where they carried on business. They also carried on business in Pernambuco, and the goods for which the bill was drawn were sent to them there by defendants; but of this neither the plaintiff nor any of the indorsees of the bill had notice until after the 5th of September, 1871.

Krauetler & Mieville indorsed the bill in London: "Pay to the order of Messrs. Pillet, Will, & Co., value in account, London, 5th July, 1870;" and sent it to the indorsees who were French subjects resident in Paris.

The first of the bills was duly accepted at Paris: —

"Accepté. Paris, 2 Juillet, 1870. Magalhaes Frères."

The second of exchange had on the face of it: "First for acceptance with M. W. Bechtel, Rue Richer, 10, where in case of need" (this being defendant's need). —

[* 527] * "In need with Messrs. W. Zellweger & Co., 29, Rue de Provence" (this being plaintiff's need).

During the currency of the bill, viz., on the 23rd of July, 1870, war was declared by France against Prussia, and about the 14th of September, Paris was invested by the forces of Prussia and her allies, and continued so invested until its capture on the 20th of

January, 1871, when a convention for an armistice was signed at Versailles.

On the 13th of August, 1870, the Emperor Napoleon, then sovereign of France, made a law, of which the following is material: —

"Art. 1. Les délais dans lesquels doivent être faits les protêts et tous actes conservant les recours pour toute valeur négociable souscrite avant la promulgation de la présente loi sont prorogés d'un mois. Le remboursement ne pourra être demandé aux endosseurs et aux autres obligés pendant le même délai.

"Les intérêts seront dus depuis l'échéance jusqu'au payement."

On the 10th of September, 1870, the Government of the National Defence, the then sovereign power of France, made a law and decree, of which the following is material: —

"No. 36. Décret qui proroge les délais accordés par la loi du 13 Août, 1870, relative aux effets de commerce.

"Art. 1er. La prorogation de délais accordée par la loi du 13 Août dernier relative aux effets de commerce est augmentée de trente jours à compter du 14 Septembre courant.

"2. Toutes les autres dispositions de la loi du 13 Août sont maintenues."

On the 14th of October, 1870, and in each ensuing month down to the 13th of February, 1871, similar decrees, *mutatis mutandis*, were passed, by which the delay was extended to the 13th of March, 1871.

On the 19th of February, 1871, war between France and Prussia was ended.

On the 10th March, 1871, the National Assembly, the then sovereign power of France, passed, and the chief of the executive of the French Republic promulgated, a law, of which the following is material: —

* "Art. 2. Tous les effets de commerce échus du 13 Août [* 528] au 12 Novembre 1870, seront exigibles sept mois date pour date après l'échéance inscrite aux lettres avec les intérêts depuis le jour de cette échéance. . . .

"Art. 3. Par dérogation à l'article 162 du code de commerce[1] le délai accordé au porteur pour faire constaté par un protêt le

[1] Article 162 of the Code de Commerce: "Lettre de change. Le refus de paiement doit être constaté le lendemain du jour de l'échéance par une acte que l'on nomme protêt faute de paiement."

refus de payement sera de dix jours. Les délais de dénonciation et de poursuites fixés par la loi courrent du jour du protêt."

On or about the 28th of March, 1871, a revolution broke out in Paris, and commercial business was suspended. This revolution came to an end about the 21st of May, 1871.

On the 21st of April, 1871, the National Assembly, the then sovereign power of France, made, and the president of the council promulgated, a law, of which the following is material: —

"No. 375. Loi relative aux prorogations des échéances des effets de commerce du 26 Avril 1871.

"Art. 1. Les effets de commerce, quelle que soit la date de leur souscription, payables dans le département de la Seine échus ou à échoir à partir du 18 Mars dernier jusqu'au dixième jour qui suivra le rétablissement du service de la poste entre Paris et les autres parties de la France ne seront exigibles qu'après ce terme.

"2. Une déclaration du Gouvernement contratera la reprise de ce service et le délai de dix jours courra de l'insertion de cette déclaration au journal officiel.

"3. Le délai facultatif de dix jours accordé au porteur par l'article 3 de la loi du 10 Mars pour les effets prorogés s'appliquera à tous les effets de commerce qui font l'objet de la présente loi."

On the 1st of July, 1871, postal service between Paris and other parts of France was re-established, and a declaration of the government of the resumption of that service was inserted in the official journal of that date.

On the 4th of July, 1871, a further law was made, and promulgated on the 7th, of which the following is material: —

[*529] * "Art. 1. Le délai de sept mois accordé par l'article 2 de la loi du 10 Mars 1871, pour protester les effets de commerce échus du 13 Août au 12 Novembre 1870, est prolongé de quatre mois. Les dits effets devenant ainsi exigibles date pour date du 13 Juillet au 12 Octobre 1871. . . . Les dispositions qui précèdent ne s'appliquent qu'aux effets payables dans le département de la Seine ou dans les communes de Sèvres, Meudon et Saint-Cloud (Seine et Oise), et créés antérieurement au 31 Mai dernier. . . .

"Art. 2. Dans les vingt jours qui suivront la promulgation de la présente loi les porteurs d'effets desquels l'échéance primitive serait antérieure à cette promulgation devront avertir leurs débiteurs des engagements qu'ils sont à remplir. . . . L'avertissement donné par le créancier et la réponse du débiteur seront constatés par le visa

du débiteur lors de la présentation, ou, en cas d'absence ou de refus, par huissier sans droit d'enregistrement aux frais du débiteur."

Within the twenty days following the promulgation of this law, viz. on the 19th of July, 1871, Pillet, Will, & Co., who were the then holders of the bill, and had been so since the 5th of July, 1870, gave notice to Magalhaes Frères, in Paris, of their obligations on the bill, and they then wrote on the bill which was then presented to them, —

"Vu pour prorogation. Paris, 19 Juillet 1871.

"Magalhaes Frères."

The bill was presented for payment at Paris by Pillet, Will, & Co. on the 5th of September, 1871, to the acceptors, who refused payment; and afterwards, on the same day, the holders presented it for payment to William Bechtel (to whom reference was by defendants on the second of exchange in case of need), who also refused payment; and also to W. Zellweger & Co., who likewise declined to take up the bill without special instructions from plaintiff.

The bill was duly protested for non-payment on the 6th of September, 1871, by the holders. Notice of dishonour and of the protest in manner required by the law of France was given by the holders to Krauetler & Mieville on the 8th of September, 1871, and was received by them on the 9th of September, and on the same day they gave the like notice to the plaintiff, and he on the
* same day gave the like notice to defendants, who refused [* 530] to pay the bill.

The plaintiff paid, before action, to Krauetler & Mieville £363 18*s.* 8*d.*, and this, together with £1 0*s.* 3*d.* for postages and for interest until the date of the suit, together with further interest at 5 per cent. on £345 12*s.* 2*d.*, from the 9th of September, 1871 (the date of the suit), until judgment, is the sum which the plaintiff is entitled to, if he can recover in the action.

Defendants had no notice that the bill had not been presented for payment prior to the 6th of September, 1871, nor of any of the laws or proclamations of the French Government.

The holders of the bill did not apply to Mr. W. Bechtel, who had an office in Paris, until the 5th of September, 1871.

Rue de Provence and Rue Richer are in Paris, and Paris is in the department of the Seine.

The Court was to have power to draw inferences of fact and to refer to the French Code de Commerce.

The question for the Court was whether the plaintiff is entitled, under the above circumstances, to recover against the defendants.

April 30, May 4. Benjamin, Q. C. (with him Trevelyan), for the plaintiff.

Herschell, Q. C. (with him Ravenhill), for the defendants.

The arguments are fully given in the judgment of the Court.

In addition to the authorities noticed in the judgment, the following were cited: For the plaintiff, — *Patience* v. *Townley*, 2 Smith, 223; 8 R. R. 711; 1 Chitty on Bills of Exchange, 714; *Rowe* v. *Young*, 2 Bli. at p. 467, *per* Bayley, J.; Code de Commerce, articles 161, 162; Codes Annotés, par Sirey, n. 30 and n. 31, to article 162 of the Code de Commerce; and n. 3 and n. 4 to the same article in the supplement of the same work; Story's Conflict of Laws, § 347; *Allatini* v. *Abbott*, 26 L. T. N. S. 746. For the defendants: Code de Commerce, art. 163; Nouguier, Lettres de Change, par. 999; *Gilbert* v. *Brett*, Le case de mixt moneys, Davys, 18; 2 Bli. at p. 98, n.; articles 85 and 86 of German Code, 2 Leoni Levi, Commercial Law, p. 73.

Cur. adv. vult.

[*531] *July 5. The judgment of the Court (Cockburn, C. J., and Lush and Quain, JJ.) was delivered by

Cockburn, C. J. This case was heard before my Brothers Lush and Quain, and myself. It was an action brought by the plaintiff, as indorsee and holder, against the defendants as drawers and indorsers, of a bill of exchange.

The defendants are merchants at Manchester. They had business transactions with the house of Magalhaes Frères, of Paris, and having shipped goods on account of the latter to Pernambuco, drew on them the bill of exchange in question, which was as follows:—

Manchester, 28th June, 1870. For £345 15*s.* 2*d.* sterling. On the 5th of October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves the sum of £345 15*s.* 2*d.* sterling, at the exchange as per indorsement, for value received, which place to account as advised.

Overmann & Schou.

To Messrs. Magalhaes Frères, 5, Rue Martel, Paris.

No. 13. — Rouquette v. Overmann, L. R., 10 Q. B. 531, 532.

The defendants were in the habit of sending bills so drawn on Paris to the plaintiff, who carried on business in London, for the purpose of his disposing of them, and remitting to them the proceeds; and there being no fixed rate of exchange between Manchester and Paris, the bills were drawn in English money, at an exchange of so many francs per pound, to be fixed by the plaintiff's indorsement on the bill.

The bill in question being, as we have seen, to the order of the drawers, was by them indorsed specially to the plaintiff, and transmitted to him for sale. The plaintiff having indorsed the bill, and by his indorsement on it fixed the rate of exchange at 25 francs $38\frac{3}{4}$ cents. for the pound sterling, sold the bill to Messrs. Krauetler & Mieville, of London, and duly remitted the proceeds to the defendants, minus the commission received by him on such transactions by agreement between him and them. Krauetler & Mieville indorsed the bill to Pillet, Will, & Co., of Paris, and transmitted it to them. The bill was duly accepted in Paris by Magalhaes Frères, the drawees.

The bill, according to its tenor, was payable on the 5th of *October, 1870. Pending its currency, the German [*532] army having invaded France, the Emperor Napoleon, on the 13th of August, by virtue of his legislative power, issued an edict in these terms: "The time within which protest and all other acts required to preserve the right of action on negotiable instruments signed before the promulgation of the present law must be effected, is prolonged for a month. Payment cannot be demanded of the indorsers or other persons bound thereby within that time."

The Emperor Napoleon having ceased to reign, on the 10th of September, the Government of the National Defence, the then sovereign power of France, passed and promulgated a law prolonging the delay thus afforded by the law of the 13th of August for the further period of a month from the ensuing 14th of September.

Similar enactments were passed from month to month by the legislative power, and duly promulgated by the head of the executive government, by which the operation of the law of the 13th of August was extended to the 13th of March, 1871. On the 19th of February the war between France and Germany came to an end. On the 10th of March the National Assembly passed, and the head of the executive government duly promulgated, a law, by

the 2nd article of which it was, among other things, enacted that bills, &c., which had become due between the 13th of August and the 12th of November, 1870, should be payable at the expiration of seven months from the time at which they respectively fell due according to their tenor. By the 3rd article, instead of the one day allowed by the 162nd article of the Code de Commerce for effecting protest on non-payment, ten days were to be allowed for that purpose. By the effect of this law the bill in question, having fallen due on the 5th of October, would have been payable on the 5th of May. But fresh occurrences took place which led to a still further postponement.

At the end of March a revolution broke out at Paris, which led to the suspension of commercial business. On the 26th of April, a law was passed by the National Assembly, the then sovereign power of France, and was duly promulgated by the president of the council, by which it was enacted that commercial bills, whatever might be the date of their signature, payable in the department of the Seine, which had already fallen due, or which [*533] would * fall due between the 18th of the previous month of March and a period of ten days after the re-establishment of the postal service between Paris and other parts of France, should not be liable to payment till after that term. The resumption of such service was to be notified by the government in the Journal Officiel, and the ten days were to run from the publication of such notice. The benefits of the delay in making the necessary protest in case of non-payment, granted by the 3rd article of the law of the 10th of March, was made applicable to all commercial bills falling within the law.

On the 1st of July the government declared the postal service between Paris and the rest of France re-established; and the present bill would consequently have been payable on the 11th; but on the 4th of July, a further law, promulgated on the 7th, was passed, whereby the delay granted by the law of the 10th of March for protesting bills of exchange which had fallen due between the 13th of August and the 12th of November was extended for another four months, making thus eleven months in the whole; and payment therefore could only be demanded, date for date, between the 13th of July and the 12th of October, ensuing. By a further article the holders of bills of exchange, &c., which, in the regular course, would have fallen due prior to the

passing of the law, were to notify within twenty days to the parties liable thereon the obligations they would have to fulfil in respect thereof. The debtor was to be entitled to avail himself of the delays in respect of protests granted by the present law. The notice to the party liable and the answer of the latter were to be noted on the bill.

On the 19th of July, Pillet, Will, & Co., the holders of the bill, gave the notice required by this law to Magalhaes Frères, the acceptors, who thereupon wrote on it, "Vu pour prorogation — Paris, 19 Juillet, 1871. Magalhaes Frères." On the 5th of September, the day on which the extended term of grace expired in respect of this bill, Pillet, Will, & Co. presented the bill for payment, which was refused. They then presented it on the same day to Mr. Wm. Bechtel, of Paris, to whom reference in case of need had been made by the drawers on the second of exchange, but he also refused payment. The bill was duly protested, according to *the French law, on the ensuing day, the [*534] 6th of September. Notice of dishonour and of the protest of the bill in manner required by the law of France was sent by Pillet, Will, & Co. to Krauetler & Mieville on the 8th of September, and was received by the latter on the 9th. The like notice was on the same day given by Krauetler & Mieville to the plaintiff, and by him to the defendants. The defendants refused payment of the bill.

Having paid to Krauetler & Mieville the sum of £368 18*s.* 8*d.*, the amount due on the bill for principal and interest, the plaintiff brings this action to recover that amount, together with a further sum for interest and postages.

The main ground of defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonour on its non-payment at that time; by reason of which the indorsers were discharged: whence, as was contended, it followed that the plaintiff had paid the bill in his own wrong, and therefore could not claim to be indemnified by the defendants; who, again, it was said, were entitled on their own account to notice of dishonour on non-payment at the regular time, — it being contended that whatever might be the effect of this special legislation of the French government, as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having

been drawn and indorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course, according to its tenor, and if it was not then paid, to give notice of its dishonour — the right to insist on due diligence in these particulars according to the law of England, as a condition precedent of liability, being one which it was not competent to a foreign legislature to affect. That, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law. The implied contract of indemnity, which attaches on non-payment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it; and that, in case of non-payment, notice of dishonour will thereupon be given. [*535] How then, it was asked, can the right to insist on * these as the conditions of liability on a bill drawn and indorsed in this country be modified or affected by the legislation of a foreign country?

The question is of considerable importance and interest in a juridical point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favour of the view presented to us on the part of the defendants. The High Court of Geneva and the Cour de Cassation of Turin have come to the opposite conclusion.[1] Our view coincides with theirs.

In considering the subject, two questions present themselves. The first, as to what was the effect of this special legislation on the obligations of the acceptors; the second, as to what, if any, was its effect on the rights and liabilities of the drawers and indorsees *inter se*. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second.

Now that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, cannot be doubted. If the

[1] Counsel on the argument read reports of these decisions from newspapers. See also a judgment of Sir P. Francis, Judge of the Consular Court at Constantinople, in accordance with the latter view, in *Allatini* v. *Abbott* (26 L. T. (N. S.) 746).

bill had been presented for payment on the 5th of October, and payment having been refused, an action had been brought in a French Court against the acceptors, whether by a French or foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English Court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance, — a rule which is strikingly illustrated by the familiar but pertinent example of the effect of days of grace being allowed by * the law of [* 536] the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or *vice versa*, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. And this arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is, indeed, true that, in the present instance, the period of grace has been accorded by *ex post facto* legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effect on the relative position of the drawer and the drawee or indorsee and holder. It is said that, although the obligations of the acceptor may be determined by the *lex loci* of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on non-payment notice of dishonour should thereupon have been given according to the requirements of English law. It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is

concerned; still less to a formality required on non-payment in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes [*537] due, be paid. In other words, * he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser before, according to the law applicable to the acceptor, the bill became due; or, the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorsees *inter se* shall be governed.

It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that

such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by *ex post facto* legislation in the foreign country. A strong argument *ab inconvenienti* may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by
* the bill at the precise moment it is to become due; he [*538]
may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The indorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment. That to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments it may be answered, that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an alteration of the local law pending the currency of the bill, the obligations of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill, falling due on a day appointed to be kept as a holiday, should be payable a day after, — as was done by the Act of 34 & 35 Vict. c. 17, — the period at which the liability of the indorser on non-payment by the acceptor would arise, would be *pro tanto* delayed.

To the second argument it may be answered, that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility.

If, then, the right of the holder, as against the acceptor and the antecedent parties, can be thus modified in respect of the time of

payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonour in order to preserve his right of recourse to them.

If the time of payment, which is of the essence of the [* 539] contract, * and the consequent necessity for presentment at the original time can thus be postponed, it would seem to follow that, *a fortiori*, a formality, the necessity for which arises only on the non-fulfilment of his obligation by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged. But, independently of this consideration, we are of opinion, on general principles, that notice of dishonour cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that if the bill had been presented for payment at the time mentioned in it, the acceptors might, possibly, have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might, possibly, the acceptor of a bill under ordinary circumstances, if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable, that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of non-payment to the indorser before the time when his right to demand payment of the acceptor has accrued, and the liability of the indorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill anew, when the period of grace expired, and the liability of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the indorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the indorser, it was only on such presentment and non-payment thereupon that the bill could be treated as dishonoured, or that notice of its dishonour could be effectually given so as to charge the indorser.

Another ground for holding that presentment and notice of dis-

honour at the earlier period were not necessary to preserve the right of recourse against the defendants, as drawers and indorsers, is to be found in the reasons assigned for requiring present-
ment at * the appointed time and notice of dishonour im- [*540]
mediately on payment being refused. The reason given is, that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his assets from the acceptor, or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability, or take steps against him for non-fulfilment of an obligation not as yet capable of being legally enforced.

It was contended on behalf of the defendants in the present case, that the question before us was concluded by the authority of the decisions of the Judicial Committee of the Privy Council in *Allen* v. *Kemble*, 6 Moo. P. C. 314, 321, 322, and of the Court of Exchequer in *Gibbs* v. *Fremont*, 9 Ex. 25; 22 L. J. Ex. 302. In delivering the judgment of the Committee of the Privy Council in the former case, Lord KINGSDOWN lays it down as law that, as between the holder and drawer, or indorser, of a bill of exchange, drawn in one country, but made payable in another, if the bill is not paid, the contract is to be governed in respect of damages and costs by the law of the country in which the bill is drawn and not by that of the country in which it is payable. "The drawer," says Lord KINGSDOWN, "by his contract undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place of domicile of the drawee if it be drawn and accepted generally, at the place appointed for payment if it be drawn and accepted payable at a different place from the place of the domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with interest, damages, and costs, as the law of the country where he contracted may allow." Whatever may be the respect to which an opinion of the Judicial Committee of the Privy Council may be entitled, the authority which would otherwise attach to the statement of the law contained in the foregoing judgment is materially diminished by the fact that it was unnecessary to the decision of

[*541] the case then before the Court. * When the case of *Allen* v. *Kemble* is more fully looked at, it will be seen that the question there turned, not on any disputed liability on a bill of exchange, but on a disputed right of set-off in a case of debtor and creditor. The facts were simply these: A., residing in Demerara, drew a bill on B., residing in Scotland, payable to C.'s order in London, and C. indorsed it to D., residing in Demerara, who indorsed it to E., resident in London. B. accepted the bill, making it payable at a banker's in London. When the bill arrived at maturity, B. was the holder of an overdue acceptance of E., the last indorsee and holder, who in the meantime had become bankrupt, and he claimed to set off the amount of this acceptance, as he was entitled to do, against his liability on his own acceptance. To avoid this right of set-off, the assignees of the bankrupt, instead of suing the acceptor, brought their action against the drawer and an indorser in Demerara. But they were foiled in an unexpected manner. By the Roman-Dutch law, the law of Demerara, a surety called upon to pay on default of his principal is entitled to the benefit of any cross claim which the principal may have against the creditor. Taking advantage of this, the defendants, not at all contesting, as indeed they could not for a moment contest, their liability on the bill, claimed, being sued in Demerara, the benefit of the local law, and insisted on their right to set off the amount of the bankrupt's unpaid acceptance in the hands of their principal, the acceptor of the bill on which they were sued, against their liability on the bill, a right which they would not have had by the law of England. The colonial Court disallowed the claim, but its decision was afterwards reversed by the Judicial Committee of the Privy Council, in our opinion most properly, so far as the result is concerned. But the decision had, obviously, nothing to do with the law relating to bills of exchange. It was simply, as we have said, a question as to the applicability of the law of Demerara, as to set-off, to a case of principal and surety on a debt of the principal arising in a country where a different law prevailed. Nothing turned on the law as to bills of exchange. The question would have been precisely the same if the action against the parties in Demerara had been

[*542] * brought on a guarantee given by them in respect of goods supplied to a party in this country.

The case of *Gibbs* v. *Fremont*, in which the Court of Exchequer adopted and acted upon the law laid down by Lord KINGSDOWN in

Allen v. *Kemble* is more to the present purpose, as the decision there turned on the law applicable to bills of exchange. A bill having been drawn in California on a party resident at Washington, without interest being reserved on the face of it, in an action against the drawer by a holder in this country, acceptance having been refused, it was held that the holder was entitled to interest according to the rate current at California.

Without expressing any opinion as to the soundness of this view, it is sufficient to observe that the question in the present case turns, not upon what may be the rights and liabilities of indorser and indorsee in regard to damages on non-payment of the bill, but on the time of presentment for payment and notice of dishonour. Now, as has already been observed, it is well settled that the time when a bill becomes due depends on the *lex loci solutionis*, and it is equally certain that presentment for payment before a bill is due in point of law is inoperative to affect an antecedent party. It was so ruled by Lord KENYON in *Wiffen* v. *Roberts*, 1 Esp. at p. 262; 5 R. R. 737, and the law has never been questioned. It is equally clear that until presentment for payment has been effectually made, notice of dishonour cannot be effectually given.

The case of *Rothschild* v. *Currie*, 1 Q. B. 43; 10 L. J. Q. B. 77, in this Court, establishes the position that where a bill, payable in a foreign country, is drawn and indorsed in this country, the sufficiency of the notice of dishonour must depend on the law of the place of payment; and consequently that notice of dishonour, good by the law of France, in which country the bill in that case was payable, though beyond the time within which such notice must have been given according to English law, was sufficient to fix the indorser. The same point arose in *Hirschfeld* v. *Smith*, L. R., 1 C. P. 340; 35 L. J. C. P. 177, and was decided by the Court of Common Pleas on the authority of *Rothschild* v. * *Currie*, though [*543] also on the further ground that, assuming that the contract between indorser and indorsee, on a bill indorsed in England, is to be governed by the law of England, and, therefore, notice of dishonour, as required by the law of England, is necessary, yet that reasonable notice is all that is required; and though, as regards inland bills, what is reasonable time has become fixed by practice and legal decision, as regards bills payable in a foreign country, what is a reasonable time must depend on circumstances, and that the law of the country where the bill is payable affords a safe criterion, and

notice given according to it may be taken to be reasonable notice. It cannot be disputed that notice of dishonour as given in this case, would have been good and sufficient according to the law of France. It follows, upon the authorities referred to, that it must be held to have been sufficient as between the holder and the antecedent parties to the bill in an action brought in this country.

Moreover, if it be once established that, on the dishonour of a bill of exchange payable in a foreign country, the notice to be given to the drawer or indorser should be, with reference to time and to the required formalities, in conformity with the law of the place of payment, a further ground presents itself for deciding against the defendants in the present case. By the law of France, before notice of dishonour can be given, a protest, accompanied by certain prescribed formalities, made through the intervention of a notary public, is indispensably necessary: see Art. 162 of the Code de Commerce. And by Article 165 of the same code, it is of this protest that the holder must give notice to the drawer or indorser whom he proposes to make liable. But, by the special law by which the bill now in question was affected, the protesting of all bills coming within its operation was expressly prohibited till the expiration of the additional time for payment allowed by way of indulgence to the acceptors. It is admitted that this bill was protested at the earliest time which the existing law admitted of, and that due diligence was used in giving notice to the defendants from the time of making the protest.

On these grounds we are of opinion that the presentment for payment was made, and the notice of dishonour given, at
[*544] the * right time, and that the foundation on which the defence rests consequently fails.

Our judgment, therefore, must be for the plaintiff.

Judgment for the plaintiff.

ENGLISH NOTES.

It will be observed that the discussion of *Allen* v. *Kemble* and *Gibbs* v. *Fremont* in the above judgment, suggests that there may still be room for argument upon the question — by what law is the measure of the liability of the drawer to be determined (*a*) in the case of non-acceptance or (*b*) in the case of non-payment by the drawee. The opinion of Lord Kingsdown given in *Allen* v. *Kemble* is fully cited in the principal case. That of Alderson, B., in *Gibbs* v. *Fremont*, was (so far as relates to the general question) as follows (22 L. J. Ex. 304): "The

general rule in all cases like the present is, that the *lex loci contractûs* is to govern in the construction of the instrument, but that applies only when the contract is not express; if it is special, it must be construed according to the express terms in which it is framed. Now, a bill drawn on a third person in discharge of a present debt is, in truth, an offer by the drawer that if the payee will give time for payment, he will give an order on his debtor to pay a given sum at a given time and place. The payee agrees to accept this order, and to give the time, with a proviso that if the acceptor does not pay, and he, the payee, or the holder of the bill gives notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, with lawful interest. This is, then, the contract between the parties. If the interest be expressly or by necessary implication specified on the face of the bill, then the interest is governed by the terms of the contract itself; but if not, it seems to follow the rate of interest of the place where the contract is made."

Notwithstanding the reserve expressed in the principal case as to the doctrine of the two cases above cited, they furnish high authority for the proposition that the liability of the drawer is to be measured by the *lex loci contractûs; i. e.*, the place where the bill is drawn. But the proposition may admit of criticism. In *Gibbs* v. *Fremont*, the bill had been refused acceptance; and it is possible that this may make a difference in regard to the measure of the drawer's liability. For, although it is clear that there is only one contract made by the drawer, namely, that the drawee shall accept the bill when duly presented for acceptance, and shall pay it when duly presented for payment, *Whitehead* v. *Walker* (1842), 9 M. & W. 506, 11 L. J. Ex. 168; yet, where the bill has been duly accepted, the liability of the drawer may have become modified by relation to that which has been undertaken by the acceptor. And in that case, the law of the place where the bill is drawn fails to supply the whole of the *data* for ascertaining the liability of the drawer. The contract of the acceptor — at all events so far as relates to the time of payment and presentment allowed by the law of the place of performance — becomes incorporated into the contract of all parties. This is the decision of the principal case. And the judgment further suggests the question whether the whole contract of the acceptor as interpreted by the law of the place of performance is not to form the measure of the liability of all parties whose liability is subsidiary to that of the acceptor.

As to the measure of damages incurred by dishonour, see No. 43 *infra* (*In re General South American Co.*), and notes there.

AMERICAN NOTES.

"A little confusion has crept into some of the books, because of a failure to note the distinction between the contract of the drawer of a bill or the indorser of a note, and that of the acceptor of a bill or the maker of a note. The contract of the acceptor of a bill binds him to pay at the place of acceptance or place named for payment; and his contract, like that of the maker of a promissory note, is governed by the law of the place of payment, that being the place where his contract is to be performed." *Hunt* v. *Standart*, 15 Indiana, 33; 77 Am. Dec. 79. Precisely to the same effect, *Everett* v. *Vendryes*, 19 New York, 436. "The general principle as to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance." Taney, C. J., in *Andrews* v. *Pond*, 13 Peters (United States Sup. Ct.), 65. See *Pierce* v. *Indseth*, 106 United States, 546; *Shoe & L. N. Bank* v. *Wood*, 112 Massachusetts, 567; *Hyde* v. *Goodnow*, 3 New York, 266; *Freese* v. *Brownell*, 35 New Jersey Law, 285; 10 Am. Rep. 239; *Freeman's Bank* v. *Ruckman*, 16 Grattan (Virginia), 126; *Thompson* v. *Ketcham*, 8 Johnson (New York), 190; 5 Am. Dec. 332; *Frazier* v. *Warfield*, 9 Smedes & Marshall (Mississippi), 220. So the question of negotiability is determined by the law of the place of payment. *Freeman's Bank* v. *Ruckman*, *supra*; *Shoe & L. N. Bank* v. *Wood*, *supra*; *Stix* v. *Mathews*, 63 Missouri, 371. In *Hibernia Nat. Bank* v. *Lacombe*, 84 New York, 367; 38 Am. Rep. 518, the rule is thus stated: "A bill of exchange is to be construed according to the laws of each place at which the contract contemplates that something is to be done by either of the parties." Citing and quoting from the principal case, and *Robinson* v. *Bland*, 1 Wm. Bl. 256; also *Dickinson* v. *Edwards*, 77 New York, 573; 33 Am. Rep. 671, holding that the law of the place of payment in respect to the rate of interest must prevail, as is the general rule here.

Mr. Daniel (1 Negotiable Instruments, § 896) states the rule to be that the acceptor's position is analogous to that of the maker of a note, and his liability is regulated by the law of the place of payment, and that is where by its terms the bill is made payable, or, if silent on that point, the place where it is accepted.

In *Tilden* v. *Blair*, 21 Wallace (United States Sup. Ct.), 241, a draft was dated and drawn in Illinois on a resident of New York, and accepted and payable in the latter State, for the accommodation of the drawer, and returned to him for negotiation in Illinois. This was held an Illinois contract because of "the controlling fact that before the acceptance had any operation — before the instrument became a bill — the defendants sent it to Illinois for the purpose of having it negotiated in that State, — negotiated, it must be presumed, at such a rate of discount as by the law of that State was allowable. What more cogent evidence could there be that it was intended to create an Illinois bill?" In *Dickinson* v. *Edwards*, 77 New York, 573, this case was distinguished from the general current of the decisions on the ground that "the naming of New York City as the place of payment was an incidental circumstance for the convenience of the acceptors, or to help the negotiation, and not as an essential part of the contract, or with the intent to affix a legal con-

sequence to the instrument." The principle of *Tilden* v. *Blair* was followed in *Wayne County Sav. Bank* v. *Low*, 81 New York, 566; 37 Am. Rep. 533, where it was held that "it cannot be contended that a party who goes into another State and there makes an agreement with a citizen of that State for the loan or forbearance of money, lawful by the law of that State, can render his obligation void by making it payable in another State according to whose laws the contract would be usurious."

"It is well settled that the time when a bill or note becomes due depends upon the *lex loci solutionis*." Citing the principal case. Bigelow on Bills & Notes, p. 343.

No. 14. — In re WHITAKER.

(C. A. 1889.)

RULE.

A PROMISSORY note given without consideration does not create any obligation at law or in equity in favour of the payee.

In re Whitaker.

42 Ch D. 119–128 (s. c. 58 L. J. Ch. 487; 61 L. T. 102; 37 W. R. 673).

This was a petition presented by Mr. Thomas Holden in the [119] matter of the above-mentioned lunatic, Mr. T. S. Whitaker, and asking for the payment, out of the fund in Court to the credit of the lunatic, of the sum of £35,000, the balance which the petitioner claimed to be due to him upon a promissory note for £50,000 given to him by Mr. T. S. Whitaker, before he was found to be of unsound mind. The circumstances under which the claim was made were as follows: Mr. Whitaker was a gentleman of considerable wealth, living near Brough in the East Riding of Yorkshire. He had a first cousin once removed, Mr. William Liddell by name, who was a barrister, though not in practice, and a very wealthy man, having large and valuable building estates at Hull, where he also carried on the business of * a shipowner in [* 120] offices belonging to Mr. Whitaker, and where one Mr. Fillingham was his agent. Mr. Liddell was a bachelor, and his only relatives besides Mr. Whitaker were the children of a deceased brother, with whom all intimacy had for some time ceased, and certain other first cousins once removed, with whom he was not

on friendly terms. Mr. Holden was a solicitor practising at Hull, who had been an old friend of Mr. Liddell and his family for more than forty years.

On the 23rd day of February, 1878, Mr. Liddell made his will, and thereby, after giving a legacy of £5000 to Mr. Fillingham, he gave and devised all his real and personal estate, which was nearly £400,000 in value to Mr. Whitaker absolutely, and appointed him and Fillingham his executors. Shortly after making this will, Mr. Liddell gave it to Fillingham for safe custody in his office at Hull, where it remained until August, 1885, when Mr. Liddell took it away, saying that he proposed altering it.

On the 10th of October, 1885, Mr. Liddell was seized at Dover, where he was residing, with an attack of *angina pectoris;* and he died on the morning of the 11th of October.

Fillingham arrived at Dover on the 12th of October, and took possession of the will and papers of the deceased. With the will was found a second will, entirely in the handwriting of Mr. Liddell, but unexecuted, and without any date except "1885," whereby, he had purported to give the whole of his real and personal estates (subject to a legacy of £5000 to Fillingham), to the petitioner Mr. Holden, and to appoint him and Fillingham his executors.

It appeared on the morning of his seizure, and after he had rallied slightly, Mr. Liddell had told his medical attendant, Dr. Parsons, that he had a little business which he should like to transact; but, having regard to his condition, the doctor advised him to wait till the morning, and, in the result, the business never was transacted. It was believed that the business which the testator desired to transact was the execution of the unsigned will.

Mr. Whitaker after the death of Mr. Liddell went to Hull, and saw the petitioner twice, viz., on the 15th and 16th of October.

On the first occasion, the petitioner told him of the exist-
[* 121] ence of * the unexecuted will, and on both occasions Mr.
Whitaker stated to the petitioner that he intended to give effect to what he believed had been the intentions of the testator, and substantially to benefit the petitioner. On the first occasion this was said by Whitaker, in the presence of his own solicitor, Mr. Henry Wilson.

On the 28th of November, 1885, the petitioner received from Mr. T. S. Whitaker a promissory note in his own handwriting, dated the 17th of November, 1885, and in the following terms: "On demand

No. 14. — In re Whitaker, 42 Ch. D. 121, 122.

I promise to pay to Mr. Thomas Holden, or order, Fifty thousand pounds, value received. — T. Stephen Whitaker."

This promissory note was inclosed in a letter to the following effect: "Inclosed you will find a promissory note for £50,000, that being the amount which, after due consideration, I wish you to consider as a legacy to you under the will of my cousin the late Mr. William Liddell. It will not be convenient for me to pay the amount down, but I will do so by instalments, for which you will be kind enough to send me receipts, at the same time indorsing each payment on account on the back of the note. You will perhaps also send me the informal document in the late Mr. William Liddell's handwriting."

The petitioner sent the unexecuted document to Mr. Whitaker, and he subsequently received from Mr. Whitaker, through Mr. Henry Wilson, three instalments of £5000 each on account of the promissory note. These instalments were respectively paid on the 2nd of March, the 27th of July, and the 9th of November, 1886, and on each of such occasions the petitioner signed a separate receipt on account, and an indorsement of the payment on account upon the promissory note.

In the month of December, 1886, Mr. Whitaker was taken seriously ill, his mind became affected, and before any further payment had been made on account of the promissory note he was found of unsound mind upon an inquisition of lunacy held in February, 1888.

A committee of his estate was appointed in July, 1888, and there were now funds in Court, part of his property, standing to the credit of the lunatic to the amount of upwards of £177,000.

The lunatic was married but never had any children. So long as he was of sound mind he recognised the petitioner's claim; * and his wife, who was his sole next of kin, con- [*122] sented to this application. The petition was presented in pursuance of liberty given by the Court of Appeal on the 26th of February, 1889.

From the evidence in support of the petition it appeared that although the lunatic was not capable of managing his affairs because of delusions with regard to his bodily state, and the hold which those delusions had upon him, he was capable of a clear understanding of all matters of business, and of expressing an intelligent wish concerning them; and that he had been told

No. 14. — In re Whitaker. 42 Ch. D. 122, 123.

of Mr. Holden's claim, and had said in writing, "I consider Holden's claim for the balance of the note for £50,000 to be a just one."

Romer, Q. C., and Macnaghten, in support of the petition: —

First, the Court will discharge out of a lunatic's estate a moral obligation incurred and partly discharged by the lunatic himself before he became of unsound mind. *In re Hewson*, 21 L. J. Ch. 825. And this principle is illustrated in numerous cases arising out of gifts to charities.

Although the sum asked for appears large, the great wealth of the lunatic must be taken into consideration, and there is also the circumstance that he is intelligent on matters of business, and himself desires that the moral obligation he has incurred should be discharged.

Secondly, the lunatic, while sane, gave to Mr. Holden a document which on the face of it conferred a legal right; and equity will give effect to a voluntary instrument creating a valid legal obligation, although it effects no transfer of property. *Ellison* v. *Ellison*, 1 W. & T. 6th ed. p. 333. *Primâ facie* a promissory note imports valid consideration, so that the *onus* is not on a person who sues on a promissory note in the first instance to prove consideration; it lies on the defendants to plead and to prove want of consideration. In administering the estate of a testator the Courts will regard a promissory note, although given without consideration, as giving a claim in the nature of a debt, which is payable out of the estate of the deceased in priority to legatees though not to the prejudice of creditors. *Dawson* v. *Kearton*, 3 Sm. & Giff. 186; 25 L. J. Ch. 166. In that case the Vice Chancellor says, [*123] 3 Sm. & Giff. 191: * "If a voluntary obligation, in the nature of a debt, is treated as payable in preference to legatees, who are also mere volunteers without anything of the nature of an obligation or debt binding the testator himself, the principle would seem to apply as much to a promissory note by which the testator voluntarily bound himself, as to the voluntary obligation by bond."

[Cotton, L. J.: A bond could be sued upon at law, a promissory note could not. Equity would cut down what a man could get at law. But I do not see how on that reasoning it would give a claim to a holder of a voluntary promissory note, which could not be sued upon at law. It was a merciful judgment in favour of the supposed legatee.]

No. 14. — In re Whitaker, 42 Ch. D. 123, 124.

Other cases to the same effect are *Arthur* v. *Clarkson*, 35 Beav. 458; *Lloyd* v. *Chune*, 2 Giff. 441; and *In re Richards; Shenstone* v. *Brock*, 36 Ch. D. 541; 56 L. J. Ch. 923.

Perhaps the expression "debt" is not a correct one; but there is no real distinction in equity in this respect between a voluntary promissory note and a voluntary bond; the same principles are applicable to both, and as to voluntary bonds have been recognised since the days of Lord HARDWICKE. *Ramsden* v. *Jackson*, 1 Atk. 292, 294.

Tweedy, for the committee, submitted to the judgment of the Court.

1889. April 16. COTTON, L. J.: —

This is an application made by Mr. Holden for the payment to him of a sum of £35,000 as the balance of a promissory note given to him by Mr. Whitaker before he became of unsound mind. The petition was framed on the footing that Mr. Holden claimed payment as a debt, and in my opinion that view was wrong. This promissory note was entirely without any consideration; it was simply a bounty by Mr. Whitaker in consequence of the circumstances to which I have adverted; and in my opinion it can in no way be considered as putting Mr. Holden in the position of a creditor of the estate of the lunatic. It was indeed contended that there were several cases which would support the view that *in administering the estate of a testator the [*124] Courts would regard a promissory note without consideration as giving a claim in the nature of a debt; and in support of those cases, to which I will very shortly refer, Mr. Romer called attention to the fact that a voluntary bond is treated as constituting a debt, but to be paid after all the debts for valuable consideration. That did not increase the rights of the holder of a voluntary bond from what they were at law, but diminished them, inasmuch as he would have been able to sue at law as the holder of a voluntary bond, and there would have been nothing at law to postpone his claim to other debts. But at law there cannot possibly be any claim by way of action on a promissory note by the original person to whom the promissory note was given if he never gave any consideration for it. Neither in law nor in equity can the payee under a promissory note, which appears on the facts before the Court to be voluntary, have any claim as a creditor.

Several cases were referred to, but one has not really to consider any case like this. I will not go through them very carefully, but

No. 14. — In re Whitaker, 42 Ch. D. 124, 125.

it will be right to refer to them shortly, for the purpose of examining whether they do lay down the proposition that the holder of a promissory note without any consideration can be treated in equity as having a claim by way of debt; and of saying that if they do, then I dissent from that proposition, and that in my opinion those cases, if they turned upon that proposition and so decided it, are not to be considered as laying down the law as it exists. Two of the cases were before Vice Chancellor STUART. *Dawson* v. *Kearton* was one; and there, without saying whether the VICE CHANCELLOR was justified in doing what he did, it appears to me that he based his judgment to a great extent upon this, that there was a compromise, there having been a previous promissory note which was itself voluntary, but on which some question had been raised by the holder of the promissory note, and the maker of it had given a new note in exchange for the original note. That he referred to in his judgment and in the argument as one of the grounds of his decision. I do not say that I should agree with that, but still that may have been the ground of decision in that case, and it [* 125] is *possible that the VICE CHANCELLOR did not mean to lay down any such proposition as was relied upon by Mr. Romer.

The other case was *Lloyd* v. *Chune*, and there it is very doubtful to my mind — for there is not a judgment at any length upon it — whether the VICE CHANCELLOR did not rely upon this, that the defendant who was an executor, and who held a promissory note for the benefit of the plaintiff, Miss Lloyd, had, during the lifetime of the testator, so acted in respect of the promissory note, by payment of interest on the amount, as to prevent the testator making any provision by way of legacy for this lady, and had thus by his conduct admitted himself to be indebted to her as executor in respect of the testator's estate. But I refer to that for the purpose of showing that there may have been other circumstances in the case. So again in the case referred to of *Arthur* v. *Clarkson*, there was a trust declared of real estate as well as a voluntary promissory note, and the deeds relating to the real estate were deposited to secure the promissory note. Now, if the Judge relied on that I think that it was a questionable decision. But if he decided that the plaintiff could have a good claim as a creditor in respect of a voluntary promissory note, I think it right that I should express my dissent from the authority of such a case. Then there was a case

of *In re Richards; Shenstone* v. *Brock*. I do not think that Mr. Justice NORTH there intended to lay down any such doctrine, but it is in my judgment unnecessary carefully to consider the case, because if he did lay down any such doctrine I must express my dissent from the view of the Judge on that question.

Then we come to this. This was, in my opinion, a mere voluntary gift on the part of Mr. Whitaker, and the question is what ought to be done now that he has been found of unsound mind.

We have full evidence of the circumstances under which he gave this promissory note; and the only thing that struck me was that there was no explanation by his solicitor as to what took place between himself and Mr. Whitaker as to his reason for giving the note. But I think, on the whole, looking to the fact
*that at that time there was no suggestion that the lunacy [*126]
had commenced, and that Mr. Whitaker did subsequently
recognise this as a thing he wished to have done, that we ought to consider that this was his voluntary and free act. There can be no question that his real intention was to make a voluntary gift to Mr. Holden, not in any way as performing any obligation by way of debt or claim against the giver, but simply as a matter of bounty which he felt it right to show towards Mr. Holden in consequence of the circumstances connected with his becoming residuary legatee instead of Mr. Holden. Therefore, although at one time I thought it might be right to have some further affidavit by the solicitor of Mr. Whitaker, I do not think we ought to require that.

Then ought the Court to perform this intended bounty, or to enable the estate of the lunatic to perform what he intended to do for Mr. Holden? Undoubtedly the Court has jurisdiction to do that, because we often (although not to so large an amount as this) give, out of the personal estate of a lunatic that which is mere bounty on his part when we see that it is in accordance with his views and his declarations before he became lunatic. That generally occurs in the case of charities where the lunatic has himself, while he was of sound mind, supported institutions of a charitable nature, and we continue that support, and perform for him when he becomes a lunatic that which we can see was his own intention while of sound mind. Here the amount which is asked for is very large, and at first sight looks somewhat startling; but then we must recollect that the lunatic, who was already a rich man, had, in consequence of the accident which had occurred, got

No. 14. — In re Whitaker, 42 Ch. D. 126, 127.

a very large personal property, stated to be something like £400,000. In my opinion we should be perfectly justified in simply performing, or enabling the committee of the lunatic to perform, for the lunatic that which, when he was of sound mind, he intended to do.

Then there comes a question as to the form of this petition. I understand that the wife of the lunatic is the only person who represents the next of kin, and that she consents to this application. The committee of the estate also appears and consents; but the wife has not been served with the petition, and does [* 127] not * appear at present; and, in my opinion, the form of the petition is one which ought to be corrected. Because it ought to be the petition of the committee asking the Court to authorize him to make this payment on behalf of the lunatic, that is to say, out of the lunatic's estate. As I said, the petition was framed on the footing of Mr. Holden being a creditor; that I think was wrong. Even if he were a creditor, we always object to creditors, or others than the next of kin, or those who are entitled to represent the next of kin, appearing before the Master in Lunacy. What I think ought to be done in order to show that we do not recognise this as any claim by way of debt, is that the committee of the estate ought to be joined as co-petitioner; and then that a consent brief ought to be delivered on behalf of the wife, and shown to the registrar before the order is drawn up. Subject to that we will make the order that the £35,000 be raised and paid by the committee to Mr. Holden.

LINDLEY, L. J.: —

In my opinion that order is right.

By an accident, and a mere accident, Mr. Liddell died under such circumstances that a very large fortune came to Mr. Whitaker, which apparently was intended to go to Mr. Holden. Mr. Whitaker was then of sound mind, and he had the feelings of a gentleman. He said to Mr. Holden, "I won't benefit by this accident to the full extent. I cannot afford not to benefit by it at all, but I will make you a present of £50,000:" and Mr. Whitaker gave him a promissory note for that amount, and afterwards paid three instalments of £5,000 each as they became due. Mr. Holden now asks for the balance.

Now I take it to be quite plain in point of law that the payee of a promissory note for which there was no consideration is not in the same position as the payee of a voluntary bond, even in the

administration of a solvent estate. The payee of a voluntary bond can bring an action on the bond at law; the payee of a promissory note for which there is no consideration cannot maintain an action at all. When Mr. Holden puts this claim forward as the claim of a creditor he makes a mistake; he is not a creditor. But it does not follow because he is not a creditor that *therefore [*128] he ought not to be paid; and in exercising the jurisdiction which the Court has over the property of the lunatic, the Court will see that the honour of the lunatic is upheld. Mr. Whitaker, a right-minded, liberal, honourable man, wished to present Mr. Holden with £50,000, and he gave him £15,000 on account. The unpaid balance is a debt of honour, not in the sense of a gambling debt, which I consider a debt of dishonour, but a debt of honour which this Court ought to recognise, if it can with justice do so. There is no conflict here between creditors — nothing of that kind. There is a very large fortune, and it appears to me right in the exercise of our discretion that we should order this sum of money to be paid.

ENGLISH NOTES.

As an older authority for the rule at law may be cited *Holliday* v. *Atkinson* (1826), 5 B. & C. 501, 8 Dow. & Ry. 163. "Where," says ABBOTT, C. J. (5 B. & C. 503), "a note is expressed to be for value received, that raises a presumption of legal consideration sufficient to sustain the promise; but that is a presumption only, and may be rebutted. This note was given to a boy only nine years old, whose father was living, and the donor was in a state of imbecility, and not far from his death. It then became a question for the jury, whether the note was given upon any legal consideration, and I think that the direction given to them as to the sufficiency of gratitude to the father or affection to the son was improper."

To raise the *primâ facie* presumption of consideration it is not indeed necessary that the note (or bill) should be expressed to be for value received, the law implying this from the nature of the instrument and the relation of the parties apparent upon it. *Hotch* v. *Treyes* (1840), 11 Ad. & El. 702. But in regard to the binding nature of the instrument, as between the immediate parties to it, it is unnecessary to cite further authority for the proposition that a bill of exchange or promissory note is of no higher or different effect, than any other record of a contract in writing.

That a bare promise — *i. e.*, a promise without consideration or the binding solemnity of a deed — could not form a legal ground of action,

is a fundamental rule of English law, as old as the conflict between the lawyers of the King's Courts and the Canonists; and was formulated by the practice of citing the authority of the *Corpus Juris* of the civil law against the pernicious doctrines of the churchmen.

But in Scotch law, and probably in other systems where the canon law was admitted as a source of authority by the Courts of Law, a promise even without consideration is binding; and the only limit upon the effectual operation of the rule is that such a promise cannot be proved by parol evidence; but only by the writ, or oath *in litem* of the promisor. It is curious that there is nothing in the Bills of Exchange Act 1882 (which applies to both countries), to show this fundamental difference; although it is adverted to by His Honour Judge Chalmers, 4th ed., p. 81.

AMERICAN NOTES.

The principle stated in this rule is elementary and universal. 1 Daniel on Negotiable Instruments, §§ 160, 162; *Peasley* v. *Boatwright*, 2 Leigh (Virginia), 198; *Bourne* v. *Ward*, 51 Maine, 191; *Bristol* v. *Warner*, 19 Connecticut, 7; *Bircleback* v. *Wilkins*, 22 Pennsylvania State, 26; *Courtney* v. *Doyle*, 10 Allen (Massachusetts), 123. And so as between the immediate parties, or as to subsequent parties with previous notice, want or failure of consideration, in whole or in part, may be shown by parol. Browne on Parol Evidence, § 70; *Stackpole* v. *Arnold*, 11 Massachusetts, 27: 6 Am. Dec. 150; *Folsom* v. *Mussey*, 8 Greenleaf (Maine), 400; 23 Am. Dec. 522; *West* v. *Kelly*, 19 Alabama, 353; 54 Am. Dec. 192; *Scott* v. *Sweet*, 2 G. Greene (Iowa), 224. So accommodation paper has no validity as between the maker and payee. *Second Nat. Bank* v. *Howe*, 40 Minnesota, 390; 12 Am. St. Rep. 744.

Section II. — *Negotiation.*

No. 15. — CURRIE *v.* MISA.

(EX. CH. 1875.)

RULE.

WHERE a negotiable security (whether a bill of exchange or note payable at a future day, or a cheque or note payable on demand) is given on account of a pre-existing debt, the creditor taking it *bonâ fide* becomes a *bonâ fide* holder for value, to the effect of having a title not defeasible by any infirmity of title in the debtor or any previous holder.

No. 15. — Currie v. Misa, L. R., 10 Ex. 153–160.

Currie v. Misa.

L. R., 10 Ex. 153–171 (s. c. 44 L. J. Ex. 94; 23 W. R. 450), affirmed in House of Lords, but on another ground, *s. n. Misa* v. *Currie* (1876), 1 App. Cas. 554 (s. c. 45 L. J. Q. B. 852; 35 L. T. 414; 24 W. R. 1049).

Appeal by the defendant against the decision of the [153] Court of Exchequer, refusing to grant a rule *nisi* to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, or a nonsuit.

The action was brought to recover £1999 3*s.* upon a cheque of the defendant and interest thereon.

The declaration stated that the defendant, on the 14th of February, 1873, by his cheque or order for the payment of money directed to Messrs. Barnetts, Hoares, Hanburys, & Lloyd, bankers, required them to pay F. de Lizardi & Co., or bearer, £1999 3*s.*, and that the plaintiffs became the bearers of the said cheque, and the same was duly presented for payment and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Pleas: *Inter alia*, and 5thly —

That there never was any consideration for the defend- [154] ant's making or paying the cheque, and that the plaintiffs became and are the bearers of the cheque, and have always held the same without having given any consideration for the same.

The facts proved at the trial, so far as material to the judgment of the Court in the Exchequer Chamber, sufficiently appear from the judgment which was delivered after the case had been fully argued and time taken for consideration.

Feb. 11, 1875. The judgment of the Court (Keating, [160] Lush, Quain, and Archibald, JJ., Lord Coleridge, C. J., dissenting) was delivered by

Lush, J. This is an action on a cheque, dated the 14th of February, 1873, drawn by the defendant on Messrs. Barnett, Hoare, & Co., for payment of £1999 3*s.* to Lizardi & Co. or bearer. The material plea is the 5th, which alleges that there never was any consideration for the defendant's making or paying the cheque, and that the plaintiffs have always held the same without having given any consideration.

We think it must be assumed on the facts stated in the case that if the action had been brought by Lizardi, the defendant would have had a good answer to it, on the ground either of fraud

or failure of consideration, it matters not which. The only question therefore is whether, under the circumstances stated, the plaintiffs are to be considered the holders of the cheque for value.

The material facts bearing on this question may be briefly stated. The defendant had purchased of Lizardi & Co. bills on Cadiz, which were delivered to him on the 11th of February, and which, according to the usual course of business, were to be paid for on the next post day, the 14th. Lizardi was at this time largely indebted to the plaintiffs, who were his bankers, on both his drawing account and a loan account, and he had for several days previously to and again on the 12th of February been pressed for payment or [*161] further security. On the 13th he paid in various * cheques on account of the balance, and at the same time handed to the plaintiffs the document set out in paragraph 13 of the case, which is designated a "bill."

On the morning of the 14th notice of this "bill," described as lying due at the plaintiffs', was left at the defendant's office, and shortly afterwards the cheque in question was paid in by the defendant to the plaintiffs' bank, and the "bill" given up to him in exchange for it. The amount of the cheque was, together with the other cheques paid in by Lizardi, entered to the credit of Lizardi's account, and a large balance still remained owing to the plaintiffs. Soon after paying in the cheque the defendant heard that Lizardi had stopped payment, and he at once instructed his bankers not to honour the cheque. In consequence of this the cheque was returned from the clearing-house in the after-part of the day, and on the following morning (the 15th) it was entered in the plaintiffs' books to the debit of Lizardi's account.

The Court below, in giving judgment for the plaintiffs, proceeded, partly at least, upon the special circumstance that the cheque was given to take up the so-called "bill," and considered that this of itself formed a sufficient consideration to entitle the plaintiffs to recover. The argument before us, however, was addressed almost entirely to the broader question, namely, whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value. As this is a question of great and general importance, and as our opinion upon it is in favour of the plaintiffs, we do not think it necessary to say more with reference to the special circumstance adverted to, than

that we are not prepared to dissent from the view taken upon this question by the Court below.

It will, of course, be understood that our judgment is based upon what was admitted in the argument, namely, that the cheque was received by the plaintiffs *bonâ fide*, and without notice of any infirmity of title on the part of Lizardi. We, therefore, for the purpose of the argument, regard the so-called "bill" as merely an authority to the defendant to pay the amount to Lizardi's bankers, instead of paying it to him, and treat the transaction as if the cheque had been paid to Lizardi, and he had paid it to
* the plaintiffs, not in order that he might draw upon it, [* 162]
but that it should be applied *pro tanto* in discharge of his overdrawn account.

It was not disputed on the argument, nor could it be, that if instead of a cheque the security had been a bill or note payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable. This has been established by many authorities, both in this country and in the American Courts. It has been supposed to rest on the ground that the taking of a negotiable security payable at a future day implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security. The counsel for the defendant accordingly contended that where the security is a cheque payable on demand, inasmuch as this consideration is wanting, the holder gains no independent title of his own, and has no better right to the security than the debtor himself had.

We should be sorry if we were obliged to uphold a distinction so refined and technical, and one which we believe to be utterly at variance with the general understanding of mercantile men. And upon consideration, we are of opinion that it has no foundation either in principle or upon authority.

Passing by for the present the consideration of what is the true ground on which the delivery or indorsement of a bill or note payable at a future date is held to give a valid title to a creditor in respect of a pre-existing debt, and assuming that it is the implied agreement to suspend, it does not follow that the legal element of consideration is entirely absent where the security is payable immediately. The giving time is only one of many kinds of what

the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Com. Dig. Action on the Case, Assumpsit, B. 1–15.

The holder of a cheque may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately he is safe. The maker of the cheque cannot afterwards * repudiate, and claim back the proceeds any more than he could claim back gold or bank notes if the payment had been made in that way instead of by cheque. This was decided in *Watson* v. *Russell*, 3 B. & S. 34; 31 L. J. Q. B. 304, (affirmed in Ex. Ch. 34. L. J. Q. B. 93), with which we entirely agree. In very many — perhaps in the great majority of cases — cheques are not presented till the following day, especially where they are crossed, and this usage is so far recognised by law that the drawer cannot complain of its not having been presented before, even though the banker stop payment in the interval. The loss in such a case falls on the drawer of the cheque, and not on the holder.

[*163]

It cannot, we think, be said that a creditor who takes a cheque on account of a debt due to him, and pays it into his banker that it might be presented in the usual course instead of getting it cashed immediately, does not alter his position, and may not be greatly prejudiced if his title could then be questioned, or that the debtor does not, or may not, gain a benefit by the holding over. If this subject were worth pursuing it would not, we think, be difficult to show that there is no sound distinction between the two kinds of securities of which we have been treating. In the course of the argument it was put to the learned counsel for the defendant whether a debtor who gave his own cheque in payment of a pre-existing debt could defend an action upon it on the ground that the creditor was not a holder for value, and Mr. Watkin Williams admitted that his argument must go to that extent, and yet it has always been the practice to sue in such a case on the cheque as well as on the original debt, and no such defence has, as far as we are aware, ever been attempted to be set up, certainly not successfully.

But it is useless to dilate on this point, for, in truth, the title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement

to suspend his remedies. The true reason is that given by the Court of Common Pleas in *Belshaw* v. *Bush*, 11 C. B. 191; 22 L. J. C. P. 24, as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realised. * This is precisely [* 164] the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had given no security. The books are not without authorities in favour of this view, although the point has not, as far as we are aware, been directly decided. Story lays it down in his work on Promissory Notes, sec. 186, that a pre-existing debt is equally available as a consideration as is a present advance or value given for the note, without suggesting any distinction between a note payable after date and one payable on demand; and the cases of *Poirier* v. *Morris*, 2 E. & B. 89; 22 L. J. Q. B. 313, *Watson* v. *Russell*, before cited, *Whistler* v. *Forster*, No. 16, p. 330, *post*, 14 C. B. (N. S.) 248; 32 L. J. C. P. 161 and others, contain clear expressions of opinion the same way.

On the part of the defendant the case of *Crofts* v. *Beal*, 11 C. B. 172; 20 L. J. C. P. 186, was strongly relied on, where it was held that a promissory note given by a surety for payment on demand without any new consideration was *nudum pactum*. It is sufficient to say of that case that the note was payable to the plaintiff, and not to order or bearer, and was not therefore a negotiable security. *De la Chaumette* v. *Bank of England*, 9 B. & C. 208, appears at first sight to be more in point, but there, although it appeared as between the plaintiff and O., by whom the bank note in question was remitted, that the state of account was in favour of the plaintiff, it is not really so, for the note had not been

[* 165] remitted in payment, but merely for collection * as agent, and the Court held that under these circumstances the plaintiff had no better title than O. For these reasons we are of opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand, and that, therefore, the judgment of the Court below ought to be affirmed.

My Brother QUAIN, who concurs in the judgment, desires to add that he does not adopt all the reasoning as to consideration.

Lord COLERIDGE, C. J. In this case I am unable to assent to the conclusion at which the other members of the Court have arrived. I am painfully conscious of the great weight of authority against me, but as at last I remain unconvinced, it is my duty to say so, and also shortly to say why.

I need not repeat, because I entirely assent, and cannot add to the statement of the facts of the case, with which the judgment prepared by my Brother LUSH sets out.

I proceed to consider the law, assuming the perfect correctness of the facts as stated by him, and being of opinion that on those facts the fifth plea is made out, and that the defendant is entitled to our judgment.

It is important to state what I understand to be the exact proposition contended for by the defendant, and, as I think, contended for rightly. It is this: If the drawer of a cheque pay it into a banker to the account of a third person, and the consideration as between the person to the credit of whose account the cheque has been paid and the drawer of the cheque wholly fails, so that as between those two parties the drawer would have a perfect answer to any action on the cheque, then the drawer may stop payment of, and has an answer to any action on, the cheque, as against the bankers who have received it, unless in the mean time they have in some way given some value for it; as by paying money, or giving credit or some other advantage, to the customer to whose account it has been paid in, or by altering their own position in some way in consequence of having received the cheque and on the faith of its being paid.

Now, it is too late to dispute that a pre-existing debt [* 166] due to the * transferee of a bill entitles him to all the rights of a holder for value. But it seems equally clear that this is an exception to general rules, an extraordinary protec-

tion given to such a holder on grounds of commercial policy only, and in order to favour the unrestricted use as currency of negotiable instruments. "It is," says Chancellor KENT, in the well-known case of *Bay* v. *Coddington*, 5 Joh. Ch. Ca. 54, "the credit given to the paper, and the consideration *bonâ fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." Mr. Justice WILLES uses language very much the same in *Whistler* v. *Forster*. "The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the law merchant as to negotiable instruments. These being part of the currency are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud, which would have rendered it unavailable in the hands of a previous holder." It would be wasting time to quote other authorities to the same effect: these are sufficient to show the grounds of sense and substance on which the law as to bills is supported. Nor, if it be necessary to have recourse to it, is the technical element of consideration wanting between the transferor and the transferee of such an instrument. Whether the true view be that adopted by Sir John Byles (Byles on Bills, 10th ed., p. 39), that a bill or note payable at a future day suspends until its maturity the remedy for the antecedent debt; or that adopted by my Brother LUSH, from the judgment of the Court of Common Pleas in *Belshaw* v. *Bush*, 11 C. B. 191; 22 L. J. C. P. 24, that it is a conditional payment of the debt, the debt reviving if the security is not realised; in either view there is consideration which may enter into but is not the whole reason for the protection given to the *bonâ fide* holder of such an instrument.

The whole * reason certainly does not apply to the case of [* 167]
a cheque, and the true question, with deference, appears to me to be whether, apart from the reasons which protect the *bonâ fide* holder of bills payable at a future day, which do not apply, there are any reasons or authorities which do apply to protect the *bonâ fide* holders of cheques given under such circumstances as the cheque was given in this case.

No. 15. — Currie v. Misa, L. R., 10 Ex. 167, 168.

As to authority, no case has been cited in which this point has been decided, yet it is certain that a case would have been cited if it could be found. There is, indeed, a *dictum* of the LORD CHIEF JUSTICE of the Queen's Bench, in *Watson* v. *Russell*, 3 B. & S. 34; 31 L. J. Q. B. 304, to the effect that there is no difference between a bill and a cheque in the hands of a holder for value. But that *dictum* must be taken with the facts of that case, in which neither was the plaintiff a banker, nor was the consideration for the cheque an antecedent debt. No authority, as I have said, has been cited on which the point has been decided. Yet it surely needs one. The doctrine as to bills of exchange has been established after many disputes and much resistance; is it likely that in the case of cheques no one who has been defrauded has ever resisted payment until now, but that every one has so felt the sense and reason of the rule contended for, that it has been acquiesced in without a struggle? I think not, and I cannot find, on the best information I have been able to get, that the general understanding is what my Brother LUSH believes it to be. On the contrary, my impression is that the opinions of men of business are much divided on this subject, and that if the Court were to decide, as I think it ought, in favour of the defendant, the consequences to mercantile transactions would be by no means so serious as it has been too much taken for granted they would be. And even if the matter of fact were clearer than it is, the understanding of mercantile men, though on such a subject entitled to deference, cannot and ought not to determine the question. Apart, then, from authority, which is wanting, how stands the thing in sense? I take a case of gross and direct fraud, for to such a case the argument, if it is good for anything, [*168] must extend. A man is cheated * out of a cheque for a large sum in favour of A.; A., who has cheated him, pays the cheque into his bankers, between whom and himself there have been large dealings greatly to the bankers' advantage. At the moment when the cheque is paid in, A. is overdrawn, and thereupon, nothing more happening, the banker claims the value of the cheque against the cheated drawer, and denies the drawer's right to protect himself against the fraud of A. by stopping his cheque, simply and solely on the ground that the fraudulent man has been allowed by the banker to overdraw his account. I can see no reason or justice in this. If either the drawer or the

banker must suffer to the extent of the value of the cheque, it seems to me much more reasonable and just that he should suffer who, with his eyes open, and to a person he knows, has gone on making advances, than he who has been directly defrauded often in a first and single transaction, and also has often no means whatever of protecting himself against fraud. To me the rule seems hard in the case of money, but it is well settled. It seems hard in the case of bills due at a future date, which are said to be like money, and to stand upon the same foot; but that is also well settled. But cheques are not money; no rule, as far as I can find, either of practice or of law, is settled with regard to them, and I am not willing to make a rule as to cheques in favour of bankers which is not just in itself, and which is not defensible, at least upon the grounds on which the rules as to money and as to bills are defended.

It is said that the distinction between a bill and a cheque is a refined one, but it is to be observed, first, that where a line is drawn, cases close to this line, but on different sides of it, must needs be separated by a distinction which is refined; and next, that we are here dealing with an exception to a general rule, and the burden of proof and stress of argument seem to me to lie rather on those who say, than on those who deny, that it is within the exception. It is for those who assert it to make it out, and the absence of direct affirmative authority in such a case is, to my mind, strong authority in the negative.

It has, however, been argued that the legal element of consideration is not entirely absent where a cheque is given, because *it is payable immediately; and my Brother Lush has [*169] put together, from Comyns's Digest, Action on the Case, Assumpsit, B. 1–15, a definition or description of consideration, to the accuracy of which I entirely assent. It is sought to draw from this definition the conclusion that the practice, by no means uniform or binding, of allowing twenty-four hours to elapse between the drawing or receipt and presentment of a cheque constitutes a new consideration as between the drawer and the payee. I cannot assent to this view. It assumes the substantial identity of a cheque with other instruments from which it differs. "A cheque," says Mr. Justice Story, Promissory Notes, 6th ed. p. 674, "is an absolute appropriation of so much money in the hands of a banker to the holder of the cheque, and there it ought to remain

until called for. In truth," he goes on, "a cheque is an instrument *sui generis*, and is construed exactly as the parties intend it. It is supposed to be drawn upon funds in the hands of the banker as banker, and it appropriates the amount to the holder of the cheque." To the same effect is the judgment of Sir JOHN BYLES in *Keene* v. *Beard*, 8 C. B. (N. S.) at p. 381; 29 L. J. C. P. 287: "A cheque is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person;" and in commenting on *De la Chaumette* v. *Bank of England*, the same learned person draws the very distinction which is insisted upon here in the defendant's favour. "It would seem to follow," says he (Byles on Bills, 10th ed., p. 39), "as a general rule, that whenever a bill or note payable on demand is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it: a doctrine which, while it cannot injure the creditor (for if he cannot recover, still he is but where he was before he received the remittance), would no doubt tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors; but it is conceived that in general a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for [* 170] value." And in a note to this passage he * observes: "It is to be recollected that a bill or note payable at a future day suspends till its maturity the remedy for the antecedent debt. There may, therefore, in this respect be a difference between an instrument payable on demand and one payable at a future day."

There is, therefore, nothing to bind a banker not to present a cheque paid in till the next day. In practice, I believe it happens constantly that they are presented at once. Although, therefore, there may be an expectation of forbearance for twenty-four hours upon the giving of the cheque, the giving of it is no consideration to forbear, and it is fallacious to confuse things in their nature different.

There are not, as we have seen, any cases directly upon cheques, but there are some upon the subject of bank notes, to which it may be proper to advert. In *Solomons* v. *Bank of England*, R. C. Vol. 3, p. 634, and which is also reported in a note to *Lowndes* v. *An-*

derson (13 East, 135, n.; 12 R. R. 341), the plaintiffs were London merchants in advance to foreign correspondents. A note had been fraudulently obtained, and had been stopped at the bank by the person defrauded. The plaintiffs were innocent of the fraud, and had received the note to be applied in diminution of an existing debt. There was evidence to connect the foreign correspondents with the fraud; and Lord KENYON held, at *nisi prius*, and the King's Bench afterwards supported the ruling, that the London merchants had given no consideration; that they were, therefore, mere agents to receive the amount of the note from the bank; that they could be in no better position than their principals; and, as Mr. Justice BULLER expressed it *in banco*, "they must stand or fall by the title of their foreign correspondents." This case was decided in 1791, and it came under the consideration of the King's Bench in 1829, in the case of *De la Chaumette* v. *Bank of England*. In that case two bank notes had been fraudulently obtained, and were remitted from abroad to the plaintiff, an English merchant, who was, at the time he received them, largely in advance to the foreign remitter. It was held by Lord TENTERDEN and the Court of King's Bench, that the plaintiff could only recover on the title of the foreign sender. "It appeared," says Lord TENTERDEN, giving the judgment of the Court, * "that at the time when [*171] the note was remitted to the plaintiff the balance as between him and Odier & Co., the foreign senders, was £7000 in favour of the plaintiff; but he did not, in consequence of having received the note, make any further advance or give any further credit to Odier & Co., than he would have done if the note had not been transmitted. Unless, therefore, we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to whom he is indebted, enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co., and that, if he can recover at all, it must be upon their right." A Bank of England note is not a cheque, no doubt, but neither is a cheque an unmatured bill. To hold that the plaintiffs cannot recover in this case, except on Lizardi's title, and that they were his agents to receive the defendant's cheque, is not in conflict with any of the cases which have been decided on bills of exchange, while it is, I think, in accordance with the principles of the two cases I have last mentioned, as well as with real justice.

I am not aware that these cases at all interfered with the nego-

tiability of bank notes; and I do not think that the negotiability of cheques will be injured if this case were decided as I should wish to decide it.

There remains the smaller question whether the special circumstance that a so-called "bill" was given up on receipt of the cheque formed of itself a sufficient consideration to entitle the plaintiffs to recover? I need say no more than that I think it did not. The so-called bill was not a bill, it was a mere memorandum and inchoate, and its relinquishment was the giving up of nothing which can be called a consideration. For these reasons I am of opinion that the judgment of the Court below should be reversed.

Judgment affirmed.

ENGLISH NOTES.

The case of *Currie* v. *Misa* was subsequently taken on appeal to the House of Lords, where it is reported under the name of *Misa* v. *Currie* (H. L. 1876), 1 App. Cas. 554, 45 L. J. Q. B. 852, 35 L. T. 414. The House affirmed the judgment of the Court of Exchequer Chamber, but as they were able to decide the case upon the narrower ground that the facts showed a good consideration for the cheque as between the original parties (Lizardi and the defendant Misa), and also that the giving up by the plaintiffs of the so-called "bill" mentioned (on p. 316, *supra*) in the above judgment was itself a sufficient consideration moving from the plaintiff to constitute them holders for value; they found it unnecessary to decide the general point on which the judgment of the Court of Exchequer Chamber is based. The judgment, therefore, of the Court of Exchequer Chamber remained an express decision on the high authority of that Court, on a general point of law which, upon their view of the facts, they considered it necessary to decide. The decision was adopted as law in the Bills of Exchange Act 1882; see sections 2 ("value"), 27 (1) (*b*), 29 (1), 38 (2), 73.

In *McLean* v. *Clydesdale Banking Co.* (a Scotch appeal decided by the House of Lords in 1883), 9 App. Cas. 95, 50 L. T. 457, the reasons of the decision of the Exchequer Chamber in *Currie* v. *Misa*, are expressly approved both by Lord Blackburn and Lord Watson, Lord Selborne (C.), who was present, apparently also approving. The question in this Scotch appeal arose out of a cheque drawn by McLean on the Bank of Scotland. The cheque had been paid into the Clydesdale Bank by a customer of theirs (one Cotton), whose account was at debit, and immediately credited by the bank to Cotton so as to reduce his debit. Before the cheque could be cleared and transmitted to the Bank of Scotland, McLean stopped it, so that, in the usual course, the Bank

of Scotland returned the cheque to the Clydesdale Bank to "refer to drawer." The Clydesdale Bank having sued McLea on the cheque, he set up a defence of fraud in the original transaction, to which the bank pleaded that they were onerous holders (*i. e.*, holders for value) of the cheque. The House, affirming the judgment of the Court of Session, and of the Sheriff, decided in favour of the Bank on the ground that they were holders for value. The cause of action had arisen before the passing of the Bills of Exchange Act, 1882, which the House considered would have been conclusive on the question. In the later case of *National Bank* v. *Silke* (C. A. 1890, 1891, 1 Q. B. 435, 60 L. J. Q. B. 199; No. 28, p. 440, *post*), Lord Justice BOWEN refers to *McLean* v. *Clydesdale Banking Co.*, as making it clear that "if a cheque is paid to a bank on the footing that it may be drawn upon at once, and it is drawn upon accordingly, the bank is a holder for value in due course."

The case of *Currie* v. *Misa* was followed by the Court of Appeal in *Stott* v. *Fairlamb* (C. A. 1883), 53 L. J. Q. B. 47, 49 L. T. 525, where a promissory note payable on demand was given for a sum of £2000, which according to an agreement for dissolution of a partnership was payable by the promisor to the promisee "within three years with interest at £5 per cent. on the same or on the instalments thereof for the time being remaining unpaid." The Court held that there being a debt existing *in praesenti*, which the debtor was entitled in his option to pay at any time within the three years, the case came within the principle of *Currie* v. *Misa*, and that there was good consideration for the promissory note, as the giving of the promissory note was in fact conditional payment.

The London and County Banking Co. v. *London and River Plate Co.* (C. A. 1888), 21 Q. B. D. 535, 57 L. J. Q. B. 601, was an anomalous case, decided by the Court of Appeal on a principle analogous to the above rule. W., the manager of a bank, had stolen certain negotiable securities, of which the plaintiffs became *bonâ fide* holders for value. W., requiring the securities in order to exhibit them to the auditors of the bank, obtained them from the plaintiffs by fraud, and restored them to the bank without the knowledge of the authorities of the bank, who were not aware that the securities had ever been out of their possession. The fraud having been discovered, the question arose between the plaintiffs claiming the securities, and the bank (defendants) claiming to retain them. The Court held in effect that the destruction of the right of action which the defendants would have had against W. for conversion was a sufficient consideration moving from the defendant bank to make them holders for value of the securities. The case is thus put by Lord Justice LINDLEY, in his judgment, which was concurred in by

Lord Justice Bowen: "The legal consequences of the theft itself were — first, to render Warden liable to conviction for a criminal offence; secondly, to render him liable in a civil action to restore the bonds or pay their value to the defendants. In addition to his criminal responsibility he was under a civil obligation to the defendants to restore the bonds or their value to them. The existence of this civil obligation affords, in my opinion, the clue to the solution of the problem which has to be solved. When Warden restored the bonds which he had stolen, he was doing no more than he was bound to the defendants to do; he was discharging, or at all events partly discharging, his obligation to them; and if the defendants chose to accept the bonds in such discharge, his obligation to the defendants would have been extinguished, if not wholly, at least to the extent of the value of the bonds restored." The judgment then proceeded to show that although the authorities of the bank had no knowledge of the transaction, the acceptance of the bank of the securities in discharge of W.'s obligation might be presumed, on the principle settled in the terms laid down by Lord Coke, in *Butler and Bakers* Cases, 3 Co. Rep. 25 *a*, that the acceptance of a gift by the donee is to be presumed until his dissent is signified, even although the donee is not aware of the gift.

AMERICAN NOTES.

This subject has been long vexed in this country. The Rule states the law prevailing in most of the United States, and as accepted by the Supreme Court of the United States, and it is not only generally applied to cases of a taking in absolute payment, but also to cases where the transfer is merely collateral to a pre-existing debt. *Goodman* v. *Simonds*, 20 How. (United States Sup. Ct.), 343; *Railroad Co.* v. *National Bank*, 102 United States, 25; *Oates* v. *Nat. Bank*, 100 United States, 247; *Stoddard* v. *Kimball*, 6 Cushing (Massachusetts), 469; *Atkinson* v. *Brooks*, 26 Vermont, 569; 62 Am. Dec. 592; *Allaire* v. *Hartshorne*, 21 New Jersey Law, 665; 47 Am. Dec. 175; *Fitzgerald* v. *Barker*, 96 Missouri, 665; 9 Am. St. Rep. 375; *Tabor* v. *Merchants' Nat. Bank*, 48 Arkansas, 454; 3 Am. St. Rep. 241; *Williams* v. *Huntington*, 68 Maryland, 590; 6 Am. St. Rep. 477; *Cook* v. *Helms*, 5 Wisconsin, 107; *Payne* v. *Bensley*, 8 California, 260; 68 Am. Dec. 318; *Swift* v. *Tyson*, 16 Peters (United States Sup. Ct.), 1; *Roxborough* v. *Messick*, 6 Ohio St. 448; 67 Am. Dec. 346; *Pitts* v. *Foglesong*, 37 Ohio State, 676; 41 Am. Rep. 540; *Spencer* v. *Sloan*, 108 Indiana, 183; 58 Am. Rep. 35; *Proctor* v. *Baldwin*, 82 Indiana, 376; *Kœhler* v. *Dodge*, 31 Nebraska, 328; 28 Am. St. Rep. 518; *Crump* v. *Berdan*, 97 Michigan, 293; 37 Am. St. Rep. 345; *Berkeley* v. *Tinsley*, 88 Virginia, 1001; *First Nat. Bank* v. *Adam*, 138 Illinois, 489; *Mix* v. *Nat. Bank of Bloomington*, 91 Illinois, 20; 33 Am. Rep. 44; *Brown* v. *Thompson*, 79 Texas, 58; *Dearman* v. *Trimmier*, 26 South Carolina, 506; *Helmer* v. *Commercial Bank*, 28 Nebraska, 474; *Skilling* v. *Bollman*, 73 Missouri, 665; 39 Am. Rep. 537; *Smith* v. *Jennings*,

74 Georgia, 551; *St. Paul Nat. Bank* v. *Cannon*, 46 Minnesota, 95; 24 Am. St. Rep. 189; *Fair* v. *Howard*, 6 Nevada, 310; *Bank of Republic* v. *Carrington*, 5 Rhode Island, 515; 73 Am. Dec. 83; note, 32 Am. St. Rep. 712.

Mr. Daniel says (1 Negotiable Instruments, § 184): "The best considered, as well as the most numerous authorities regard the creditor who receives the bill or note of a third party from his debtor, either in payment of or as collateral security for his debt, as a *bona fide* holder for value."

Some influential Courts, however, hold that the taking of such paper as a mere collateral security for a precedent debt, without the surrender of anything thereupon, does not constitute a taking for value. *Bay* v. *Coddington*, 5 Johnson, Chancery, 54; 9 Am. Dec. 268; 20 Johnson, 637; 11 Am. Dec. 342; *Comstock* v. *Hier*, 73 New York, 269; 29 Am. Rep. 142; *Bramhall* v. *Beckett*, 31 Maine, 205; *Smith* v. *Bibbey*, 82 Maine, 34; 17 Am. St. Rep. 464; *Bowman* v. *Van Kuren*, 29 Wisconsin, 209; 19 Am. Rep. 554; *Royer* v. *Keystone Bank*, 83 Pennsylvania State, 248; *Depeau* v. *Waddington*, 6 Wharton (Pennsylvania), 220; 36 Am. Dec. 216; *Cullum* v. *Branch Bank*, 4 Alabama, 21; 37 Am. Dec. 725; *Loeb* v. *Peters*, 63 Alabama, 243; 35 Am. Rep. 17; *Richardson* v. *Rice*, 9 Baxter (Tennessee), 290; 40 Am. Rep. 92; *Ferriss* v. *Tuvell*, 87 Tennessee, 386; 3 Lawyers' Rep. Annotated, 111; *Ruddick* v. *Lloyd*, 15 Iowa, 441; 83 Am. Dec. 423; *Lee's Adm'r* v. *Smead*, 1 Metcalfe (Kentucky), 628; 71 Am. Dec. 494; *Prentice* v. *Zane*, 2 Grattan (Virginia), 262; *First Nat. Bank* v. *Strauss*, 66 Mississippi, 479; 14 Am. St. Rep. 579. The basis of this doctrine is thus stated in *Coddington* v. *Bay*, 20 Johnson, 637; 11 Am. Dec. 342: "The right to hold against the owner, in any case, is an exception to the general rule of law; it is founded on principles of commercial policy. The reason of such a rule would seem to be that the innocent holder, having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection. But what superior equity has the holder, who made no advances nor incurred any responsibility on the credit of the paper he received, whose situation will be improved if he is allowed to retain, but if not, is in the condition he was before the paper was passed? To allow such a state of facts as sufficient to resist the title of the real owner would be productive of manifest injustice, and is not required by any rule of policy; it is enough if the holder be secure when he advances his funds, or makes himself liable on the credit of the paper he receives." On the other hand, the contrary doctrine is based on "the convenience and safety of those dealing in negotiable paper," *Blanchard* v. *Stevens*, 3 Cushing (Massachusetts), 168; and because "by the almost universal usage of the world of commerce a transaction of this sort is understood by the parties to imply further forbearance on the pre-existing debt, and thus the indorsee is lulled into a false security by means of an instrument which the person sought to be held liable has made and put into circulation." *Manning* v. *McClure*, 36 Illinois, 498; and that the undertaking of the transferee "to fix the liability of prior parties, by due presentation for payment, and due notice in case of non-payment — an undertaking necessarily implied by becoming a party to the instrument — was a sufficient consideration to protect it against equities existing between the other parties, — of which it had no notice," *Railroad Co.* v. *National Bank*, 102 United States, 25.

But even under the New York doctrine, it is held that "it is otherwise if

the thing be taken in discharge of the debt, or if other security be surrendered in consideration thereof." *First Nat. Bank* v. *Strauss*, 66 Mississippi, 479; 14 Am. St. Rep. 579. "The actual and absolute extinguishment of a pre-existing debt in consideration of the transfer to the creditor of negotiable paper will constitute the transferee a holder for value so as to be protected against prior equities therein." *Mayer* v. *Heidelbach*, 123 New York, 332; 9 Lawyers' Rep. Annotated, 850; see *Bardsley* v. *Delp*, 88 Pennsylvania St. 420; *Norton* v. *Waite*, 20 Maine, 175; *Brush* v. *Scribner*, 11 Connecticut, 388; *Barney* v. *Earle*, 13 Alabama, 106; *Stevens* v. *Campbell*, 13 Wisconsin, 375; *May* v. *Quimby*, 3 Bush (Kentucky), 96; *Reddick* v. *Jones*, 6 Iredell, Law (North Carolina), 107; 41 Am. Dec. 68; *Harrold* v. *Kays*, 64 Michigan, 439; 8 Am. St. Rep. 835; *Bank of Mobile* v. *Hall*, 6 Alabama, 639; 41 Am. Dec. 72; *Draper* v. *Cowles*, 27 Kansas, 484. And see other cases cited in note 4, 1 Daniel on Negotiable Instruments, § 832. Mr. Daniel says "there is no doubt" of this doctrine.

The principal case is cited in Bigelow on Bills and Notes, p. 501.

No. 16. — WHISTLER *v.* FORSTER.

(1863.)

RULE.

THE holder without indorsement of a bill payable to order, though taken by him *bonâ fide* and for value, has no better title than the person from whom he took it; and such holder is affected by fraud, of which he has notice before he obtains the formal indorsement.

Whistler v. Forster.

32 L. J. C. P. 161–164 (s. c. 14 C. B. N. S. 248; 8 L. T. 317; 11 W. R. 648.)

[161] Action by the indorsee against the maker of a cheque on the City Bank for £97 10*s.*, payable to A. S. Griffiths & Co. or order, and indorsed by A. S. Griffiths & Co. to the plaintiff.

There were pleas traversing the making and indorsing, and also a plea that the defendant was induced to make the cheque through the fraud of the said A. S. Griffiths & Co., and that there never was any value or consideration for the indorsement of the same to the plaintiff, or for his holding the same, and that he had notice of the premises before and when the same was first indorsed to him, and took the same from the said A. S. Griffiths & Co. with such notice.

It appeared, at the trial, before WILLES, J., at the London Sittings

No. 16. — Whistler v. Forster, 32 L. J. C. P. 161–163.

in last Michaelmas Term, that Griffiths had fraudulently obtained the cheque from the defendant on the 3rd of October, 1862, on a representation that he would furnish the defendant with money sufficient to cover the amount of it early on the morning of the next day: this he failed to do, and the defendant never had any value or security for the cheque. The cheque, though given on the 3rd of October, was dated the 4th of October, as, according to the understanding of the parties, the cheque was not to be used until the latter day. Griffiths, however, gave this cheque to the plaintiff on the 3rd of October, on account of a debt which was due from him to the plaintiff; but he neglected at that time to indorse the cheque.

On the 4th of October the plaintiff was for the first time informed (which he was by the defendant), of the circumstances under which the cheque had been obtained; and with such knowledge he subsequently obtained an indorsement on the cheque by Griffiths.

It was therefore contended, at the trial, that the plaintiff could not recover, first, because the cheque was post-dated (a ground which merely depended on the since repealed Stamp Act of 55 Geo. III.), and, secondly, because at the time of the indorsement by Griffiths the plaintiff had notice of the fraud which had been practised by Griffiths on the defendant.

The learned Judge directed a verdict to be entered for the defendant, with leave to the plaintiff to move to set the same aside, and to enter a verdict for the plaintiff.

A rule *nisi* to that effect was afterwards obtained by counsel for the plaintiff, on the grounds that the cheque was a valid instrument and sufficiently stamped, and that the plaintiff had received sufficient interest in the cheque to entitle him to sue before receiving notice from the defendant.

The rule having been argued: —

Erle, C. J. This is an action against the drawer of a bill [163] of exchange, for the instrument, though called a cheque, is a bill of exchange for the purpose of the Stamp Act. The plea is, that the defendant was defrauded of such instrument, and that it was indorsed to the plaintiff with notice of the fraud; and the facts are, that the instrument was a negotiable instrument, which had been obtained by Griffiths from the defendant by fraud, and had been handed over by Griffiths to the plaintiff for value, and with the intention at the time of passing it to the plaintiff as indorsee. The

No. 16. — Whistler v. Forster, 32 L. J. C. P. 163, 164.

indorsement was, however, omitted at the time the instrument was so handed over to the plaintiff, and the right, therefore, of the plaintiff at that time was the same as if an ordinary chattel had passed to him by an equitable and not a legal assignment, and consequently the plaintiff had then all the rights which Griffiths could convey and no more. But Griffiths, having defrauded the defendant of the draft, could pass no right in it to the plaintiff by so handing it to him. The law merchant as to negotiable instruments creates a title which arises on the delivery of such instruments by indorsement, and then the title is good against the world, provided the instrument be taken for value and without notice of any fraud. Now, the title of the plaintiff is not by assignment to him of a negotiable instrument by indorsement without notice of fraud, for when he became such indorsee he had had notice that the cheque had been fraudulently obtained from the defendant. There may be, according to the argument, conflicting equities in both the defendant and the plaintiff to have the bill of exchange as against Griffiths, but the legal right is as I have already mentioned. . . . [He then dealt with the point as to the stamp, holding that the instrument was a bill of exchange properly stamped.]

[164] Willes, J. I concur with my Lord as to both points. . . . As to the second point, the general rule of law is undoubted, that no one can transfer a better title than he himself possesses. — *Nemo dat quod non habet.* To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These being part of the currency are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud, which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner whereby a title is acquired according to the law merchant, and not merely a transfer which is valid in equity according to the doctrine respecting the assignment of *choses in action*, now, indeed, recognized and in many instances enforced by Courts of law; and it is therefore clear that in order to acquire the benefit of this rule the holder of the bill must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so. Until he does so, he is merely in the position of the assignee of an ordinary *chose in action*, and has no

better right than his assignor; when he does so he is affected by fraud which he heard of before the indorsement.

KEATING, J. I am of the same opinion. . . . As to the second point, I am of opinion that the plea was made out by the defendant. The plaintiff sues as indorsee of the bill in question, and the plea is that the defendant had been defrauded of it, and that the plaintiff had notice of such fraud before the bill was indorsed to him. The simple question is, when was the bill first indorsed to the plaintiff? The indorsement of a bill is not complete without a written indorsement. Now, before the bill was so first completely indorsed to the plaintiff he had notice of the fraud. Consequently, Griffiths never transferred any title to the plaintiff to sue on such bill. . *Rule discharged.*

ENGLISH NOTES.

The effect of the rule is contained in section 31 (4), of the Bills of Exchange Act 1882. The principle of negotiability of Bills of Exchange (and promissory notes) implied in the three preceding sub-sections is thus stated by Mr. Justice BLACKBURN, in *Crouch* v. *Credit Foncier* (1873), L. R., 8 Q. B. 374, at p. 381, 42 L. J. Q. B. 183, at p. 188: — "In the notes," he says, "to *Miller* v. *Race* (1 Sm. L. C.), where all the authorities are collected, the very learned author says: 'It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in *market overt*. But that if either of the above requisites be wanting, *i. e.*, if it be either not accustomably transferable, or though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of *market overt*.' Bills of Exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who by a *genuine* indorsement, or where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bonâ fide* holder for value, he has a good title, notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."

Where A. the drawer of a bill payable to his own order has written

his name upon it and delivered it to B., not with the intention of transferring the property to B., but in order that B. should hold it for the bank, of which A. and B. are both employees, and B. indorses it to C., who has knowledge that B. has no right to it, the acceptor sued on the bill may properly plead in defence against the plaintiff who has taken the bill with knowledge of the fraud, that A. did not indorse it. *Marston* v. *Allen* (1841), 8 M. & W. 504, 11 L. J. Ex. 122.

But if a bill with such an apparent indorsement as in the last cited case had found its way into the hands of a *bonâ fide* holder for value, neither the acceptor nor the drawer would have any answer to the action by such a holder. *Ingham* v. *Primrose* (1859), 7 C. B. (N. S.) 82, 28 L. J. C. P. 294; see *per* Williams, J. 7 C. B. (N. S.), p. 85. "The reason is," he says, "that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country; and in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be apparently a part of such currency." On the other hand, if the indorsement were forged, no title can be made through it, — *Mead* v. *Young* (1790), 4 T. R. 28, 2 R. R. 314, — unless by some estoppel, or the statutory provisions relating to cheques or bills payable to order on demand. Bills of Exchange Act 1882, s. 24, s. 55 (2), s. 60. It had been argued in *Ingham* v. *Primrose*, that the circumstances there — namely, that the bill had been torn in two with the intention of destroying it and afterwards fraudulently put together, as if it had been sent in two pieces by post — amounted to forgery; but the Court did not consider it the same thing, for this purpose, as a forged signature. It was rather likened to the class of cases where the maker of the instrument is held responsible for negligently leaving a blank which is filled up fraudulently so as to present the appearance of a genuine bill for a larger amount than intended, as in *Young* v. *Grote* (1827), 4 Bing. 253, 12 Moore, 484, 5 L. J. C. P. 165.

Where the holder of a bill payable to his order transfers it for value without indorsement, the transferee is entitled to the same rights as his transferor, and the transferor or any person representing him under a general title may be required to indorse the bill; but the representative may do so in such terms as to negative personal liability. *Ex parte Mowbray* (1820), 1 Jac. & W. 428; *Watkins* v. *Maule* (1820), 2 Jac. & W. 237, 243; and see section 31 (4) and (5) of Bills of Exchange Act 1882.

An indorsement may be validly made by writing on the face of the bill. *Ex parte Yates, In re Smith* (L. JJ., in Bankr. Dec. 1857), 2 De G. & J. 191, 27 L. J. Bankr. 9.

No. 16. — Whistler v. Forster. — Notes.

AMERICAN NOTES.

The principal case is cited in 1 Daniel on Negotiable Instruments, §§ 706, 745; Bigelow on Notes and Bills, pp. 446, 447.

It has been held that an indorsement subsequent to the transfer of the bill relates back and operates as if made at the time of the transfer. *Baker* v. *Arnold*, 3 Caines (New York), 283; *Beard* v. *Dedolph*, 29 Wisconsin, 136.

Mr. Daniel says, "This doctrine may be, and doubtless is, true when the indorsement at the time of the assignment was agreed upon and intended to be made, but omitted by mistake, accident, negligence, or fraud. *Southard* v. *Porter*, 43 New Hampshire, 380;" — where "the party had notice of the defence at the time of the indorsement, but not at time of assignment. But beyond this it cannot go. If the instrument be payable to order, an assignment is not in the usual course of business. It transfers the equitable, but not the legal title, and an indorsement after maturity, or after notice of a defence, cannot affect an anterior imperfect transaction, and exclude equitable defences which had become available." Citing the principal case. See *Lancaster National Bank* v. *Taylor*, 100 Massachusetts, 24; 1 Am. Rep. 71; 97 Am. Dec. 70, founded on and largely quoting from the principal case, characterizing it as "determined by eminent judges of great experience and authority in mercantile law," and as expressing "with fullness and accuracy the rule," etc. In this case the indorsement was after notice of the equity.

In *Haskell* v. *Mitchell*, 53 Maine, 468; 89 Am. Dec. 711, it was held that the contemporaneous promise to indorse, not fulfilled until after maturity, did not avoid the defence of want of consideration made by the maker against the indorsee.

The Rule is precisely sustained by *Clark* v. *Callison*, 7 Illinois Appellate, 267; *Foreman* v. *Beckwith*, 73 Indiana, 518; *Moore* v. *Miller*, 6 Oregon, 254; 25 Am. Rep. 518; *Pavey* v. *Stauffer*, 45 Louisiana Annual, 358; 19 Lawyers' Rep. Annotated, 716, citing the principal case as one "upon which all subsequent decisions have been predicated." See also *Bingham* v. *Goshen Nat. Bank*, 118 New York, 349; *Clark* v. *Whitaker*, 50 New Hampshire, 474; 9 Am. Rep. 286, citing the principal case; *Spinning* v. *Sullivan*, 48 Michigan 9; *Central Trust Co.* v. *First Nat. Bank*, 101 United States, 68; *Tucker* v. *Tucker*, 119 Massachusetts, 79; *Nichols* v. *Gross*, 26 Ohio State, 425; *Patterson* v. *Care*, 61 Missouri, 439.

"There has never been any doubt" of this doctrine. Bigelow on Bills and Notes, p. 447, citing the principal case.

No. 17. — HARROP *v.* FISHER.

(1861.)

RULE.

WHERE a bill is payable to order, the delivery of the bill by the payee to another person with the intention of transferring the property, does not of itself constitute an authority to the latter person to indorse the bill in the name of the former.

Harrop v. Fisher.

30 L. J. C. P. 283–286 (s. c. 10 C. B. N. S. 196; 7 Jur. N. S. 1058; 9 W. R. 667).

[283] This was an appeal from the County Court of Sheffield, upon the following case: —

This was a plaint brought by the respondent against the appellant, and was heard and determined (without a jury) in the above County Court, on the 21st day of November, one thousand eight hundred and sixty, before WILLIAM WALKER, Esq., the Judge of that County Court.

The particulars of the respondent's demand were as follows: This action is brought to recover the sum of twenty pounds and nineteen shillings principal and interest, due to the respondent as holder of a dishonoured bill of exchange, of which the following is a copy: —

£20 0 0 SHEFFIELD, July 8, 1859

Four months after date, pay to my order the sum of twenty pounds for value received. WILLIAM JOHNSON.

To Messrs. Harrop & Co.,
Bellows Manufacturers,
Sheffield.

Indorsed — Pr. pro. Wm. Johnson,
James Radcliffe.

Crossed — Accepted payable at the London and Westminster Bank, Alfred Harrop.

	£20	0	0
To 11 months Intst.		19	0
	20	19	0

No. 17. — Harrop v. Fisher, 30 L. J. C. P. 283. 284.

The following facts were proved: That a bill of exchange, of which the above is a copy, was drawn by one William Johnson and accepted by appellant, in consideration of goods supplied by Johnson, he promising to supply further goods to *make up [*284] the full amount of £20, but which further goods he never did supply.

Johnson got the bill discounted by one James Radcliffe, who was not aware that the full consideration had not been paid to the acceptor, and Radcliffe *bonâ fide* paid to Johnson £18 for the bill, and received it from him, but from ignorance or inadvertence did not ask Johnson to indorse it.

Radcliffe placed the bill in his cash-box and neglected to present it for payment until two or three months after it became due, when he applied to the appellant personally for payment, and was told by him that the drawer Johnson had not supplied all the goods he had promised to supply, but that if Radcliffe would take off £1 10*s.* from the amount he would pay it; and appellant also informed Radcliffe that he had supplied the London and Westminster Bank with funds to pay the bill at maturity, but as it had not been presented he had withdrawn them.

Radcliffe at the time refused to take £18 10*s.* in full discharge of the amount of the bill, and at a subsequent interview was informed by the appellant that he could not pay the bill until it had Johnson's indorsement on it. Radcliffe told defendant that he would indemnify him against any claim by any other person on the bill, and the same offer was made by the respondent's attorney at the trial, but in both cases was refused. Radcliffe afterwards (but not in the appellant's presence) wrote the name of Wm. Johnson as an indorser on the back of the bill; but immediately after having done so erased that indorsement, so that it was barely legible at the trial, and indorsed "*per* pro. Wm. Johnson, James Radcliffe." Before doing so Radcliffe had endeavoured to find Johnson, but had not been able to do so in consequence of Johnson having left Sheffield, and, as it was supposed, gone to America.

After the indorsement was made in manner above stated, the bill was duly presented for payment and dishonoured; and the appellant, though applied to frequently, has always since refused to pay it, until Johnson's indorsement in his own handwriting should be obtained. After all the transactions above stated, Radcliffe paid the bill to the respondent, in part discharge of a debt due from

Radcliffe to the respondent; and it was taken as admitted by the respondent, that he had no other right against the appellant than Radcliffe would have had if he had not so transferred the bill to the respondent. Radcliffe had done other business for Johnson, and Johnson told him at the time when Radcliffe discounted the bill for him, that the acceptor was a responsible person, and would be sure to meet the bill at maturity; but he never gave any express authority to Radcliffe to indorse it in his (Johnson's) name, nor any authority further than what may be inferred from the facts above stated. Johnson had never applied to the appellant on the subject of the bill, but some of the creditors had given notice to the appellant not to pay it to the holder (Johnson cannot now be found).

These were the only material facts proved; and upon these facts it was contended, on behalf of the appellant, that there was no evidence of any authority given by Johnson, the payee, to Radcliffe or the respondent to indorse or write his (Johnson's) name *per* procuration, and therefore the said indorsement was void and of no effect, and the respondent could not recover the amount of the bill and interest in this action. On behalf of the respondent, it was contended that Johnson's omission to indorse the bill being a mere inadvertence, and that he having received £18 from Radcliffe as discount for the bill, and having delivered the bill to Radcliffe saying that the acceptors were responsible parties and were sure to meet the bill at maturity, there was evidence that Johnson intended to pass all his right, title, and interest in the bill, and justified Radcliffe in signing Johnson's name "*per* pro.," and in doing all that was necessary to obtain payment of the bill, and that appellant was liable to pay it to the holder, more especially as he had offered to pay £18 10*s.* to Radcliffe on its being first presented to him. The Judge decided that a jury was at liberty to infer and ought to infer from the facts above stated, and he sitting both as Judge and jury did infer from them, that Johnson had for a good consideration transferred his whole interest in the bill to Radcliffe, and had impliedly given Radcliffe authority to obtain payment of it from the acceptors, and to do all acts necessary for obtaining such payment, and that consequently the indorsement made by Radcliffe was made

[*285] *by the implied authority of Johnson, and was sufficient to give Radcliffe or any holder for good consideration from Radcliffe (which the respondent was) a right of action against the

acceptor for the amount of the bill; and he gave judgment for the amount sued for.

If the Court should be of opinion that the decision of the Judge was wrong, the judgment was to be set aside, and a nonsuit, or judgment for the appellant, entered; if otherwise, the judgment was to be confirmed.

T. Jones, for the appellant. The question is whether, when a bill is made payable to order of drawer, and not indorsed by him, the person receiving such bill honestly and for good consideration can himself indorse it; and it is submitted that he cannot. The inconvenience arising from breaking in upon the rule applicable to bills, that if payable to order they must be indorsed before negotiation, would be intolerable. If this indorsement is good, it would be evidence against Johnson of the plaintiff's authority to indorse all bills. But there is no inconvenience the other way, for the party might have sued in the name of the drawer. If the plaintiff is entitled to have the bill indorsed, a Court of equity would order Johnson to indorse it. *Ex parte Greening*, 13 Ves. 206; *Moxon* v. *Pulling*, 4 Camp. 51; and Chitty on Bills, p. 237, where it is said, "If a party has transferred a bill without indorsing it, when it was intended that he should do so, a bill may be filed in equity to compel him, and his assignees if he has become bankrupt, to indorse;" and again, "It should seem that, as the transfer implies an authority to do all acts to make it available, the party to whom the transfer has been made may sue in the name of the transferor. But it seems that the promise to indorse will not enable the holder himself to make a sufficient indorsement in his name; and the only remedy will be to sue him for the breach of his promise, or others in his name." Here there is no express authority, nor is there anything from which it can be taken that the plaintiff was employed to sign Johnson's name, nor from which an authority can be implied. The case finds in effect that there was no intention to give authority to indorse, but it would have been given if it had been thought about. If an authority is to be implied by law, it would be implied in the case of bills of lading, which would be in effect to make the indorsement of such instruments good, though by parol.

Quain, *contrà*. There was evidence of an authority to indorse. Johnson gave the plaintiff all the authority necessary to vest the bill in him. It is either the case of a deposit or a sale out and

out; but it was clearly not the former, for he meant to give the plaintiff the property in the bill. The cases are collected in Byles on Bills, p. 23. In *Prescott* v. *Flinn*, 9 Bing. 19, TINDAL, C. J., says, "It may be admitted that an authority to draw does not import in itself an authority to indorse bills, but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine on the whole of the evidence whether an authority to indorse existed or not." The bill gives notice to all the world that the plaintiff had a limited authority. *Alexander* v. *MacKenzie*, 6 C. B. 760; 18 L. J. C. P. 94, and all that the indorsement shows is that the authority was exceeded, but it is good as far as it goes. If the words "without recourse" were in the indorsement, that would do.

Jones, in reply, was stopped.

ERLE, C. J. I am of opinion that the defendant is entitled to succeed. The intention of the parties was that the plaintiff should succeed, and have his money; but the act of indorsing a bill of exchange involves so many consequences, that to hold that this name was lawfully put on the bill, would introduce a most dangerous doctrine with reference to documents of the most important description.

WILLES, J. I am of the same opinion. It might be, or it might not be, convenient that a person like the plaintiff should have the right of determining for himself whether he had the right to indorse; but hitherto the law has not conferred such authority, and it must therefore be found, if at all, in the act of the party himself. It was in the mind of both that this bill had been indorsed. I do [* 286] not draw the conclusion, which Mr. Quain suggests * from what took place, that Johnson in effect says, "You may indorse the bill which I deposit." It is usual to establish the authority to indorse as given before the exercise, but that is not done here.

BYLES, J. Story, at section 201 of his work "On Bills," lays down the law thus: "If there be an assignment" of a bill payable to a person or his order "without an indorsement, the holder will thereby acquire the same rights only as he would acquire upon an assignment of a bill not negotiable. If, by mistake or accident or fraud, a bill has been omitted to be indorsed on a transfer, when it was intended that it should be, the party may be compelled by a Court of equity to make the indorsement." Now, in the case of

Rose v. *Sims*, 1 B. & Ad. 521, there was an express promise in writing by the plaintiff in that action to indorse the bill; and yet PARKE, J., says, "This is not a case of mutual credit within the Bankrupt Act; it is merely a case where a cause of action arises for the non-performance of a contract;" and TAUNTON, J., says the same. There no one suggested that the transferee had a right to put the name. Indeed, if he had, it would lead by a very short cut to the repeal of the rule that an indorsement must be in writing. The moment you proved a parol promise to indorse, you would then have an indorsement.

KEATING, J., concurred. *Judgment for the appellant.*

ENGLISH NOTES.

There is nothing in the Bills of Exchange Act 1882, explicitly to point out this rule; but the rule is consistent with the general principle stated in section 91 (1). It is a question of presumption of intention as to which it is convenient that an arbitrary rule should be laid down.

AMERICAN NOTES.

The principal case is cited in 1 Daniel on Negotiable Instruments, § 744.

In *Hardesty* v. *Newby*, 28 Missouri, 567; 75 Am. Dec. 137, it was held that possession of an unindorsed note delivered by the payee for collection does not authorize the holder to indorse it in his name.

No. 18. — EDIE *v.* EAST INDIA COMPANY.

(1761.)

No. 19. — SIGOURNEY *v.* LLOYD.

(K. B. 1828.)

LLOYD *v.* SIGOURNEY.

(EX. CH. 1829.)

RULE.

A BILL indorsed to "A." even without adding the words "or order" remains negotiable and may be indorsed by A. to B., and so on. But an indorsement "Pay to A. (or to A. or order) for my use," or in similar language, is restrictive — being sufficient to give notice that no valuable con-

sideration has been given by A., and consequently that the bill is no longer negotiable.

Edie v. East India Company.

2 Burr. 1216–1228 (s. c. 1 Black. 295).

[1216] This was an action, brought by the indorsees, upon two foreign bills of exchange drawn by Colonel Clive, then in the East Indies, upon the East India company, and ac-
[* 1217] cepted by them, payable to Mr. Campbell or order, * then also in India, and indorsed by Mr. Campbell to Mr. Robert Ogilby. One of these bills was by such indorsement directed to be paid to Robert Ogilby or order, in the usual way of indorsing; and no dispute or question arose upon it.

The other bill was also indorsed by Mr. Campbell to Robert Ogilby: but the words "or order" were originally omitted in this indorsement; and afterwards put in by another hand, before the trial.

These bills thus indorsed by Mr. Campbell to Mr. Ogilby (without adding the words "or order," in the indorsement of the latter) were by him indorsed to the plaintiff Edie and Lard or order.

A verdict was taken for the plaintiff, upon the count as to the former bill. But,

[* 1218] * On the second, an objection was taken to the want of the words "or order," which the defendant's counsel insisted were necessary to be originally inserted by the indorser; and that the omission of them was equivalent to the most restrictive words that he could have made use of in order to limit the payment. And, accordingly, on this second count (after evidence being taken upon the custom of merchants, the effect of which evidence is stated in the judgment of Lord MANSFIELD) a verdict was found for the defendants.

Mr. Morton, of counsel for the plaintiffs, having moved for a new trial, Mr. Norton, and Mr. Wedderburn now showed cause on behalf of the defendants, why a new trial should not be granted.

In support of the motion, Mr. Morton and Mr. Yates had cited the three following cases; viz. *More* v. *Manning*, Comyns, 311, in point; where it was holden "that a promissory note to pay to one, or order, is assignable *toties quoties* by the indorsee or indorsees, though the words 'or order' be omitted in the indorsement."

Acheson v. *Fountain*, 1 Strange, 557, in point also; it being there holden "that an indorsable note indorsed to A. B. without saying 'or order,' is an indorsement to the indorsee or order; for the law interprets the assignments to be in the same manner as the note is drawn."

And *Evans* v. *Cramlington*, in Carthew, 5, 2 Ventris, 309, 310, which was said to be applicable to the present case.

Mr. Norton and Mr. Wedderburn, *contra*, for the defend- [1219] ants, insisted, that the present verdict was right, and ought to stand. They relied upon the custom of merchants as proved at the trial.

Mr. Morton and Mr. Yates, having been heard in reply —

Lord MANSFIELD. I thought, at the trial, that the defend- [1221] ants might be at liberty to go into the usage of merchants upon this occasion.

And Mr. Race, cashier of the Bank of England, gave evidence "that the bank, if they ever discounted the bills not indorsed to order, did it only upon the credit of the indorser; but that otherwise they would not take them, not considering them as being negotiable."

Mr. Simon, a very eminent and experienced merchant, deposed that he considered the omission of these words as restrictive of the indorsement to the particular individual person specified in the indorsement: and he added, that it was, in his opinion, merely in the nature of a personal authority "to receive the money;" and was not negotiable.

So Mr. Grant, another witness on the part of the defendants, declared his opinion also to be.

So also Mr. Regnier, their fourth and last witness.

These were the four witnesses for the defendants.

The plaintiffs, on their part, called Mr. Richard Cope (partner with Mr. Honywood the banker): but they were mistaken in him; for he agreed with the other four witnesses, exactly.

Another witness called by the plaintiffs was Mr. Udney; who thought it sufficient without the words "or order," and attested that he had himself discounted one, and said he had paid, he believed, fifty bills where the words "or order" were omitted in the indorsement.

Mr. Macbean, a notary public, also in his opinion held the indorsement of a bill of exchange to be negotiable, notwithstanding the omission of these words; and that no objection of this sort was

ever made. Indeed if the bill should be indorsed "pay the contents to A. B. only," it was looked upon, he said, to be a restriction of the payment to A. B. personally.

Mr. Uny and Mr. Anderson deposed to the same effect, "that the omission of the words or order did not prevent the negotiability."

But the plaintiffs did not, however, come prepared with particular witnesses to the usage in such cases; not expecting that the evidence in support of such a usage would have been admitted.

I told the jury, that by the general law (laying the usage [* 1222] out of the case) the indorsement would follow the * nature of the original bill, and be an absolute assignment to the indorsee or his order.

And after having told them that this was the general law, then I left to them upon the particular evidence of the usage that had been laid before them; and recommended it to them to consider well of this evidence; and told them, that if they found an usage so established and settled amongst merchants and traders as to be clear and plain and beyond doubt, they might find a verdict for the defendants upon that second bill: but I directed them, that if they were doubtful of the usage, or if the usage appeared to them not to be fully and clearly established, or to be the other way, then they ought to find for the plaintiffs.

I told them, that the question arose upon the insolvency of Ogilby, the first indorsee; and that it ought to be considered by them, who it was that gave the trust to Ogilby: for he that gives the trust ought to run the risk of his credit.

I observed that this indorsement was made by Mr. Campbell, the payee, to this Ogilby; and if he meant to trust Ogilby, it was but reasonable that he should be the person to suffer by Ogilby. And it was clear that he meant to trust Ogilby with the money; for it is acknowledged on all hands, that Ogilby himself had a right to receive it of the company, whether he had a right to indorse the bill to another person, or not.

The jury staid out a considerable time; and then brought in a verdict for the plaintiffs, upon the bill indorsed to Ogilby or order (which was not disputed): but they gave their verdict for the defendants, upon that count which declared upon the second bill (for £2000) which was indorsed to him without adding the words "or order."

In the whole course of the evidence no one fact was proved

where the indorsee to whom a bill was indorsed, without adding the words "or order," ever actually lost the money; so as to put him upon disputing the point.

Since the trial, I have looked into the cases, and have considered the thing with a great deal of care and attention, and thought much about it; and I am very clearly of opinion, that I ought not to have admitted any evidence of the particular usage of merchants in such a case. Of this, I say, I am now satisfied; for the law is already settled.

I lay the case of *Evans* v. *Cramlington* out of the way; as I do not see that it is much applicable to the case now before us.

But I go upon the two cases of *More* v. *Manning*, * and [*1223] *Acheson* v. *Fountain*. The former was an assumpsit upon a promissory note given by Manning to Statham or order; Statham assigned it to Witherhead, and Witherhead to the plaintiff. Upon a demurrer to the declaration, exception was taken, "because the assignment was made to Witherhead without saying to him and order: and then he cannot assign it over." But it was resolved by the whole Court, that it was good: for, if the original bill was assignable, then, to whomsoever it is assigned, he has all the interest in the bill, and may assign it as he pleases. And very right that was: for the main foundation is, "what the bill is in its origin." And accordingly, as that note was originally made payable to Statham and order, they held the assignment of it to Witherhead to be an absolute assignment to him, which comprehended his assigns. It could not be an indorsement in blank; because it is stated "that the assignment was made to Witherhead, without saying to him or order." The point resolved was "that the assignment to Witherhead was absolute." The words added at the end of the report are inaccurate, and might, at first view, occasion a little confusion: but, to be sure, the court went into an additional argument; which the reporter has omitted to particularize. But the declaration sets out the assignment; which is "an assignment by Statham to Witherhead, omitting to add the words 'and order.'"

Then as to the other case of *Acheson* v. *Fountain*: The plaintiff had declared upon an indorsement made by William Abercrombie, whereby he appointed the payment to be "to Louisa Acheson or order;" upon producing the bill in evidence, which appeared to be originally made payable to Abercrombie or order, yet Abercrombie's indorsement was only this: "Pray pay the contents to Louisa

No. 18. — Edie v. East India Company, 2 Burr. 1223, 1224.

Acheson." It was objected, "that the indorsement did not agree with the declaration." The Court, notwithstanding this, gave judgment, upon the ground of a general proposition in law, "that a bill is negotiable, without adding these words to the indorsement." And though the plaintiff might perhaps have had leave to amend his declaration in the point objected to, yet the declaration came before the Court unamended: so that the objection came with its full strength; and the Court gave their opinion upon the point, as a matter of clear settled law: for the whole Court were of opinion, "that it was well enough, that being the legal import of the indorsement; and that the plaintiff might, upon this, have indorsed it over to another, who would be the proper order of the first indorser." And accordingly, judgment was given for the plaintiff.

[* 1224] * A draft drawn upon one person, directing him "to pay money to another or order," is, in its original creation, not an authority but a bill of exchange, and is negotiable. It belongs to the payee to do what he thinks proper with it, and to use it as best suits his convenience. It is his property; and he may assign it as such, and to whom he pleases; and his direction "to pay it to such a one" is a direction "to pay it to him or his order," for he assigns his whole property in it and has had a valuable consideration for so doing.

Another thing observable is the absurdity of the opinion of the merchants (which they avowed to be their opinion), "That a bill thus indorsed was not to go to executors or administrators in case of the indorsee's death;" whereas there can be no doubt that such an interest is transmissible to executors or administrators.

The words "or order" are not necessary to be inserted in the indorsement, any more than the words "executors or administrators" are necessary to be added to it.

The point now in question has been already solemnly settled both in the Court of King's Bench and Common Pleas by the two adjudications that have been mentioned; and therefore witnesses ought not to have been examined to the usage, after such solemn determinations of what was the law.

Therefore there ought to be a new trial.

Mr. Justice DENISON concurred, *in toto.*

This verdict upon the second count is not well founded. The point in question is not matter of fact, but matter of law.

No. 18. — Edie v. East India Company, 2 Burr. 1224, 1225.

I never before heard of this notion of a restrictive assignment of a negotiable bill.

Where a bill is originally made payable to A. or order, it is of course and in its very essence negotiable from hand to hand. An inland bill of exchange is assignable in its nature, *toties quoties;* and promissory notes are now put upon the same foot with them. Foreign bills of exchange are equally so, by the law of merchants, and by the settled determinations of courts of law in England.

This is a matter of law, and the law is clearly and [* 1225] fully fixed. There is no instance of a restrictive limitation, where a bill is originally made payable to a man or order.

I never heard of an indorsement to A. only. In general the indorsement follows the nature of the thing indorsed, and is equally negotiable.

But, at least, here is no such restraint as that; here is nothing from whence to collect an intent to limit and restrain it. The law has determined that the bill is negotiable in itself; and there is no law to the contrary, nor any pretence for it in the present case. And it would be infinitely inconvenient if it should be otherwise; for as no circumstances at all appear, it would destroy or disturb that certainty which transactions of this nature require.

An executor or administrator may indorse a bill or promissory note, within the custom of merchants. In the case of *Rawlinson v. Stone*, 3 Wils. 1, upon a writ of error from C. B., an inland bill of exchange was made payable to A. or order; A. died, and the administrator of A. assigned the note to the plaintiff in the Common Pleas; for whom that Court gave judgment upon demurrer. The Court, upon argument of the writ of error here, held "that the executor or administrator might assign it over;" and they affirmed the judgment of the Court of Common Pleas. The executor or administrator is only assignee in law, not in fact; yet they held that he might assign it by the name of executor or administrator, and that it was the common method to do so. The indorsement virtually included it.

Now the present case includes that, and more; for here the first indorsee was an assignee in fact. And it ought to be so, for the sake of certainty, and for the benefit and convenience of trade. No intention appears here to restrain it, and in general the law says "it is assignable."

And it is not material when or how filled up, for it is every day's practice, to fill up the indorsement long after it is made; nay, even in Court, at the trial.

I will not give any opinion whether the indorser might have limited his assignment by some clear plain negative words, if in fact it had been his intention to limit and restrain it.

Here, no such intention appears; the indorsement is general, and the law is settled "that the assignment follows the nature of the thing assigned." And the law being already so settled, the jury ought not to have given their verdict upon an opinion contrary to it.

A new trial ought therefore to be granted; but no costs should be paid, for the reasons already mentioned.

[* 1226] * Mr. Justice FOSTER concurred that there should be a new trial; because it is a verdict against a known and settled rule of law; as appears by the two adjudged cases reported in Comyns and Strange. Therefore it ought not have been left to a jury at all.

Much has been said about the custom of merchants. But the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law.

People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs (which are part of the common law), and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law; and therefore ought not to have been left to the jury after it has been already settled by judicial determinations.

Mr. Justice WILMOT was of the same opinion.

The law with regard to this point is settled and fully established by the two cases which have been cited, and upon right and proper principles.

This original contract is, "to pay to such person or persons as the payee or his assignees or their assignees shall direct;" and there is as much privity between the last indorser and the last assignee as between the drawer and the first payee. When the payee assigns it over, he does it by the law of merchants; being a *chose in action*, not assignable by the general law. And the indorsement is part of the original contract, and is incidental and appurtenant to it in the nature of it, and must be understood and interpreted to be made in the same manner as the bill was drawn;

and the indorsee holds it in the same manner, and with the same privileges, qualities, and advantages as the original payee held it; that is, as an assignable negotiable note, which he may indorse over to another, and that other to a third, and so on at pleasure.

There is a great deal of difference between giving a *naked authority "to receive it," and transferring it over [*1227] by indorsement. And I doubt whether he can limit his indorsement of it by way of assignment or transfer to another, so as to preclude his assignee from assigning it over as a thing negotiable. For the assignee purchases it for a valuable consideration; and therefore purchases it with all its privileges, qualities, and advantages, one of which is its negotiability.

To be sure, he may give a mere naked authority to a person "to receive it for him;" he may write upon it, "pray pay the money to my servant for my use;" or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him and for his own use. In such case it would be clear that no valuable consideration had been paid him. But, at least, that intention must appear upon the face of the indorsement. Whereas here, no such thing nor anything tending to it, appears upon the face of the indorsement; it is a general assignment without any restriction at all.

The principle I rely upon is the paying a valuable consideration for the assignment.

In the case of *More* v. *Manning* (which is in point), those words added at the end, "that at a trial, when a bill is given in evidence, the party may fill up the blank as he pleases," are redundancy. And that indorsement could not be an indorsement in blank; it appears otherwise from the case itself. It was made to Witherhead, but without saying "to him and order."

So the other case, *Acheson* v. *Fountain*, in 1 Strange, 557, is likewise in point. And there is no difference, whether the determinations be on promissory notes or on bills of exchange; it is just the same thing because it is to be governed by the same rule.

(He cited a manuscript report of that same case of *Acheson* v. *Fountain* which is reported by Sir John Strange, which agreed with Sir John's report of it, and with mine, exactly.)

There is another case, *Fisher* v. *Pomfrett*, Carthew, 403, that shows this to be a right determination (though the state of that case was indeed just the reverse of the present case). It was a

bill of exchange payable to T. S. who indorsed it, "Pay the contents of this bill unto the order of Mr. Fisher." Fisher brought his action as indorsee. The defendant demurred to the declaration because the indorsement was not to Fisher himself, but to his order. But the Court held that Fisher might well bring the action, "for amongst tradesmen that form was commonly
[* 1228] used, though intended to be made * payable to the person whose order is mentioned." And Fisher had judgment.

Therefore a note indorsed over to A. would enable him to indorse it over to B., and so on. For the convenience and course of trade is to be attended to; the intention is to be regarded, not the form.

The custom of merchants is part of the law of England, and courts of law must take notice of it as such.

There may indeed be some questions depending upon customs amongst merchants where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful. And even there the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law, and so was the case of *Hawkins* v. *Cardy*, Carthew, 466; 1 Salk. 65. There the defendant had given a note under his hand "to pay unto E. G. or order a certain sum of money;" "E. G. by indorsement on this note, ordered part of the money to be paid to the plaintiff. Upon which this action was brought; and a special custom amongst merchants was laid in the declaration, according to the plaintiff's case." Upon a demurrer to this declaration, it was adjudged "that this is a void custom, because by means of such division the defendant would be subject to as many actions as the person to whom the note was given should think fit; and this upon a single contract which subjected him to one action only." This warrants what I said, "that the original contract must be looked into." Here the original contract is a negotiable bill, and the indorsee is in the place of the original payee.

The two cases of *More* v. *Manning*, and *Acheson* v. *Fountain*, serve to prove "that there is no such custom of merchants as the defendants pretend," for they could not have been so determined as they were if there had been such a custom of merchants.

Therefore these judicial determinations of the point are the *lex mercatoria* as to this question; for they settle what is the custom of merchants, which custom is the *lex mercatoria*, which is part

of the law of the land. But this finding of the jury in the present case is directly contrary to the *lex mercatoria* so fully settled and established by legal adjudications.

Therefore the verdict ought to be set aside.

Per Cur. unanimously, the verdict was set aside and a new trial ordered.

Sigourney v. Lloyd. Lloyd v. Sigourney.

8 Barn. & Cress. 622–634 (s. c. 3 Man. & Ry. 58).

Assumpsit for money had and received. Plea, general [622] issue. The plaintiff was a merchant residing at Boston, in the United States of America. The defendants were bankers in London, carrying on business under the firm of Messrs. Jones, Lloyd & Co. Before the trial the parties agreed that the plaintiff should take a verdict by consent for £3164 11*s.* 8*d.*, subject to the following case, with liberty for either party to turn it into a special verdict. This was accordingly done with the approbation of Lord Tenterden, C. J., before whom the cause came on for trial: —

In the month of July, Captain Attwood, who commanded a vessel belonging to the plaintiff, took in payment of a cargo of flour, the property of the plaintiff, which he sold at Rio Janeiro, a bill of exchange for £3164 11*s.* 8*d.*, drawn in a set of three by March, Sealy, Walker and Co., of that place, on March, Sealy, and Co. of London. This bill was payable to the order of Messrs. Hendricks, Wierss, and Co., who indorsed it to Captain Attwood. The following are copies of the first and third parts of the bill: —

* £2971 due 28th November. [* 623]

Rio de Janeiro, 12th July, 1825.

For £3164 11*s.* 8*d.* 1258.

At sixty days sight pay this first of exchange, second and third not paid, to the order of Messrs. Hendricks, Wierss, & Co. three thousand one hundred and sixty-four pounds, eleven shillings, and eightpence, value of the same, which place to account, as *per* advice from

March, Sealy, Walker, and Co.

This bill was indorsed by the payees to A. Attwood.

Rio de Janeiro, the 12th July, 1825.

For £3164 11*s.* 8*d.*

At sixty days sight pay this third of exchange, first and second not paid, to the order of Messrs. Hendricks, Weirss, and Co., three thousand

one hundred and sixty-four pounds, eleven shillings, and eight-pence, value of the same, which place to account, as per advice from

March, Sealy, Walker, and Co.

This was indorsed by the payees to A. Attwood, by Attwood to the plaintiff, by the latter in the following words: "Pay to Samuel Williams, Esq., of London, or his order, for my use;" and by S. Williams to Jones and Co.

Attwood sent the first of the set to the correspondent of the plaintiff, Mr. Samuel Williams of London, who was an American agent and factor for merchants and planters, carrying on such business to a very great extent, inclosed in the following letter: "Sir, I herewith have the honour to enclose you the first of exchange for £3164 11*s.* 8*d.* sterling, at sixty days sight, on Messrs. March, Sealy, and Co., in London, in favour of myself, it being the pro-
[* 624] ceeds of a cargo of flour in brig *Swiftsure*, * belonging to Henry Sigourney, Esq., Boston, America, which you will please to present for acceptance, and keep at the disposal of the second or third." But he did not indorse the bill. Williams received the letter and bill on the 26th September, 1825, and procured the acceptance of the bill in due course. The third of the set was remitted to the plaintiff; and he having indorsed it as aforesaid, "Pay to Mr. Samuel Williams, or order, for my use," remitted it to Williams in the following letter of the 17th September, 1825: "Captain Amaziah Attwood, of my brig *Swiftsure*, arrived here yesterday, Rio Janeiro, whence he sailed about the July. He informs me that he left a letter directed to you, to be forwarded to you by the next English mail, containing the first of March, Sealy, Walker, and Co.'s draft on March, Sealy, and Co., London, dated 12th July, at sixty days sight, for £3164 11*s.* 8*d.* sterling, in favour of Messrs. Hendricks, Weirss, and Co., and by them indorsed to said A. Attwood He thinks he did not indorse the draft; and if received, it can only be accepted. Enclosed you have third bill of the set indorsed to me by Captain Attwood, and to yourself by me. I presume that if the other should have been previously received and accepted, that a receipt on the one now transmitted would be accepted at maturity. Have the goodness, when you advise the receipt, which I trust will be as soon as possible, of the present, to inform me the standing of the acceptors. Henry Sigourney." The letter and bill were received by Williams

on the 21st October, 1826. The defendants had no notice of the before-mentioned letters of Captain Attwood and the plaintiff. Williams stopped payment on the 24th of October aforesaid, and a docket was struck against him * on the 25th of the [* 625] same month, upon which a commission, dated the 27th of the same month, was issued, and he was declared a bankrupt immediately afterwards. At the time Williams received the bill in question, as well as at the time of his bankruptcy, the balance of account was in favour of the plaintiff to the amount of upwards of £3000, exclusive of the before-stated bill. On the morning of the 22nd of October, when the discount hereinafter mentioned was made, the balance in favour of Williams with the defendants was £3784 10*s.* 10*d.* About eleven o'clock on that day Williams indorsed the bill in question, with others, amounting in the whole to £7081 17*s.* 9*d.*, to the defendants, who were his bankers, and in the habit of discounting for him very largely, and the said bills were *bonâ fide* discounted for him, and credit given to him for the amount, less the discount; and subsequently, viz. at the clearing-house about five o'clock in the evening of that day, the defendant paid Williams's acceptances due that day to the number of thirty-two, and three drafts, amounting to £10,683 18*s.* 1*d.* The bill in question was honoured at maturity, and the amount received by the defendants on the 28th November, 1825.

F. Pollock for the plaintiff. The bill belonged to the plaintiff, and he is entitled to recover its amount from the defendants. The indorsement was special, so as to prevent the indorsee from transferring any interest in the bill beyond the particular purpose or the particular individual mentioned in the indorsement. The earliest case where such a special indorsement is mentioned is *Snee* v. *Prescott*, 1 Atk. 247. There Lord HARDWICKE * says, [* 626] "Promissory notes and bills of exchange are frequently indorsed in this manner, *Pray, pay the money to my use*, in order to prevent their being filled up with such an indorsement as passes the interest." In *Edie* v. *The East India Company*, 2 Burr. 1227, p. 342, *ante*, WILMOT, J., speaking of an indorser, says, "To be sure he may give a mere naked authority to a person to receive it for him: he may write upon it, 'Pray, pay the money to my servant, for my use;' or use such expressions as necessarily import that he does not mean to indorse it *over*, but is only authorizing a particular person to receive it for him and for his *own use*. In such

case it would be clear that no valuable consideration had been paid him. But, at least, that intention must appear upon the face of the indorsement." It appears, therefore, from these two authorities that an indorsement in the form used in the present case will prevent the indorsee from passing the interest in the bill by a subsequent indorsement. The general indorsement of a bill makes it the legal property of the indorsee, and gives him the *jus disponendi;* but an indorsement for the use of another is notice that the property in the bill is in that other, and that the holder is an agent for him, and cannot transfer the bill. [He was then stopped by the Court.]

Parke, *contra.* It may be conceded that the negotiability of a bill may be restrained by a special indorsement. The question, which in this case turns entirely on the construction of the indorsement, is whether it restrains the negotiability of the bill, and makes every subsequent holder a trustee for the plaintiff.

[* 627] * The general rule is that an indorsement transfers to the indorsee all the rights of the indorser, and, among others, the right of transferring the interest in the bill by indorsement, *More* v. *Manning*, Com. 311; *Acheson* v. *Fountain*, 1 Str. 557; *Edie* v. *East India Company.* In the latter case, WILMOT, J., even intimated a doubt whether there could be a restrictive indorsement. But, conceding that there may, the question is, whether the indorsement in this case contains clear negative words restraining the negotiability of the bill? The words must be construed most strongly against the plaintiff, the party using them. First, the bill is indorsed payable to order. *Primâ facie*, therefore, it was transferable. The legal title was in Williams, though, as between the plaintiff and him, he might be bound to hold the bill for the plaintiff's use; and if Williams had the legal title, he might transfer his interest in the bill by indorsement. The meaning of such an indorsement was considered in *Evans* v. *Cramlington*, Carth. 5; 2 Vent. 307; Skinn. 264; 1 Show. 4. There the bill was payable "to Price or order, for *the use of Calvert.*" Price indorsed it to Evans; after which an extent issued against Calvert, and the money due upon it was seized to the use of the king. These facts appearing upon the pleadings, two points were made upon demurrer; the one, whether Calvert had such an interest in the money as might be extended; and the other, whether Price had power to indorse the bill, or whether he had only a bare authority to receive the money for the use of Calvert; and the Court of King's Bench,

and afterwards the Exchequer Chamber, held that Calvert had not such an interest as could be *extended, and that [*628] Price had power to indorse the bill, and judgment was given for the plaintiff. In the case, as reported in Shower, p. 4, Lord HOLT says: "This is a bill which is assignable by Price, and when Price assigned it he received the money, and that receipt was for the use of Calvert; and there Calvert hath his action; but we can take notice of none but Price; and at this rate the credit of bills of exchange will be spoiled." [BAYLEY, J. The question was not raised there whether Price indorsed contrary to his duty to Calvert.] If Calvert's consent had been necessary, that must have been stated in the pleadings to have been given; but there is no such averment. The pleadings are set out in 2 Ventris, p. 307. That case, therefore, is an authority to show that Williams had authority to transfer the interest in the bill in this case. The words "to my use" may be construed as a direction from the plaintiff to Williams, his agent, to apply the bill or the proceeds of it to his, the plaintiff's, use. The other construction makes the indorsement restrictive. But the intention is not clear, and it ought to be so, in order to restrain the negotiability of the bill. If the first construction be adopted, the defendants clearly were not bound to see to the application of the money. If the words of the indorsement had been, "which place to my account," or "which hold to my use," the defendants would not have been bound to look to the application of the money. [BAYLEY, J. We do not know that the bill was intended to be negotiated. It probably was not, unless Sigourney gave authority.] The party to whom the bill was tendered is not bound to make any inquiry. *According- [*629] ing to the argument on the other side, every subsequent indorsee would be a trustee for the plaintiff. That would be very inconvenient. [BAYLEY, J. We are not bound to decide that all the subsequent indorsees will be trustees for the plaintiff.] The argument is equally good if it be confined to the case of the first indorsee. The question turns entirely on the intention of the indorser. In *Evans* v. *Cramlington*, 1 Show. 4, Lord HOLT says that when Price assigned the bill and received the money, he became trustee for Calvert. If that be so, then Williams, by indorsing for value to Lloyd, became trustee for the plaintiffs. That was before the bill became due. He could not make the defendants trustees for the plaintiffs. The reasonable construction of the indorsement

is that it was a direction by the principal to his selected agent to apply the proceeds to his use. If there were any fraud or other suspicious circumstances, the case might have been different. *Treuttel* v. *Barandon*, 8 Taunt. 100, proceeded on that ground. [Bayley, J. Here the defendants were parties to the misapplication of the money.] They applied the money generally according to the directions of Williams; they could not know in what mode Williams was to apply the money to the use of the plaintiff. This was a *bonâ fide* discount in the way of trade to Williams himself. The defendants were not trustees for the plaintiff.

Lord Tenterden, C. J. I am of opinion that in this case the plaintiff is entitled to recover. It appears from the report of the case of *Snee* v. *Prescot*, 1 Atk. 247, that in 1743 an indorse-
[* 630] ment in this form was not unusual; and it * appears to have been the opinion of Lord Hardwicke in that case, and also to have been the opinion of Mr. Justice Wilmot, in the case of *Edie* v. *The East India Company*, 2 Burr. 1227, p. 351 *ante*, that such an indorsement will have the effect of preventing a subsequent transfer of the bill for the benefit of any other than the person for whose use it is expressed to have been made by the indorsement. The case of *Ancher and Others* v. *The Bank of England*, Doug 637, is an authority to the same effect. The indorsement was not precisely in the same form as in the present case, but the effect of it is the same. The indorsement there was, "The within must be credited to Captain Moreton L. Dahl, value in account." An indorsement purporting to have been made by Dahl was afterwards forged, and the Bank of England discounted the bill. The acceptors did not pay it; before it became due they had failed, and one Fulgberg paid it for the honour of Ancher and Co., the plaintiffs; and upon the ground that the indorsement had restrained the negotiability of the bill, they brought an action for money had and received against the bank. Lord Mansfield directed a nonsuit; but upon a rule to show cause why there should not be a new trial, and cause shown, Lord Mansfield, Willes and Ashurst, JJ., thought the indorsement restrictive, and that the plaintiffs were entitled to recover; but Buller, J., thought otherwise; upon which Lord Mansfield said, the whole turned on the question, whether the bill continued negotiable? and if they altered their opinion, they would mention the case again; but it never was mentioned afterwards: and upon a new trial,

Lord MANSFIELD directed the jury to find for the plaintiff, * which they did. It has been said that the indorsement [* 631] "pay to Williams for my use" is a mere direction to Williams to apply the money produced by the bill to Sigourney's use; but the words taken in that sense would be useless; for whether the words be on the face of the indorsement or not, as soon as Williams received the proceeds of the bill, he must necessarily apply them to Sigourney's use, and place them to his credit in the account between them. So that those words will have no effect whatever, unless they have that of restraining the negotiability of the bill, or at least of making the first indorsee (if he takes the bill with those words on it, as Williams did in this case) a trustee for the original indorser. The case of *Evans* v. *Cramlington*, when duly considered, does not seem to me to be sufficient to countervail the authorities to which I have already adverted. The bill in that case was drawn by Cramlington upon one Ryder, payable to T. Price or his order, for £500, for the use of E. Calvert. Ryder accepted but did not pay the bill. Price indorsed it to Evans for value. The latter brought an action against Cramlington the drawer; he pleaded that Calvert (who was named in the bill as the *cestui que use*) was an officer of the excise, and indebted to the king in such a sum, and that upon an exchequer process at the suit of the king this £500 was extended in his hands. To this plea there was a demurrer. It appears, therefore, that Cramlington in answer to the claim of Evans, the indorsee, set up what is sometimes denominated the *jus tertii*; and the only question which it was necessary for the Court to determine was, whether the bill, being in trust only for the use of Calvert, was liable to be seized under the extent against him? The Court was of * opinion [* 632] that it was not. The proposition of Cramlington, that the *jus tertii* intervened, failed entirely, and it became unnecessary to decide any other point. That case, therefore, as it seems to me, is not of sufficient weight to countervail the opinions delivered in *Snee* v. *Prescot*, *Edie* v. *The East India Company*, and *Ancher* v. *The Bank of England*. The use of indorsements of this kind is not small, nor are they, as it seems to me, inconsistent with the interests and convenience of commerce. Such an indorsement will not prevent the indorsee from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal all will be well, but the indorsee must look to him for the application of it. It will have

the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debts at the expense of his correspondent. I cannot see that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said, that it cannot be expected that bankers or others when requested to discount such bills as this, should look into the accounts between the principal and his agent. I agree it cannot be expected they should; but still if they take the bill so indorsed, they take it at their peril, and must be bound by the state of the accounts between those parties.

BAYLEY, J. The indorsement in this case is in the words [* 633] "pay to Williams or his order for my use." The * question is, whether the words "for my use" have or have not any effect with reference to the bill itself? The person who remits a bill, may give private directions to his correspondent in the letter in which the bill is inclosed, and if he means the directions to be private, they will be confined to the letter. But when he introduces the words "to my use" on the bill itself, he notifies to the world that he, the party indorsing, has not given to the indorsee a general unlimited authority to apply it to his own purposes, but only to apply it to the use of him the indorser. It has been suggested, that the most convenient construction to put on the words will be, to hold that the indorser meant thereby to direct Williams to apply the money to his, the indorser's, use, but not to put the indorsee on his guard. My opinion is, that that is the most convenient construction which will most effectually protect the party who appears by the form of the indorsement used by him to have thought that he required protection. It is said, why introduce the words "or order?" The purposes of the indorser may, perhaps, have required that the bill should be indorsed. But before any person could honestly take that bill and advance money on it, he ought, seeing the words "for my use" on the bill, to have satisfied himself, from the correspondence and the state of the accounts between Sigourney and Williams, whether the latter was indorsing it for the benefit of Sigourney or for himself. And if such a person advances money upon a bill so indorsed without making such inquiry, he advances it at his peril. Now, in this instance, the defendants advanced money on this bill without making any inquiry,

and applied the whole of that money to the use of Williams. The bill was discounted on the * 22nd of October, [* 634] the day after it was received. At that time Williams had more than £3000 in the hands of the defendants. They discounted this and other bills to the amount of £7000, and in the course of the day all the money produced by this and other bills, to the amount of £10,000, was applied to the use of Williams, so that in the afternoon of that day they had in their hands £182 only.

As to the case of *Evans* v. *Cramlington*, it is sufficient to say that that case came before the Court on demurrer, and that there was no question whether there had been any misapplication of the money which had been received by means of the bill. In this case there has been a misapplication of the money by the defendants. That is a sufficient distinction between this case and that of *Evans* v. *Cramlington*. For these reasons I am of opinion, that in this case the plaintiff, who made the special indorsement, thereby effectually protected himself, and is entitled to the judgment of the Court. *Postea to the plaintiff.*[1]

Lloyd v. Sigourney (Exch. Ch.).

5 Bing. 525–532 (s. c. 3 Moore & Payne, 229; 3 Young & J. 220).

The case having been turned into a special verdict pursuant to leave above mentioned, the defendant brought a writ of Error in the Exchequer Chamber from the judgment of the King's Bench; and, after argument on the special verdict, the judgment of the Court was pronounced as follows, by

BEST, C. J. We are all of opinion, that the judg- [5 Bing. 531] ment of the Court of King's Bench must be affirmed.

Whoever reads the indorsement on this bill of exchange must perceive that its operation is limited, and that the object of the indorser was to prevent the money received in respect of the bill from being applied to the use of any other person than himself: to whomsoever the money might be paid, it would be paid in trust for the indorser; and into whose hands soever the bill travelled, it carried that trust on the face of it. And we see no inconvenience to commercial interests from such a limitation of the effect of the indorsement so expressed; the only result will be, to make parties open their eyes and read before they discount.

[1] LITTLEDALE, J., was in the Bail Court.

[* 532] * It is impossible to read this indorsement without seeing that *some* inquiry is necessary; for if such be not the use of the words introduced, they are of no use. But if a use can be found for them, the Courts must apply them in the way in which they were intended to operate.

The indorser has added the words "or order," to the name of the indorsee, because, if he had not done so, the indorsee must have attended in person to obtain payment of the bill, and the short way to obviate that inconvenience was to introduce the words "or order." But he still intended that the person ordered by the indorsee to receive the amount should receive it to the use of him, the indorser.

But the defendants below, instead of paying the amount of the bill for the use of Sigourney, the indorser, have discounted it for the use of Williams, the indorsee. We are all, therefore, of opinion that the judgment of the Court of King's Bench must be

Affirmed.

ENGLISH NOTES.

See, as to the former branch of the rule, Bills of Exchange Act, sect. 8 (4), and sect. 34 (3).

The Act by sect. 8 (4) has extended the principle of the former branch of the rule, so as to apply to the drawing, as well as the indorsement of the bill. Before the Act, a bill or promissory note drawn payable to A. without the addition of "or order," or the like words, was not negotiable. *Plimley* v. *Westley* (1835), 2 Bing. N. C. 249, 5 L. J. C. P. 51.

As to the latter branch of the rule, see Bills of Exchange Act 1882, sect. 35.

In *Trenttel* v. *Barandon* (1817), 8 Taunt. 100, cited in the argument of the latter of the principal cases, p. 358, *ante*, the indorsement was "pay to R. D. or order for account of T. & W." R. D. had indorsed the bill to the defendants by way of pledge for a debt of his own. In an action of trover for the bills, the plaintiffs (T. & W.), were held entitled to judgment against the pledgees. The judgment hardly went so far as to say that the indorsement was restrictive. But that is the necessary effect of it. And accordingly such an indorsement is made restrictive by the Bills of Exchange Act 1882, sect. 35 (1).

On the other hand, an indorsement to A. B. "value in account with X," — where the reference to the account appears to be a mere statement of the consideration for the bill, or something else than a direction that the payment is to be applied for the purposes of the account, — is

not a restrictive indorsement. *Potts* v. *Reed* (1806), 6 Esp. 57. 9 R. R. 808. *Murrow* v. *Stuart* (1853), 8 Moore, P. C. 267; *Buckley* v. *Jackson* (1868), L. R., 3 Ex. 135, 18 L. T. 886.

Where an indorsement is in its terms general, evidence cannot be received of an intention that it should be restrictive, so as to alter the legal effect of the indorsement. *Soares* v. *Glyn* (Ex. Ch. 1845), 8 Q. B. 24, 14 L. J. Q. B. 313, 9 Jur. 881.

A bill of exchange made or indorsed payable to "order of A. B.," is payable to A. B. himself unless he orders otherwise, which he has of course the option to do. *Smith* v. *McClure* (1804), 5 East, 450, 7 R. R. 750.

AMERICAN NOTES.

The principal cases are cited in 1 Daniel's Negotiable Instruments, § 698, with *Power* v. *Finnie*, 4 Call (Virginia), 411; *Wilson* v. *Holmes*, 5 Massachusetts 543; 4 Am. Dec. 75; *Williams* v. *Potter*, 72 Indiana, 354; *Johnson* v. *Mitchell*, 50 Texas, 212; 32 Am. Rep. 602; *Hook* v. *Pratt*, 78 New York, 371; 34 Am. Rep. 539; *First Nat. Bank* v. *Reno County Bank*, 3 Federal Reporter, 257; *White* v. *National Bank*, 102 United States, 658; *Blaine* v. *Bourne*, 11 Rhode Island, 1; 23 Am. Rep. 429, citing the principal cases; *Claflin* v. *Wilson*, 51 Iowa, 15; *Fawsett* v. *Nat. L. Ins. Co.*, 97 Illinois, 9, all of which sustain the doctrine of the Rule. In *Hook* v. *Pratt*, *supra* (which cites *Edie* v. *East India Co.*), it is said: "The citation from 3 Kent Com. 92, states the principle to be that when the indorsement is a mere authority to receive the money for the use or according to the directions of the indorser, it is evident that the indorsee did not give a valuable consideration for it, and is not the absolute owner." In this case the putative father of an illegitimate child drew a draft to his own order, and indorsed it to the order of the mother, expressly "for the benefit" of the child. This was held to import a consideration. The expressions held restrictive are "to J. S. only," "for my use," "to order for my use," "for me," "credit my account," "for account or on account of C. D.," "for collection," etc. See also *Merchants' Nat. Bank* v. *Hanson*, 33 Minnesota, 40; 53 Am. Rep. 5; *Gibson* v. *Hawkins*, 69 Georgia, 354; 47 Am. Rep. 757 ("to be held as collateral"); *National, &c. Bank* v. *Hubbell*, 117 New York, 384; 15 Am. St. Rep. 515; *Farmers', &c. Bank* v. *Nat. T. W. Co.*, 151 Massachusetts, 113; 21 Am. St. Rep. 161.

But unless the restriction appears on the paper the purchaser in good faith gets exclusive title. *Coors* v. *German Nat. Bank*, 14 Colorado, 202; 7 Lawyers' Rep. Annotated, 845.

Second principal case cited, Bigelow on Bills and Notes, p. 135.

No. 20. — ATTWOOD v. MUNNINGS.

(1827.)

RULE.

THE holder of a bill signed by an agent expressly *per procurationem* has notice that the agent has a limited authority, and his right to sue the principal depends upon whether the agent so signing did so within the actual limits of his authority.

Attwood v. Munnings.

7 Barn. & Cress. 278-285 (s. c. 1 Man. & Ry. 66).

[278] Assumpsit by the plaintiffs, as indorsees, against the defendant, as acceptor of a bill of exchange for £1560. Plea,
[* 279] the general issue. At the trial before Lord * TENTERDEN, C. J., at the London sittings after Michaelmas term 1823, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case: —

The plaintiffs were bankers carrying on business in the city of London; the defendant was a merchant engaged in extensive mercantile business, and also in joint speculations to a considerable amount, with Thomas Burleigh, Messrs. Bridges and Elmer, S. Howlett, and W. Rothery. In the year 1815 the defendant went abroad on the partnership business, and remained abroad till after the bill upon which this action was brought became due. By a power of attorney, dated the 18th of May, 1816, the defendant granted power to W. Rothery, T. Burleigh, and S. Munnings, his wife, jointly and severally for him, and in his name, and to his use, to sue for and get in moneys and goods, to take proceedings, and bring actions, to enforce payment of moneys due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions; "indorse, negotiate, and discount, or acquit and discharge the bills of exchange, promissory notes, or other negotiable securities which were or should be payable to him, and should need and require his indorsement;" to sell his ships, execute bills of sale, hire on freight, effect insurances; "buy, sell, barter, exchange, export and import all goods, wares, and merchandises, and to trade in and deal in the same, in such man-

ner as should be deemed most for his interest; and generally for him and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform, and accomplish all and singular such further and other acts, deeds, matters, and things as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and * concerns, and as he might or could do if per- [* 280] sonally acting therein." By another power of attorney, dated the 23rd of July, 1817, and executed by the defendant when abroad, he gave to his wife, S. Munnings, power to do a variety of acts affecting his real and personal property; "and also for him and on his behalf, to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require, &c.; and generally to do, negotiate, and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein." T. Burleigh corresponded with the defendant, and acted as his agent, both before and after the receipt of this power. The defendant, while abroad, employed part of the produce of the joint speculations in his individual concerns, and during his absence, T. Burleigh, for the purpose of raising money to pay to creditors of the joint concern, who were become urgent, drew four bills of exchange for £500 each upon the defendant, dated May, 22nd, 1819. The proceeds of those bills were applied in payment of partnership debts; they were accepted by the defendant by procuration of S. M., his wife. The bill in question was afterwards, in order to raise money to take up those bills, drawn and accepted in the following form: "Six months after date pay to my order £1560, for value received: T. Burleigh. Accepted *per* procuration of G. G. H. Munnings. S. Munnings." This bill was discounted by the plaintiffs. The defendant returned to England in October, 1821, and he, and each of the partners to the joint speculations, claimed to be a creditor on that concern.

Parke for the plaintiffs. The question is, whether, * under either of the powers of attorney, the defendant's [* 281] wife was authorized to accept bills drawn by Thomas Burleigh, to raise money to discharge debts owing by the partners in the joint concern? By the second power express authority was given to Mrs. M. to accept bills drawn by agents of the defendant as occasion might require. Burleigh, the drawer, is found to have acted

as agent of the defendant, and, therefore, the only circumstance necessary to complete the authority is to show that occasion did require that the bill should be drawn. That, however, cannot affect third persons. They are bound to see the power to accept, but not to ascertain how far the bill was necessary. Powers are often construed differently as to the attorney and third persons. In *Howard* v. *Baillie*, 2 H. Bl. 618; 3 R. R. 531, Eyre, C. J., puts an instance, viz. a power to pay debts in course of administration; payment of a simple contract before a specialty debt would be good, *quoad* the creditor, but not as to the attorney. It is not possible for strangers to have such a knowledge of the party's affairs as to be enabled to judge whether the occasion did make the bill requisite. The agent, of course, has such knowledge; and the power as to this part must be considered directory only. The party is protected by having the choice of his own agent, and may derive great benefit from giving him power to draw or accept bills in cases of expediency as well as in cases of absolute necessity. The power in question may fairly be read, as if the words "at the discretion of my attorney," or "as my attorney shall think fit," had been inserted, instead of, "as occasion shall require." If the words had been "as shall be necessary," a different construction might have prevailed. The case of *The East India Co.* v. *Hensley*, [* 282] * 1 Esp. 112, differs from the present. There the agent had a special and limited power to buy silk of a particular quality. If the order to him had been general, to purchase such silk as occasion should require, and he had bought silk of a second quality, although the occasion required him to buy it of the first, the principal would have been bound by his act. But, secondly, the occasion did require this bill to be accepted. The case states that the defendant was engaged in various speculations individually and in partnership. He had applied to his own use funds of the joint firm. The joint concern was in debt, and the bill in question was drawn and accepted for the purpose of paying those debts. [Bayley, J. There is nothing said in the power as to partnership concerns, and as to them it was unnecessary, for the other partners had, without any power of this sort, authority to bind the defendant.] The words of the power are general; there is nothing in them to limit the authority to the private concerns of the defendant, and the words must be construed most strongly against him. But if it be held that the special authority to accept bills

did not extend to this case, still the general power in the first instrument was sufficient to authorize the acceptance; that relates to the management of all the defendant's affairs; and if any words are sufficiently comprehensive to give both special and general powers, they have been used in that instrument.

Pollock, *contrà*. If the first power had been capable of receiving the construction now attempted to be put upon it, the second would have been wholly unnecessary; but it manifestly was not intended to apply to the acceptance of bills. The question, therefore, turns upon * the authority to accept given by the [* 283] second power. Much argument has been addressed to the question how far the power was restricted by the introduction of the words "as occasion shall require." But supposing no such words to have been used, then the power would have been to accept bills drawn by his agent or correspondent, but that must mean an agent or correspondent in that transaction. Nor would any difficulty arise out of such a construction; for the acceptance being by procuration, ought to put parties taking the bill on their guard, and they should require the production of the letter of advice accompanying the bill.

Bayley, J. This was an action upon an acceptance importing to be by procuration, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly. By the first of the powers in question the defendant gave to certain persons authority to do certain acts for him, and in his name, and to his use. It is rather a power to take than to bind; and, looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it; the first power, therefore, did not warrant this acceptance. The second * power gave an express authority to [* 284] accept bills for the defendant, and on his behalf. No such power was requisite as to partnership transactions, for the other

partners might bind the firm by their acceptance. The words, therefore, must be confined to that which is their obvious meaning, viz. an authority to accept in those cases where it was right for him to accept in his individual capacity. Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents; but the drawer of the bill in question was not his agent *quoad hoc.* The bills are to be accepted, too, "as occasion shall require." It would be dangerous to hold that the plaintiff in this case was not bound to inquire into the propriety of accepting. He might easily have done so by calling for the letter of advice; and I think he was bound to do so. For these reasons, I am of opinion that judgment of nonsuit must be entered.

Holroyd, J. I agree in thinking that the powers in question did not authorize this acceptance. The word "procuration" gave due notice to the plaintiffs, and they were bound to ascertain before they took the bill, that the acceptance was agreeable to the authority given. The case does not state sufficient to show that this bill was drawn by an agent in that capacity, but rather the contrary; for it appears that it was drawn to raise money for the joint concern in which the drawer was a partner; it does not, therefore, come within the special power. Then as to the general powers. These instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect.

[*285] Littledale, J. I am of the same opinion. It is *said that third persons are not bound to inquire into the making of a bill; but that is not so where the acceptance appears to be by procuration. The question then turns upon the authority given. The first power of attorney contains an authority to indorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to anything as to which limited powers are given. The second power gives authority "to accept for me and in my name, bills drawn or charged on me by my agents or correspondents, as occasion shall require." The latter words, as to the occasion, do not appear to me to vary the question; and, reading the sentence without them, it authorizes the acceptance of bills drawn by an agent. The present bill was not drawn by Burleigh in his character of agent, and therefore the acceptance was without sufficient authority, and the plaintiff cannot recover upon it. *Postea to the defendant.*

ENGLISH NOTES

This rule is embodied in the Bills of Exchange Act 1882, s. 25.

Where an incorporated company was formed for the express and primary purpose of accepting and indorsing bills, and the articles of association gave the directors an express general power for this purpose; the directors passed a resolution empowering the chairman to accept on behalf of the company bills to a certain amount, on condition of securities of a specified description, and to a certain amount, being deposited. Subsequently the board of directors authorised the chairman to accept certain bills pursuant to the previous resolution, and he did accept those bills "on behalf of" the company. The bills so accepted were held binding on *bonâ fide* holders for value, although it was alleged that the board when approving the issue of the bills had been deceived as to the amount of securities deposited, and that they were therefore not authorised by the original resolution. The principle of *Attwood* v. *Munnings* was held not to apply. *In re Land Credit Co. of Ireland, Ex parte Overend, Gurney, & Co.* (L. JJ. 1869), L. R., 4 Ch. 460, 39 L. J. Ch. 27, 20 L. T. 641.

A company whose business was importing and dealing in tinned provisions, appointed H. their manager and agent in South America, "to take the entire charge of the business of the company there." H. negotiated with L. for a supply of provisions, which L. was prepared to furnish on having a guarantee from some third person. H., in order to procure such a guarantee from S., gave S., in exchange for his promissory note for £1000, to be deposited as a guarantee, a promissory note for £1000, made by H., "in representation" of the company. It was held by North, J., that, it not being shown that the giving of the note was necessary for carrying on the business of the company, or in the ordinary course of business of such a company, the note was not binding on the company. *In re Cunningham & Co., Simpson's claim* (1887), 36 Ch. D. 532, 57 L. J. Ch. 169, 58 L. T. 16.

Where a power of attorney (by W.) authorised the agent (T.) to "negotiate, make sale, dispose of, assign, and transfer" (*inter alia*), Government promissory notes, the power was held by the Judicial Committee not to have authorised the indorsement of the note by way of pledge, and the pledgee having received the note on an indorsement signed by the agent "W. by his attorney T.," was held not to have acquired a title to the note. *Jonmenjoy Coondoo* v. *Watson* (1884), 9 App. Cas. 561, 53 L. J. P. C. 80, 50 L. T. 411.

The operation of the rule is controlled by the 60th section of the Bills of Exchange Act 1882, which follows the enactment first made by the Act 16 & 17 Vict. c. 59, s. 19, for the protection of bankers having

presented to them cheques drawn upon themselves payable to order. It has been held by the Court of Appeal in *Charles* v. *Blackwell* (1877), 2 C. P. D. 151, 46 L. J. C. P. 368, 36 L. T. 195, that the protection extends to cheques expressed to be indorsed by procuration, although the indorsement is without authority or forged. In *Bissell* v. *Fox* (1884), 53 L. T. 193, a commercial traveller who had no authority from his employer to indorse cheques, had indorsed cheques drawn to order of his employer with the employer's name "*per pro.*," and paid them into his own account with his bankers. The bankers gave him credit for the amounts, and the traveller subsequently drew out his balance and absconded. In an action by the employer against the bankers for the amount of these cheques, DENMAN, J., gave judgment for the whole claim, but the Court of Appeal varied the judgment in regard to one of the cheques which had been drawn upon the defendant bankers themselves. This decision seems to require an elastic construction of the words of section 60 of the Act. It may be asked, Does a banker by crediting the amount of a cheque to a customer "pay" the cheque "in the ordinary course of business?"

AMERICAN NOTES.

"Whenever the authority purports to be derived from a written instrument, or the agent signs the paper with the words 'by procuration,' in such a case the party dealing with him is bound to take notice that there is a written instrument of procuration, and he ought to call for and examine the instrument itself to see whether it justifies the act of the agent. Under such circumstances he is chargeable with inquiry as to the extent of the agent's authority; and if without examining into it when he knows of its existence — and especially if he has it in his possession — he ventures to deal with the agent, he acts at his peril, and must bear the loss if the agent transcended his authority." 1 Daniel on Negotiable Instruments, § 280, citing the principal case, and *Stainback* v. *Read*, 11 Grattan (Virginia), 281; 62 Am. Dec. 648 (citing the principal case, two of the five Judges dissenting); *North River Bank* v. *Aymar*, 3 Hill (New York), 262.

Mr. Daniel criticises the English form of signing ("C. D., by procuration of A. B.," A. B. being the principal), as ambiguous and unadvisable. "as it might import that A. B. was the agent signing by procuration of C. D."

But the duty of inquiry does not exist where the instructions to the agent are private and the limitation is not notified. *North River Bank* v. *Aymar*, *supra*.

No. 21. — AMORY *v.* MERYWEATHER.

(1824.)

No. 22. — In re OVEREND, GURNEY, & CO. Ex parte SWAN.

(1868.)

RULE.

Where an overdue bill is negotiated the person taking it acquires no better title than the person from whom he receives it had.

But the defence does not apply to a mere right of set-off or other right not inherent in the contractual relation represented by the bill.

Amory v. Meryweather.

2 Barn. & Cress. 573–579.

Debt on bond, bearing date the 13th May, 1822, for £1000. [573] Plea, first (after craving oyer of the bond and condition, which was for the payment of £500 by two instalments, the first of which became payable on the 13th May, 1823), *non est factum*. Secondly, that on the 18th May, 1817, the defendant, by M. White, as the agent and on the behalf of the defendant, made and entered into divers, to wit, one hundred unlawful contracts and agreements with persons to the defendant unknown, for the buying and selling of shares in a public stock or security of this realm to the amount of £10,000 three per cents., to wit, at, &c. Averment that the contracts were not specifically performed, but that afterwards, to wit, on, &c., at, &c., he, the said M. White, did, as the agent and on the behalf of the defendant, voluntarily pay and give the sum of £500 to the said * persons, with whom the said contracts [* 574] had been made, for satisfying the respective differences for the not performing by the defendant of the said contracts, contrary to the form of the statute, and thereupon for securing the repayment to White of £499 10*s.* parcel of the sum of £500 so voluntarily paid by M. White, and for no other purpose; defendant, on, &c., at, &c., at the request of White, made his promissory note, and thereby

promised to pay three months after date to White or order £499 10*s.* That White indorsed the note to the plaintiffs, they knowing that it had been made by the defendant, on the occasion and for the purpose aforesaid; that after the note became due, the plaintiffs threatened to commence an action upon the note against the defendant, and thereupon the defendant gave the bond in lieu of the note and the money secured thereby. The third plea stated the making of the unlawful contracts, and that White paid £500 for differences, and that for securing the repayment thereof to White defendant gave his promissory note, and then proceeded as follows: "That before the payment of the note, and long after the same had become due and payable, according to the tenor and effect thereof, to wit, on the 1st of January, 1820, White indorsed the note to the plaintiffs. That afterwards, to wit, on the 13th May, 1822, to wit, at, &c., the plaintiffs threatened to commence an action against the defendant for the recovery of the money in the note mentioned; and thereupon the defendant, in fear of the said action, did, at the request of the plaintiffs, to wit, on, &c., at, &c., make and seal, and as his act and deed, deliver to the plaintiffs the said writing obligatory in the declaration mentioned, and the plaintiffs then and there ac-
[* 575] cepted and received the said writing obligatory in lieu of *the said last mentioned promissory note, and of the said sum of money so purporting to be secured thereby as aforesaid, including also therein the sum of £5 5*s.* for the stamp impressed on the said writing obligatory and the costs thereof, and on no other account and for no other consideration whatsoever, the plaintiffs then well knowing that the said promissory note in that plea mentioned, had been made and drawn, and delivered by the defendant on the occasion and for the purpose in that plea mentioned, and on no other account or occasion." At the trial before Abbott, C. J., at the London sittings after last Easter term, the execution of the bond was admitted, and White was called as a witness on the part of the defendant, and he proved that the note was given to him to cover a sum which he, as broker to the defendant, was to pay for losses on stock-jobbing transactions. In May, 1819, he being in want of money, indorsed the note to the plaintiffs as a security for money which they advanced to him, but did not then inform them of the consideration upon which the note was given; but they were informed of it before the bond was executed. Upon this evidence, the Lord Chief Justice directed a verdict to be found for the plain-

tiff on the second plea, inasmuch as the averment in that plea, that notice of the illegality of the note was given to the plaintiffs when they took the note, was not proved. He was further of opinion that the third plea was not proved, inasmuch as it alleged that the note was given to secure to White the repayment of money paid by White for compounding differences, whereas it appeared by White's evidence, that the note was given before the differences were actually paid. But it was contended that it was substantially proved, and a verdict was found for the plaintiffs on the first and * second issues, and for the defendant on the last issue, [* 576] with liberty for the plaintiff to move to enter the verdict for him on that issue, and in the event of his not succeeding in that rule, to move for judgment *non obstante veredicto*, on the ground that the bond was good, although the plaintiffs could not have sued on the note. A rule *nisi* had been obtained by the Attorney-General for entering the verdict for the plaintiffs on the last issue, or for judgment *non obstante veredicto*.

Scarlett showed cause. The third plea is good, and was made out in proof. The defendant, therefore, is entitled to judgment on the whole record. It appears upon the plea that the bond was given as a substitution for a promissory note, which had been indorsed to the plaintiffs two years after it was due. As against these plaintiffs the defendant, therefore, would be entitled, in an action on the note, to avail himself of every defence which he would have had against the original holders. *Brown* v. *Turner*, 7 T. R. 630. It is averred that the plaintiffs had notice of the illegality of the original consideration before the bond was given. Here, therefore, the plaintiffs, holding a promissory note which they knew to be void (because it was given to secure money paid for differences on stock-jobbing transactions), took the bond in lieu of it. *Cannan* v. *Bryce*, 3 B. & A. 179, is an authority to show that that bond is void. Secondly, the plea was supported by the proof: it was necessary in the plea to state facts sufficient to show that the plaintiffs could not recover, and it sufficed to prove substantially the facts stated. When a plaintiff sets out a * contract specially, he [* 577] can recover only on the contract as set out, and must, therefore, prove it literally; but it is otherwise where the contract is not specially stated. Here the substance of the plea is that the note was given to pay differences on stock-jobbing transactions, and that has been proved. It is wholly immaterial whether those differences

were paid before or after the note was given. It would have been sufficient to allege that the note was given for and in respect of differences, &c. That is the substance of the allegation in the plea.

The Attorney-General, *contra*. There can be no doubt that by omitting or altering words the plea might be made to correspond with the evidence. The facts alleged have not been proved. The plea is that White having paid the differences, the note was given to him for securing the repayment to him of that money which he had actually paid. The proof is that the note was given to White to secure to him money which he had not then paid, but which he was to pay. Assuming the plea to be proved, still the plaintiffs are entitled to judgment, *non obstante veredicto*. Here it is alleged that the plaintiffs took the note from White after it was due, but without knowledge of the original consideration. It would undoubtedly have been a good defence to an action on the note that it was originally given to secure money to be paid in respect of illegal stock-jobbing transactions; but it is no defence to an action on the bond, which is a new security, and not made between the parties to the illegal contract. In *George* v. *Stanley*, 4 Taunt. 683, the defendant [* 578] had given bills for the * amount of money lost at play: these bills were negotiated and came to the hands of the plaintiff, and when they became due the defendant gave in lieu of them other bills, and when these last bills became due, he confessed a judgment, which the Court refused to set aside, unless it were shown that the holder of the bills had notice of the illegality of the original consideration. [Holroyd, J. Here the note was indorsed after it was due, and that is a suspicious circumstance, from which the law infers that the party taking the note had knowledge of some infirmity in the title of the holder, and the indorsee then takes it, subject to all the objections to which it was liable in the hands of the person from whom he took it.] In *Cuthbert* v. *Haley*, 8 T. R. 390, one Plank had discounted certain promissory notes of Haley's, and took usurious interest upon them, and then deposited them with his bankers, who gave him credit for them. When they became due, Haley not being able to pay gave the bankers his bond. The latter had no knowledge of the usury between Plank and Haley. It was held that the bond was good.

Abbott, C. J. There is a great distinction between the two

cases. Here the plaintiffs took the promissory note after it was due. There was no period of time when they could have maintained an action upon the note, and they had notice of the illegality of the original consideration before the bond was given. In *Cuthbert* v. *Haley*, the bankers had no knowledge of the usury at the time when the bond was given, and Lord KENYON, in delivering his judgment, relies upon that circumstance. We are all of opinion that, as it appears * upon the plea that the bond was [*579] given as a substitution for a note which was taken by the plaintiffs, subject to an infirmity of title of which they had full notice before the bond was taken, the latter instrument is void. The rule, therefore, for entering up judgment for the plaintiffs, *non obstante veredicto*, must be discharged. We also think that the third plea is not supported by proof; but the defendant may have leave to amend his plea upon paying the costs of the trial, with liberty to the plaintiffs to reply *de novo*.[1]

In re Overend, Gurney, & Co. Ex parte Swan.

L. R., 6 Eq. 344–367 (s. c. 18 L. T. 230; 16 W. R. 560).

This was a summons taken out on behalf of Patrick D. [344] Swan, a flax-spinner at Kirkaldy, in Scotland, and also on behalf of certain other flax-spinners, all of whom are, for convenience and for the purposes of the present question, hereafter included under the name of "Mr. Swan," calling upon the official liquidator of Overend, Gurney, & Co., Limited, to show cause why Mr. Swan should not be admitted a creditor of the said company for the sum of £26,545, and interest, or for such other amount as the Court should determine, and why he should not be paid the amount of dividends payable upon such sum.

The following statement of facts was admitted on both sides for the purpose of obtaining the opinon of the Court upon the questions of law which had arisen between the parties: —

The claim of Mr. Swan arises upon and in respect of several * bills of exchange drawn by certain persons carrying [*345] on business at St. Petersburg under the title of "Cattley & Co.," upon Overend, Gurney, & Co., amounting in the whole to £26,545, and negotiated by Cattley & Co. in St. Petersburg, and afterwards accepted by Overend, Gurney, & Co., and dishonoured

[1] No rule had been drawn up at the time when this case was printed.

No. 22. — In re Overend, Gurney, & Co. Ex parte Swan, L. R., 6 Eq. 345, 346.

by them at maturity, and then taken up and paid by Mr. Swan *supra protest* for honour of the drawers, under the circumstances hereinafter mentioned.

Messrs. Cattley & Co. have for many years carried on the business of export and general merchants at St. Petersburg, and were in the habit of securing in the autumn and winter of each year large supplies of Russian produce from the interior of the country to be ready in St. Petersburg for shipment to Great Britain upon the opening of the navigation in the spring of the succeeding year. These shipments were then made by Cattley & Co. in execution of orders which in the meantime had been collected by them during the said autumn and winter by their agents in the United Kingdom. Messrs. Robinson & Fleming acted as the agents in London for Messrs. Cattley & Co., and were in the habit of obtaining from various flax and other manufacturers in Great Britain, orders which they forwarded to Messrs. Cattley & Co in the autumn and winter of each year, for large quantities of flax and other produce to be shipped in the succeeding spring, and Messrs. Cattley & Co. immediately on the receipt of these orders drew bills upon the various British manufacturers for amounts approximating as nearly as could be estimated to the full invoice price of the goods ordered. This course of business enabled Messrs. Cattley & Co., by the negotiation of these drafts, or by other banking arrangements, to make advances to the flax-growers and other producers, and to complete the payments for the goods upon their delivery in St. Petersburg. For the purpose of carrying on this and other business with Great Britain, and obtaining the necessary banking facilities for such purpose, Messrs. Cattley & Co. entered into arrangements with Messrs Overend, Gurney & Co. to act as their bankers in London, and in accordance with these arrangements Messrs. Cattley & Co. were in the habit of drawing bills at St. Petersburg from time to time upon Overend, Gurney, & Co. in London, at some months' date, at such times and to such amounts as their business [* 346] might * require, whilst they on their part remitted to Overend, Gurney, & Co. all bills upon Great Britain which came into their possession in the course of business. By this means Cattley & Co. kept Overend, Gurney, & Co. from time to time in funds to meet the acceptances which they had come under for Cattley & Co. as they arrived at maturity. It was no part of this arrangement, nor was it, in fact, the course of business between

them, for Cattley & Co. to make remittances to meet specific acceptances, but it was understood and so arranged that Overend, Gurney, & Co. were to be kept out of cash advances. In consideration of the transaction of this business Cattley & Co. paid Overend, Gurney, & Co. one-half per cent. upon the total amount of acceptances which the latter came under for them as above stated. In addition to this arrangement, it was further agreed that Cattley & Co. should be allowed, in consideration of an additional commission, a margin for overdrawing to the extent of £10,000 in excess of the remittances forwarded by them for the purpose of meeting the acceptances as before mentioned. By this means, and in consideration of such extra commission, Cattley & Co. had always a current credit for drawing to the extent of £10,000 over and above the amount of remittances to be forwarded by them to meet the acceptances then maturing. On the 10th of May, 1866, the date of the stoppage of the firm of Overend, Gurney, & Co., the latter were under acceptances for Cattley & Co., under the foregoing arrangements, to the amount of £26,545. These bills had been drawn, and would have become due at the respective dates set forth in a schedule. At the date of the petition for winding-up Overend, Gurney, & Co. had in hand remittances in cash and bills equal in nominal value to nearly £13,000, but they received no further remittances from Cattley & Co., and of these bills so remitted £6200 were not paid at maturity, and remained still unpaid, leaving in the hands of Overend, Gurney, & Co. a cash balance of £6911 3*s.* 2*d.* The bills, amounting to £26,545, were all duly presented for payment by the various holders upon Overend, Gurney, & Co., and dishonoured, and they were duly protested for non-payment. Amongst the British manufacturers who were in the habit of giving orders to Cattley & Co. was Mr. Swan, and in the autumn of 1865 he (and also certain friends of his who are included and referred to in all references to * Mr. Swan) [* 347] had given orders through Messrs. Robinson & Fleming to Cattley & Co. for very large quantities of flax to be shipped in the following spring. For the price of these intended shipments Cattley & Co., in accordance with their course of business as above stated, immediately drew upon Mr. Swan for the full estimated amount of the invoice price of these goods, and which amount, for the purposes of the present question, is to be taken to have been the full amount. These drafts were remitted by Cattley & Co. to

Overend, Gurney, & Co., and were accepted by Mr. Swan, and were credited in account by Overend, Gurney, & Co. to Cattley & Co., and duly paid at maturity. Mr. Swan never had any current or open account with Cattley & Co., and his transactions with them were limited entirely to the orders for flax, which were at once paid for as above mentioned. At the date of the suspension of Overend, Gurney, & Co., a very large quantity of the flax ordered by Mr. Swan from Cattley & Co., for which he had given his acceptances, still remained at St. Petersburg, in the possession of Cattley & Co., ready for shipment. When Overend, Gurney, & Co. suspended payment on the 10th of May, 1866, the news of their suspension was at once forwarded to St. Petersburg, and Cattley & Co. immediately upon receipt of the news telegraphed to Messrs. Robinson & Fleming, their agents, stating, as the fact was, that if Overend, Gurney, & Co.'s acceptances to their drafts were returned to St. Petersburg dishonoured, they would be compelled to stop payment, and in that event the holders of the dishonoured bills might have stopped all the flax and other produce about to be shipped. Thereupon Messrs. Robinson & Fleming communicated with Mr. Swan with a view to his taking any steps for the protection of his interests he might be advised in order to prevent the shipment of the flax purchased and paid for by him as aforesaid being stopped. Mr. Swan, upon receipt of this news, and on the 12th of May, 1866, came up to London, and having taken advice upon his position in the matter, determined, for the protection of his own interests, and to prevent the shipment of the flax being stopped, as it might and would have been if the bills had been returned dishonoured to St. Petersburg, to take up the acceptances in the event of their dishonour by Overend, Gurney, & Co., *supra protest*, and he accordingly gave instructions to Messrs. [* 348] Robinson & * Fleming to take the necessary steps to protect his interests, and supplied them with the necessary funds to take up the said acceptances for him. When these acceptances became due they were dishonoured by Overend, Gurney, & Co., and were duly protested by the holders for non-payment, and were then paid by Mr. Swan *supra protest*, and handed to him together with the protest.

Messrs. Drake, Kleinwort, & Co., who were the holders of these acceptances on the 12th of May, 1866, and to whom the same had been indorsed by their correspondents in St. Petersburg for presen-

tation on Overend, Gurney, & Co., and for collection, would not have permitted Mr. Swan to have taken up the said acceptances, and to have held their St. Petersburg correspondents still liable upon their indorsements, and would only agree to his interfering after the bills were dishonoured. Mr. Swan (including also his friends) provided money for taking up the acceptances out of his own resources and on his own account, and for the sole purpose of protecting his own interests only, and not for the benefit, nor by the authority of, nor as the agent for, Cattley & Co.; and he had not at that time, nor has he since, had any money, property, effects, means, or credits of any kind belonging to Cattley & Co. applicable to the purpose, and he took the bills up *bonâ fide* for his own benefit, and to protect his own interest only. Cattley & Co. were, it is believed, at the time of the maturity of the acceptances, and have still continued to be, unable to meet their liabilities, although they have not formally and publicly suspended payment. Mr. Swan, however, after he had taken up the said acceptances, applied to them for reimbursement, but was informed by them, as the fact was, that they were unable to provide the money, and they have never been able to do so, and Mr. Swan has not been in any way repaid.

It is agreed that the question in this case, and with reference to which the above facts have been stated, is, whether Mr. Swan is entitled to claim against Overend, Gurney, & Co., as a creditor, for any amount of the said acceptances, or whether he is entitled only to stand in the same position as the drawers, and the Court is to be at liberty to draw inferences from the above statement of facts.

* Mr. Watkin Williams, and Mr. W. F. Robinson, for [* 349] the claimant, Mr. Swan: —

The course of dealing is fully set forth in the state of facts agreed upon between the parties. When orders were sent out to Cattley & Co., of St. Petersburg, for goods by Swan and his friends, bills were drawn by Cattley & Co. upon those who had ordered the produce, and the bills were accepted by them. These bills were then sent to Overend, Gurney, & Co., for collection, and Cattley & Co. drew upon Overend, Gurney, & Co., with whom Cattley & Co. had a credit, to the amount of the English bills, and they had a further credit for overdrawing to the extent of £10,000, which was to be paid for by a commission agreed upon between them. Swan

knew nothing of this arrangement, and had nothing to do with it. All he knew was, that if the bills were not taken up Cattley & Co. would stop payment, and the goods which were in the hands of Cattley & Co. would be taken by their Russian creditors, and would not be sent to England, the effect of which would be to damage his trade to a great extent. Under these circumstances, he took advice as to the course he ought to pursue, and the method adopted by him was to wait until the bills were dishonoured, and then to take them up *supra protest* for the honour of the drawer. He might have taken them up before they arrived at maturity, but this was objected to because it would have thrown a responsibility upon the correspondent bankers at St. Petersburg. Swan took the bills up, not simply for the honour of Cattley & Co., but also for his own benefit.

The contention on the part of the official liquidator is founded upon the case of *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169, in which the Lord Chancellor (Lord Erskine) is reported to have said: "A bill, accepted, being dishonoured, is taken up for the honour of the drawer by the petitioner. The effect is, that he has a clear right against the drawer. So he has a right to stand in the place of the drawer; but cannot make a title stronger than that of the drawer, and oust the assignees of the bankrupts of the defence which they would have against him." This decision can only be supported on the supposition that the person who took up [* 350] the bill was the agent of the drawer, and * stood in the same position, but Swan was in a very different position, since it was for his own benefit that he took up the bills.

The text-writers have all accepted the case of *Ex parte Lambert* 13 Ves. 179; 9 R. R. 169, as law, but it has been overruled in subsequent cases.

It is admitted that Cattley & Co. could not have recovered upon these bills more than the amount of the balance due to them in the hands of Overend, Gurney, & Co Swan stood in the position of indorsee for value after maturity, and as such he is entitled to recover against the acceptor. This would have been the case even if the bills were accommodation bills, if Swan had given value.

It was decided in *Bickerdike* v. *Bollman*, 1 T. R. 405; 2 Sm. L. C. 55; 1 R. R. 242, that the drawer of an accommodation bill is not entitled to notice of its dishonour, but these were bills of which Cattley & Co. were entitled to notice, as is laid down in *Blackhan*

v. *Doren*, 2 Camp. 503; 11 R. R. 779; *Hammond* v. *Dufrene*, 3 Camp 145, and *Thackray* v. *Blackett*, 3 Camp. 164; 13 R. R. 783.

A man is entitled to discount a bill on the credit of the acceptor without having any knowledge of the person presenting it, and he can recover upon it, provided he has given value, and there is honesty in the transaction. This principle was laid down differently in *Gill* v. *Cubitt*, 3 B. & C. 466; but the doctrine was subsequently set right in *Raphael* v. *Bank of England*, 17 C. B. 161; 25 L. J. C. P. 33, and other cases reversing the rule in *Gill* v. *Cubitt*.

In this case Swan was an indorsee for value, and in this lies the distinction from some of the authorities. In *Brown* v. *Davies*, 3 T. R. 80, where a promissory note was indorsed to the plaintiff after it became due, it was held that the maker was entitled to go into evidence to show that the note was not for value as between him and the payee; and in *Tinson* v. *Francis*, 1 Camp. 19; 10 R. R. 617, it was held that an indorsee of a promissory note for value, who had received the note after it became due from an indorser who had not given value, could not sue the maker. But these cases were much commented upon in *Sturtevant* v. *Forde*, 4 Man. & G. 101; 4 Scott N. R. 668, where the Judges decided, upon the authority of *Charles* v. *Marsden*, 1 Taunt. 224, and *Stein* v. *Yglesias*, 1 C. M. & R. 565, * that a plea by the acceptor [* 351] of a bill to an action by the indorsee, that the bill was accepted before it became due, at the request and for the accommodation of J. S., and without any value or consideration for acceptance, or for the payment, and that the bill was indorsed to the plaintiff after it became due, was bad. *Attwood* v. *Crowdie*, 1 Stark. 483, and *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L. J. Ex. 112, are consistent with the law as laid down in *Charles* v. *Marsden*.

An indorsee of a bill for value after dishonour has as good a title against the acceptor as if it had been indorsed before maturity, and the right to set off as between Cattley & Co. and Overend, Gurney, & Co., cannot be pleaded against Swan, the holder for value, such set-off not being an equity attaching to the bill itself. These points are settled by *Oulds* v. *Harrison*, 10 Ex. 572; 24 L. J. Ex. 66; *Burrough* v. *Moss*, 10 B. & C. 558; 5 Man. & Ry. 296; *Lazarus* v. *Cowie*, 3 Q. B. 459; 11 L. J. Q. B. 310, and *Holmes* v. *Kidd*.

Then with regard to the text-books. It is laid down in Byles on Bills of Exchange, 9th ed. ch. 21, p. 260, "that any party to a

bill of exchange may pay for honour; so may a mere stranger, without any previous request or authority from the party for whose honour he pays. It is clear there can be no payment for honour till the bill is dishonoured by non-payment and a protest is essential. The most advantageous course to be pursued by a man desiring to protect the credit of any party to a dishonoured bill is simply to pay the amount to the holder, and take the bill as an ordinary transferee." But in some cases, he says, a payment *supra protest* may become essential. He continues: "The party paying *supra protest* has also his remedy against the acceptor."

The subject is treated in the same way in other books: Beawes' Lex Mercatoria, vol. i. p. 569 (quarto ed.), ss. 50, 53, 54, 56; Pothier's General Works, vol v. p. 285, pt. 1, ch. 4, art. 5; Chitty on Bills of Exchange, p. 509; Story on Bills, ch. 8, p. 266; Pardessus' Treatise, page 500, part 3, cap. 7, s. 408, ed. 1856; Bayley on Bills, page 321; Malynes' Lex Mercatoria (London fol. ed., ch. 6, p. 265.

[* 352] * Upon these authorities we say, first, that the plaintiff is in the same position as an indorsee for value, and can successfully sue Overend, Gurney, & Co. under the circumstances of this case. And, secondly, that an indorsee may sue the acceptor, notwithstanding he knows it is an accommodation bill, if he gives value for it. It matters not whether Overend, Gurney, & Co. got value for the bills or not. Swan, at any rate, gave value. There is no reason why Overend, Gurney, & Co. should benefit by Swan's payment. The proper mercantile way of dealing with the bills was to take them up, as the plaintiff did after being protested.

Mr. Roxburgh, Q. C., Mr. Ferrers, and Mr. J. C. Mathew, for the official liquidator: —

At the time of the stoppage of Overend, Gurney, & Co. the amount due to Cattley & Co. upon the account between them was £6911 3*s.* 2*d.*, and this is the only sum which Mr. Swan, the holder of the bills, can claim against the estate of Overend, Gurney, & Co. The bills were, in effect, accommodation bills, and Cattley & Co. could only have recovered against Overend, Gurney, & Co. the sum due on taking the accounts between them. Swan having taken up the bills *supra protest* for the honour of the drawer, can stand in no better position than the drawer. This rule is laid down distinctly in *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169, where the facts were similar to these. It is admitted that Swan

took up the bills for the honour of the drawer, that is, for his benefit; he cannot, therefore, be heard to say that he took them for his own benefit.

It is said that Swan has placed himself in the position of indorsee for value; but this cannot be said in the present case, since one of two innocent parties must suffer. If Overend, Gurney, & Co. are held liable to pay, then they will do so without having received value, and the same may be said of Mr. Swan. If Swan has a right to sue, he must have the same right against all the indorsers. Beawes (vol. ii. p. 570, s. 54), says: "He that pays a bill *supra protest* immediately succeeds the possessor in the right and title thereto;" but if he has the right of an indorsee, he may sue the other indorsees; that shows that the right of the person intervening for honour is not the same as the indorsee. In Pardessus the same principle is laid * down p. 500; and also [* 353] in Dana's Kentucky Reports, p. 35. *Ex parte Lambert* has never been questioned, but the principle is laid down in all the text-books, and even in Mr. Justice BYLES' last edition, p. 229. If the bills had been transferred from Drake & Co., the right to sue would have attached, but not so when taken up *supra protest* for honour of the drawer. The only benefit given Swan is such as the drawer had, and not such as an indorsee would have had. In Bayley on Bills, 6th ed. p. 321, the distinction is laid down between an indorsee for value after dishonour, and a person intervening for honour. In *Sturtevant* v. *Forde*, 4 Man. & G. 101, 104; 4 Scott N. R. 668, the view taken by the Judges of the equity of the case is shown. *Mertens* v. *Winnington*, 1 Esp. 113, decides that he who intervenes for the honour of the indorsee, and not the drawer, becomes as indorsee of the bill, and entitled to all remedies against the other parties to the bill. But if he takes it up for the honour of the drawer, he can stand in no better position than the drawer. Bills are just as much negotiable after dishonour as before; but after dishonour the bill becomes disgraced, and therefore it is taken up subject to liabilities. The rights of a holder by negotiation are greater than one who takes up a bill for the honour of a drawer.

The question as to the equities affecting a bill is discussed in *Holmes* v. *Kidd*, 3 H. & N. 891. A person taking an overdue bill takes it subject to its equities. If Swan had known that Cattley & Co. had not supplied money to Overend, Gurney, & Co., he would

have been bound by the equities between Cattley & Co. and Overend, Gurney, & Co. There is nothing in the equity of this case to entitle Swan to say that he is in the position of *quasi* indorsee for value; there is, in fact, nothing more than is to be found in all cases where a bill is taken up for the honour of the drawer.

[The following books were also cited: Nueyer on Bills, 2nd ed. 1851, vol. i. s. 593; Massé on Bills, 2nd ed. 1862, vol. iv. p. 2078.]

Mr. Williams in reply: —

The position of Mr. Swan is not that of an accommodation [*354] *acceptor. The payment by Swan operated in discharge of all the indorsees subsequent to the drawer for whose honour he took it up. *Jones* v. *Broadhurst*, 9 C. B. 173. It has been decided that the effect of such a payment would not discharge the acceptor. *Cook* v. *Lister*, 13 C. B. (N. S. 543, p. 552, *post*; *Johnson* v. *Royal Mail Steam Packet Company*, L. R., 3 C. P. 38; 37 L. J. C. P. 33. Swan is not in the ordinary position of an indorsee, but he is indorsee according to the custom of merchants. He may sue the acceptor, but not the drawer, because he took the bill up *supra protest* for the honour of the drawer. The custom of merchants is set out in Ludwicke. Swan is in the same position as if he had taken the bill by indorsement from Drake & Co., except that he cannot transfer it to any one else, nor can he sue the drawer because of his protest. If Swan had not paid the money, Overend, Gurney, & Co. must have paid some one.

All the codes of law in foreign countries have a rule to the effect now contended for, except in India, where the recent code is silent upon the subject. They all go to this, that one who takes up a bill *supra protest* for honour is in the position of an indorsee.

Mar. 21. Sir R. Malins, V. C.: —

Upon the state of facts agreed to between the parties there is no dispute that if the bills in question, amounting to £26,545, had remained in the hands of Drake, Kleinwort, & Co., or, rather, of the St. Petersburg correspondents who were the purchasers of them, the estate of Overend, Gurney, & Co. must have paid the full amount. But it is contended by the official liquidator of that estate, that the fortunate accident of Mr. Swan having taken up the bills under the circumstances stated, has wholly discharged that estate from all liability to pay anything on account of them beyond the £6941 3*s.* 2*d.*, the balance belonging to Cattley & Co., which re-

mained in the hands of Overend, Gurney, & Co. This contention is rested on the ground that the bills, as between Cattley & Co. and Overend, Gurney, & Co., were virtually accommodation bills, upon which the former could only have recovered the balance actually *due to them on the result of the accounts between [*355] the two firms; and that Swan having, in form, taken up the bills for the honour of the drawers, must stand in their shoes, and can have no better right to recover than they would have had if the bills had been thrown back upon them. It is admitted by the counsel for Mr. Swan, that if the bills had been thrown back upon Cattley & Co. they could not have recovered more upon them than the balance due on the result of the accounts between the two firms, viz., £6911 3*s.* 2*d.*

The resistance of the official liquidator to pay these bills is mainly rested upon the general rule supposed to be established in *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169, that a person who takes up a bill after dishonour for the honour of the drawer, or for any other object, can only stand in the place of the drawers, and can have no better right of recovery upon it against the acceptor than the drawer would have had. The short facts in *Ex parte Lambert* were, that a firm of Adams & Co., at New York, drew upon a firm in London two bills of exchange; that the petitioners, Lambert & Co., being interested in the welfare of the American house, as to one of the bills before it arrived at maturity, and as to the other after maturity, took them up, not under protest, but simply took them up and paid the money to save the discredit of the drawers in having the bills returned to New York. The Lord Chancellor, Lord Erskine, decides the matter in these few words: "I continue of the opinion I expressed yesterday. Upon this affidavit there is no doubt that if Adams & Co. had themselves been plaintiffs in an action, the acceptors of these bills might, as against them, have insisted that the bills were drawn merely for the accommodation of the drawers; and they had no effects; though that would not have been an answer to an indorsee for valuable consideration without notice. Then what is this case? A bill accepted, being dishonoured, is taken up for the honour of the drawer by the petitioner. The effect is, that he has a clear right as against the drawer. So he has a right to stand in the place of the drawer; but cannot make a title stronger than that of the drawer, and oust the assignees of the bankrupts of the defence which they would have against him.'

Therefore the broad rule laid down by Lord ERSKINE is, that
[* 356] he who * takes up a bill after dishonour cannot, under any circumstances, be in a better position than the drawer of the bill. If, therefore, the bill is given as accommodation, or without effects, inasmuch as the drawer cannot recover, the holder from the drawer cannot do so.

It may not make any difference in the result, but it must be remarked that these bills were not, in the proper sense of the word, accommodation bills, for it is clear that the drawer of a mere accommodation bill is not entitled to notice of its dishonour, — that is decided in *Bickerdike* v. *Bollman*, 1 T. R. 405; 2 Sm. L. C. 55; 1 R. R. 242, and is a recognised rule. It is equally clear that these were bills of which Cattley & Co., the drawers, were entitled to notice of dishonour.

In *Blackhan* v. *Doren*, 2 Camp. 503, 504; 11 R. R. 779, the action was against the defendant as a drawer of a bill of exchange for £250, dated Kingston, Jamaica, October 1, 1809, on Messrs. Hunter & Co. in London, at six months after sight. This was refused acceptance. To excuse the sending of notice of the dishonour of the bill to the defendant, the plaintiff called a clerk of the drawers, who stated that when it was presented they had produce in their hands belonging to him to the amount of about £1500, but that he owed them £10,000 or £11,000, and that they had appropriated the effects in their hands to go in satisfaction of this debt. Lord ELLENBOROUGH said: "If a man draws upon a house with whom he has no account, he knows that the bill will not be accepted, he can suffer no injury from want of notice of its dishonour, and therefore he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee," — in this case, of course, upon the statement, Cattley & Co. had a fluctuating balance in the hands of Overend, Gurney, & Co. "There notice is peculiarly requisite. Without this how can the drawer know that credit has been refused to him, and that his bill has been dishonoured? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing, and the defendant should be a party to it. I wish that notice had never been dispensed with, and then we should not have been troubled with investigating accounts between drawer and drawee. I certainly will not relax the rule still farther, — which I should do if

I were to hold that notice was unnecessary in the *present [*357] instance." *Hammond* v. *Dufrene*, 3 Camp. 145, 146, was an action on a bill of exchange for a certain amount drawn by the defendant and accepted by Messrs. Dufrene & Penny, and payable three months after date. There the payment of the bill was resisted on the ground that notice of its dishonour had not been given. Lord ELLENBOROUGH again lays down the rule thus: "I think the drawer has a right to notice of the dishonour of a bill, if he has effects in the hands of the acceptor at any time before it becomes due. In that case he may reasonably expect that the bill will be regularly paid, and he may be prejudiced by receiving no notice that it is dishonoured. I am aware that the inquiry has generally been as to the state of accounts between the drawer and drawee when the bill was drawn or accepted; but I conceive the whole period must be looked to from the drawing of the bill till it becomes due, and that notice is requisite if the drawer has effects in the hands of the drawee at any time during that interval. Therefore, if the defendant in this case paid a sum of money for Messrs. Dufrene & Penny" — which it appeared by the facts he did — "before the 28th of July, you must prove that he had due notice it was not paid on that day by the acceptors."

This point may be considered as finally settled by another case of *Thackray* v. *Blackett*, 3 Camp. 164, 165; 13 R. R. 783, where the same point was raised, and where Lord ELLENBOROUGH says: "It is well settled that the insolvency or bankruptcy of the acceptor does not dispense with due notice of the dishonour of the bill being given to the drawer." Then the report states that "in the ensuing term the Attorney-General was refused a rule to show cause why there should not be a new trial, all the Judges being of opinion that the defendant was entitled to notice of the dishonour." That may be considered as having put the point at rest. In this case, therefore, it being admitted that there was a fluctuating balance belonging to the drawers in the hands of Overend, Gurney, & Co., and that they finally had the balance of between £6000 and £7000 in their hands when they stopped, it necessarily follows that these were bills of which Cattley & Co. were entitled to receive notice of dishonour, and were not in the strict sense of the word accommodation bills. The general proposition that a person who takes an accommodation * bill after it [*358] has been dishonoured, cannot be in a better situation than

the drawer as against the acceptor, cannot now be maintained. It was admitted by Mr. Roxburgh, in his argument for the official liquidator, that the law is now settled that an indorsee for value of an accommodation bill after dishonour can recover against the acceptor, though the drawer himself could not have done so; and the authorities on that point most distinctly support that admission. The contrary was certainly formerly held, and it may be considered that *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169, was supported by the current of authority at the time it was decided. In *Tinson* v. *Francis*, 1 Camp. 19; 10 R. R. 617, Lord Ellenborough uses this expression (this being in 1807, the decision of Lord Erskine being 1806): "After a bill or note is due it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be incumbered." The same doctrine is also laid down in *Brown* v. *Davies*, 3 T. R. 80, decided by Lord Kenyon, Mr. Justice Buller, and the other distinguished Judges of the Court of Queen's Bench at that time.

This, however, is distinctly overruled by the authorities commencing in the following year and uniform down to the present time. In *Charles* v. *Marsden*, 1 Taunt. 224, 225, which was a case decided in 1808, only two years after the decision of Lord Erskine in 1806, the marginal note correctly states the decision: "It is not, of itself, a defence to an action by the indorsee of a bill of exchange to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due." Sir James Mansfield, in giving judgment in this case, says: "It is not necessarily to be inferred because it was an accommodation bill that there was an agreement not to negotiate it after it became due; but if there was such an agreement it was the defendant's own fault that the bill was outstanding: for even supposing that the drawer had undertaken to provide for the payment when the bill became due, the acceptor" — the acceptor here was sued by an indorsee after maturity — "had a right to require that it should be given up. It happened through his permission. therefore, [* 359] if the bill gave the * drawer any power to delude the indorsee. None of the cases cited go so far as to support this plea." Mr. Justice Lawrence takes the same view.

In *Sturtevant* v. *Forde*, 4 Man. & G. 101, this point came very

distinctly for decision. The marginal note in this case states the decision: "A plea by the acceptor of a bill to an action by the indorsee, that the bill was accepted before it became due, at the request and for the accommodation of J. S., and without any value or consideration for the acceptance or for the payment, and that the bill was indorsed to the plaintiff after it became due, is bad." Lord Chief Justice TINDAL expresses that very clearly; and also Mr. Justice COLTMAN. Mr. Justice CRESSWELL observed: "It is said that the indorsee of a bill which is overdue takes it subject to all the equities. Perhaps a better expression would be" — and that is an expression confirmed by every subsequent authority — "that he takes the bill subject to all its equities;" that is, the equities of the bill, not the equities of the parties. "That brings it to the question whether this is an equity which attaches to the bill. In *Charles* v. *Marsden*, 1 Taunt. 224, 225, the Court said that there was no reason why a bill should not be negotiated after it became due, unless there was an agreement for the purpose of restraining it. *Atwood* v. *Crowdie*, 1 Stark. 483, is consistent with the law as laid down in *Charles* v. *Marsden*."

Stein v. *Yglesias*, 1 C. M. & R. 565, which is an earlier case than the one I have just mentioned, is precisely to the same effect, namely, that a plea that the bill being an accommodation bill was passed with notice of that fact to the indorsee after maturity, is bad. The case of *Oulds* v. *Harrison*, 10 Ex. 572, 578; 24 L. J. Ex. 66, is also important for another point which I shall have to advert to. The indorsee of an overdue bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; but he does not take it subject to claims arising out of collateral matters, such as the statutory right of set-off. That is laid down by Mr. Baron PARKE. The case is somewhat long; but I will read one passage from the judgment: "It must be considered as entirely settled by the case of *Burrough* v. *Moss*, 10 B. & C. 558: 5 Man. & Ry. 296, that the indorsee of an overdue bill takes it subject to * all the equities that attach to the bill [* 360] itself in the hands of the holder when it was due, as, for instance, the payment or satisfaction of the bill itself to such holder, or where the title of such holder was only to secure the balance of an account due, as seems to have been the case in *Collenridge* v. *Farquharson*, 1 Stark. 259, but the indorsee does not take it subject to claims arising out of collateral matters, as

the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties." The same doctrine will be found in *Lazarus* v. *Cowie*, 3 Q. B. 465; 11 L. J. Q. B. 310. That I do not refer to particularly, but the rule is there equally distinctly laid down. Many others might be cited, and they are perfectly uniform. These authorities have settled the law that an indorsee of a bill of exchange for value after its dishonour has as good a title against the acceptor as if it had been indorsed to him before maturity, unless there is an equity attached to the bill itself; and they also show that the right of set-off as between the acceptor and the drawer is not an equity attached to the bill, which can be enforced against the indorsee. The two cases of *Sturtevant* v. *Forde*, 4 Man. & G. 101, and *Oulds* v. *Harrison*, 10 Ex. 572; 24 L. J. Ex. 66, are authorities against the right of the acceptor to plead a set-off against the drawer as a defence to the action upon the bill by the transferee of it after dishonour. The same point was, if possible, more distinctly decided in that case which I have already mentioned, *Burrough* v. *Moss*, 10 B. & C. 558, which is a remarkably strong application of the rule that a set-off as between the drawer and acceptor cannot be pleaded against the holder of the bill who became so after its dishonour.

These cases having established that the right of set-off is not an equity attached to the bill itself, the case of *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L. J. Ex. 112 (Ex. Ch.), shows very distinctly what an equity attached to the bill itself is. In that case the acceptor had accepted a bill of £300, depositing with the drawer certain canvas, which he was to be at liberty to sell as the means of providing for the bill. The bill was indorsed when overdue to the plaintiff, and afterwards the canvas was sold by the drawer, but did not wholly pay the bill. The question was, whether the indorsee could recover. Here Mr. Justice Erle said:

[*361] * "The question is, whether the receipt of the money by the drawer is a bar to this action. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency." That contingency is the equity which attached to the bill, and which bound him, having taken it after maturity. Mr. Justice Crompton said: "Upon the concoction of this bill it was agreed that it was not to be paid if the canvas was sold. That

agreement directly affects the bill, and was part of the consideration for it. The case, therefore, differs from that of a right of set-off against the indorser, which is merely a personal right not affecting the bill. In the present case the equity directly attaches to the bill. The plaintiff, therefore, got a defeasible title only." In the case of *Cook* v. *Lister*, 13 C. B. (N. S.) 543, p. 552, *post*, it is decided that the actual payment of an accommodation bill is an equity attaching to the bill itself, and therefore a good defence to an action against the acceptor. These authorities show that the broad proposition for which *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169, was relied upon by the counsel for the official liquidator, namely, that the transferee of a bill after dishonour can under no circumstances have a better right against the acceptor than the drawer would have, cannot at this day be maintained, and, indeed, they most conclusively show that that case is no longer law. The rule laid down in that case was so important that I sent for the Registrar's book for the purpose of ascertaining the facts of the case with accuracy. I have had the Registrar's book copied, and I find that instead of the bills being taken up by the petitioner after they arrived at maturity, the facts were these: the bills had not arrived at maturity when they were taken up by the petitioners, who petitioned Lord ERSKINE to be allowed to stand as creditors against the estate of the acceptor. The dates of the acceptances are given. The first of the two bills arrived at maturity on the 7th of April, and the second on the 12th of April, 1792. But they were taken up for the honour of the drawer, not therefore, observe, under protest, for they could not be protested before maturity; they were taken up for the honour of the drawers (or rather to prevent the bills being returned to New York) on the *27th of February, six weeks, therefore, before they [*362] arrived at maturity; and there is not a suggestion in the facts that they were taken up with notice, that they were, in point of fact, bills drawn upon the acceptor without effects, so that the two facts upon which the case is supposed to proceed entirely fail; first, that he took them after maturity is entirely wrong; secondly, that he took them with notice that they were accommodation bills is entirely wrong also. Upon these facts it appears, therefore, that the bills were taken up by the petitioner nearly two months before they arrived at maturity, and without notice that they were accommodation bills, as between the drawers and acceptors. In every

point of view, therefore, I am obliged to come to the conclusion that though *Ex parte Lambert* may be considered as having been law in accordance with the current of authorities when Lord ERSKINE decided it, although it does not seem that even that proposition can be maintained when the facts are looked at, yet it is so wholly opposed to the more modern authorities that it is in fact completely overruled by them.

It is singular that, under these circumstances, none of the subsequent authorities have professed in terms to overrule *Ex parte Lambert*, but they have nevertheless effectually done so by a current of decisions in direct opposition to it, and it certainly is, I must say, very remarkable that this case, completely overruled by a current of authorities extending over more than half a century, continues to be cited in all the text-books — Chitty, Bailey, and even Mr. Justice Byles' book — as if it were still law, although the same books cite the authorities that have in principle completely overruled it. *Ex parte Lambert* is the case referred to for the proposition of law, which, I am bound to say, shows that it is the habit of even the best text-writers to take these things for granted one after another.

It is therefore clear that in the present case Mr. Swan would have had the same right to recover the amount of these bills against the acceptors, as his transferors, Messrs. Drake, Kleinwort, & Co., had, if he had simply taken the bills from them with or without indorsement, when he paid the money to them on the 12th of May, 1866. But it is contended, on the part of the [* 363] official * liquidator, that Mr. Swan having taken up the bills *supra protest* for the honour of the drawer has effectually discharged the acceptors, except so far as the drawer could have recovered against them. It is a sound rule to construe all instruments and acts in accordance with the intention of the parties, if it be possible to do so. In the present case it is clear, beyond all possibility of doubt, that the intention of Drake, Kleinwort, & Co. in requiring Mr. Swan to take the bills in the form he did was simply to discharge their correspondents, the St. Petersburg bankers, who were the purchasers of them for value; and that there was no object or intention on their part to discharge the acceptors, Overend, Gurney, & Co., and it is equally clear that Mr. Swan's intention was merely to protect his own interest, and that so far from desiring to discharge the liability of the acceptors,

he took the bills in the entire faith that their liability was preserved. I need not again refer to the 19th paragraph of the admissions, which so explicitly states that he did it with regard to his own interest, and to protect his interest only. It is also clear beyond all doubt that the estate of Overend, Gurney, & Co. has no equity to be discharged from the liability to pay these bills by the transaction in question. Overend, Gurney, & Co. had accepted the bills under a mercantile arrangement with the drawers, which must be considered as a valuable consideration for the acceptance. They had a commission, they had a good customer, and the arrangement was one of mercantile value; and therefore, as regards all third parties, at all events, they must be regarded as bills given for valuable consideration; and the bills were in the hands of *bonâ fide* holders for value, and it is perfectly right, therefore, that they should be bound to pay the bills, whoever might be the holder of them for value.

Mr. Roxburgh said that this was a case in which one of two innocent parties must suffer, but that is, in my opinion, a wholly erroneous view of the case. Overend, Gurney, & Co. are not innocent parties in the sense in which that expression is used in this Court, but the acceptors of bills for consideration, and under circumstances which make it absolutely their duty to pay to the actual holders. It is admitted on both sides that the effect of taking up a dishonoured bill for the honour of any particular party to it, is to discharge all the subsequent parties, and in the * present case the necessary consequence, therefore, [* 364] of Mr. Swan having taken up these bills for the honour of the drawers, was to discharge the indorsees, who were, of course, subsequent to the drawer, and such effect was, as I have stated, in strict accordance with the intention of the parties when the bills were taken up; the intention of Drake, Kleinwort, & Co. being simply that the indorsees of the bills, the St. Petersburg bankers, should be discharged. What, then, is the situation of the holders as against the prior parties to the bill? *Mertens* v. *Winnington*, 1 Esp. 113, is very shortly reported to this effect. It was a case before Lord KENYON: "Assumpsit against the defendant, as drawer of a bill of exchange. The bill in question was drawn by the defendant on Carrioni, in Italy, in favour of Webbould. Webbould indorsed it to Burton, Forbes, & Gregory. They sent it to their correspondent in Holland, who sent it to Italy, where it was pre-

sented to Carrioni for payment, who refused it; upon which the plaintiffs, who were merchants resident at Venice, paid the bill for the honour of Burton, Forbes, & Gregory, and now brought their action against the defendant as drawer." This, it will be observed, was not paid *supra protest* for the honour of any particular person, but paid generally. "Lord KENYON was of opinion, that where a bill is so taken up, that the party who does so is to be considered as an indorsee paying full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled — that is, to sue all the parties to the bill; and he therefore directed the jury to find a verdict for the plaintiff." In Chitty on Bills, p. 509, the rule, as I conceive, is laid down with perfect accuracy, until he comes to this unfortunate and mistaken case, *Ex parte Lambert*, 13 Ves. 179; 9 R. R. 169, when he says, "But a person taking up the bill for the honour of the drawer in particular, and not generally for the honour of the bill, has no right against the acceptor without effects," and then he quotes *Ex parte Lambert*. So that Mr. Chitty, like the rest, treats that case, overruled again and again, as if it were still law. In Beawes, which I see is frequently referred to by all text-writers, and treated as a book of eminent authority, the rule is thus laid down, p. 570, s. 54: "He that pays a bill *supra protest* immediately succeeds the [*365] possessor * in the right and title thereof, though there be no formal transfer made, nor *cessio actionis* on the holder to the payer, yet to prevent all disputes it may be more advisable, especially in some cases, to have this cession made in form, and to this the possessor is obliged whenever it is demanded of him." Then in sect. 57 he says: "He that discharges a bill protested for non-payment" — which is the case here — "in honour of the drawer, hath no remedy against the indorsers," — that is the very object of this particular form, to discharge the indorsement of the St. Petersburg bankers — "though he that honours a bill protested for non-payment for an indorser hath his remedy over, not only against the said indorser, but against all that were before him, including the drawer, though he hath no action, law, or right against the indorsers that follow him for whose account the payer was willing to discharge the bill, as has been mentioned about accepting bills." Therefore Beawes puts it thus: he takes it up for an indorser, he succeeds to the title of that indorser, and he has the same right against him that the holder had. The same

doctrine is laid down in Pothier, sect. 171, p. 336. I have a translation of the section here, and have verified it, and I believe it to be perfectly accurate; it is this: "Although in the case of other debts, a stranger who has no interest in paying them is not by paying them subrogated into the rights of the creditor, unless he has for that subrogation the consent of the creditor or of the debtor, nevertheless in the case of bills of exchange a stranger who pays it *supra protest* is rightfully subrogated to all the rights of the holder of this bill," — observe the word holder, "*propriétaire*" is the expression in French, — "although there be no transfer of it, and though the receipt which had been given him made no mention of any subrogation having been accorded to him, or say nothing about his having demanded it; this is so laid down," and then various authorities are cited for it. If the liability of the acceptor is preserved when the bill is taken up for the honour of an indorser, why should it be lost if it is taken up for the honour of the drawer, and for full value, in the belief that the bill was accepted for value? There is no principle in the rule which is contended for to the contrary. I think the true principle applicable to the case is that which is contended for by Mr. Watkin * Williams, that Mr. Swan's position is that of an [*366] indorsee for value after maturity, subject only to this, that his becoming so *supra protest* for the honour of the drawer discharges all the subsequent parties, and obliges him to look to the acceptor only, as if there had been no indorsees of the bill. The argument to the contrary on the part of the official liquidator was in truth mainly, if not wholly, based upon the decision of *Ex parte Lambert*, which I have shown to be no longer law. Justice certainly requires the estate of Overend, Gurney, & Co. to pay these bills, and I am happy to find, upon a careful consideration, that there is no rule of law which obliges me to come to a conclusion which would be totally opposed to justice, that by the transactions between Drake, Kleinwort, & Co. and Mr. Swan, on the 12th of May, 1866, that estate had been discharged from the liability to pay these bills. If I were to come to that conclusion, I should be in effect deciding that Mr. Swan had done precisely the same on the 12th of May as if he had gone to the official liquidator and given him a cheque upon his bankers for £26,545. That amount they were liable to pay while the bills remained in the hands of Drake, Kleinwort, & Co., and it would be a most absurd conclusion,

in my opinion, if that liability to pay were discharged immediately Mr. Swan paid his £26,545, and took from Drake, Kleinwort, & Co. all the rights of these bills; the object of the transaction being to put him in all respects in their situation as against the acceptors. His object was to make this calculation: Is it to my advantage to pay down £26,545, taking my chance of being reimbursed out of the estate of Overend, Gurney, & Co.? Probably he made his calculations that Overend, Gurney, & Co. would take some time to wind up, but with such a body of shareholders they must ultimately pay in full. The extent of his risk, therefore, was being kept out of his money for a year or two. On the other hand, if he allowed these bills to go back to St. Petersburg, the goods, which are stated to be of very large value, would have been stopped at St. Petersburg, and supplies to the manufacturers would have been withheld; therefore upon this calculation, not intending to benefit the drawer or the acceptor, he only had regard to his own inter-
[* 367] est and his own protection. He adopted a most * reasonable course, and I should deeply regret if I had not the power of protecting him in it. In taking up these bills he simply placed himself in the position of the holders of the bills. I must therefore decide that these bills, in the hands of Mr. Swan, do constitute a debt against the estate of Overend, Gurney, & Co., and he must be admitted to prove for them accordingly.

I desire to be understood as resting my decision on two distinct points. First, that an indorsee or transferee for value of a bill of exchange after dishonour, has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it. I have already stated that the right of set-off is not an equity which attaches to the bill itself. The only right of the acceptor against the drawer here was a right of set-off, or a right to take the accounts between them. That, as I have shown by the authorities, is not an equity which attaches to the bill. Secondly, that the person who takes up a bill *supra protest* for the honour of a particular party to the bill, succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over. Mr. Mathew cited the authority of a French writer upon that subject. The rule

there laid down was acceded to by Mr. Watkin Williams in his reply, and I find it adopted in many cases, that a person who does take up a bill for the honour of a particular person, *supra protest*, cannot himself indorse it over. The result therefore is, that the debt must stand against the estate.

ENGLISH NOTES.

See Bills of Exchange Act 1882, sect. 36 (2).

As an earlier authority for the former part of the rule may be cited *Lee* v. *Zagury* (1817), 8 Taunt. 114. Dallas, J., in his judgment says: "W. forwarded the bill to O. & Co., his agents, for the purpose of procuring payment from the defendant, who was the drawer of that bill. O. & Co., in breach of the trust reposed in them, indorsed this overdue bill to V. for a valuable consideration, who took it therefore subject to all the equities to which it was liable in their hands."

On the second branch of the rule, the authorities are so fully stated in the elaborate judgment of Malins, V. C., that it is unnecessary here to comment further upon any of the cases up to the time of that judgment. In the later case of *Ex parte The Oriental Commercial Bank, In re European Bank* (1870), L. R., 5 Ch. 358, 39 L. J. Ch. 588, 22 L. T. 422, it is observed, on the very high authority of Lord Justice Giffard: "The law on this subject cannot be better stated than it was by Vice-Chancellor Malins in *Ex parte Swan*." The question in *Ex parte The Oriental Commercial Bank* arose in this way: P. out of money in his hands (and which he held in a fiduciary capacity) belonging to the O. Bank, purchased for himself overdue bills which he sold to the E. Company at an enhanced price. Giffard, L. J., held that the right of the O. Bank to follow the money was an equity attaching to the bills; and that therefore the title of the E. Company to the bills was subject to this right, and the O. Company were accordingly entitled to recover from them the price which P. paid for them out of the O. Company's money.

AMERICAN NOTES.

"The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferrer is subject, does not extend so far as to admit set-offs which might be available against the transferrer. A set-off is not an equity; and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself, and the transferee is not subject to a set-off which would be good against the transferrer, arising out of collateral matters. This is the English rule on the subject." 2 Daniel's Negotiable Instruments, §§ 1435 *a*, 1436, citing *Burrough* v. *Moss*, 10 B. & C.

558; *Whitehead* v. *Walker*, 10 M. & W. 696; *Gallilier* v. *Gallilier*, 10 Lea (Tennessee), 24; *Barnes* v. *McMullins*, 78 Missouri, 260; *Drexler* v. *Smith*, 30 Federal Reporter, 754; *Davis* v. *Miller*, 14 Grattan (Virginia), 8; *Annan* v *Houck*, 4 Gill (Maryland), 332; *Hughes* v. *Large*, 2 Barr (Pennsylvania), 103; *Clay* v. *Cottrell*, 6 Harris (Pennsylvania), 413; *Chandler* v. *Drew*, 6 New Hampshire, 469; 26 Am. Dec. 704; *Robinson* v. *Lyman*, 11 Connecticut, 30; 25 Am. Dec. 52; *Carpenter* v. *Greenop*, 71 Michigan, 661; 16 Am. St. Rep. 662, citing *Burrough* v. *Moss*, 10 B. & C. 558.

In some States (as in New York) the statute admits set-offs. Outside the statute the point was deemed doubtful in *Miner* v. *Hoyt*, 4 Hill (New York), 193; *Patterson* v. *Wright*, 61 Wisconsin, 292.

But in some States the English rule is discarded. *Baxter* v. *Little*, 6 Metcalf (Massachusetts), 7; 39 Am. Dec. 707; *Pettee* v. *Prout*, 3 Gray (Massachusetts), 502; 63 Am. Dec. 778; *Shirley* v. *Todd*, 9 Greenleaf (Maine), 83; *McDuffie* v. *Dame*, 11 New Hampshire, 244; *Martin* v. *Trobridge*, 1 Vermont, 477; *Foot* v. *Ketchum*, 15 Vermont, 258; 40 Am. Dec. 678; *McKenzie* v. *Hunt*, 32 Alabama, 491; *Nixon* v. *English*, 3 McCord (South Carolina), 549; *Perry* v. *Mays*, 2 Bailey (South Carolina), 351; *McKewer* v. *Kirtland*, 33 Iowa, 350.

But at all events no set-offs between antecedent persons, arising after the transfer, can be available against the holder. *Davis* v. *Miller*, 14 Grattan (Virginia), 8; *Baxter* v. *Little*, 6 Metcalf (Massachusetts), 7; 39 Am. Dec. 707.

No. 23. — BROOKS *v.* MITCHELL.

(1841.)

No. 24. — GLASSCOCK *v.* BALLS.

(C. A. 1889.)

RULE.

A PROMISSORY note payable on demand (with interest or otherwise) cannot be treated as overdue, so as to affect the holder with a defect of title of which he had no notice, on the ground that an unreasonable time for presenting it for payment had elapsed since the date of its issue.

Even if the note has been discharged by payment — provided it has not come back into the hands of the maker and been re-issued contrary to the stamp laws — the holder for value without notice of the circumstance is not affected by it.

No. 23. — Brooks v. Mitchell, 9 M. & W. 15, 16.

Brooks v. Mitchell.

9 M. & W. 15–18 (s. c. 11 L. J. Ex. 51–52).

Trover, to recover a promissory note for £1000, dated 24th [15] December, 1824, made by one Lens, payable on demand, with interest, to the bankrupt, Charles Evans, or his order. The first count was upon the possession of the bankrupt, the second on the possession of the plaintiffs as assignees. — Pleas, 1st, not guilty; 2ndly, that the bankrupt was not possessed of the note, *modo et formâ;* 3rdly that the note was not the property of the plaintiffs as assignees, *modo et formâ:* 4thly, that before the supposed conversion, and before the bankruptcy, to wit, on the 12th * of [* 16] March, 1836, the said Charles Evans indorsed and delivered the said note to one Royle, who afterwards, to wit, on the 16th of January, 1838, indorsed and delivered the same to the defendant, *bonâ fide*, and for a good and valuable consideration, and without notice of any right or title in the plaintiffs as assignees of the said Charles Evans. Verification. — The plaintiff joined issue on the first three pleas, and for replication to the last, admitting the indorsement and delivery in fact by Evans to Royle, and by Royle to the defendant, traversed the allegation that the indorsement and delivery by Royle to the defendant was *bonâ fide*, and for a valuable consideration, and without notice of any right or title of the plaintiffs as assignees. Issue thereon.

At the trial, before Wightman, J., at the last Liverpool assizes, the following facts appeared. The bankrupt, Evans, who had been a banker in Manchester, having advanced to Lens, who was his foster brother, the sum of £1000, received from him, as a security for its repayment, the promissory note in question, which bore date the 24th of December, 1824. Evans had debited Lens in account with the interest half-yearly, down to the 25th of December, 1835. On the 12th of March, 1836, Evans indorsed the note to Royle, and, as the plaintiffs alleged and endeavoured to prove, without any consideration. In August of the same year, Evans became a bankrupt. On the 16th January, 1838, Royle indorsed and delivered the note to the defendant, and in the March following himself became bankrupt. A dividend of 5*s.* 6*d.* in the pound was paid under the fiat against Evans, and of 4*s.* 6*d.* in the pound under that against Royle; but no mention was made of the note in ques-

tion until June, 1839, when the defendant made application to Lens, the maker, for payment of interest upon it; and, on Lens's death, in the following August, the defendant commenced an action against his widow, to recover the amount of it. Upon these [* 17] facts, the * learned Judge directed the jury to consider, whether the note was indorsed by Evans to Royle before the bankruptcy of Evans; and if it was so indorsed, whether Royle gave a valuable consideration for the indorsement; and if he did not, whether the defendant gave value for the note to Royle, without knowledge that Royle had given no value to Evans. The jury found, that the note was indorsed to Royle by Evans before his bankruptcy, and that the defendant gave value for it to Royle, and as to the question whether Royle gave value for it, they said there was no sufficient evidence to the contrary. The learned Judge thereupon directed a verdict for the defendant.

Wortley now moved for a new trial, on the ground of misdirection. — The finding of the jury is incomplete, for they have not found in terms that Royle gave any consideration for the note; and all the evidence given in the cause went to show that he gave none. That being assumed to be the case, if the note was overdue when it came to the hands of the defendant, he could have no better title than Royle, and no right to retain the note as against the assignees of Evans. Now, the note was overdue when it came to the hands of the defendant, for it was a note made in the year 1824, payable on demand, on which it appeared no interest had been paid for three years; and under these circumstances, the demand of payment by the defendant was not made within a reasonable time. The rule is laid down in Bayley on Bills, p. 232 (5th ed.), that "a bill or note, payable on demand, must not be kept locked up; if it be, the loss will fall upon the holder." [Parke, B. — The author is speaking there of the liability of collateral parties. The case of a cheque is quite different from that of a promissory note. A cheque ought to be presented speedily; but a promissory note payable on demand circulates for years.] The foundation of the rule just referred to is, that the delay in [* 18] presentment raises an * inference of fraud, which ought, therefore, to put the party who takes the instrument under such circumstances upon his guard. Bayley on Bills, 157; *Taylor* v. *Mather*, 3 T. R. 83, n. That applies equally to a note payable on demand as to any other negotiable instrument. A party taking

a note under such circumstances, takes it subject to the same consequences as a party who takes an overdue note payable after date. [PARKE, B. The non-payment of interest for three years was the only circumstance tending to have put the defendant upon his guard, because a promissory note payable on demand is current for any length of time.] It is settled law, that a note payable on demand is payable immediately; and therefore that the Statute of Limitations runs upon it from the date of the note, and not from the time of the demand. *Christie* v. *Fonsick*, 1 Selw. N. P. 141. *Barough* v. *White*, 4 B. & C. 325; 6 D. & R. 379; 3 L. J. K. B. 227, shows, indeed, that a note payable on demand cannot be considered as overdue at the time of the indorsement of it; but this case goes much further, since here the note was made in 1824, and no demand of interest, or of payment of the principal, was made by any party from 1835 till 1839.

PARKE, B. I cannot assent to the arguments urged on behalf of the plaintiffs. If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily.

The rest of the Court concurred, and on this ground the rule was, therefore, *Refused.*

Glasscock v. Balls.

24 Q. B. D. 13–17 (s. c. 59 L. J. Q. B. 51; 62 L. T. 163; 38 W. R. 155).

Appeal of defendant from the judgment of Lord COLERIDGE, [13] C. J., at the trial.

The facts were as follows. The plaintiff as indorsee sued the defendant as maker of a promissory note. The defendant had on October 11, 1882, given to one Wayman a promissory note payable to his order on demand for the sum of £289, being the note sued upon, as security for a debt. Subsequently, the defendant being then indebted to Wayman in the sum of £641, as security for part of which Wayman held the note, the latter required further security; and the defendant executed a mortgage to him of certain property to secure the total debt, with a covenant for payment of the mortgage debt. A memorandum was made at the same time to the effect that the mortgage was to be an extra security for the

amount secured by the promissory note. Wayman afterwards transferred the mortgage by a deed of statutory transfer in the form given by the Conveyancing Act, 1881, to one Hall, receiving from the latter upon such transfer the sum of £700. The note remaining in the hands of Wayman after the transfer of the mortgage, he indorsed it to the plaintiff as security for a debt of
[* 14] £200 due from him to the plaintiff. It was admitted * that the plaintiff took the note without any knowledge of the before-mentioned circumstances. After such indorsement Wayman paid to the plaintiff £60 on account of his debt. The Lord Chief Justice gave judgment for the plaintiff upon the note for £140, the balance of the debt of £200, after deducting the payment on account.

H. Tindal Atkinson, for the defendant. If a negotiable instrument is paid at maturity, it is extinguished, and cannot afterwards be put in circulation. A note payable on demand is payable immediately. In this case there was the equivalent of payment of the note when the mortgage security was realized by transfer and the payee received the amount of the note on such realization. The indebtedness of the defendant to the payee was then discharged; and the note being thereby extinguished could not be indorsed afterwards. *Freakley* v. *Fox*, 9 B. & C. 130; 7 L. J. K. B. 148. The payee could not then have sued on the note, and his title to it was gone. He merely held it as trustee for the maker. The note, being extinguished, cannot be put into circulation afterwards, for that would amount to a re-issue of the note, and a note payable on demand cannot be re-issued after payment by the maker. *Bartrum* v. *Caddy*, 9 Ad. & E. 275; 8 L. J. Q. B. 31.

[Lord Esher, M. R. That case decided that a note which had been paid by the maker and delivered back to him could not be re-issued by him by reason of the Stamp Laws. Here the note never got back to the hands of the maker.]

If the note was extinguished and discharged in the hands of the payee, and he could not sue on it, circulating it afterwards really amounted to a re-issue of it without a fresh stamp. The payee, when the note was satisfied, really held it as the maker's agent, and so it may be said to have come back to the maker. There was no laches on the part of the defendant in this case in leaving the note in the payee's possession, because it was not suggested that the defendant knew that the payee had realized the money due by transfer of the mortgage security.

No. 24. — Glasscock v. Balls, 24 Q. B. D. 14–16.

[He also cited *Roberts* v. *Eden*, 1 Bos. & P. 398; *Beck* v. *Robley*, 1 H. Bl. 89, n. (a); * *Thorogood* v. *Clarke*, 2 Stark. [* 15] 251; *Morley* v. *Culverwell*, 7 M. & W. 174; and Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 86.]

Horace Browne, and A. McPherson, for the plaintiff, were not called upon.

Lord Esher, M. R. In this case the plaintiff sues the maker of a promissory note payable on demand as indorsee. It was admitted that the plaintiff was indorsee of the note for value without notice of anything that had occurred. The plaintiff cannot be said to have taken the note when overdue, because it was not shown that payment was ever applied for, and the cases show that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back. Under such circumstances *primâ facie* the indorsee for value without notice is entitled to recover on the note. It lies on the defendant to bring the case within some recognised rule which would prevent such an indorsee from recovering upon the note. It has been held that there may be a defence to an action by a *bonâ fide* indorsee for value, where the note has been paid and has come back into the maker's hands before it was indorsed to the plaintiff. That defence does not arise in respect of any merits of the defendant, but because the Stamp Act has not been complied with. In such a case it has been held that there was a re-issue of the note, and therefore the case stood on the same footing as if the note had been then issued for the first time without a stamp. The effect of non-compliance with the stamp laws is that the note is not a negotiable instrument and is not capable of indorsement. Such a defence only arises where there has been a re-issue of the note. The note cannot be said to be re-issued, unless it gets back again into the power or control of the maker. I do not say it would be necessary that it should actually come back into his hands; it might be enough, I think, if it came into the hands of some agent for him. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value without knowledge that it has been paid from suing. This case is not within the rule applicable to such cases * as [* 16] *Bartrum* v. *Caddy*, 9 Ad. & E. 275; 8 L. J. Q. B. 31, for two reasons. First, the note here has not been paid. Nothing has happened which would prove a plea of payment. Something has

happened which would entitle the maker to certain rights as against the payee, but which is not payment of the note. The maker might be entitled to an injunction to prevent the payee from suing on the note, but there has not been a payment of the note. It was said by the defendant's counsel that the note was extinguished. I cannot say I understand the meaning of the term "extinguished" as used in the argument. I never heard of a plea of extinguishment of a bill or note. Secondly, this case cannot be brought within the case that was cited, because, even if the note could be treated as paid, it never came back into the power or control of the maker, and therefore cannot be said to have been reissued. No other principle could be suggested by the defendant under which the case could be brought, and therefore it must come under the general principle that the maker of the note, having issued it and allowed it to be in circulation as a negotiable instrument, is liable upon it to an indorsee for value without notice of anything wrong. For these reasons I think the appeal must be dismissed.

Lindley, L. J. I am of the same opinion. I think that the defendant fails to establish a defence either at law or in equity. The mortgage given by the defendant to the payee of the note was accompanied by a memorandum which prevented any merger of the debt for which the note was given. It is a mistake to speak of the transfer of the mortgage as a realization of that security. Realization would be by foreclosure or sale. It is quite true that, as between the defendant and the payee of the note, after the transfer of the mortgage, in equity the right of the payee to sue on the note for his own benefit ceased, because he had parted with all his interest and could only hold the note as trustee for the mortgagor or for the transferee as the case might be, and the payee therefore could be restrained by injunction from suing on the note, unless he were entitled to sue as trustee for the transferee of the mortgage, which would depend upon the agreement between the par-
[* 17] ties. That would be the * equitable right of the defendant as against the payee. But, when the note gets into the hands of a *bonâ fide* indorsee for value without notice of the facts, there can be no such equity as against him.

Lopes, L. J., concurred.

Appeal dismissed.

ENGLISH NOTES.

The rule is, in effect, embodied in the Bills of Exchange Act 1882, section 86 (3). The rule as to presentment in order to charge the indorser is different, and for this purpose the note must be presented for payment within a reasonable time, section 86 (1). But even to charge an indorser, where there were circumstances showing an intention acquiesced in by the indorser, that the note should remain a continuing security, the Judicial Committee have held a delay of about ten months in presenting the note, not unreasonable. *Chartered Mercantile Bank of India* v. *Dickson* (1871), L. R., 3 P. C. 574.

It is to be observed that, in regard to the point laid down in the former part of the rule, a promissory note differs from a bill payable on demand, or cheque. See Bills of Exchange Act 1882, section 36 (2). The reason of the distinction is stated in the judgment of PARKE, B., in *Brooks* v. *Mitchell*, p. 401, *supra*.

The cases as to cheques are elaborately reviewed in the judgment of FIELD, J., in *The London & County Banking Co.* v. *Groome* (1881), 8 Q. B. D. 288, 51 L. J. Q. B. 224, 46 L. T. 60. In that case the bank (plaintiffs), to whom the cheque in question had been paid in by a customer, sued the maker of the cheque which was dishonoured. The cheque, which was alleged by the defendant to have been fraudulently negotiated, was eight days old when it was paid in to the bank (plaintiffs); but no circumstance except the lapse of time was elicited at the trial to show ground for suspicion by the bank as to the title of their customer to the cheque. FIELD, J., on the hearing on further consideration, gave judgment for the plaintiffs. The cases chiefly commented on were *Down* v. *Halling* (1825), 4 B. & C. 330, and *Rothschild* v. *Corney* (1829), 9 B. & C. 388.

These two cases, which are at first sight contradictory, require some attention. In *Down* v. *Halling*, the owner of a cheque for £50 lost it the day after its date. Five days later, a woman of respectable appearance came to the shop of the defendants, who were wholesale linen drapers and haberdashers in Cockspur Street, purchased a silk gown and scarf at the price of £6 10s., and tendered in payment the £50 cheque. Upon being desired to write her name and address on the cheque, she said she was an indifferent writer, and the shopman wrote it for her. The defendants then gave her the goods and the balance of the cheque in cash. The defendants got payment of the cheque from the plaintiff's bankers, and he sued them for the amount. The LORD CHIEF JUSTICE (ABBOTT, afterwards Lord TENTERDEN), directed the jury to find a verdict for the plaintiff if they thought that the defendants had taken the cheque under circumstances which ought to have excited

the suspicions of a prudent man, observing at the same time, that there was no evidence to show that the defendants, in taking the note, had acted fraudulently; but the question was whether they had not acted negligently. The jury found for the plaintiff. The Court, after argument, refused a new trial. In the considered opinion of the Court delivered by Abbott, C. J., the ground of the decision is thus stated: "The cheque came into the hands of the defendants five days after its date. We are of opinion, that an instrument of this nature coming to the hands of a party so long after its date is to be considered in the same light as a bill of exchange overdue; and in such a case it is incumbent on the party who takes the instrument under such circumstances, to show that the party from whom he took it had a good title to it." It will be seen how this recital of the law was recanted by the same judge in the subsequent case.

In *Rothschild* v. *Corney*, the plaintiff was induced by a fraud to sign and deliver two cheques upon Masterman & Co. (crossed with the word "& Co."), and amounting to £1330. Six days after the date of the cheques, one Brady (who had given no value for the cheques, though he was innocent of the fraud), carried the cheques to the defendants, who were wine merchants, and to one of whom Brady was personally known; and asked them, as he himself had no banking account, to give him cash for the cheques, and to get them presented by their bankers, Remington & Co. The defendants, to whom Brady was known, consented to do this; he gave Brady the money, and handed the cheques to Remington & Co., who the same day obtained payment of them from Masterman & Co. Lord Tenterden, C. J., left it to the jury to find for the plaintiff, if they thought that the circumstances of the case were such as ought to have excited the suspicions of prudent men, and that the defendants had not acted with reasonable caution; but otherwise to find for the defendants. The jury found for the defendants. A new trial was moved for, on the ground that the jury ought to have been directed that the cheques were overdue, and that, consequently, the defendants took them at their peril, and could have no better title than Brady. Lord Tenterden, in giving judgment, said: "It cannot be laid down as matter of law, that a party taking a cheque after any fixed time from its date does so at his peril; and therefore the mere fact of the defendants having taken the cheques six days after they bore date, from a person who had not given value for them, did not entitle the plaintiff to a verdict. It was indeed a circumstance to be taken into consideration by the jury in determining whether the defendants had taken the cheque under circumstances which ought to have excited the suspicions of prudent men." He considered that the verdict ought

not to be disturbed. BAILEY, J., could not say that the right question was not left to the jury or that the decision was wrong, although he would have been better satisfied had their verdict been the other way. LITTLEDALE, J., was of opinion that the direction given to the jury was right, and was not prepared to say that they did wrong in finding for the defendants. The rule for a new trial was accordingly refused.

Although the law laid down in the judgment of the Court in the former case is flatly contradicted in the latter; and although the direction to the jury in neither case is beyond the reach of criticism: the two cases together support these propositions: (*a*) That where a cheque is tendered for negotiation, the time which has elapsed from its date may (if long enough) be sufficient alone to put the person to whom it is tendered upon the inquiry as to the title of the person tendering it; (*b*) That no fixed time can be assigned for this purpose; (*c*) That a lapse of time so short as even five or six days may combine with other circumstances to form such reasonable ground of suspicion of want of title that the person acting in defiance of the suspicious facts will be chargeable with notice of the want of title, if there is want of title in fact. The decision in *The London & County Banking Co.* v. *Groome*, is quite in accordance with this view of the two previous decisions. Where (as in that case) a person pays a cheque on another bank to his account with his own bankers, the elements of suspicion, other than the lapse of time itself, appear to be minimised.

The statutory provision of the Bills of Exchange Act 1882, sect. 36 (3), no doubt is intended to represent the law to be extracted from the decisions. The phrases "unreasonable time," and "question of fact," give abundant latitude for interpretation by judge and jury.

Where a promissory note more than twenty years old, payable three months after demand, was found, after the death of the promisee, among his papers, and payments of two instalments of interest, also more than twenty years back, were noted upon it, the Court of Appeal held that, independently of the Statute of Limitations, the note must be presumed to have been satisfied; and further that the payment of interest was evidence of a demand made more than twenty years before, and the Statute of Limitations would then have begun to run so that the debt was barred. *In re Rutherford, Brown* v. *Rutherford* (C. A. 1880), 14 Ch. D. 687, 49 L. J. Ch. 654, 43 L. T. 105. This decision appears in no way to be in conflict with the principal cases or with the corresponding provisions of the Bills of Exchange Act 1882.

No. 25. — Heilbut v. Nevill. — Rule.

AMERICAN NOTES.

"In the United States, as a general rule, a different view is taken, and payment must be speedily demanded in order to preserve recourse against the indorser and preserve the note from defences which may be made against overdue paper." 1 Daniel on Negotiable Instruments, § 606, citing the principal case. Mr. Daniel is of opinion that this view is wrong, except where the paper is transferred by indorsement subsequent to the making. Ibid. § 610, citing *Machado* v. *Fernandez*, 71 California, 362.

In New York, *Wethey* v. *Andrews*, 3 Hill, 582, the fact that the note bore interest was held to justify a postponement for payment until "some proper point for computing interest, such as a quarter, half a year, a year," etc. But in *Herrick* v. *Woolverton*, 11 New York, 581; 1 Am. Rep. 461, a transfer three months after date was held to admit equities. This view is sustained by *Morey* v. *Wakefield*, 41 Vermont, 21; 98 Am. Dec. 562; *Losee* v. *Dunkin*, 7 Johnson (New York), 70; 5 Am. Dec. 215; *Rhodes* v. *Seymour*, 36 Connecticut, 6. See note, 80 Am. Dec. 252, citing the principal case, and observing that by the American authorities demand must be made within a reasonable time, whether the note bears interest or not.

The principal case is given in full, Bigelow on Bills and Notes, 160.

This doctrine is sustained by *Wheeler* v. *Guild*, 20 Pickering (Massachusetts), 545; 32 Am. Dec. 231; *Davis* v. *Miller*, 14 Grattan (Virginia), 1; *Wilcox* v. *Aultman*, 61 Georgia, 541; 37 Am. Rep. 92; *McClelland* v. *Bartlett*, 13 Illinois Appellate, 236; *Jenkins* v. *Shinn*, 55 Arkansas, 317; *Coffman* v. *Bank of Kentucky*, 41 Mississippi, 212; 90 Am. Dec. 371; *Best* v. *Crall*, 23 Kansas, 482; 33 Am. Rep. 185. In the last case the Court observed: "Now a maker of a negotiable note, who before its maturity pays the payee the amount thereof without a surrender of the note, does so at his peril. If the payee is no longer the holder, or entitled to receive the money, the payment in no manner discharges the paper, or prevents the real holder from recovering upon it."

But it is otherwise of a note transferred by assignment without indorsement. *Vann* v. *Marbury* (Alabama), 23 Lawyers' Rep. Annotated, 325, with notes.

No. 25. — HEILBUT *v.* NEVILL.

(EXCH. 1869.)

RULE.

WHERE a bill payable to the order of a firm is indorsed in the name of the firm by a partner for his own purposes and in fraud of his co-partners, the indorsee, having notice of the fraud, acquires no right in the bill even to the extent of the interest of the partner so indorsing it.

No. 25. — Heilbut v. Nevill, L. R., 5 C. P. 478, 479.

Heilbut v. Nevill.

L. R., 5 C. P. 478 – 484 (s. c. 39 L. J. C. P. 245; 22 L. T. 662; 18 W. R. 898).

Appeal against a decision of the Court of Common Pleas, [478] making absolute a rule to enter a verdict for the plaintiffs, L. R., 4 C. P. 354, 38 L. J. C. P. 273.

1. Two of the plaintiffs, viz. Heilbut and Rocca, are the creditors' assignees of one George Spill, a bankrupt, who previously to his bankruptcy was in partnership with the third plaintiff, Briggs, as manufacturers of waterproof fabrics. The first count of the declaration was for the conversion of bills of exchange alleged to be the property of Spill & Briggs. The second count was similar, laying the property as belonging to the assignees of Spill and Briggs. There were also counts for money received to the use of Spill and Briggs, and also to the use of the assignees and Briggs. The defendant pleaded, to the first and second counts, not guilty, and not possessed; and, to the money counts, never indebted.

2. On the 13th of March, 1867, Spill was arrested and lodged in Whitecross Street prison under an execution upon a judgment against Spill and Briggs; and detainers were subsequently lodged against him, with the sheriffs, by other creditors of the firm of Spill & Briggs, upon judgments obtained against them. Spill was detained in custody under these executions until the 18th of April, 1867, on which day he was adjudicated bankrupt by a registrar of * the Court of Bankruptcy, on one of his peri- [* 479] odical visits to the prison, pursuant to the provisions of the Bankruptcy Act, 1861.

3. The defendant between the month of April, 1865, and the 13th of December, 1866, from time to time advanced moneys to Spill in his private capacity, and paid moneys on his account, amounting to £312 11*s.* 6*d.*

4. In September, 1866, a general meeting of the creditors of Spill & Briggs was called, and a resolution passed that the estate should be wound up under the inspection of four of the principal creditors; and a deed of inspection was prepared and executed by a statutory majority of the creditors of the firm and by the plaintiff Briggs. Subsequently, on the 13th of December, 1866, Spill went to the counting-house of the firm, and made a list of the bills there, and took away, among others, ten bills of exchange belonging to the partnership, of the value in all of £314 5*s.* 4*d.*, which had been

accepted by customers of the firm, and were drawn or indorsed by the firm.

5. On the same 13th of December, Spill took to the defendant the bills mentioned in the last paragraph, and indorsed such of them as required indorsement in the partnership name, and handed the whole of them to the defendant in payment of the debt from Spill to the defendant, who thereupon paid to Spill the difference between the amount of the bills and the amount of the alleged debt, viz., £1 13*s.* 10*d.* The bills were so handed over by Spill in fraud of the firm of Spill & Briggs. The defendant had notice that they were handed over in fraud of the firm; and it was admitted that the handing over of the bills to the defendant was a fraudulent preference.

6. The pleadings in the action were to form part of the case.

7. The cause was tried at the sittings in London after Michaelmas Term, 1868, before MONTAGUE SMITH, J., who directed a nonsuit, but reserved leave to the plaintiff to move to enter a verdict for the sum claimed, — the fraudulent preference being admitted, and the Court having power to draw inferences of fact. A rule *nisi* was obtained in Hilary Term, 1869, which was made absolute in the following Easter Term.

Prentice, Q. C. (Barnard with him), for the defendant. The [* 480] * delivery of the bills by Spill to the defendant was a transaction which was voidable as against Spill's assignees; but, before they could take advantage of that, the assignees must elect to disaffirm the transaction, according to *Stevenson* v. *Newnham*, 13 C. B. 285; 22 L. J. C. P. 110. To entitle them to maintain an action for the conversion, there must be a demand and refusal: *Nixon* v. *Jenkins*, 2 H. Bl. 135. And the election must be made before action brought: *Marks* v. *Feldman*, L. R., 5 Q. B. 275; 39 L. J. Q. B. 101. As against Spill, the defendant's property in the bills was unquestionable; and Spill's assignees can be in no better position than Spill himself. Briggs clearly could not have maintained this action alone: and, if he joined Spill in the action, no bankruptcy intervening, Spill being estopped from setting up his own fraud, both would be estopped: *Jones* v. *Yates*, 9 B. & C. 532; *Wallace* v. *Kelsall*, 7 M. & W. 264; 10 L. J. Ex. 12; *Phillips* v. *Claggett*, 10 M. & W. 102; 12 L. J. Ex. 275. This difficulty is not removed by the assignees of Spill, instead of Spill himself, being parties to the action.

No. 25. — Heilbut v. Nevill, L. R., 5 C. P. 480, 481.

Butt, Q. C. (Archibald, with him), for the plaintiffs, was not called upon.

Cockburn, C. J. I am of opinion that the judgment of the Court of Common Pleas should be affirmed. The action is brought by the assignees of Spill, a bankrupt, and Spill's partner. The declaration contains counts in trover and for money had and received. My judgment is based entirely on the claim in the counts for money had and received. So far as the counts for conversion are concerned, the case is open to considerable difficulty. The case of *Nixon* v. *Jenkins* establishes that where assignees of a bankrupt intend to disaffirm an act of the bankrupt on the ground of fraudulent preference, they must do some act, as, by making a demand of the goods, for instance, so as to divest the property in the goods, before they can maintain an action for their recovery. That seems to be a sound principle, though a somewhat technical one. The act of the bankrupt being only voidable at the option of the assignees, until they have done something to intimate their intention to avoid the transaction, it remains valid. But that purely technical objection does not apply where the action is [*481] brought for money had and received. The goods having been converted into money, the defendant cannot restore them, and therefore there is no necessity for a disaffirmance of the transaction by a notice or demand. When they do avoid the transaction, the money is money had and received to their use. There is no necessity for importing the technical difficulty into this form of action. Upon the statement of facts before us, I think we are justified in assuming that the bills in question have been realized and are now in the hands of the defendant in the shape of money. Then comes the question how far the action can be jointly brought by Spill's assignees and Briggs. It is unnecessary for us to consider what may be the rights of Briggs and Spill's assignees as between themselves. The two partners might have brought the action, if there had been no bankruptcy, provided Spill was not estopped from setting up his own fraud. No such estoppel, however, can prevail against the assignees; and therefore I see no reason why the action should not be brought by them jointly with Briggs, as against whom the acts of Spill never were valid.

Kelly, C. B. I entirely agree that the judgment of the Court below must be affirmed. There may be several grounds upon which this action is maintainable. I, however, think it enough to rest my

judgment on one, which I take to be conclusive of the question. It appears that Briggs and Spill were traders in partnership, and were possessed of certain bills of exchange, and that Spill, without the authority of Briggs, and in fraud of the partnership, took the bills and indorsed and delivered them to the defendant in satisfaction of a private debt of his own; and it further appears that the defendant, when he received the bills from Spill, knew that they were the property of the firm, and that Spill delivered them to him without authority and in fraud of the partnership. The first question which rises upon this state of facts is, whether any property in the bills, — the entirety or the share of Spill, — passed under the circumstances. I am clearly of opinion that no property in the bills, or in Spill's separate interest in them, passed by the delivery to the defendant. Spill was not the owner of the bills; [* 482] he only had an interest in them as one of * the firm. That interest he could not pass away by indorsement. There is no such form of indorsement known to the law. By the indorsement, therefore, of such of the bills as required indorsement, even Spill's interest in the bills did not pass to the defendant; and, as to those which were delivered over without indorsement, I need hardly say that the defendant could acquire no property by the mere delivery. Spill might, indeed, have passed his interest in the bills in equity, but not at law. As to any legal effect, therefore, the indorsement of some of the bills and the delivery of the rest were absolutely null and void. Then comes the question whether the action is rightly brought in the names of the assignees and Briggs jointly. Spill having become bankrupt, his assignees find that the defendant is in possession of money the proceeds of bills of exchange belonging to the firm, — for I agree that we may assume that the defendant has received the amount of the bills, — and they jointly with Briggs bring an action for money had and received. As the defendant took no property in the bills, the proceeds of the bills received by him were the moneys of the co-partnership. Under these circumstances, I think there was no defence to the action for money had and received. In the view we take, it becomes unnecessary to consider the effect of the fraudulent preference. It might or might not raise some difficulty. My judgment is based on the ground that no property or interest in the bills passed to the defendant by the indorsement and delivery of them to him by Spill.

Channell, B. I am of the same opinion. Whatever difficulty

might have presented itself as to the plaintiff's right to maintain the action upon the counts for conversion, I think none exists as to the counts for money had and received. I agree with the Lord Chief Baron that no title or property in the bills ever vested in the defendant; and, though a difficulty in the way of procedure might have arisen if the action had been brought by the firm, that difficulty is removed by the events which have happened. I cannot entertain a doubt that, when the proceeds of the bills were received by the defendant, they became the moneys of the assignees and Briggs.

Blackburn, J. I also am of opinion that the judgment of the * Court of Common Pleas should be affirmed. I am [*483] not quite satisfied as to whether or not any property in the bills passed to the defendant by the indorsement and delivery. But, if any did pass, I think the transaction between Spill and the defendant was voidable, and the plaintiffs may maintain this action. I agree that, where a transaction of this sort is voidable, and an innocent party has acquired an interest in the property, the election on the part of the assignees to disaffirm it comes too late: *Young* v. *Billiter*, 8 H. L. Cas. 682; 30 L. J. Q. B. 153. If, therefore, this was simply an action for the conversion of the bills, I should have felt a difficulty in holding that it could be maintained without a previous disaffirmance of the transaction by the assignees. But, with regard to the counts for money had and received, no such difficulty arises. If there was nothing to prevent the assignees from disaffirming the transaction as against the defendant, I see no reason why they might not at once do so, and sue for the proceeds of the bills as money received to their use; the mere issuing of the writ being a sufficient disaffirmance for that purpose. So long as Spill was *sui juris*, there would no doubt be a difficulty. He could not disaffirm his own contract; and, as Briggs could not sue without joining him, there would be a technical obstacle in the way. If Spill's assignees had no more right than Spill himself had, they would be equally estopped: *Jones* v. *Yates*, 9 B. & C. 532. As far as Briggs' interest in the bills was concerned, he clearly might disaffirm the transaction, so as to Spill's interest the assignees might. I, therefore, see no objection to their joining in an action for money had and received, though there is that technical difficulty in the way of their maintaining an action for the wrongful conversion.

Mellor, J. I am of the same opinion. I think the same result

must follow in this case whether the delivery of the bills by Spill to the defendant was a void transaction or voidable only. The technical difficulty of an action by Briggs and Spill jointly is, I agree, for the reasons already given, removed by Spill's bankruptcy.

Lush, J. I also agree that the judgment of the Court [* 484] below * should be affirmed, for the reasons given by the Lord Chief Justice and the Lord Chief Baron.

Cleasby, B. I am entirely of the same opinion. The authority of one partner to deal with the property of the firm depends upon agency. The text-books lay it down that one member of a firm has no power to pledge the goods of the co-partnership, and that any attempt to do so would not have the effect of passing the property in the goods. That being so, the indorsement and delivery of the bills in question by Spill to the defendant had not the effect of vesting any property therein in the defendant. If the assignees were suing as representing Spill, the same objection might have been urged as if Spill himself was a party to the action. But, the transaction being confessedly fraudulent, the assignees here are suing adversely to the bankrupt. *Judgment affirmed.*

ENGLISH NOTES.

The partner in a firm of a commercial nature has a general authority to draw, accept, or indorse, or otherwise negotiate bills for and in the name of the firm. *Bank of Australasia* v. *Breillat* (1847), 6 Moore, P. C. 152, at p. 193. And doubtless, in a question with the holder in due course, the other partners would be precluded, by way of estoppel, from denying that the act was done for the purposes of the firm. Chalmers, 4th ed., p. 68. And see *per* Willes, J., in *Hogg* v. *Skeen* (1865), 18 C. B. N. S. at p. 432, 34 L. J. C. P. 153, 155, 12 L. T. 709.

Where the firm has been dissolved, the authority of a partner to indorse a bill, in the name of the firm, so far as relates to the effect of passing the property, is presumed to continue until the bill is disposed of. *Lewis* v. *Reilly* (1841), 1 Q. B. 349, 10 L. J. Q. B. 135. It has been observed that this case goes too far in holding that the indorsement was good so as to charge the retired partner with the liability: Chalmers, 4th ed., p. 71; Lindley, 5th ed., p. 216. There are a number of authorities which show that a signature may be authorised as an indorsement for the purpose of passing the property, but not for that of rendering liable a person other than the person actually signing. *Williamson* v. *Johnson* (1825), 1 B. & C. 146; *Anderson* v. *Weston* (1840), 6 Bing. N. C. 296, 27 L. J. C. P. 194; *Smith* v. *Johnson* (1858), 3 H. & N. 222, 27 L. J. Ex. 363.

No. 26. — Jones v. Gordon. — Rule.

AMERICAN NOTES.

The rule in this country is that a party who takes negotiable paper from a partner for his private debt cannot recover without proving the assent of all the partners. 1 Daniel's Negotiable Instruments, § 366; *Atlantic State Bank* v. *Savery*, 82 New York, 294; *Dob* v. *Halsey*, 16 Johnson (New York), 24; 8 Am. Dec. 293; *Rogers* v. *Batchelor*, 12 Peters (United States Sup. Ct.), 229; *Baird* v. *Cochran*, 4 Sergeant & Rawle (Pennsylvania), 397; *Tyree* v. *Lyon*, 67 Alabama, 4; *Davis* v. *Smith*, 27 Minnesota, 391. In *Atlantic State Bank* v. *Savery*, *supra*, the Court speak of "the well established doctrine that one partner cannot bind the firm by negotiable paper made by him in its name, and applied to discharge his pre-existing indebtedness, without the assent of the other partners; and this would be so even if the creditor had no knowledge that the paper was so made."

This doctrine goes further than the Rule, and is thought by our commentators to be contrary to the English doctrine. See 1 Daniel on Negotiable Instruments, § 366, notes.

In Nebraska, it is held that the creditor may presume that the paper was given to the partner on account of his interest in the profits. *Warren* v. *Martin*, 24 Nebraska, 273.

No. 26. — JONES *v.* GORDON.

(H. L. 1877.)

RULE.

WHERE two persons who are known by each other to be insolvent and to be contemplating bankruptcy issue accommodation bills drawn by one and accepted by the other and *vice versâ*, it is a fraud on the general creditors; and a third person taking such bills with notice of the circumstances, makes himself a party to the fraud and is not a *bonâ fide* holder of the bills. The facts of his having purchased the bills for a small fraction of their nominal amount, and of his knowing the embarrassed circumstances of the debtors, and having refrained from making inquiries of persons who could have informed him as to the true consideration for the bills, are sufficient evidence to show the want of *bona fides*.

No. 26. — Jones v. Gordon, 2 App. Cas. 616, 617.

Jones v. Gordon.

2 App. Cas. 616-635 (s. c. 47 L. J. Bankr. 1; 37 L. T. 477; 26 W. R. 172).

[616] This was an appeal against a decision of the Court of Appeal reversing a decision of the Chief Judge in Bankruptcy. 1 Ch. D. 137; 45 L. J. Bankr. 1.

The respondent was the trustee of the estate of two [* 617] bankrupts * named John Gomersall and James France Gomersall, who formerly carried on business at Dewsbury, in Yorkshire: the appellant was a person who, for a sum of £200, had purchased certain bills of exchange accepted by the Gomersalls, and who claimed to prove against their estate, not the sum of £200, the actual amount of his purchase-money, but the sum of £1727 2*s.*, being the nominal amount of those bills. The facts were these: —

For several years before 1874 the Gomersalls had employed one Searby as their commission agent in London. In the end of 1870 they began to draw bills on him, always, at first, furnishing him with the means of meeting those bills; but in 1874 they drew bills on him, or he became the drawer and they the acceptors, and a system of what is commonly called the making of "accommodation bills," was established between them. The character of the transactions appeared from the various letters which passed between the parties. Some are subjoined. The Gomersalls in January, 1874, wrote to Searby, "Enclosed we hand you bill duly accepted. Try Lovering, but before doing so get to know where he would discount it, and who he banks with, as you know it would not do for our bank or yours to know it, and so be careful in this point and oblige, &c." Other letters of a similar kind were written, and on August 20th, 1874, they wrote: —

"What we want you to do is to draw on us for same amounts we have drawn upon you, and if the bank is queer to put them into a third parties, to hand to some business friends of yours, say John Lovering, or some such man, one that you and us could have confidence in, but do not mention it to a single person breathing, as we are not afraid but what the bank will come to. We do this suppose they do not and to make you safe. If they should write you take no notice but leave it to us. Withdraw all moneys from your bank perchance they might take extreme measures and put

No. 26. — Jones v. Gordon, 2 App. Cas. 617, 618.

an attachment on your banking account. See to this early in the morning."

In another letter giving Searby caution as to his proceedings, and as to the bankers, the Gomersalls said, "File your petition, Monday, without delay. We shall file ours on Tuesday or Wednesday if they do not retract the summons already sent." There were other letters of a similar character.

* Searby drew fourteen bills on the Gomersalls, which [* 618] were the bills now under discussion. The bills were accepted by the Gomersalls, and returned to Searby, who thereon tried to get them discounted, but failed. There were fourteen of these bills in all, and Lovering (the person specially mentioned in the Gomersalls' letters as "a friend" of Searby) offered some of them to a person named Bennett for discount or for sale. Ten of them were purchased by Bennett for a sum of £250, and the remaining bills (amounting to £1757 2*s.*) were purchased by Jones for £200. These transactions took place at the end of August, 1874. On the 5th of October, 1874, the Gomersalls filed their petition for liquidation; they were adjudged bankrupts on the 8th of October; proof of the bills was tendered, and Jones claimed to prove for £1727 2*s.*, the nominal amount of the bills he had purchased. Mr. Gordon, who had been appointed trustee under the liquidation, sent to Jones a notice of objections to his claim, which claim he, Gordon, rejected. The second of these objections was in these terms: "That at the date of the bankruptcy of the Gomersalls you were not the holder of the bills of exchange in the affidavit mentioned, or any of them, for value, and could not then have maintained an action against them thereon, if they had not become bankrupts." The County Court Judge adopted the objection, and ordered the proof against the estate to be limited to £200, but his decision was overruled by the Chief Judge in Bankruptcy, who ordered that the proof for the nominal amount of the bills should be received and be admitted to dividend. This decision was, in its turn, overruled by the unanimous decision of the Court of Appeal, and the proof was ordered to be limited to the sum of £200. Nom. *In re Gomersall*, 1 Ch. D. 137, 45 L. J. Bankr. 1. This appeal was then brought.

Mr. A. G. Marten, Q. C., and Mr. Cooper Willis, for the appellant, insisted, first, that the form of notice given by the trustee in bankruptcy was insufficient under the general Bankruptcy Rules of

1870 for want of clearly specifying the nature of the objection; next, they contended that there was nothing here which could be pretended to be a preference of a particular creditor. The [* 619] bills were sold, as goods might have been sold, * to raise money for the Gomersalls. Such a sale of goods would have been valid, and so was this sale of bills. Jones knew nothing of any fraud, and such a knowledge could not be presupposed against him. As against the holder of bills of exchange, no mere presumptions were admissible. The negotiability of bills of exchange could not be affected in that way. There was nothing here which subjected the holder of these bills to a charge of taking part in fraud; yet, without being liable to that charge, he was entitled to recover the full amount of the bills. On the face of them, the bills were perfectly regular. Every one knew that in the ordinary way of commercial transactions, bills of certain firms become liable to doubts and suspicions. That made the dealing with them a matter of risk. The person who, under such circumstances, was willing to incur the risk, and advance real money upon bills of that sort, might be accused of rashness but could not be accused of fraud, and without the imputation of fraud he was entitled to recover the amount of the bills on which he had advanced his money. For the advantage of commerce, bills of exchange were negotiable instruments which passed freely, and which, appearing on the face of them, as these did, to be valid, became on mere transfer, and certainly on indorsement, valid securities in the hands of the holders. Unless there was plain evidence establishing against the holders a charge of fraud or corruption, they were entitled to recover. There was nothing of the sort here. All that was required to be done in the delivery and transfer of bills of exchange had been done here, and the parties to the bills, and the estates of those parties, were liable upon them. [*Ex parte Bloxham*, 6 Ves. 449; 5 R. R. 358; Byles on Bills, Ch. xi. ed. 1874; *Castrique* v. *Buttigieg*, 10 Moo. P. C. 94; and *Denton* v. *Peters*, L. R., 5 Q. B. 475, were referred to.]

Mr. De Gex, Q. C., and Mr. Finlay Knight, for the respondent: —

The form of notice was amply sufficient. There was no need here to discuss in any way the general doctrine of the negotiability of bills of exchange, but the circumstances showed that, while that general doctrine existed in full force, a case was [* 620] * established which left no doubt that the purchase of

No. 26. — Jones v. Gordon, 2 App. Cas. 620, 621.

these particular bills had been effected with a full knowledge of the real facts, and with the purpose of gaining an advantage for the purchaser at the expense of the ordinary *bonâ fide* creditors of the Gomersalls. If the evidence supported that view of the case, there was no pretence for saying that such a transaction could stand. The undoubted facts showed such a case as to throw on the holder the *onus* of proving *bona fides* and value, and he had not proved value beyond a certain amount.

[*Marston* v. *Allen*, 8 M. & W. 494; 11 L. J. Ex. 122; *Bailey* v. *Bidwell*, 13 M. & W. 73; 13 L. J. Ex. 264. See PARKE, B., at 13 M. & W. p. 76, *May* v. *Chapman*, 16 M. & W. 355, and *Hall* v. *Featherstone*, 3 H. & N. 284, were cited.]

Mr. Marten replied.

Lord O'HAGAN: —

My Lords, you have had the advantage of an able and elaborate argument of the case, and the farther advantage of a report of the full discussion which it underwent in the Courts below; and I believe that your Lordships see no reason to doubt the perfect correctness of the judgment of the Court of Appeal. For my own part, I think it manifestly right; and I am glad that the authority of this House will sustain it, without hesitation or reserve, in the interest of the mercantile honour and security of the country.

The facts of the case are peculiar, though the principles applicable to them seem to me plain and well-established. As was observed in the Court of Appeal, although frauds on the eve of a bankruptcy are common enough, they have usually been frauds on persons advancing money or selling goods to bankrupts; but here the fraud was not attempted on the persons so advancing or selling, but on the general body of creditors. It is, so far, novel, and all the more dangerous on that account; but I am satisfied that the settled law gives ample power to meet it: and we are bound to apply that law with vigour and efficiency, if we would discredit unconscientious speculation, and prevent the repetition of transactions which the only one of the Judges in the Courts below * who ruled in the appellant's favour, has rightly [* 621] pronounced "nefarious."

A preliminary point was raised grounded on the Bankruptcy Rules of 1870, alleging the insufficiency of the trustee's notice of objection, by reason of its too great generality. I have grave doubts whether such an objection ought now to be entertained, as

No. 26. — Jones v. Gordon, 2 App. Cas. 621, 622.

it does not appear to have been taken in the Court of Appeal; and I think your Lordships would scarcely be disposed to permit a suitor who has allowed his opportunity of urging such a point to lapse, to raise it after judgment has been given against him, and his adversary has encountered expense and delay which would have been spared if it had been successfully urged in the first instance. But, even if the argument be admissible, I think there is nothing in it. The notice of objection to proof appears sufficient, under the Bankruptcy Rules of 1870. It indicates, clearly enough, the ground to be taken against the appellant's claim, and, having regard to the nature of the transaction and the known principles on which alone it could be impeached, your Lordships can have no doubt that he was well informed of the general case to be made against him. It was not necessary or possible to go into details. A notice is not a pleading; and the doctrine that, in the latter, fraud, to be availed of against its perpetrator, should be specifically stated, has no application to the former. The defence comes too late; but, at all events, it is untenable.

The real questions in the case are substantially two. The appellant claims against the estate of the bankrupts, of whom the respondent is trustee, the sum of £1727 2*s.* in respect of four bills of exchange, drawn by a Mr. Searby, accepted by them, and purchased by the appellant from their agent for the sum of £200. Your Lordships are required to determine: First, whether the circumstances under which the bills were drawn and accepted tainted them with fraud? And, secondly, whether the appellant had such notice of that fraud as disentitles him to recover?

The bankrupts carried on business at Dewsbury under the name of Gomersall Brothers; and Searby was a commission agent in London, selling goods for them. They were in the habit of drawing bills upon each other to a large extent, bills without any consideration. It is perfectly plain, upon the correspondence, that [* 622] these * bills were drawn — in the words of one of the Lords Justices — "for the fraudulent purpose of raising money so as to cheat the creditors of both drawer and acceptor." Or, as another learned Judge expressed it, "the bills were mere shams and fictitious things." The parties to them were in a condition of utter insolvency; and both were contemplating bankruptcy whilst they strove to palm their worthless paper on the commercial public.

The evidence of this is conclusively furnished by the letters in

No. 26. — Jones v. Gordon, 2 App. Cas. 622, 623.

proof. I do not trouble your Lordships by reading them again as you have heard them repeatedly, but I shall call your attention to one or two passages which put beyond controversy the relations of these correspondents and the motives of their action. The bankrupts wrote to Searby on the 20th of August; [His Lordship read a number of passages from the letters such as have already been set out, and proceeded:] Comment on such a correspondence would be idle. It establishes the whole case of the respondent on the first branch of it, — the insolvency of the parties; the total want of consideration for the bills; the imminence of bankruptcy; and the intention to defraud. As between the juggling concoctors of the bills it is quite plain that they were nullities, and that no claim could have been established by the one against the other.

But then arises the second question, How far is the appellant affected by the fraud? He alleges that he purchased the bills for the sum of £200; and, although that sum was not one-eighth of the apparent value, if the purchase was made *bonâ fide*, without notice of the fraud or knowledge of it, or means of knowledge, or duty to institute inquiry reasonably suggested by the circumstances of the case, which would have afforded such knowledge, he would be entitled to sue the acceptor or the drawer, or to claim his dividend on the bankrupt's estate for the entire amount.

On the facts admitted by himself, I submit that your Lordships cannot hold him so entitled.

This is his own sworn statement of the mode in which he became possessor of the bills: —

"These bills on which I have proved were brought to me by Mr. Lovering. He brought them all together. He offered me no other. I had discounted bills brought to me by him before. I
* occasionally discount bills. These were left with me for [*623] a day or two that I might make inquiries about them. I did so. I never saw Searby to my knowledge to that time. I did not want him, and I did not ask Mr. Lovering about him. I could have found him if I desired it. I did not know of Mr. Bennett having any bills. I had no communication with him about these bills. I inquired of one or two clerks I knew in the city about the credit of Messrs. Gomersall. I thought it a very risky thing from the information I received. I did not inquire of any one as to the consideration for the bills or any of them. I did not ask Lovering anything about the consideration. I am not aware if he had any

No. 26. — Jones v. Gordon, 2 App. Cas. 623, 624.

interest in them. I afterwards advanced £200 for them. I refused to discount them. I never bought any other bills before from any one. I made no inquiry as to the consideration. I generally buy as cheap as I can. I presumed the bills were *bonâ fide*. I have received no dividend from Searby's estate. Lovering gave me no reason for his having the bills. I think I offered to buy them. I declined to discount them. This was the latter end of August. The cheque I gave is dated the 31st August."

It is to be noted that the bills so sold bore false dates, and that the sale so made was in the month of August, after the letters to which I have called your Lordships' attention had indicated the purpose of bankruptcy by the drawer and acceptor, and the scheme by which they hoped to defeat the claims of creditors. But as we have no proof that Jones knew of the ante-dating or of the correspondence, I do not think that these things can be fairly pressed against him. What seems to me conclusive is his own statement of his own case. It puts, in my mind, beyond dispute, that he must have known the embarrassed circumstances of the acceptors and the drawer. His inquiries as to Messrs. Gomersall led him to the conclusion, he admits, that it was "a very risky thing" to deal for these acceptances; and, as to Searby, the transaction itself was perfectly demonstrative of his insolvent condition. This draft made him answerable for above £1700, and it was purchased, with all his liability upon it, for £200. The bills, according to Mr. Lovering's account, had been hawked about and nobody would have them; and when the appellant took them, without inquiry or explana-
[*624] tion, he must have been thoroughly assured of the *incapacity of the parties to meet their engagements. In his affidavit, he says he was informed that the acceptors, although in difficulties, "were possessed of assets," and he speculated on the possibility of rendering those assets available to the detriment of *bonâ fide* creditors. But that very allegation tends to make it plain that he purchased, having no expectation of recovering against Searby, and he had none, because the circumstances satisfied him, as they must have satisfied any reasonable being, that Searby would not be able to discharge his liabilities.

Assuming, then, that the appellant had knowledge of the insolvency of the acceptors and the drawer, what was the nature of the transaction of sale? For a sum of £200, a claim to £1727 is sold, and no sort of reason is sought or given for a proceeding so abnor-

mal and extraordinary. Could any man of intelligence, — any commercial man, — any man conversant with bill transactions, — and such the appellant was, — have failed to believe that the offer of such terms was clouded with suspicion and suggestive of fraud? Could any honest trader, disposed to realise advantage only from just and open dealing, have failed to inquire as to the motives which suggested such a strange proposal, and to seek some explanation that might reconcile it with fair play to all concerned?

The appellant's hope, avowedly, was to clutch a portion of the assets of the bankrupts, through the transfer of securities of a most questionable kind; and is it unjust to him to suppose that he shrank from investigation, because he apprehended that it might lead to discovery which would baulk him of his object, and make his claim, as a purchaser with notice of the fraud, inadmissible in a Court of justice?

At all events, he deliberately abstained from all inquiry. He had the fullest opportunity of making it. Lovering, he says, "gave no reason for having the bills:" and Lovering never was interrogated about them. Searby was within his reach, — "I could have found him," he says, "if I desired it." But he desired nothing of the kind. He did not wish to ask, — how it came to pass that Searby sold his large liability for a sum so small? He did not desire to put a question as to the consideration for the bills; or why, or where they had been concocted, or what would be the *effect of [*625] the transfer of them on the creditors of the conspiring insolvents? Any question of the sort he felt might get an inconvenient answer; and having the fullest means of knowledge, he wilfully refused to obtain it. Of the reason of his refusal your Lordships cannot entertain a doubt.

Very properly, reliance was placed by the respondent's counsel on the inadequacy of the price offered for the bills, considered as valid and subsisting securities; and it was fairly urged that as, in the criminal law, the purchase of goods at a gross undervalue is pregnant evidence of guilty knowledge, so, in this case, the buyer of above £1700 worth of securities for £200 must reasonably have such knowledge imputed to him. It was argued on the other side that as no more could be got for them in the market, the price was adequate, and that therefore such an inference should not be drawn. But this is a plain fallacy. If other people were wise enough and honest enough to avoid a fraudulent transaction, their

abstinence can hardly avail the man who does not shrink from it, in spite of the flagrant *indicia* of impropriety.

My Lords, the law upon the subject is clear, and in full accordance with sound policy and common sense. It is thus stated in a work of very high authority: "A wild and fraudulent absence of inquiry into the circumstances, when they are known to be such as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a suspicion or belief that inquiry would disclose a vice in the bills) amount to general or implied notice."[1] And Lord WENSLEYDALE has said: "Notice and knowledge mean not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes."[2]

My Lords, I suggest that the case before your Lordships comes plainly within the operation of these principles. The circumstances, beyond all doubt, invited inquiry, and made it, to an honest man, unavoidable. The means of knowledge were in the appellant's power. He dealt personally with Lovering. He had Searby at his call. He never questioned the one or sent for the other. His conduct was wholly inexplicable, save on the assumption of his suspicion or belief — which any person of ordinary [*626] *sense and experience must have entertained — that inquiry would disclose a "vice in the bills." He was determined that notice of that vice should not be used to deprive him of his chance of a dividend, and tried to avoid it by "wilfully shutting his eyes," and evading all inquiry. My Lords, he has not succeeded. The legal principles to which I have adverted govern the case; and the notice which they enable your Lordships to fix upon him will deprive him of profit from the fraud.

Mere negligence might not disentitle him to recover. Mere inadequacy of consideration might not, in certain circumstances, bar his claim. In spite of both, he might have proved the integrity of his motives and the purity of his conduct. But, without disregard to undisputed facts (which seem to me to make it palpable that his ignorance was wilful, if it was not, as I believe it was, only simulated), this transaction cannot be allowed to stand. If it could, the creditors of an insolvent would never be sure that he might not, by a trick at the moment when his circumstances had become most desperate, and when he was actually preparing to go

[1] Byles on Bills, 119, and cases there cited.

[2] Lord WENSLEYDALE, *May* v. *Chapman*, 16 M. & W. 361.

into bankruptcy, transfer the right to prove on his estate to a person with whom he had had no real dealings, and who had no real claim upon him, so as to make the dividend of legitimate creditors inadequate or wholly worthless. Lord Justice MELLISH calls this "a new fraud;" and the invention of it too characteristic of a period which has been dishonourably marked by affairs of the kind. With that eminent and lamented Judge I think that we should be "very unworthy descendants" of those who have heretofore administered our law, if we allowed it to prevail. If we needed to better the example of those who established the doctrines which guard the rights of creditors, I am sure your Lordships would not hesitate to give those principles a salutary extension. But this seems to me unnecessary. The existing law, strictly applied to the circumstances with which we have to deal, is abundantly sufficient to enable you to do plain justice by affirming the judgment of the Court of Appeal.

Whether the appellant should be allowed to prove for the £200 which he paid to Lovering, is not now a question for decision, as there is no cross-appeal. The Lords Justices ruled that he should be, and whatever may be my own impression of the matter, their * decision in that respect is unchallenged, and I shall [* 627] say nothing of it.

On the whole, I advise your Lordships that the judgment should be affirmed and the appeal dismissed with costs.

Lord BLACKBURN: —

My Lords, I am entirely of the same opinion. I should be extremely sorry to say anything which should cast doubt upon the principle that a bill of exchange, or a negotiable instrument of that sort, is negotiable to the fullest extent of its kind. The negotiation of these bills of exchange, in a mercantile country like this, is of very great value. I take it to be perfectly clear that when a bill of exchange is (as these bills of exchange are) on the face of it a good bill, and there is nothing on the face of it to show the contrary, it *primâ facie* imports value; *primâ facie* a bill of exchange is a good bill of exchange, and it is necessary to show the contrary. I take it that even if the contrary is shown, if it can be shown that a bill of exchange in its inception was not a good bill of exchange, and that originally it was obtained by fraud, yet a person who has taken it *bonâ fide* and for value is entitled to sue upon it if the parties are solvent, and is entitled in a case of bankruptcy to prove

upon it, even though it is shown that there was an infirmity or vice in the title of some of those persons who passed it, unless the knowledge of that vice is brought home to him who took it.

But, then, I think it is clear both upon the authorities, and also, as it seems to me, upon good sense, that when it is shown that a bill of exchange was a fraudulent one, or an illegal one, or a stolen one, in any one of those cases it being known that the person who holds it was a party to that fraud, to that illegality, or to that theft, and therefore could not sue upon it himself, the presumption is so strong that he would part with it to somebody who could sue for him that that shifts the burden. Then, instead of the bill of exchange being *primâ facie* good, as it otherwise would be, so that the person holding it is entitled to recover upon it without proof of more, that shifts the burden. That has been decided over and over again. The consequence is, that the man who sues has in that case the *onus* upon him to prove that he [* 628] * gave value. I should be unwilling to say precisely whether it shifts the *onus* upon him to show that he gave value *bonâ fide*, so that, although he gave value he must give some affirmative evidence to show that he was doing it honestly, or whether the *onus* of proving that he is dishonest, or that he had notice of things that were dishonest, remains on the other side, although he is bound to prove value. The language of the quotation from Mr. Baron PARKE would seem to show that the *onus* as to both is shifted; but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case. I have no doubt that in proving value, it may be proved that he himself took the bill under such circumstances, that although he gave value he could not sue upon it.

Farther, my Lords, I think it is right to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris*, or when it is sought to be proved against the estate of a bankrupt, it is necessary to show that

the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not make any difference if he knew that there was something wrong about it and took it. If he takes it in that way he takes it at his peril.

But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did * know that there was something wrong in it. If [* 629] he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind — I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover — I think that is dishonesty. I think, my Lords, that that is established, not only by good sense and reason, but by the authority of the cases themselves.

Now, my Lords, I pass from the general question to the particular case before us. These bills of exchange would seem to be good bills of exchange; there is nothing wrong upon the face of them, but although they purport to be drawn as good bills would be drawn, yet the external evidence proves beyond all doubt (I will not trouble your Lordships by repeating the letters which have been read) that at the time these bills were drawn, and at the time they were indorsed, Searby the drawer, and Gomersall the acceptor were both intending to become bankrupts, not simply that they were both insolvent and likely to become bankrupts, but

that they had it actively in their minds that they were going to become bankrupts, and they both were aware and knew that if they could put these bills of exchange in issue, and get them circulated into the hands of an honest holder (of course they would have preferred that it should be an honest holder rather than a dishonest one), that man would come, not upon them personally, but upon the estate after they were bankrupts, and take away from their creditors as many shillings in the pound of the assets as the dividend would amount to upon the nominal amount of those bills, and not upon the sum actually advanced on them.

There was an elaborate discussion of the matter by the late Lord Justice MELLISH, for whom no one can have a greater respect than I have, to prove that such being the transaction it could not possibly stand in a Court of Bankruptcy; to show that [*630] such a bill * could have been proved neither by Searby nor by any one to whom, in contemplation of bankruptcy (for I consider that a material element), it was issued in order that he might, advancing a small sum upon it, get from the dividends in the Court of Bankruptcy the full nominal amount of the bills. There was an elaborate argument to show that that would have been a fraud upon the bankruptcy laws, and that the bills could not have been allowed to be proved, either in the hands of Searby or of any one who took them with notice that there was something wrong about the bills, the notice being in the manner and to the extent I have already mentioned. No one who took with notice could sue; that must be the result. It did not require, I think, so much elaborate argument to show that, but I have not the slightest hesitation in advising the House to affirm in that particular the judgment of the Court below.

Then, my Lords, comes the important question, is there enough here to show that Jones, who gave £200 upon these bills, the nominal amount of which was £1727, had notice to the extent to which, as I have mentioned, notice must be proved that there was something wrong about the bills: that they could not have been proved against the estate of Gomersall by Searby, the holder, and that they were brought to him to get a small sum for them, because they could not have been issued without? Was there enough to lead Jones to a suspicion of that, and therefore to call upon him to make inquiries, or if he did not make inquiries, was there enough to show that that must have been wilful on his part,

and because he thought that if he did make inquiries the result would be unfavourable? I think it is necessary to go as far as that, and I think the evidence amply goes as far as that in this case.

Mr. Jones gives two accounts of his purchase of the bills. One of them is in his second affidavit, where he says that the bills "were brought to me," "and offered to me for discount, and from inquiries I then made I received information that the acceptors would be unable to pay the said bills in full as they were in difficulties, but that they were possessed of assets, and that there was a fair prospect of my being able to obtain payment of parts of the amount made payable by the said bills. The bills were left in my hands for a few days, and on the 31st of August last I agreed to purchase the same for the sum of £200." I read that, my Lords, * because it seems to me that Mr. Jones there states, [* 631] without disguise, the important and material fact that he was aware that Gomersall & Co.'s bankruptcy was in contemplation, that he was aware that they had assets, that he was aware that he would get his share of the dividends upon the full amount of the bills of exchange, namely, £1750, and that he thought that would be enough to repay him the £200, and certainly, therefore, that he was quite aware of that material and cardinal fact that the bills were issued and discounted in contemplation of bankruptcy. When he is examined *viva voce* he says: "The bills were brought to me, the bills were left with me for a day or two that I might make inquiries about them. I did so. I never saw Searby to my knowledge at that time. I did not want him, and I did not ask Mr. Lovering about him. I could have found him if I desired it." Then he goes on after a little while and says: "I made no inquiries of any one as to the consideration for the bills, or any of them. I did not ask Lovering anything about the consideration. I am not aware if he had any interest in them. I afterwards advanced £200 for them. I refused to discount them. I never bought any other bills before from any one. I made no inquiry as to the consideration. I generally buy as cheap as I can. I presumed the bills were *bonâ fide*. I have received no dividend from Searby's estate. Lovering gave me no reason for his having the bills."

Now, my Lords, in an ordinary case a man is entitled to presume a bill to be *bonâ fide*, but I think it becomes a question whether, under the circumstances which this statement discloses, Jones had

No. 26. — Jones v. Gordon, 2 App. Cas. 631, 632.

a right to presume that the bills were *bonâ fide*, and whether he did not really know that if he inquired into them, or spoke to Searby, or inquired of anybody else about Searby, he would have been confirmed in what he himself suspected, that the bills were not *bonâ fide*. Consequently, although if Searby had got an honest, ignorant, innocent man without knowledge to give value for them that man would have been able to prove, yet he, Jones, would be then fixed with clear knowledge which would prevent him from being a person entitled to recover, and therefore he abstains from making inquiries.

[* 632] I think, my Lords, that since the repeal of the Usury Laws we * can never inquire into the question as to how much was given for a bill, and if Searby was in such a position that he could have proved against the estate it would have been no objection at all that he conveyed these bills to another for a nominal amount, that he sold bills nominally amounting to £1727 for £200. Although I think that could not have been inquired into, yet the amount given in comparison with the apparent value is an important piece of evidence guiding us to a conclusion as to whether or not it was a *bonâ fide* transaction. I am sure of this, that in criminal cases the general evidence that is given to show that the receiver of goods which were stolen knew that they were stolen is that he has given a great undervalue for them. That is not by any means conclusive, because it may very well be that he has given the undervalue under circumstances which do not suffice to prove that he had a felonious intention, or a felonious knowledge, which would be required to make him guilty. In like manner, I think if it is shown that a considerable undervalue was given for bills, although that alone would probably not be sufficient, it is an element, and an important element, in considering whether the man who gave that undervalue was *bonâ fide* doing it because he was in honest blundering and stupidity taking the thing without knowing that he was committing or assisting in fraud, or because he had a suspicion that he would deprive himself of a good bargain if he made too much inquiry and so had it brought home to him that there was fraud.

My Lords, with regard to this I do not know that I can do better than refer to what the late Lord Justice MELLISH says about these particular circumstances, 1 Ch. D. at p. 145; 45 L. J. Bankr. 6. He says that Mr. Jones "manifestly knew that both parties"

(the drawer and the acceptor) "were hopelessly insolvent, probably that the drawer could pay nothing at all; but that the acceptors, although likely to become bankrupts, had assets sufficient to pay a dividend." I have always pointed out, and I wish to repeat it, that in my mind the fact that these bills were issued for discount in contemplation of bankruptcy, and that the discounter knew that it was in contemplation of bankruptcy, is of extreme importance. Then he goes on: "What right had he to suppose that an utterly insolvent * drawer" (that is, Searby),—"a man who [* 633] would do such a thing as sell bills for £200, and in a short time afterwards have a claim against him for £1700 — would have kept these bills in his possession for two or three months after they were drawn, never receiving any money at all upon them, if he had had a good claim as against the acceptor?" "It appears to me," says the late LORD JUSTICE, "that if Jones had not absolutely shut his eyes, there was sufficient for him to come to the conclusion, looking to the state of both these parties, that these bills were drawn for the purpose of enabling them recklessly to raise money on the eve of bankruptcy." I am entirely of the same opinion, and I think that, taking the whole of the circumstances together, particularly the fact that he knew they were issued in contemplation of bankruptcy, the fact that he calculated the price upon what he supposed would be the amount of dividend that he should receive upon the whole amount of the £1727, and that, apparently (though the evidence is slight upon that point), the amount of that dividend would have been about three times what he paid; taking all these things together, and seeing how very improbable it was that the bills should be discounted in the way that they were, honestly, by a person who had a right to prove against the estate, — taking all these things together, I come to exactly the same conclusion that was arrived at by the Court of Appeal below, that the circumstances were such as to produce the conviction that his refraining from making farther inquiry, not necessarily of Searby, but of anybody about Searby, can be attributed to nothing else than a suspicion in his mind that something was wrong about the bills, and that if he inquired farther he would be fixed with clear and conclusive notice and knowledge that the bills were wrong, and that, therefore, he could not get a dividend upon them. Now it is proved in fact that the bills were wrong, so that if he had notice he could not get a dividend. Under these

circumstances I think that the decision of the Court below was quite right, and I consequently agree in the judgment proposed.

I have only farther to add a word or two on the point that the notice of objection to the proof given by the trustee was not sufficient. I think, no doubt, there must be such a notice as [* 634] calls the * attention of the parties to the fact to be proved, so that they may be prepared to meet it, but I think that this notice was amply sufficient to show to everybody who read it that the point to be disputed was this, Was Mr. Jones, who took these bills, a *bonâ fide* holder for value in such a manner that he could have sued upon them if the parties had been solvent, or could prove upon them in case of bankruptcy? And the course of the evidence shows that they so understood it, and that the parties brought their proof accordingly.

Lord GORDON: —

My Lords, I quite concur in the views which have been expressed by your Lordships, and I think it very satisfactory indeed that we feel not the slightest difficulty in affirming the judgment of the Lords Justices. I think it would be a very serious thing for the commercial world if there should be any toleration of such practices as appear to have been adopted by the parties who are interested in this case.

When I looked into the case I thought the judgment appeared to be right, and the only difficulty which suggested itself arose from the fact that the learned Judge in Bankruptcy entertained a different view. But I see that the way in which he treats the subject is this: "If Mr. Jones could sustain an action, as no doubt he could, against the drawer and acceptor of these bills, he being the *bonâ fide* holder for valuable consideration, then he can prove upon them." Now this is an assumption which I venture to think he was scarcely justified in making. Looking to all the circumstances, I doubt very much whether Jones could have maintained any action on the bills. Yet the whole scheme of the first judgment is based upon that hypothesis. I also doubt very much whether, even if he could raise an action, he could prove against the estate. I think that the state of bankruptcy introduces some new elements into the consideration of such questions as these, and opens the door for an investigation into the conduct of the bankrupt and those who were conscient and confidant, as we express it in Scotland, with the bankrupt. Behaving, as they

have behaved, and attempting, as they have attempted, to benefit by his bankruptcy, I do not think they could have been allowed the advantage they sought. Probably your Lordships would * consider more carefully any suggestions of fraud [* 635] on the part of those who were conscient and confidant with the bankrupt than you would consider similar suggestions with regard to third parties, or any one.

Now, in the present case, the transactions between the Gomersalls and Searby really are positively disgraceful. I am not using, I think, too strong an expression when the learned Chief Judge in Bankruptcy himself says: "I do not wonder at the impression made upon the learned Judge's mind" (that is, the County Court Judge), "when the details of all these nefarious transactions came out before him." In a case which produces the impression which this case did produce even upon the learned Chief Judge, that the transactions were nefarious, one feels anxious that Courts should not allow themselves to be run away with from the true strict law applicable to the case. I have very carefully watched this case during the argument of Mr. Marten, and have gone along with a great deal of what he said as to the impolicy of doing anything which would injure the negotiability of bills of exchange, which form so valuable an element in the credit of this country. But steadily keeping that in view, I venture to think that, looking at the facts of this case we not only have here a case as between the Gomersalls and Searby of gross fraud, but that any one who had notice of the real facts ought to have made minute inquiries into all the circumstances under which he took the bills. If the appellant took the bills from Searby, who was open to objection, and he had notice of the objection, it would apply to him. If he wilfully abstained from making himself cognizant of the facts, it may properly be said that if a man wilfully shuts his eyes, so as to avoid inquiring into the circumstances connected with such a history as this, the only impression which can be produced upon any unbiassed mind is, that he did so because he was afraid that if he inquired into the circumstances he would ascertain what would be equivalent to notice, destructive of any claim he might afterwards make.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 26th June, 1877.

No. 26. — Jones v. Gordon. — Notes.

ENGLISH NOTES.

The effect of this case, and particularly Lord BLACKBURN's judgment is now embodied in the Bills of Exchange Act 1882, sections 29, 30, and 90. In *Tatam* v. *Haslar* (1889), 23 Q. B. D. 345, 58 L. J. Q. B. 432, it is, on the former section, held that where evidence of fraud has been given by the defendant, the holder must prove not only that value has been given, but also that it has been given honestly. CHARLES, J., observes (23 Q. B. D. 349, 58 L. J. Q. B. 434), that the Act has settled the doubt expressed by Lord BLACKBURN, at p. 426, *supra* (2 App. Cas. 628), in accordance with the opinion expressed (though not decided) by that learned Lord; and that the effect of sections 29 and 30 is that every holder of a bill is *primâ facie* to be deemed to be a holder in due course; but when evidence of fraud is given, he must prove that he is a holder in due course, — that is to say, that he has given value for the bill, and has taken it in good faith as defined by section 90.

AMERICAN NOTES.

The question of constructive notice of fraud in the inception of negotiable paper has been much vexed here as well as in England. The test in this country is now generally held to be good faith, and not diligence; mere suspicious circumstances do not put the party on inquiry. The doctrine of *Goodman* v. *Harvey*, 4 Ad. & Ell. 870, is preferred to the older doctrine of *Gill* v. *Cubitt*, 3 B. & C. 466. *Shaw* v. *Railroad Co.*, 101 United States, 564; *Swift* v. *Tyson*, 16 Peters (United States Sup. Ct.), 1; *Goodman* v. *Simonds*, 20 Howard (United States Sup. Ct.), 367; *Phelan* v. *Moss*, 67 Penn. St. 62; 5 Am. Rep. 102; *Chapman* v. *Rose*, 56 New York, 137; 15 Am. Rep. 401; *Magee* v. *Badger*, 34 New York, 247; 90 Am. Dec. 691; *Seybel* v. *Nat. Currency Bank*, 54 New York, 288; 13 Am. Rep. 583; *Maitland* v. *Citizens' Nat. Bank*, 40 Maryland, 540; 17 Am. Rep. 620; *Credit Co.* v. *Howe M. Co.*, 54 Connecticut, 357; *Hamilton* v. *Vought*, 34 New Jersey Law, 190; *Spooner* v. *Holmes*, 102 Massachusetts, 503; 3 Am. Rep. 491; *Freeman's Nat. Bank* v. *Savery*, 127 Massachusetts, 75; 34 Am. Rep. 345; *Farrell* v. *Lovett*, 68 Maine, 326; 28 Am. Rep. 59; *Breckenridge* v. *Lewis*, 84 Maine, 349; 30 Am. St. Rep. 353; *Witte* v. *Williams*, 8 South Carolina, 290; 28 Am. Rep. 294; *Kelley* v. *Whitney*, 45 Wisconsin, 110; 30 Am. Rep. 697; *Pond* v. *Waterloo Agr. Works*, 50 Iowa, 600; *Greneaux* v. *Wheeler*, 6 Texas, 526; *Comstock* v. *Hannah*, 76 Illinois, 530; *Edwards* v. *Thomas*, 66 Missouri, 483; *Frank* v. *Lilienfeld*, 33 Grattan (Virginia), 390; *First Nat. Bank* v. *Johns*, 22 West Virginia, 520; 46 Am. Rep. 506; *Davis* v. *Seeley*, 71 Michigan, 210; *Merchants Nat. Bank* v. *Hanson*, 33 Minnesota, 40; 53 Am. Rep. 5; *Fox* v. *Bank*, 30 Kansas, 446; *Merchants' Bank* v. *McClelland*, 9 Colorado, 610; *Murray* v. *Beckwith*, 81 Illinois, 43; *Kitchen* v. *Loudenback*, 48 Ohio State, 177; 29 Am. St. Rep. 540; *Rublee* v. *Davis*, 33 Nebraska, 779; 29 Am. St. Rep. 509.

Many of these decisions reverse former decisions founded on the old English doctrine.

A few States adhere to the old English doctrine. *Hunt* v. *Sandford*, 6 Yerger (Tennessee), 387; *Adkins* v. *Blake*, 2 J. J. Marshall (Kentucky), 40; *Sanford* v. *Norton*, 14 Vermont, 234; *Ormsbee* v. *Howe*, 51 Vermont, 182; 41 Am. Rep. 841. In the last case it was held that a note obtained by duress and fraud and without consideration, is void in the hands of one who is a general purchaser of the payee's notes, knowing his fraudulent practices in obtaining them. So a purchaser was held to be put on inquiry where a note was offered to him by a stranger for much less than its face, although he knew the maker to be solvent, by its being payable at a place in his town which had no existence, and his knowledge that it was given for a township right of some sort. *Farthing* v. *Dark*, 109 North Carolina, 291.

The circumstances, however, may so strongly intimate a defect in the title that a jury will be justified in finding bad faith. *Corer* v. *Myers*, 75 Maryland, 406; 32 Am. St. Rep. 391; *Hulbert* v. *Douglas*, 94 North Carolina, 122; *Bank* v. *Rider*, 58 New Hampshire, 512. As, for example, the payment of an absurdly small consideration. *Johnson* v. *Butler*, 31 Louisiana Annual, 776; *Smith* v. *Jansen*, 12 Nebraska, 125; 11 Am. Rep. 761; *De Witt* v. *Perkins*, 22 Wisconsin, 473; *Lay* v. *Wissman*, 36 Iowa, 305; *Proctor* v. *Cole*, 104 Indiana, 373; *Gould* v. *Stevens*, 43 Vermont, 125; 5 Am. Rep. 265; *Colliger* v. *Francis*, 2 Baxter (Tenn.), 423; *Auten* v. *Gruner*, 90 Illinois, 300; *Chouteau* v. *Allen*, 70 Missouri, 341; *Millard* v. *Barton*, 13 Rhode Island, 610; 43 Am. Rep. 51; *Griffith* v. *Shipley*, 74 Maryland, 591; 14 Lawyers' Rep. Annotated, 405. This doctrine was applied in a striking manner in the recent case of *Canajoharie Nat. Bank* v. *Diefendorf*, 123 New York, 191; 10 Lawyers' Rep. Annotated, 676, where notes were made by a farmer known to the cashier, who had never engaged in business requiring the discounting of paper to the amount in question, and the notes were executed two hundred miles away from home, and were presented for discount by a stranger, and discounted usuriously without any inquiry.

This line of decisions is put on the reasoning that abstinence from inquiry in such circumstances is not mere gross negligence, but is wilful or fraudulent blindness, equivalent to bad faith, because "a *bonâ fide* owner would not throw away his property for a mere song." But in these cases the consideration paid was "utterly trifling." In others a discount of three-fifths or one-half was held not conclusive. *Phelan* v. *Moss*, 67 Pennsylvania State, 59; 5 Am. Rep. 402; *Bailey* v. *Smith*, 14 Ohio State, 402; 84 Am. Dec. 385; *Cannon* v. *Canfield*, 11 Nebraska, 506.

See note, 11 Am. St. Rep. 309; 10 Lawyers' Rep. Annotated, 676.

Mr. Bigelow cites the principal case (Bills and Notes, p. 442), and adopts the doctrine that want of caution, however great, or gross negligence, as distinguished from fraudulent or wilful blindness and bad faith, will not affect the title.

No. 27. — SMITH *v.* UNION BANK OF LONDON.

(C. A. 1875.)

No. 28. — NATIONAL BANK *v.* SILKE.

(C. A. DEC. 10, 1890.)

RULE.

A BILL or cheque payable to order or bearer cannot be deprived of the negotiable character of such instruments, except by restrictive indorsement or by statutory provisions made for that purpose, exactly complied with.

A cheque drawn payable to the order of M. and crossed "account of M. National Bank," held not to be thereby made not negotiable.

Smith v. Union Bank of London.

1 Q. B. D. 31–36 (s. c. 45 L. J. Q. B. 149; 33 L. T. 557; 24 W. R. 194).

[31] Error from the judgment of the Court of Queen's Bench in favour of the defendants on a special case. L. R., 10 Q. B. 291; 44 L. J. Q. B. 117.

Action to recover £21 9*s.*, the amount of a cheque drawn by Richard Mills and others, the directors of the Civil Service Co-operative Association, upon defendants, a banking company, payable to plaintiff's order, which cheque the association, on the 9th of January, 1874, delivered to the plaintiff in payment of a debt of £21 9*s.* due from them to him; and he accepted the cheque as payment conditionally on it being honoured, and gave the association a receipt for the amount.

The plaintiff indorsed his name on the cheque and wrote across it the name of his bankers, the London and County Banking Company. While the plaintiff's servant was taking the cheque to the plaintiff's bankers it was stolen from him and sold by [*32] the *thief to Robert Thurger for £8 10*s.*, who passed it for full value to C., a customer of the London and Westminster Bank, and C. soon afterwards paid it into that bank. They presented it to the defendants for payment, and the defend-

ants paid it to the London and Westminster Bank and returned it to the drawers.

At the time the defendants paid the cheque it was crossed with the name of the plaintiff's bankers, the London and County Banking Company, and with two transverse lines; and such crossing was made and placed on the cheque by the plaintiff in such manner as to form and be a material part of the cheque within 21 & 22 Vict. c. 79, s. 2.[1] The name of the London and Westminster Bank was not written across the cheque when it was paid by the defendants.

The question for the opinion of the Court was whether the plaintiff is entitled to recover from the defendants for so paying the cheque or for converting the same.

Nov. 8. J. Brown, Q. C. (with him Collyer), for the plaintiff; D. Walker, for the defendants.

* The arguments and cases cited were the same as in the [*33] Court below. *Cur. adv. vult.*

Nov. 29. The judgment of the Court (Lord Cairns, C., Lord Coleridge, C. J., Bramwell, B., and Brett, J.,) was delivered by

Lord Cairns, C. In this case the facts are as follows: Mills and others drew a cheque on the defendants payable to the order of the plaintiff, the plaintiff received it, indorsed it, and wrote across it the name of the London and County Banking Company. It was

[1] 21 & 22 Vict. c. 79, s. 1: "Whenever a cheque or draft on any banker, payable to bearer or to order, on demand, shall be issued crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and, except as hereafter mentioned, shall not be obliterated, or added to, or altered by any person whomsoever after the issuing thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed, or if the same be crossed as aforesaid without a banker's name, to any other than a banker."

Sect. 2. "Whenever any such cheque or draft shall have been issued uncrossed, or shall be crossed with the words 'and company,' or any abbreviation thereof, and without the name of any banker, any lawful holder of such cheque or draft, while the same remains so uncrossed, or crossed with the words 'and company,' or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker: and whenever any such cheque or draft shall be uncrossed, any such lawful holder may cross the same with the words 'and company,' or any abbreviation thereof, with or without the name of a banker, and any such crossing as in this section mentioned shall be deemed a material part of the cheque or draft, and shall not be obliterated, or added to, or altered by any person whomsoever after the making thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed as last aforesaid."

stolen, never reached the London and County Banking Company, but came to the hands of a customer of the London and Westminster Bank as a *bonâ fide* holder for value. He paid it into that bank, who presented it to the defendants. They paid it. The plaintiff then brought this action, treating himself as the owner of the cheque, and the defendants as having wrongfully converted it, and also claiming the amount of it on the ground that the defendants have infringed to his loss the statute 21 & 22 Vict. c. 79. See *ante*, p. 437, n. (1).

The question is, whether any action is maintainable by the plaintiff against the defendants.

It is quite certain that before that statute no action would have been maintainable on these facts. By the plaintiff's indorsement in blank the cheque became payable to bearer, and would have continued payable to bearer, whoever that bearer might be, banker or other. The crossing of the cheque, if without the drawer's authority, could have no effect on his mandate to his banker, if with his authority (as it may well be taken to be, considering the well-known usage of holders of cheques crossing them with a banker's name), it would in effect be the drawer's direction to the drawee. Still (before the statute) the cheque would have remained a cheque payable to bearer, with, at most, a direction to pay it to no bearer but a banker; or rather, according to the cases, with only a caution or warning to the drawees, that care must be used in paying it to any one else. *Bellamy* v. *Marjoribanks*, 7 Ex. 389; 21 L. J. Ex. 70; *Carlon* v. *Ireland*, 5 E. & B. 765; 25 L. J. Q. B. 113. Those [*34] cases, and that of *Simmons* v. *Taylor*, 2 C. B. (N. S.) 528; 4 C. B. (N. S.) 463; 27 L. J. C. P. 45, 248, clearly show that, whatever may have been the effect of a crossing, the negotiability of the cheque was not thereby restrained. Then, have the statutes restrained it? It is impossible to hold that they have. There is not a word in them to that effect. Their sole object is to give a direction to the banker who is drawee. The first, 19 & 20 Vict. c. 25, recites that its object is to provide that drawers or holders of drafts, payable to bearer or order on demand, may be enabled effectually to direct the payment of the same only to or through some banker. It then enacts that the crossing shall have the force of a direction to the bankers upon whom the cheque is drawn, that it is to be paid to or through some banker, and the same shall be payable only to or through some banker. The Courts of Common Pleas and

Exchequer Chamber in *Simmons* v. *Taylor* both expressed opinions that this did not restrain the negotiability of the cheque. The other statute, 21 & 22 Vict. c. 79, enacts this more at large, with provisions against obliteration of the crossing. It says the crossing shall be deemed a material part of the cheque, but it says so for the purpose of forbidding its obliteration. The direction to the drawee, as to whom he is to pay it to, remains the same. The Legislature might have enacted that any one 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. We must say, then, that the holder of the cheque, the customer of the London and Westminster Bank, who presented it to the defendants, was the lawful holder, entitled to retain it against the plaintiff and all the world. Mr. Brown, indeed, admitted this. But we have thought it right to examine into the matter, because, if that admission is well founded, our judgment must be for the defendants. For if the holder was a lawful holder, and the plaintiff never could have procured payment of the cheque, how is he damnified by the defendants having paid it? Suppose, instead of their paying it, the holder had handed it to them for value, which he might have done had he kept an account with them. Or he might have gone to the drawers and exchanged this cheque for a new one not crossed. But surely if he might have done that, *he and the drawers might have [*35] gone to the defendants and requested payment to him notwithstanding the crossing: as whatever may be done indirectly may be done directly. Or the holder might have opened an account with the London and County Bank and paid the cheque in, or got some friend to do so; and then the defendants must have paid it, or dishonoured it, and then the drawers would be liable on it. It never can have been the intention of the Legislature that matters should be brought to a dead lock, where the holder could keep possession of the cheque, and yet be unable to get payment by consent of drawers and drawees. Such an enactment would leave the value where it ought not to be, viz. with the drawer.

It is asked, what then is the effect of the statute in enabling the payee to cross a 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 direc-

tion. This must often operate for the benefit of the payee or holder who had crossed the cheque. Further, if in addition to the cheque being crossed, the signature of the payee was forged, he would retain his property, as pointed out by Mr. Justice BLACKBURN, L. R., 10 Q. B., at p. 296, and could recover it from the banker notwithstanding 16 & 17 Vict. c. 59, s. 19, which protects a banker paying on a forged indorsement.

The case may be put in another way. The plaintiff cannot maintain an action for the conversion of the cheque, for he had no property in it. He cannot maintain an action on the ground that the defendants have paid the cheque contrary to the statute, because, though an action lies by the person grieved where the provisions of a statute have been infringed, yet that is only when those provisions are for his direct benefit, and he has sustained loss by their infringement. Here the prohibition of payment except to a banker is for the direct benefit of the drawer, indirectly only for the benefit of any holder of the cheque. The drawer, if any, is the person grieved.

[* 36] As we have shown, the plaintiff is no loser by the cheque having been paid, as another person had * become the lawful holder of it. Further, the drawers might refuse to be debited with it as having been paid contrary to their mandate as altered by the statute. It cannot be that in addition to this the defendants are liable to this action.

If the statute had meant to prevent any person becoming lawful holder of a crossed cheque unless he derived title through lawful holders, this ought to have been, and might easily have been, expressed. If it meant that a man might be a lawful holder, but in no way entitled to the money, — a not very intelligible proposition, — this ought to have been expressed.

We may observe that s. 2 of 21 & 22 Vict. c. 79 is inaccurate. It leaves out a provision for a cheque crossed generally "and Co." or "and Company."

The judgment must be affirmed.

Judgment affirmed.

National Bank v. Silke.

1891, 1 Q. B. 435–440 (s. c. 60 L. J. Q. B. 199; 63 L. T. 787; 39 W. R. 361).

[436] Action by the plaintiffs, as holders of a cheque for £450, payable to order, drawn by the defendant, and indorsed to the plaintiffs.

No. 28. — National Bank v. Silke, 1891, 1 Q. B. 436, 437.

At the trial before DAY, J., without a jury, it appeared that on April 29, 1889, the defendant drew on the Camden Town branch of the Alliance Bank a cheque for £450, which he handed to J. F. Moriarty. The cheque ran, "Pay to the order of J. F. Moriarty, Esq., four hundred and fifty pounds," and was crossed by the drawer, "Account of J. F. Moriarty, Esq., National Bank, Dublin." Moriarty indorsed the cheque, and sent it to the plaintiffs, the National Bank, at Dublin, in a letter, directing them to credit his account with that sum. His account was then slightly overdrawn. The plaintiffs wrote acknowledging the receipt of the cheque "for your credit." The cheque arrived in Dublin on the 30th, and the amount was at once placed to Moriarty's credit, which made a balance of about £443 to his credit.

On the same day the plaintiffs sent the cheque to London for collection. It was presented at the Camden Town branch on May 2, and was dishonoured, the defendant having given directions to the bank not to pay it, on the ground that it had been obtained from him by false representations. In the meantime cheques of Moriarty had been paid by the National Bank, which reduced his balance to £46 19s.

On May 4 the manager of the plaintiffs' bank wrote to Moriarty: "Please note that cheque £450, drawn by J. Silke, has been returned to us unpaid, with answer, 'Orders not to pay.' Please send us a remittance to take it up." On the 10th the cheque was again presented at the Alliance Bank, and again returned. The plaintiffs, after some correspondence with the defendant, commenced this action.

The learned Judge gave judgment for the plaintiffs. The defendant appealed.

* Crump, Q. C., T. Willes Chitty, and Ernest Pollock, for [*437] the defendant. The direction to carry the amount of the cheque to Moriarty's account prevents it from being negotiable. Under the Bills of Exchange Act, 1882, s. 8, a bill is not negotiable if it contains words prohibiting transfer. Here the direction to pay to the account of Moriarty, at the National Bank, prohibits payment in any other way. Moriarty, therefore, could not transfer the cheque, and could not make the plaintiffs holders, so as to entitle them to sue upon it. The decision below gives no effect to s. 8.[1]

[1] By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8; "When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable."

No. 28. — National Bank v. Silke, 1891, 1 Q. B. 437, 438.

[Lindley, L. J. Does this section apply to cheques?]

Section 73 shows that it does. A cheque is a bill of exchange, payable on demand, and there is nothing in s. 8 to exclude from it bills payable on demand. In *Bellamy* v. *Marjoribanks*, 7 Ex. 389, 21 L. J. Ex. 70, nothing turned on the words "for account of the Accountant-General." The case went only on the effect of crossing, which has been entirely altered by statute. But suppose the cheque could be negotiated to the bank, it was not in fact negotiated. When a cheque is sent by a customer to his bankers, he does not ask them to discount it. He intends them to receive the amount and place it to his credit.

[Bowen, L. J. How do you distinguish this case from *McLean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95?]

There the cheque was to be applied in reduction of an overdrawn balance — there was a special contract. Here the bankers never understood that they were discounting the cheque so as to make it their own. If they had, they would not have applied to Moriarty to take it up when dishonoured.

[Bowen, L. J. Is it not to be inferred from the facts that the bankers were intended to have such rights as would protect them in respect of the advances they made on the credit of the cheque?]

No holder of a negotiable security applies to the person from whom he received it; he applies to the person liable to pay.

[*438] *Woolf, Q. C., and Boydell Houghton, for the plaintiffs, were not called on.

Lindley, L. J. The defendant was a customer of the Alliance Bank in London, and drew upon that bank a cheque payable to the order of Moriarty. It was crossed by the defendant with these words: "Account of J. F. Moriarty, Esq., National Bank, Dublin." Moriarty indorsed this cheque and sent it to the plaintiffs, the National Bank at Dublin. The plaintiffs sent it to London for collection, and it was dishonoured. In the meantime the amount had been carried to Moriarty's credit in his account with the plaintiffs, and drawn upon by him. When the cheque was returned to the plaintiffs dishonoured, they wrote to Moriarty for funds to take it up, and, as he failed to provide them, they commenced the present action against the defendant, and have recovered judgment. From that judgment the defendant has appealed.

The defendant first contends that by virtue of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8, the plaintiffs can-

not sue upon this cheque, and that nobody but Moriarty could acquire any right to sue upon it. I am not satisfied that under that Act a cheque payable to bearer or to order can be made not negotiable except under the provisions in ss. 76–82, as to crossed cheques. We need not now decide that point; for, assuming that it can, it is necessary in my opinion that very plain words to that effect should be used. It is most important that a cheque should not be an embarrassing document. I am not satisfied that any words other than the words "not negotiable," which are prescribed by the Act, will be sufficient to make such a cheque not negotiable. I will, however, assume without deciding, that s. 73 makes s. 8 applicable to cheques. Sect. 8, sub.-s. 1, enacts that "when a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable" Then sub-s. 4 says: "A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not * be transferable." I will assume for the [* 439] purposes of this case that under those provisions you can draw a bill expressed to be payable to order or to bearer, and yet make it not transferable; though I am disposed to think that you cannot. But if you can, there must be plain words prohibiting transfer or showing an intention that the bill shall not be transferable. Ambiguous words will not do. Now do the words in the present case prohibit transfer of the cheque, or indicate an intention that it shall not be transferable? It cannot be contended that they prohibit transfer, and I do not think that they indicate an intention that the cheque should not be transferable. They amount to nothing more than a direction to the plaintiffs to carry the amount of the cheque to Moriarty's account when they have received it.

There only remains the question whether the plaintiffs are holders of the cheque in due course and for value. The cheque was sent to them that they might carry it to Moriarty's credit, so that he might draw upon it, which he did; and I cannot say that they held it merely as agents to collect the amount for him.

Bowen, L. J. I am of the same opinion, and shall only add a few words on the second point, whether the plaintiffs are holders of the cheque in due course for value. The case of *McLean* v

Clydesdale Banking Co. (Notes to No. 15, pp. 328, 329, *supra*), 9 App. Cas. 95, makes that clear which to a mercantile man would have appeared clear without any decision, — 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 is a holder for value in due course.

Fry, L. J. On the second point, I shall add nothing. As regards the first point, I am inclined to think that s. 8 divides bills into three classes, — bills not negotiable, bills payable to order, and bills payable to bearer; so that a bill payable to order must always be negotiable. But assuming that a bill payable to order can be made not negotiable under s. 8, sub-s. 1, I am clearly of opinion that the words used in the present case neither prohibit [*440] transfer nor indicate an intention that the * cheque should not be transferable. Much more definite words must be used to counteract the effect of the cheque being expressed to be payable to order.

Appeal dismissed.

ENGLISH NOTES.

See as to restrictive indorsements, Bills of Exchange Act 1882, s. 35, and see No. 19 and notes, pp. 353, 362, *ante*.

The statutory provisions, referred to in the above rule and now contained in the Bills of Exchange Act 1882, are sections 76 and 81, as to cheques crossed "not negotiable."

Section 8 (1) as to the terms in which a bill may be drawn so as not to be negotiable, probably does not apply to a cheque to "order," or "bearer," at all. Compare section 8 (2), and see judgment of Lindley, L. J., p. 442, *supra*. Whether an acceptance of a bill drawn to order can be qualified (under s. 19) so as to render it not negotiable, seems questionable. The difficulty, at all events, of doing so is exemplified by the case of *Decroix* v. *Meyer* (C. A. 1890), No. 10, p. 249, *supra* (25 Q. B. D. 343, 59 L. J. Q. B. 538).

AMERICAN NOTES.

The first principal case is cited in 1 Daniel's Negotiable Instruments, § 1585, with the observation, "The English usage is not practised, that we are aware of, in the United States."

No. 29. — Heylyn v. Adamson, 2 Burr. 669. — Rule.

Section III. — *Duties as to presentment and notice.*

No. 29. — HEYLYN *v.* ADAMSON.

(1758.)

RULE.

In an action by an indorsee against an indorser, — the plaintiff, in the case of a bill of exchange, must prove due diligence against the acceptor, but need not prove any demand of the drawer: in the case of a promissory note, he must prove due diligence against the maker of the note.

Heylyn v. Adamson.

2 Burr. 669–678.

This was an action on the case, upon promises. And [669] the first count in the declaration was upon an inland bill of exchange, drawn by Robert Carrick and directed to William Dods, dated the 13th day of March, 1756; whereby the said Robert Carrick required the said William Dods to pay to the defendant or his order £100 at forty days after date, value received, as advised by the said Robert Carrick; which said bill was indorsed by the said defendant (Eleanor Adamson) to the said plaintiffs, and was accepted by the said Dods, but not paid by him.

Upon the trial of this cause, before Lord Mansfield, at the sittings after the last Hilary term at Guildhall, it was proved on the part of the plaintiffs, that the said Robert Carrick made the bill; and that the defendant indorsed it to the plaintiffs; and that the said William Dods accepted it, but afterwards refused payment; and that the plaintiffs thereupon, on the day it became payable, carried it to be protested for the non-payment; and soon afterwards brought their action thereon against the defendant: but it did not appear on the trial, that the drawer of the bill had any notice of such non-payment, or that any demand of the money was ever made on him before the commencement of the suit.

It was thereupon objected by the defendant's counsel, "That the action would not lie against the defendant [the indorser] until a

demand of payment had been made upon the drawer:" and as no such demand was proved to have been made on the drawer, the plaintiffs ought therefore to be nonsuited.

[* 670] * Lord MANSFIELD directed a verdict to be given upon the said first count, for the plaintiffs, for £100 damages and forty shillings costs; subject to the opinion of the court, "Whether, upon this case, the plaintiffs were entitled to recover."

A case was accordingly stated for the opinion of the court, and signed by Sir Richard Lloyd for the plaintiffs, and by Mr. Norton for the defendant.

The only question was, whether, in an action brought upon an inland bill of exchange, by the indorsee against an indorser, this objection, "that no evidence was given at the trial, of notice to the drawer of the bill, or even of making any inquiry after him," was a ground of nonsuit?

It was argued on Tuesday last (the 14th instant), by Mr. Serjeant Davey for the plaintiff, and Mr. Rooke for the defendant.

Serjeant Davey made a distinction between inland bills of exchange, and notes of hand. In the latter, the drawer is to be the payer; in the former, the drawee (the acceptor of the bill) is to pay it. So that upon a note of hand, the drawer of the note is the first person to be resorted to, for payment but upon an inland bill of exchange, the acceptor of the bill, not the drawer, is the first person to be resorted to, for payment (though the drawer shall indeed stand as a collateral security for his so doing). Therefore cases upon promissory notes are not applicable to cases on inland bills of exchange. The bill-holder can't come upon the drawer of the bill till the person upon whom it is drawn shall either refuse to accept it, or refuse payment after he has once accepted it.

Every indorsement of a bill of exchange is in the nature of a new bill of exchange; and if there are several indorsers, they all undertake "that the drawee [the acceptor of the bill] shall pay it."

The indorsee is a stranger to the drawer of a bill of exchange: he is only concerned with the acceptor.

A bill of exchange may happen not to be dated from any certain place; or it may be dated from a place where the drawer does not reside; as where a traveller, calling at an inn, takes up money there, and gives a bill which is afterwards indorsed by his landlord.

* And it would be vastly inconvenient to all the parties [* 671] if it should be holden necessary for the indorsee to find out or even search for the drawer of an inland bill of exchange, to give him notice "that the acceptor has refused payment." For, the security may be lost in the interim, whilst such search is making: the indorser may break before the indorsee may be able to find the drawer. But the indorser may know where to find him, or how to apply to him.

Six Chief Justices have been of different opinions on this point: three of them, of one opinion; three, of another.

The 9 & 10 W. III. c. 17 was the first Act that gives protests for non-payment of inland bills of exchange; and the 3 & 4 Ann. c. 9, §§ 4, 5, extends the protest to the case of non-acceptance. The words of both these Acts are remarkable; viz. "That the protest shall be notified to the party from whom the bill was received, who shall repay the same with interest and charges."

The inconvenience may be the same (as to this matter) upon an inland bill, as upon a foreign bill. Yet upon a foreign bill it certainly is not necessary. In 1 Strange, 441, *Bromley* v. *Frazier*, Tr. 7 G. I. on a foreign bill of exchange, the Court, on mature deliberation, held, "that a demand upon the drawer is not necessary, to make a charge upon the indorser; but the indorsee has liberty to resort to either." It was a point then unsettled. In 1 Salk. 131, 133, there are, as it is said in 1 Strange, 441, contradictory opinions upon it; which are professedly settled by that case of *Bromley* v. *Frazier*, as the book declares: but those contradictory opinions are upon inland bills of exchange. Indeed, the case of *Bromley* v. *Frazier* (then directly under consideration) was upon a foreign one: but the book goes on thus (which is general, and equally applicable to both sorts), — "And as to the notion that has prevailed, 'that the indorser warrants only in default of the drawer,' there is no colour for it: for every indorser is in the nature of a new drawer; and at *nisi prius* the indorsee is never put to prove the hand of the first drawer, where the action is against an indorser. The requiring a protest for non-acceptance is not because a protest amounts to a demand; for it is no more than giving notice to the drawer, to get his effects out of the hands of the drawee, who, by the other's drawing, is supposed to have sufficient wherewith to satisfy the bill." So that this notion is here exploded, "that the indorser of a bill of exchange warrants only

in default of the drawer." But every indorser warrants against the default of the payer.

[* 672] * In the case of *Hamerton* v. *Mackrell*, M. 10 G. II. B. R. (which was subsequent to the case in 1 Strange, 441) an action by the indorsee of a promissory note against the indorser, the objection was, that it was not alleged in the declaration, "that a demand was made upon the drawer of the note." And it was there holden not necessary to be alleged in the declaration. But Lord HARDWICKE mentioned the opinions of HOLT, MACCLESFIELD, PRATT, RAYMOND, EYRE, and KING. HOLT, EYRE, and RAYMOND held it to be necessary: MACCLESFIELD, PRATT, and KING were of a contrary opinion, viz., "that it was not necessary."

These opinions seem to relate only to notes of hand: but upon a bill of exchange, the indorsers are all only promisors and undertakers for the payer (the acceptor) of the bill; and are not obliged to look after the original drawer. And fact and experience in business are agreeable to this position.

Mr. Rooke for the defendant, insisted that upon an action brought by the indorsee against an indorser of an inland bill of exchange, the plaintiff ought, at the trial, to prove notice to and demand of payment from the drawer of the bill.

The indorser is only a conditional undertaker for the drawer of the bill, who is the first contractor; he stands as a surety only, and cannot be called upon, unless the drawer makes default. It is like the case of principal and accessory; where the accessory cannot be tried before the principal: so here the indorser cannot be liable till the original contractor has failed in performing his contract.

And great inconveniences might follow if this was otherwise.

There are several authorities which fully prove that it is necessary. Cases in B. R. Temp. W. III. 244; *Lambert* v. *Oakes* at Guildhall; and 1 Ld. Raym. 443. *Lambert* v. *Oakes*, s. c., is directly in point; 1 Salk. 126, pl. 6, *Anon.*, probably s. c.,[1] accordingly; 1 Strange. 649, M. 12 G. I.; *Syderbottom* v. *Smith*. Upon an action against the indorser of a promissory note, at Guildhall, C. B., Lord Chief Justice EYRE'S opinion was accordingly, "that the plaintiff must prove diligence to get the money of the drawer; the indorser only

[1] *Lambert* v. *Pack*, 1 Salk. 127, pl. 9, seems clearly s. c. Indeed they are, all four, probably, the same case; though two of them are placed under M. 10, and the other two under P. 11, W. III.

No. 29. — Heylyn v. Adamson, 2 Burr. 672–674.

warranting on his default." And for want of such proof, he directed the jury to find for the defendant. 2 Strange, 1087; * *Collins* v. *Butler*, at Guildhall, *per* LEE, Ch. Just. It was [* 673] ruled accordingly; who cited a case determined on great debate, in C. B., in P. 4 G. II. — Due diligence must be shown to have been used in inquiring after the drawer of the bill of exchange, before the money can be recovered against the indorser.

And there is no difference between a note of hand and a bill of exchange other than that the drawer of the note is the express promisor, and (as it were) both drawer and drawee; whereas on a bill of exchange he is only an implied promisor. Indeed on a foreign bill of exchange this notice and demand is not necessary, because the foreign drawer is not amenable to justice here.

As to the words of the statutes of 9, 10 W. III. & 3, 4 Ann., they do not exclude the necessity of giving notice to the drawer; though they add an additional caution, "of giving notice to the person from whom the bill was received."

Mr. Serjeant's case, wherein mention is made of the six Chief Justices differing in opinion, seems to be taken from the 3rd volume of the Abridgment of the Law.

Serjeant Davey, in reply. — I agree that the drawer of a bill of exchange is only a conditional undertaker for the drawee, and so also is the indorser of a bill of exchange a conditional undertaker for the drawee. But it does not follow that the indorser of a bill of exchange is only a conditional undertaker for the drawer.

The case of *Lambert* v. *Oakes* was upon a note of hand (according to Lord RAYMOND) and Lord Chief Justice HOLT'S opinion upon a bill of exchange was upon a case not before him.

In the case of *Hamerton* v. *Mackrell*, Lord HARDWICKE [1] held it not necessary.

The drawee's place of abode is always known upon a bill of exchange, but not the drawer's.

The Court gave no opinion at the time of this argument; but postponed it, in order to settle the point with precision and certainty.

* Lord MANSFIELD observed that the confusion seemed [* 674] to have arisen from its not being settled "who is the original debtor."

[1] The Serjeant had been misinformed, for Lord HARDWICKE (as appears by my note of that case) did not give or even intimate his own opinion upon that point.

No. 29. — Heylyn v. Adamson, 2 Burr. 674, 675.

Mr. Justice DENISON said the case of *Hamerton* v. *Mackrell* was upon a writ of error, and the judgment was affirmed upon the allegation contained in the declaration of a promise made by the indorser, which (upon a writ of error) they considered as an express promise; but Lord HARDWICKE did not give his own opinion at all upon what is now the present question. CUR. ADVIS'.

Lord MANSFIELD now delivered the resolution of the Court.

His Lordship said: He could not persuade himself that there had really been such a variety of opinions upon this question at *nisi prius*, as had been mentioned at the bar. But, however that may be, it must now be determined upon the nature of the transaction, general convenience, and the authority of deliberate resolutions in court.

A bill of exchange is an order or command to the drawee who has, or is supposed to have, effects of the drawer in his hands, to pay. When the drawee has accepted he is the original debtor, and due diligence must be used in applying to him. The drawer is only liable in default of payment by him, due diligence having been used; and therefore if the acceptor is not called upon within a reasonable time after the bill is payable, and happens to break, the drawer is not liable at all.

Every man, therefore, who takes a bill of exchange must know where to call upon the drawee, and undertakes to demand the money of him.

When that bill of exchange is indorsed by the person to whom it was made payable, as between the indorser and indorsee, it is a new bill of exchange, and the indorser stands in the place of the drawer; the indorsee undertakes to demand the money of the drawee. If he neglects, and the drawee becomes insolvent, the loss falls upon himself. If the indorsee is diligent, and the drawee refuses payment, his immediate remedy is against the indorser; and it was very properly observed[1] that the Act of 9, 10 W. III. requires notice of the protest to be given "to the person from whom the [* 675] * bill was received." He may have another remedy against the first drawer as assignee to and standing in the place of the indorser.

The indorsee does not trust to the credit of the original drawer: he does not know whether such a person exists, or where he lives,

[1] 2 Burr. 671; *ante*, p. 447.

or whether his name may have been forged. The indorser is his drawer, and the person to whom he originally trusted in case the drawee should not pay the money. There is no difference in this respect between foreign and inland bills of exchange, except as to the degree of inconvenience: all the arguments from law and the nature of a transaction are exactly the same in both cases.

As to foreign bills of exchange, the question was solemnly determined by this Court upon very satisfactory grounds, in the case of *Bromley* v. *Frazier*, 1 Strange, 441. That was "an action upon the case upon a foreign bill of exchange by the indorsee against the indorser;" and on general demurrer it was objected "that they had not shown a demand upon the drawer, in whose default only it is that the indorser warrants." And because "this was a point unsettled, and on which there are contradictory opinions in Salkeld, 131 & 133, the Court took time to consider of it. And on the second argument they delivered their opinions: That the declaration was well enough; for the design of the law of merchants in distinguishing these from all other contracts by making them assignable was for the convenience of commerce, that they might pass from hand to hand in the way of trade in the same manner as if they were specie. Now to require a demand upon the drawer will be laying such a clog upon these bills as will deter everybody from taking them. The drawer lives abroad, perhaps in the Indies, where the indorsee has no correspondent to whom he can send the bill for a demand; or if he could, yet the delay would be so great that nobody would meddle with them. Suppose it was the case of several indorsements, must the last indorsee travel round the world before he can fix his action upon the man from whom he received the bill? In common experience, everybody knows that the more indorsements a bill has, the greater credit it bears; whereas if those demands are all necessary to be made, it must naturally diminish the value, by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorser warrants only in default of the drawer, there is no colour for it; for every indorser is in the nature of a new drawer, and at *nisi prius* the indorsee is never put to prove the hand of the first drawer, where the action is * against an indorser. The requiring a [* 676] protest for non-acceptance is not because a protest amounts to a demand; for it is no more than a giving notice to the drawer to get his effects out of the hands of the drawee, who (by the other's

drawing) is supposed to have sufficient wherewith to satisfy the bill." Upon the whole, they declared themselves to be of opinion "that in the case of a foreign bill of exchange, a demand upon the drawer is not necessary to make a charge upon the indorser, but the indorsee has his liberty to resort to either for the money; consequently the plaintiff [they said] must have judgment."

Every inconvenience here suggested holds to a great degree, and every other argument holds equally in the case of inland bills of exchange.

We are therefore all of opinion "that to entitle the indorsee of an inland bill of exchange to bring an action against the indorser, upon failure of payment of the drawee, it is not necessary to make any demand of, or inquiry after, the first drawer."

The law is exactly the same and fully settled upon the analogy of promissory notes to bills of exchange; which is very clear when the point of resemblance is once fixed.

While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed, the resemblance begins; for then it is an order by the indorser upon the maker of the note (his debtor by the note), to pay to the indorsee. This is the very definition of a bill of exchange.

The indorser is the drawer, the maker of the note is the acceptor, and the indorsee is the person to whom it is made payable. The indorser only undertakes in case the maker of the note does not pay. The indorsee is bound to apply to the maker of the note; he takes it upon that condition, and therefore must, in all cases, know who he is, and where he lives; and if after the note becomes payable, he is guilty of a neglect and the maker becomes insolvent he loses the money and cannot come upon the indorser at all.

Therefore, before the indorsee of a promissory note brings an action against the indorser, he must show a demand or due diligence to get the money from the maker of the note, — just as the person to whom the bill of exchange is made payable must show [* 677] * a demand or due diligence to get the money from the acceptor before he brings an action against the drawer. This was determined by the whole Court of Common Pleas, upon great consideration, in Pasch. 4 G. II.; as cited by my Lord Chief Justice Lee in the case of *Collins* v. *Butler*, 2 Strange, 1087.

So that the rule is exactly the same upon promissory notes as it

No. 29. — Heylyn v. Adamson. 2 Burr. 677, 678.

is upon bills of exchange; and the confusion has, in part, arisen from the maker of a promissory note being called the drawer; whereas, by comparison to bills of exchange, the indorser is the drawer.

All the authorities, and particularly Lord HARDWICKE, in the case of *Hamerton* v. *Mackrell*, M. 10 G. II. (according to my Brother DENISON'S state of what his Lordship said), put promissory notes and inland bills of exchange just upon the same footing; and the statute expressly refers to inland bills of exchange. *Vide* 3 & 4 Anne, c. 9.

But the same law must be applied to the same reason; to the substantial resemblance between promissory notes and bills of exchange; and not to the same sound, which is equally used to describe the makers of both.

My Lord Chief Justice HOLT is quoted as being of opinion, "that in actions upon bills of exchange, it is necessary to prove a demand upon the drawer." For proof of this, the principal case referred to is that of *Lambert* v. *Oakes*, reported in three books, 1 Lord Raymond, 1 Salk. and 12 Mod.

In 1 Lord Raymond, 443, it appears manifestly that the question arose upon a promissory note. "R. signed a note under his hand, payable to Oakes, or his order; Oakes indorsed it to Lambert, upon which Lambert brought the action for the money against Oakes. *Per* HOLT, C. J., He ought to prove that he had demanded or done his endeavour to demand this money of R. before he can sue Oakes upon the indorsement. The same law, if the bill was drawn upon any other person, payable to Oakes or order;" that is, "A demand must be made of the person upon whom the bill is drawn." And other parts of the case manifestly show this to have been the meaning. For my Lord Chief Justice HOLT is reported to have said, "The indorsement will subject the indorser to an action; because it makes a new contract, in case the person upon whom it is drawn does not pay it." Again, "If the indorsee does not demand the money payable by the bill, of the person *upon whom it is drawn, in convenient [*678] time, and afterwards he fails, the indorser is not liable."

In Salkeld,[1] the case is confounded: it is stated to be a bill of

[1] 1 Salk. 127 (there called *Lambert* v. *Pack*), pl. 9. The report in 1 Salk. 126, pl. 6, is much more strong and explicit: but it is short, anonymous, and a mere loose scrap by the same reporter, who was manifestly unclear about the case (being s. c. with pl. 9).

exchange, and "that the demand must be made upon the drawer, or him upon whom it was drawn." My Lord Chief Justice Holt had said that a demand must be made of the maker of a promissory note (calling him the drawer); and in the case of a bill of exchange, of him upon whom the bill is drawn. The report jumbles both together, as applied only to a bill of exchange; misled, I dare say, by the equivocal sound of the term "drawer," and by the Chief Justice's reasoning in the case of a promissory note, from the law upon bills of exchange.

In 12 Modern, 244, the case is mistaken too, and stated as upon a bill of exchange, and as a determination "that there must be a demand upon the drawer of the bill of exchange;" and yet the report itself shows demonstrably that what was said by my Lord Chief Justice Holt was applied to the maker of a promissory note (calling him the drawer). For the report makes him argue: "So if the bill was drawn on any other person, payable to Oakes or order;" which shows that the case in judgment was not a bill drawn upon another person, but payable only to Oakes by R. himself.

It seems to me as if Lord Chief Justice Holt, in that case, had considered the drawee of a bill of exchange in the same light as the maker of a promissory note; but loose and hasty notes, misled by identity of sound, have misapplied what was said of the drawer of a promissory note, to the drawer of a bill of exchange; and to such a degree misapplied it, that two reports out of the three[1] have stated the question as arising upon a bill of exchange; which is manifestly otherwise.

But be this conjecture as it may, we are all of opinion, "That in actions upon inland bills of exchange, by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get the money from the drawee (or acceptor), but need not prove any demand of the drawer; and that in actions upon promissory notes, by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get the money from the maker of the note."

Accordingly the rule was, That the *postea* be delivered to the plaintiff.

[1] There seem to be four reports of s. c. See 2 Burr. note, p. 672, and p. 448 *n. supra.*

No. 29. — Heylyn v. Adamson. — Notes.

ENGLISH NOTES.

Since the above decision of Lord Mansfield, the rule never appears to have been questioned. It is impliedly embodied in the Bills of Exchange Act 1882, sections 45 (3) and 89.

The contract of the indorsee, as explained by Byles, J., in *Susé* v. *Pompe* (1860), 8 C. B. N. S. 538, 30 L. J. C. P. 75, at p. 78, is "that if the drawee shall not at maturity pay the bill, he, the indorser, will on due notice pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity."

The position of the indorser as surety — or *quasi* surety — for the acceptor is fully considered in the case of *Duncan Fox & Co.* v. *North and South Wales Bank*, No. 45, p. 591, *post* (6 App. Cas. 1, 50 L. J. Ch. 355, 43 L. T. 706).

AMERICAN NOTES.

This distinction is well recognised in this country. 1 Daniel's Negotiable Instruments, § 669 *a*, citing the principal case; ibid. § 571. The engagement of the acceptor and maker is to pay on presentment; that of the drawer and indorser is to pay in case of non-payment upon such presentment and notice of non-payment. The maker and acceptor are bound, although presentment is not made at the due time, *Sims* v. *Nat. Com. Bank*, 73 Alabama, 251; but due presentment must be made, or excuse for its omission shown, to hold drawer or indorser. *Cox* v. *Nat. Bank*, 100 United States, 712; *Harvey* v. *Girard Nat. Bank*, 119 Pennsylvania State, 212. Demand must be made of acceptor; if made of any other person, it is improper. *Rice* v. *Ragland*, 10 Humphreys (Tennessee), 545; 53 Am. Dec. 737. Indorser of a note or bill is not liable until payment has been demanded of the maker or acceptor. *Haddock* v. *Murray*, 1 New Hampshire, 140; 8 Am. Dec. 43; *Ecfert* v. *Des Coudres*, 1 Mill (South Carolina), 69; 12 Am. Dec. 609. To hold drawer, due demand for payment must be made of the acceptor. *Orear* v. *McDonald*, 9 Gill (Maryland), 350; 52 Am. Dec. 703; *Thatcher* v. *Mills*, 14 Texas, 13; 65 Am. Dec. 95; *Adams* v. *Darby*, 28 Missouri, 162; 75 Am. Dec. 115; *Kupfer* v. *Bank of Galena*, 34 Illinois, 328; 85 Am. Dec. 309.

No. 30. — RAMCHURN MULLICK *v.* LUCHMEECHUND RADAKISSEN.

(1854.)

RULE.

In order to charge the drawer upon a foreign (or other) bill of exchange payable after sight, the holder must have presented the bill for acceptance within a reasonable time.

Ramchurn Mullick v. Luchmeechund Radakissen.[1]

9 Moore's P. C. 46–70.

[46] This was an action of assumpsit on a foreign bill of [*47] exchange, brought by the appellant, as indorsee, * against the respondents, as drawers. The bill was drawn at Calcutta, on the 16th of February, 1848, for $37,840 31c., on Dent & Co., at Hong Kong, in respect of certain opium consigned to them, payable to the respondents, or order, sixty days after sight, and indorsed by them in blank, and delivered to Muttyloll Seal, and by him indorsed to the appellant.

The bill was transmitted to Hong Kong, and presented on the 24th of October in that year to Messrs. Dent & Co. for acceptance, who refused to accept the same, whereupon the bill was protested in due form at Hong Kong, and notice thereof was served on the respondents at their house of business in Calcutta, by the appellant. The respondents, however, refused to pay the amount due on the bill, whereupon the appellant, as indorsee, brought an action of assumpsit against them, as drawers and indorsers, in the Supreme Court at Calcutta.

The plaintiff declared specially upon the bill of exchange, giving particulars as to dates of indorsement, presentation, &c.

The plaintiff pleaded *inter alia*, and by special leave, a plea hereinafter referred to as the "additional plea," to the [49] effect that the bill was not duly and within a reasonable and proper time presented to Messrs. Dent & Co. for their acceptance as in the count alleged.

[1] Present The Right Hon. Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan, Knt. the Right Hon. T. Pemberton Leigh,

No. 30. — Ramchurn Mullick v. Luchmeechund Radakissen, 9 Moore's P. C. 49–51.

The cause came on for trial on the 11th of August, 1849, when the Supreme Court, after the examination of witnesses and of the documentary proofs which were put in evidence, found a verdict for the * respondents on the additional plea; and [* 50] a verdict for the appellant on certain other issues; and found specially and declared, in giving the verdict, "That the bill of exchange was not presented to the drawees within a reasonable time. That there was no proof of any resulting damage. That it was proved that the drawees were then and still remained solvent, and that there was no proof of any failure of any party to the bill."

A new trial was afterwards ordered by the Supreme Court, on the consent of both parties, and the costs of the former trial were directed to form part of the costs in the cause.

On the 21st of December, 1850, the cause was tried again. It appeared from the evidence of the witnesses, that Muttyloll Seal had the bill of exchange for value from the respondents, on the 16th of February, 1848; and that he took the bill, not with a view of remitting it to China, but of selling it in Calcutta; and that he held the bill until the 25th of July, in that year, when he sold it to the appellant, who forwarded it for acceptance, by the China mail steamer on the 7th of September, in that year; and that the bill arrived at Hong Kong in October, and was presented for acceptance to Dent & Co. on the 24th of that month, who then refused to accept it. Evidence of the state of the money market at that time was given; from which it appeared that the early part of the year 1848 was a period of great commercial difficulty and mistrust in Calcutta, and that great difficulty was experienced in selling bills on China, uncovered by shipping documents accompanying such bills. It was also in evidence that Muttyloll * Seal had ineffectually endeavoured to dispose of the [* 51] bill before he sold it to the appellant; that there was a monthly mail to China, by a steam-vessel leaving Calcutta at the beginning of each month, and that the appellant held the bill over the departure of one mail, though he forwarded it by the next. It was also in evidence, that there was no definite custom or usage in regard to the time for sending foreign sight bills for acceptance. The witnesses all agreed that but for the state of commercial affairs, the bill ought not to have been kept so long in hand; that though bills on China had been known to have been kept in hand

for three or four months, none were ever known to be kept so long as five months. Evidence was also given to show that the respondent's Gomastah, by whom the bill of exchange was drawn, and by whom all the Calcutta business of the firm was managed, was aware in the month of May that the bill had not been forwarded to Hong Kong for acceptance, and that he made no objection then on the score of delay; also that Dent & Co. had all along continued, and then were, solvent; and that all parties were *in statu quo*, no damage having resulted from the delay.

Upon this evidence the Supreme Court found a similar verdict to that given on the first trial, liberty being reserved to each of the parties to move to enter a verdict on the particular issues found against them.

Accordingly, on the 24th of December, 1850, the appellant obtained a rule calling on the respondents to show cause why the verdict found for them on the additional plea should not be set aside, and a verdict for the appellant entered instead, on [*52] the * following grounds: First, that the parties being proved to be *in statu quo*, and no damage whatever resulting from the delay in the presentment, the *onus* of proving that the delay was improper or unreasonable lay upon respondents. Secondly, that even if the *onus* was upon the appellant, he sufficiently accounted for the same; or else why a new trial should not be had on the ground that the ruling of the Court in this respect was in the nature of a misdirection; or else why judgment should not be entered for appellant, *non obstante veredicto*, on the twelfth (or additional) plea, on the ground, that no damage whatever was alleged therein to have accrued to the respondents, and no reason assigned why the drawees should not have paid on presentment.

The respondents also obtained a rule as to the issues which had been decided unfavourably to them.

The rules were fully argued; and on the 14th of March, 1851, the Supreme Court at Calcutta delivered judgment discharging both rules.

[* 59] * From so much of this judgment as discharged the appellant's rule, the present appeal was brought. A cross appeal was also brought by the respondents from the same judgment, so far as it concerned the discharge of their rule. Both appeals were set down for hearing at the same time, but the first

No. 30. — Ramchurn Mullick v. Luchmeechund Radakissen, 9 Moore's P. C. 59, 60.

appeal was the only one argued, the decision of their Lordships upon it rendering the hearing of the second appeal unnecessary.

The Attorney-General (Sir Alexander Cockburn), Mr. Bramwell, Q. C., and Mr Leith, for the appellant.

There are two principal questions in this case. First, whether the bill was duly and within a reasonable and proper time presented for acceptance; and secondly, whether, even if it was not so presented, the Court below having found that the parties remained *in statu quo*, and the drawees solvent, such delay in presentment is a defence available to the respondents in this action. There is also a question as to the sufficiency of the additional plea, which it may be convenient to dispose of in the first instance. No damage to the respondents is averred by that plea to have arisen by the delay. The plea, therefore, was either bad for not alleging any damage to the respondents by the delay in presentment, or, if it be taken to contain any allegation to that effect by implication from the statement, that the bill was not presented within a reasonable and proper time in that behalf, then the plea was not proved; or, if the plea is to be taken to be no more than a traverse of the averment of presentment in the plaint, then we submit that such averment was proved, and that no * question of delay [* 60] or damage arises. — [Mr. Baron PARKE: No doubt the plea is informal. The real issue raised by that plea is, whether the presentment was within a reasonable time.] — Upon the first question, we submit, that the bill was, under the circumstances, proved at the trial, and according to the principle of all the authorities, presented within a reasonable time for acceptance. It was a foreign bill, dated the 16th of February, payable at Hong Kong, sixty days after sight, and the evidence shows that it is the usual course of business to sell such bills in open market, and that such was the state of the money market, that though Muttyloll Seal made many attempts to sell the bill, he could not effect a sale till the latter end of the month of July. The bill was payable to the respondents' order. It was no part of the arrangement that the bill was to be forwarded forthwith to Hong Kong. It is doubtful whether there is any obligation at all upon the holder to present a foreign bill, payable at or after sight, within any fixed time which can be defined by the term "reasonable." No criterion of what is a "reasonable time" is to be found in any of the authorities upon this subject, for they vary according to the circumstances of each case. —

No. 30. — Ramchurn Mullick v. Luchmeechund Radakissen, 9 Moore's P. C. 60–62.

[Mr. Baron PARKE: All bills payable after sight must be presented in order to fix the time when the bill is to run.] — It is a mixed question of fact and law, not governed by any fixed rule, but to be considered with reference to all the circumstances which may make it reasonable or unreasonable that the party should hold the bill instead of sending it for presentment and acceptance. All the authorities show, that in the case of a foreign bill of exchange not payable in the country where it is drawn, you are not bound
[*61] * to send it at once for presentment. *Mellish* v. *Rawdon*, 9 Bing. 416; *Muilman* v. *D'Eguino*, 2 H. Bl. 565; *Goupy* v. *Harden*, 7 Taunt. 159, 17 R. R. 478; *Meggadow* v. *Holt*, 12 Mod. 15; 1 Show. 317; *Butler* v. *Play*, 1 Mod. 27; *Terry* v. *Parker*, 6 Ad. & E. 502. In the case of *Straker* v. *Graham*, 4 M. & W. 721, it is true the Court of Exchequer held that a bill of exchange, drawn on the 12th of August, in Newfoundland, payable ninety days after sight in England, which was not presented for acceptance until the 16th of November, was not presented for acceptance within a reasonable time; but there was in that case no circumstances proved in explanation of the delay, and it is, therefore, distinguishable from the present case. The state of the money market at Calcutta is a sufficient explanation why the bill was not forwarded to Hong Kong and presented sooner for acceptance. There are two other cases, *Prideaux* v. *Collier*, 2 Stark. 57, and *Hill* v. *Heap*, 2 Dow. & Ry. N. P. 57, in which it was held, that presentment on the day the bill is due is necessary. Those cases, however, are *nisi prius* decisions, and relate to notices of dishonour. The same rule as to presentment is recognised in America. *Wallace* v. *Agry*, 4 Mason's U. S. R. 336; s. c. 5 Mason's U. S. R. 118; *Robinson* v. *Ames*, 20 John. U. S. R. 146; *Aymar* v. *Beers*, 7 Cowen's U. S. R. 503; Story, "On Bills of Exchange," ch. viii. § 231. So, by the French law, Pardessus, Droit Comm., tom. ii. part. iii. tit. ii. chap. iv. sec. 2, arts. 358–9; Pothier, Traité du Contrat de Change, tom. ii. p. 185 (2d ed.) — [Mr. Baron PARKE: By the Code de Commerce, Liv. i. tit. 8, s. 11, presentment
[*62] * for acceptance must be made within six months from the date.]

Secondly. The refusal of the drawees to accept was not in consequence of any delay in presentment. But if the Court should be of opinion that there is a rule as to presentment for acceptance within a certain time, and that there was in this case unreasonable

delay in presenting the bill, this question then arises, whether, all parties being *in statu quo*, and no damage having accrued or proved to have arisen by such delay, can the drawers avail themselves of the want of presentment within a reasonable time, and set up such laches as a defence to the action? *Robinson* v. *Hawksford*, 9 Q. B. 52; 15 L. J. Q. B. 377, is a strong authority upon this point. That was an action against the drawer of a cheque on a banker, and the Court held, that it was no answer to such action, that the cheque was not presented in a reasonable time unless during the delay the fund had been lost by the failure of the banker. Here all the parties were perfectly solvent, from the date of the bill to the time of presentment and dishonour, and we submit, upon all the authorities, that the fact of delay of presentment without damage having accrued did not warrant the judgment of the Supreme Court. It was incumbent upon the respondents to show that they suffered damage in consequence of the delay.

Sir Fitz-Roy Kelly, Q. C., Mr. Serjeant Channell, and Mr. H. Clarke, for the respondents.

The substantial question at issue really is, whether the twelfth, or additional plea, constituted a good defence in point of law to the action. It raises a point of mercantile law involving a question of great * importance to the mercantile community, [*63] and may be considered under two heads. First. We submit, that the Court below, sitting as a jury to determine the question of fact arising out of the case, have come to a just conclusion upon the issue, whether Muttyloll Seal used due diligence in presenting the bill in question for acceptance. Secondly. We submit, that as the bill was not presented within a due and reasonable time, the doctrine contended for by the appellant, that the drawers not being prejudiced or damaged by the delay in the presentment of the bill, he was entitled to recover, is unsupported by principle or authority.

First. We utterly deny the proposition that a foreign bill, payable at or after sight, does not require presentment. — [Mr. Baron Parke: You need not argue that point, as the Court is with you.] The sole point then, upon this branch of the case, is, whether this bill was presented for acceptance within a reasonable time. That was a question for the jury. By the verdict entered for the respondents on the twelfth plea, it was found by the Court, that the presentment of this bill for acceptance was not within a reasonable

time. Such finding was, we submit, justified by the evidence, as no sufficient explanation was given for the delay proved. The retention of the bill in the possession of Muttyloll Seal for a period of five months and nine days was an unreasonable time. *Mellish* v. *Rawdon*, is referred to by Story On Bills of Exchange, ch. viii. § 231, and its subsequent detention by the appellant is by no means satisfactorily explained.

[*64] Secondly. Assuming that the Court, sitting as a *jury, found correctly, that the delay was unreasonable, the question then arises whether the appellant can recover, notwithstanding the delay, upon the assumption that the drawers were not prejudiced or damaged by the delay in presentment. Such an objection cannot now be entertained. If the appellant intended to have relied upon it, it ought to have been the subject of a special replication, or of a special allegation in the plaint. — [Mr. Baron PARKE: In *Carter* v. *Flower*, 16 M. & W. 743; 16 L. J. Ex. 199, the Exchequer Court held, that if the declaration alleges notice, if in fact notice was given, the question of reasonable notice arises. If no notice was given the circumstances excusing notice must be pleaded specially.] — That is the present case if you substitute the word "presentment" for "notice." *Robson* v. *Olive*, 10 Q. B. 714; 16 L. J. Q. B. 437, is also an authority on this point. The facts relied upon by the appellant, if they establish anything, establish an absolute excuse for non-presentment, which ought to be put upon the record. But the question of damage is no ingredient or element in the question of "reasonable time." The only excuse for non-presentment, or the delay in the presentment, would be that which does not exist here, the absence of funds, or of the expectation of them. The law upon this point is clearly laid down by Story On Bills of Exchange, ch. viii. § 231, and he refers to Chitty On Bills of Exchange; *Whitehead* v. *Walker*, 9 M. & W. 515; 11 L. J. Ex. 168. — [Mr. Baron PARKE: The same law is laid down in *Carter* v. *Flower*.] — The case of *Robinson* v. *Hawksford*, 9 Q. B. 52; 15 L. J. Q. B. 377, relied upon by the appellant, is distinguished

[*65] from the present: it relates to a *cheque. In that case it was held, that as against the drawer of a cheque upon a banker, the time before presenting the cheque for payment, although unreasonable, is no objection, if the result has not been attended with damage from failure of the bankers. Here it is a foreign bill of exchange, payable after sight, and is entirely different from a cheque.

No. 30. — Ramchurn Mullick v. Luchmeechund Radakissen, 9 Moore's P. C. 65, 66.

The case stood over for consideration: judgment was now pronounced by

Mr. Baron PARKE: —

The question on which their Lordships are to give their opinion in this case, is, whether the Supreme Court at Calcutta rightly decided the issue on the additional plea, in favour of the defendants. The plea is certainly informal, but there is no doubt, as has been already intimated, that the true issue raised by that plea is, whether the bill of exchange on which the action is brought, was presented for acceptance in a reasonable time.

There is as little doubt, that it is now much too late to contend, that the law does not require a presentment for acceptance of a foreign or other bill of exchange, payable at, or a certain time after, sight. How otherwise can the time the bill has to run be fixed, where it is payable after sight? Indeed, the statute of 3rd & 4th Anne, c. 9, sec. 7, makes an inland bill of exchange, received in satisfaction of a debt, a full and complete payment if the holder does not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and, therefore, in some cases, undoubtedly, it requires the presentment for acceptance; and as the law has been *long settled that the holder of a [*66] bill, payable after date, is not obliged to present it for acceptance, it must apply to bills payable on or after sight. Presentment, then, being necessary for acceptance, the inconvenience of an indefinite postponement of the time of payment of such a bill, which the unlimited power of presenting when the holder might please would necessarily lead to, long ago suggested that there should be a limit. In some foreign nations it is provided for by positive enactment, fixing the times of presentment with reference to the places where the bill is drawn, and where the drawee resides, as in the French Code de Commerce, lib. i. part 8, sec. 11. But in our law, there being no such fixed limit by enactment, where there is no usage of trade to fix the time, it has long been established, that such bill must be presented in a reasonable time, which is a mixed question of law and fact, for the determination of a jury, with the assistance of a Judge, where trial by jury exists, and for the determination of the Court, where they exercise, as they do in Calcutta, the functions of a jury as well as those of Judges. This rule is adopted for want of a better law defining the time precisely.

We have then to pronounce our opinion, whether, in this case,

the Court has proceeded to decide what is a reasonable time upon a correct principle, and whether the evidence warranted the conclusion they have drawn upon it, that the presentment, in this case, was not made in reasonable time.

The Court assumed, that the correct principle was laid down fully in the cases of *Mellish* v. *Rawdon*, which is in accordance [*67] with the prior case of *Muilman* v. *D'Eguino*, and * *Fry* v. *Hill*, 7 Taunt. 397; 18 R. R. 512, that in determining the question of "reasonable time" for presentment, not the interests of the drawer only, but those of the holder, must be taken into account; that the reasonable time expended in putting the bill into circulation, which is for the interest of the holder, is to be allowed; and that the bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. The Court, in acting upon that principle, concluded from the evidence, that the bill was improperly detained for a portion at least of the time which elapsed between the 16th of February, 1848, when it was drawn, and the 26th of July, when it was indorsed over by Muttyloll Seal, the then holder, to the plaintiff. They thought, that the evidence proved, that for the whole of that time, a period of more than five months, bills on China were altogether unsaleable in Calcutta; that such was the permanent and regular state of the market; and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had a right, with a view to his own interests, to keep the bill for some time, he had no such right when there was no hope of the amendment of that state of things; and we are of opinion, that the evidence fully justified this conclusion from it, and that the Court, deciding on facts as a jury, were perfectly right. Indeed, we should not have reversed their judgment on a matter of fact, unless we were quite satisfied they were wrong, their knowledge of local circumstances, and the character and appearance of the witnesses, enabling them to form a more correct opinion than a tribunal of appeal in this country possibly could. But, [*68] in our opinion, * they drew a proper inference from the evidence in the case.

It remains to consider only one point which was insisted upon in the Court below, and also argued at the bar before us, namely, that as the drawers remained perfectly solvent from the date of the bill to the present time, the rule as to presenting in a reasonable

No. 30. — Ramchurn Mullick v. Luchmeechund Radakissen, 9 Moore's P. C. 68, 69.

time did not apply, and that there was no laches which would constitue a defence by the drawers, unless they had incurred a loss by that laches. The Court below decided, that the solvency of the drawers and the want of proof of actual loss by laches, constituted no answer to the objection of laches. We think they were right. There is no trace of such a qualification in the elaborate judgment of Lord Chief Justice TINDAL, in *Mellish* v. *Rawdon*, in which the circumstances which constitute a reasonable delay are fully discussed; no mention is made of the insolvency of the drawer subsequent to the drawing, although it did occur in that case, or some loss by the drawer, being an essential condition to the application of the rule laid down; and in *Muilman* v. *D'Eguino*, it was clear that the failure of the drawer caused no damage to the plaintiff, being before the time that the bill could possibly have been presented in India, yet that circumstance was not mentioned as dispensing with the obligation to present in a reasonable time; and, with respect to all bills of exchange payable after date, it is fully settled, that neither the want of presentment at the time the bill is due, nor the want of due notice, are excused, because the drawer has continued solvent, or the holder incurred no loss by non-presentment, or want of regular notice.

This point was fully considered in the case of **Carter* v. [*69] *Flower*, and we believe admits of no doubt, and we agree with the Court below, that the continued solvency of the drawers does not prevent the application of the rule, that the bill must be presented in a reasonable time, with reference to the interest of the drawer to put the bill into circulation, or the interest of the drawee to have the bill speedily presented.

The authority on which reliance is placed on the part of the appellant, in support of the doctrine contended for, is that of *Robinson* v. *Hawksford*, 9 Q. B. 52; 15 L. J. Q. B. 377, which is the case of a cheque presented some days after it was drawn, to the banker, and not paid, in consequence of the countermand of the drawer; and the Court held, that if the drawee continued solvent, and no damage has arisen from delay of presentment, the drawer continued liable.

If this had been a decision on a regular bill of exchange, payable on or after sight, it would have been a strong authority for the plaintiff in error. It is not, however, the case of a bill of exchange, but of a banker's cheque, which is a peculiar sort of instrument, in

many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance; in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment; it is not entitled to days of grace; and though it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to [*70] appropriate to a creditor, the person giving *the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that place. There is a very good note on this subject in the case of *Serle* v. *Norton*, 2 Moo. & Rob. 404, as to the difference between cheques and bills of exchange. We do not think that the case of a cheque is similar to that of regular bills of exchange, inland or foreign, drawn payable at or after date, and are satisfied with the view taken of this authority in the Court below.

We, therefore, think, that we ought to recommend her Majesty to affirm the judgment of the Court below, with costs.

ENGLISH NOTES.

The rule is now embodied in sections 39 and 40 of the Bills of Exchange Act 1882. These sections embrace bills payable after sight, whether English or foreign, and so, it will be observed, does the judgment of the Judicial Committee in the above case; although the bill there in question was (as is usually the case with bills payable after sight) a foreign one.

The alternative mentioned in the Act (section 40 (1)),—"the holder must either present it for acceptance *or negotiate* it within a reasonable time." — is doubtless suggested by the case of *Mellish* v. *Rawdon* (1832), 9 Bing. 416, cited in the principal case, where the payee at Rio, of a bill drawn in London, payable sixty days after sight, retained it for four months, during which time Rio bills were at a discount; and then negotiated it. The Court, in a considered judgment delivered by Tindal, C. J., held that the jury were rightly directed to determine whether, looking at the situation and interests of both drawer and holder, there had been unreasonable delay on the part of the plaintiff in

forwarding the bill for acceptance or putting it in circulation; and that, under the circumstances, a verdict for the plaintiff — in effect finding the delay in presentment excused — ought not to be disturbed.

The effect of the alternative as put in the Act is, however, not very clear. His Honour Judge Chalmers suggests the question: "Does not negotiation within a reasonable time *toties quoties*, excuse presentment, or is there any limit?" Chalmers, 4th ed. p. 134.

AMERICAN NOTES.

The presentment for acceptance of a bill payable after sight must be without unreasonable delay, or drawer and indorsers are discharged, for they have an interest in shortening and limiting the period of their liability. *Bell* v. *First Nat. Bank*, 115 United States, 379; *Allen* v. *Suydam*, 20 Wendell (New York), 327; 32 Am. Dec. 555.

No. 31. — GIBB *v.* MATHER.

(EX. CH. 1832.)

RULE.

WHERE a bill is payable at a particular place, presentment at any other place, is not sufficient to charge the drawer.

The statutory enactment (1 & 2 Geo. IV. c. 78, now embodied in sect. 19, (2) (*c*) of the Bills of Exchange Act 1882) to the effect that an acceptance payable at a particular place without other restrictive words, is a general acceptance (contrary to the decision of the House of Lords in *Rowe* v. *Young*, 1820, 2 Bligh, 391), does not alter the rule as to the liability of the drawer.

Gibb v. Mather.

2 Cr. & J. 254-265 (s. c. 2 Tyr. 189; 8 Bing. 214; 1 M. & Scott, 387).

Assumpsit against the plaintiff in error (the defendant [254] below), as drawer of a bill of exchange, payable to his own order "in London," and accepted payable at Messrs. Jones, Lloyd, & Co., bankers, London, and directed to the drawee, payable in London. The presentment to the acceptor was made in Liverpool; and, for the purpose of raising the question whether this was a sufficient presentment to charge the drawer (the defendant below), at the

trial before PARKE, J., at the Lancaster Lent Assizes, 1830, a bill of exceptions was tendered.

The plaintiffs (below) were partners together in trade, and holders of a certain bill of exchange, which was as follows: (that is to say), "Liverpool, 27th September, 1828. — Four months after date, pay to the order of myself in London, £175 10s.; value received in timber. — Duncan Gibb. To Messrs. Chapman & Fairclough, Liverpool, payable in London;" which bill was accepted as follows: (that is to say), "Accepted at Messrs. Jones, Lloyd, & Co., bankers, London. — Chapman & Fairclough;" and indorsed as follows: (that is to say), "P. pro. Duncan Gibb, John Kempster." The defendant (below) himself presented the bill for acceptance, and himself received back the bill from the acceptors accepted. The bill was presented at Liverpool to the acceptors for payment on the 30th day of January, 1829, on which day the bill had accrued due; and the acceptors refused to pay the same; and notice was given on the 30th day of January, 1829, by the plaintiffs (below) to the defendant (below), of the presentment [*255] of the bill to the * acceptors, and of their refusal to pay the same. The handwriting of the several parties to the bill and the authority of Kempster were proved. The learned Judge delivered his opinion to the jury, that, upon this evidence, the plaintiffs (below) were entitled to a verdict. Upon this direction, the jury found a verdict for the plaintiffs (below), and a bill of exceptions was tendered and sealed; and judgment having been entered up, a writ of error was brought, which was now argued by —

Kelly, for the plaintiff in error. The single question in this case is, whether, on a bill whereby, in the body of the bill, the drawee is required to pay to the order of the drawer in London, and which bill is, in compliance with such direction of the drawer, accepted by the drawee payable at a particular place in London, it be necessary, to charge the drawer, to prove a presentment in London. That question depends on two propositions. It is submitted on the part of the plaintiff in error: first, that, before the late statute, 1 & 2 Geo. IV. c. 78, it would have been necessary on a bill so drawn, to show a presentment in London; and, secondly, that the statute does not affect drawers.

Before the case of *Rowe* v. *Young*, 2 Brod. & Bing. 165, considerable difficulties prevailed as to the effect of acceptances at a particular place. It was held by the Court of Common Pleas, that,

even to charge an acceptor, it was necessary to show a presentment at the place. The Court of King's Bench, on the other hand, in several cases held that such acceptances were general, and that the acceptor was liable as on a duty to pay everywhere. In the case of *Rowe* v. *Young*, the House of Lords upheld the opinion of the Common Pleas. But, whatever difference had prevailed on this subject, no difference or difficulty existed where the bill in its body contained a direction to the acceptor to make his acceptance payable at a particular place. *Sanderson* v. *Bowes*, 14 East, 500; 13 R. R. 299, * *Roche* v. *Campbell*, 3 Camp. 248; and [*256] see *Hodge* v. *Fillis*, 3 Camp. 462, and many other cases, clearly establish the principle that the naming the place in the body of the instrument makes the place material as affecting the rights of the particular parties. *Sanderson* v. *Bowes* was an action against the maker; and *Roche* v. *Campbell* was against the indorsee of a promissory note; and the principle of these decisions applies still more strongly to the case of the drawer of a bill, who is only liable on the default of the acceptor in paying the bill, when a proper presentment is made at the place named. It appears, therefore, that, whatever difference existed between the two Courts, as to the necessity of a presentment at a particular place on a special acceptance, there was no doubt as to the necessity of a presentment at the place named in the body of a bill or note. The difficulty was, as to charging the acceptor; there was none as to the drawer; and the consideration of this being the state of the law before the passing of the statute 1 & 2 Geo. IV. c. 78, is material towards the proper understanding of the object of that statute.

In the recitals of the statute, as well as in the enacting part, no mention whatever is made of the drawer. The acceptor alone is referred to, and the statute gives to the acceptor the power of limiting his responsibility, so as to relieve himself from the inconveniences referred to in the opinions of the Judges in *Rowe* v. *Young*.

The statute recites the inconveniences of acceptors only: and it does not at all affect drawers, who are not even mentioned in it, and about whom no difference of opinion had previously existed. It may fairly be contended, therefore, that the statute did not contemplate the case of a drawer, to whom no power is given by the statute to protect himself and limit his liability, and who can only do so by expressing such restriction in drawing the bill. He had

this power before the statute, and he retains it notwith-
[*257] standing *the statute. A drawer who passes a bill of this description, promises, in effect, that he will pay it, if the drawee do not pay on a presentment at a particular place and time, and due diligence be used and notice given. An acceptor, then, cannot surely be allowed to enlarge the extent of the drawer's liability by his acceptance, which would be the effect of holding that the drawer in this case was liable, without a presentment in London. The drawer may have drawn in this form, because he knew that the drawee had funds in London. He may be aware that the drawee has money in a London banker's hands, and his liability would be very considerably increased, if he were liable on a presentment at any other place.

In this particular case, it is stated, that the bill was accepted before it passed out of the hands of the defendant (below), the drawer, and it will perhaps be contended, that his knowledge of the mode in which it was accepted will make him liable on the presentment in question. The case, however, must be decided by the general rule to be adopted in construing instruments of this nature. It may be said, that some recent decisions, *Selby* v. *Eden*, 3 Bing. 611; *Fayle* v. *Bird*, 6 B. & C. 531, have established that such a presentment as the present is good as against the acceptor, but there is no authority whatever to show that it is good as against a drawer.

In the case of *Rowe* v. *Young*, Mr. Justice BAYLEY said, 2 Brod. & Bing. 231, "The effect of such an acceptance is this: that, to entitle the holder to sue the drawer or indorser, it casts an obligation upon him to present the bill at Sir John Perring & Co.'s for payment, but that, as against the acceptor himself, the holder is not bound so to present it." The majority of the Judges held, in that case, that the acceptor was not liable without such a pre-
sentment; but it was considered as clear, that the drawer
[*258] was not liable under *the circumstances. Here, the contract of the drawer appears on the bill, and the bill only, and cannot be altered by the acceptance. The presentment is a condition precedent, and must be shown. As against the acceptor, the necessity of a presentment at the particular place is taken away by the statute, but, as to the drawer, the law remains unaltered.

Roscoe, *contrà*. — This being a general acceptance, by the opera-

tion of the statute 1 & 2 Geo. IV., c. 78, the drawer is not discharged by the want of a presentment in London. The liability of the drawer is, to pay the bill, if, in case of a proper presentment to the drawee or acceptor, he neglects to pay it. The question, therefore, in this case is, whether there has been a proper presentment. If the bill did not require a presentment in London, in order to charge the acceptor, it did not require a presentment in London, in order to charge the drawer. Where the acceptance is special, the presentment must be at the place indicated, to charge either the acceptor or the drawer; where it is general, no presentment is necessary, as against the acceptor; and, as against the drawer, a presentment to the acceptor anywhere is good. But, according to the argument for the plaintiff in error, this acceptance is both special and general; special, as it regards the drawer; general, as it regards the acceptor. There is no authority for such a distinction as this. That this acceptance is general, appears from the cases of *Selby* v. *Eden*, 3 Bing. 611, and *Fayle* v. *Bird*, 6 B. & C. 531.

[TINDAL, C. J. In *Fayle* v. *Bird*, Lord TENTERDEN observed, that, but for the case of *Selby* v. *Eden*, he should have entertained some doubt if the case was within the provisions of the statute.]

But it is said that the request to pay is conditional in * the body of the bill, which requires the acceptor to pay [* 259] in London. The condition of the bill is complied with by the acceptance as it stands, though it should be held to be a general acceptance; for, the effect of it, in law, is, that the bill may be presented for payment either in London or to the acceptor personally.

It is frequently matter of convenience that the holder of a bill should be able to receive payment in London, which is the reason for inserting the condition in the bill; but that object is equally attained, though he may, at the same time, have the additional power of presenting it personally to the acceptor. The drawee, by accepting the bill in this manner, complies with the request of the drawer, and, at the same time, incurs an additional liability, which is not injurious to the drawer.

But, supposing the bill to be such as to require the drawee to accept it payable in London only, and not to accept it so as to make a presentment in any other place sufficient, two questions arise; first, whether the drawee has complied with that request;

and, secondly, supposing that he has not done so, whether the drawer is discharged. In order to make this a special acceptance, so as to render a presentment in London, and there only, necessary the drawee ought to have complied with the requisitions of the stat. 1 & 2 Geo. IV. c. 78, which requires the addition of the words "only, and not otherwise or elsewhere." Having neglected to insert these words, the acceptance is general.

[Bayley, B. Suppose a bill drawn, "Pay to my order, at No. 32, Cornhill, London," and accepted generally?]

In such case, a presentment to the acceptor anywhere would be good. The holder ought to require him to accept it in the terms of the stat. 1 & 2 Geo. IV. c. 78, payable at 32, Cornhill only, and not otherwise or elsewhere, and, on refusal, might resort to [* 260] the drawer. In this case, the holder * chose to take a general acceptance, varying from the terms of the bill (supposing the argument on the other side to be correct, that the bill requires a payment in London only); and the next question is, whether, by such an acceptance, and a presentment in pursuance of it, the drawer is discharged.

There are many cases in which, notwithstanding a variation in the acceptance from the terms of the bill, the drawer has been held liable on a presentment according to the acceptance.

[Lord Lyndhurst. I agree you may vary by restricting, but not by extending the liability.]

The question, whether a variation in the acceptance, with regard to the place of payment, discharges the drawer, was put by the Judges in the case of *Rowe* v. *Young*, and it was the opinion of several of their Lordships, that such variation will not discharge the drawer, unless he is injured by it. Now, in this case, it appears, that the drawer could not have been injured; for, upon the bill of exceptions, it will be seen that the acceptance was made while the bill was in the hands of the drawer. He cannot, therefore, now say that he was injured by a variation of which he approved.

There is nothing in the statute 1 & 2 Geo. IV. c. 78, to show that it was not intended to apply to the drawer as well as the acceptor; nor could the statute affect the liability of the latter, without also affecting that of the former.

It was unnecessary to provide specifically for the case of the drawer, since his liability depends upon that of the acceptor. The

words of the statute are very general, and enact, that an acceptance like the present shall be taken to be a general acceptance, "to all intents and purposes."

Kelly replied. *Cur. adv. vult.*

* The judgment of the Court was now delivered by Tin- [* 261] DAL, C. J.

This was an action by the indorsees against the drawer of a bill of exchange after non-payment by the acceptors. Upon the trial of the cause, it appeared upon production of the bill that the drawer, in the body of the bill, required the drawee to pay to the order of himself "in London," the sum mentioned therein; that the bill was addressed to Messrs. Chapman & Fairclough, Liverpool, with the additional words "payable in London," and that it was by them accepted "at Messrs. Jones, Lloyd, & Co., bankers, London." It appeared further, that, upon the day the bill became due, it was presented for payment to the acceptors at Liverpool, who refused payment, and that due notice of such refusal was given to the defendant. The learned Judge who tried the cause directed the jury that the evidence above stated was sufficient to entitle the plaintiffs to recover, and the jury found their verdict for the plaintiffs below. The propriety of this direction now comes before us, upon a bill of exceptions tendered by the defendant below; and the question raised for our consideration is this, — whether, in an action against the drawer of the bill above set forth, on the ground of non-payment by the acceptors, it is or is not necessary to prove a presentment for payment at the banking-house in London, where the same is made specially payable by the acceptance. And we are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

Before the passing of the statute 1 & 2 Geo. IV. c. 78, it was a subject of considerable doubt in the Courts of law, whether, in the case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the acceptor without averring in the declaration, and proving at the trial, a presentment for payment at the place where the drawee had, by his acceptance, * made the bill payable. Upon that point, [* 262] the Court of Common Pleas had held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only; the Court of King's

Bench, on the contrary, had held it was unnecessary to make any such presentment, on the ground that the acceptance was a general acceptance, with a mere intimation of a place of payment, if the holder thought proper to apply there. The conflicting opinions of the two Courts upon that point were set at rest before the framing of the statute, by the judgment of the House of Lords in the case of *Rowe* v. *Young*, 2 Brod. & Bing. 165, by which judgment the opinion held by the Court of Common Pleas was decided to be the law of the land. But the doubt which had been formed was confined to the case where the question arose between the holder and the acceptor. In cases between the indorsee and the drawer upon a special acceptance by the drawee, no doubt appears to have existed, but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable upon the dishonour of the bill by the acceptor. Still less did the doubt ever extend to cases where the drawer directed, by the body of the bill, that the money should be payable at a particular place; in such a case, all the Courts at Westminster agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the Court of King's Bench, in the case of a banker's promissory note which was made payable at a certain place named in the body of the note. See *Sanderson* v. *Bowes*, 14 East, 500; 13 R. R. 299. The same doctrine was also laid down in the case of *Roche* v. *Campbell*, 3 Camp. 247, where the action was brought by the indorsee of the note against the indorser. Now, no distinction as to this point can be taken between the [* 263] drawer of a bill of * exchange and the indorser of a promissory note. As to their liability to the holder, they stand precisely in the same situation. It is the acceptor of the bill and the maker of the note who are primarily liable to the holder, and the drawer of the bill, like the indorser of the note, does not become liable until there has been a due presentment made to the party liable in the first instance to pay the bill. The law, therefore, which applies to the indorser of the note, will also govern the case of the drawer of a bill. Such, then, being the state of the drawer's liability at the time the statute was passed, it must still remain the same, unless the statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptors alone.

No. 31. — Gibb v. Mather, 2 Cr. & J. 263, 264.

The title of the act is, An Act to regulate acceptances of bills of exchange, and — after reciting that it has been adjudged that, where a bill is accepted payable at a banker's, the acceptance thereof is not a general, but a qualified acceptance, but that a general practice and understanding had prevailed amongst merchants, that such acceptance was a general acceptance, — it proceeds to enact that, after the passing of that Act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place, by the words and in the manner directed in the Act. The very reference in the statute to the adjudication by law, imports that the Legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the Act. Again, the enactment comprehends in terms the cases of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and indorsers. It foresees the inconvenience which is cast * upon acceptors by the enactment [* 264] that an acceptance of a bill payable at a particular house, shall thenceforth be considered as a general acceptance, and it gives the acceptor the power of protecting himself against such inconvenience, by the use of restrictive words in his acceptance. But the inconvenience is as great to the drawer as to the acceptor. If the drawer has directed his money to be paid at a particular place, and, after an acceptance made payable at that place, the bill should be returned to him dishonoured without a presentment at the house where it is made payable, it is as great a hardship upon him as the Act had contemplated and provided for in the case of the acceptor. If, then, the statute had intended the enactment to apply to the case of the drawer, we cannot but think the same protection would have been given to the drawer, which had been given in terms to the acceptor of the bill.

One argument advanced on the part of the defendant in error is, that the acceptor has varied his acceptance from the original terms in which the bill was drawn, and, as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance, under the operation of the late statute. But the answer to this argument seems to be, that the direction contained in the body of the bill is not altered or varied

by the terms of the acceptance any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directed the drawee to pay the money in London, the drawee accepts, specifying the particular house in London at which he intends to pay the bill; without such specification, the acceptance might be useless, from its generality, and the form of the bill implies, that the drawer expected and intended the drawee to make it payable in London.

We therefore think that, as no presentment was made at the house of the bankers in London, where the acceptor had un-
[* 265]. dertaken to pay it, the liability of the drawer never * arose, and consequently, that the judgment which has been given for the plaintiff below must be reversed. *Judgment reversed.*

ENGLISH NOTES.

In the principal case the place of payment was specified by the drawer. In order, however, to charge the drawer or indorser, the bill must be presented at the place specified for payment, although the place was specified by the acceptor, and although the acceptance is by the statute (Bills of Exchange Act 1882, sect. 19 (2) (*c*) and sect. 52 (1)), a general acceptance (see note to No. 8, p. 245, *ante*), so that presentment for payment is not necessary to make the acceptor liable. *Saul* v. *Jones* (1858), 1 El. & Bl. 59, 28 L. J. Q. B. 37. The effect of this case as well as of the principal case is embodied in the Bills of Exchange Act 1882, sect. 45.

As to presentment for payment of promissory notes, upon which the analogy with bills of exchange does not afford an exact guide, the rules are now embodied in sect. 87, of the Bills of Exchange Act 1882. Of the cases on which the section is founded, it will be enough to cite — as cases where the maker was charged, — *Sands* v. *Clarke* (1849), 8 C. B. 751, 19 L. J. C. P. 84, 14 Jur. 352, where the promise was to pay to S. & Co., "at No. 11 Old Slip," and in an action against the maker of the note, the Court sustained a demurrer on the ground that it did not appear by the declaration that the note had been presented at No. 11 Old Slip, or that the defendant (who had absconded) had prevented such presentment being made; *Bowes* v. *Howe* (Ex. Ch. 1813), 5 Taunt. 30, 14 R. R. 700, a decision of the Exchequer Chamber upon the same principle; and *Masters* v. *Baretto* (1849), 8 C. B. 433, 19 L. J. C. P. 50, where the words below the signature of the note, "Payable at Messrs. W. & P.'s" were held not to make it necessary in order to charge the maker that the note should have been presented there. And — as cases where an indorser is charged — the cases of *Roche* v. *Camp-*

bell, 2 Camp. 247, and the other cases in the King's Bench, cited in the judgment in the principal case. p. 474, *ante*, showing that where a place of payment is named in the body of the note, presentment must be made there; and *Saunderson* v. *Judge* (1795), 2 H. Bl. 510, 3 R. R. 492, showing that where there is only a memorandum mentioning a place of payment, it is sufficient to charge an indorser, if the note has been presented to the maker anywhere. In *Beeching* v. *Gower* (1816), Holt N. P. 313, 17 R. R. 644, it was held that where a banker's promissory note is made payable at a bank in Tunbridge and likewise at a bank in London, the holder has an option to present it at either place.

AMERICAN NOTES.

The principal case is cited and approved in 1 Daniel's Negotiable Instruments, § 519. (But in this country presentment at the particular place appointed is not necessary to charge maker or acceptor. Ibid. § 643.) Sustaining the rule in respect to drawer or indorser, see *Cox* v. *National Bank*, 100 United States, 712; *Broun* v. *Hull*, 33 Grattan (Virginia), 27; *Shaw* v. *Reed*, 12 Pickering (Massachusetts), 132; *Nichols* v. *Pool*, 2 Jones (North Carolina) 33; *Townsend* v. *Dry Goods Co.*, 85 Missouri, 508; *Parker* v. *Stroud*, 98 New York, 379; 50 Am. Rep. 685; *Brown* v. *Jones*, 113 Indiana, 46.

No. 32. — PHILIPS *v.* ASTLING.

(1809.)

RULE.

If the drawee of a bill goes abroad, leaving an agent at home with power to accept bills, and who does in fact accept the bill, the bill must be presented for payment to the agent, if the drawee at the time of maturity continues absent; and in default of such presentment the drawer, as well as a guarantor of the bill, is discharged.

Philips v. Astling.

2 Taunt. 206–212 (s. c. 11 R. R. 547–551).

Assumpsit. The declaration stated, that in consideration [206] that the plaintiff would sell and deliver to Davenport and Finney certain goods, to the amount of £500 to be paid by a bill for the amount drawn by Davenport and Finney on Houghton at six months, and also in consideration of a certain premium at the rate of £5 per cent. thereon, to be therefore paid by the plaintiff to the defendants, the defendants undertook to guarantee the payment of

the sum for which the bill should be so drawn when the same should become due; and the plaintiff averred that he afterwards sold and delivered the goods to Davenport and Finney, to the amount aforesaid, to be paid for as aforesaid, and that such bill of exchange was afterwards, when it became due, duly presented to Houghton for payment; but that he refused to pay, whereof Davenport and Finney, and the defendants respectively had
[* 207] notice, and were requested to guarantee * the payment of, and pay the amount of the bill; but that they did not nor would guarantee or pay the same.

Upon the trial of this cause at the Guildhall sittings after Trinity term, 1809, before Mansfield, C. J., it appeared that Davenport and Finney being desirous to obtain credit with the plaintiff for provisions for the use of the ship *Providence*, the defendants gave an undertaking written with a pencil in the following terms. "Memorandum. — We jointly and severally undertake to guarantee a payment of £500, at £5 per cent., say, by a bill drawn on G. Houghton by Davenport and Finney for £500. Dated 10th January, 1808." The provisions were furnished, and a bill was given in payment for them, dated the 11th of January, and drawn by Davenport and Finney on G. Houghton at six months' date, for £515 11*s.* 10*d.* payable to their own order. It appeared that at the time when the bill became due, Houghton was at sea, and remained absent for several months after; but he had a sister residing in London, to whom he had given an authority to fill up and accept bills in his name, and to transact other business for him, and who had in fact accepted this very bill. The bill became due on the 14th of July; it was not presented for payment to the sister. On the 16th, notice was given to Davenport and Finney that it remained unpaid, but no notice was given to the defendants. In February, 1809, Davenport and Finney became insolvent; and Houghton was declared a bankrupt in July, 1809. No application was made to the defendants for payment till after the date of both bankruptcies. The jury found a verdict for the plaintiff, deducting the £5 per cent. for the premium of the guaranty, which had never been paid; and the Chief Justice reserved liberty to the defendants to move to enter a nonsuit; accordingly,

[* 208] Vaughan, Serjt., in this term obtained a rule *nisi* upon two grounds; first, that the contract was to guarantee a bill of the

precise amount of £500, and this was a bill for a greater sum. Secondly, that the guaranty not being for the payment of the price of the goods generally, but referring to a bill as a specific mode of payment, it was necessary that all due diligence should be used to obtain payment of the bill before the parties could resort to the guarantee.

Shepherd and Best, Serjts., now showed cause. — Although on this contract the guaranty would not bind the defendant to a greater extent than £500, yet, whether the bill be for a greater or less sum is immaterial; if it had been for £1000, or if goods to the amount of £1000 had been sold, the defendants would have been thereupon liable for £500 of it; for the contract related to the identical sale of provisions for which this bill was given, not to the mere form of the payment; it would be otherwise, indeed, if the guaranty was merely for the payment of a particular bill of exchange. It cannot be said that this sale was not the very transaction meant to be guaranteed, and the contract must be construed according to the intention of the parties. Next, as to the want of diligence; this is not a guaranty that the drawer shall pay the bill, but that the acceptor shall pay it; the guarantee does not stand in the situation of the drawer; and, therefore, although want of diligence in presenting would discharge the drawer, it does not at all assist the defendant, for he stands in the situation of the acceptor; and as no want of diligence in presenting the bill for payment would discharge the acceptor, who would be liable, though the bill should be for the first time presented for payment after an interval of many months, so neither is the guarantee, who stands in the place of the acceptor only, thereby discharged.

* If anything had been done with the bill which would [* 209] discharge the acceptor, perhaps it might discharge his guarantee also; or even if it be supposed that the contract is alternative, that either the drawer or the acceptor shall pay the bill, still, unless the defendant can show that all the parties to the bill are discharged, the guarantee continues liable, because he may resort to the acceptor, who is not discharged, though the drawer is; and this transaction takes place upon a valuable consideration.

Vaughan, in support of the rule, contended, that the defendants were discharged from their guaranty by the want of presentment to the sister who was the agent of Houghton, and by the want of timely notice to the drawers, and to the defendants; for that the

defendants stood as indorsers of the bill, and as such, had a right to insist upon proof of notice to themselves of the non-payment both by the drawer and the acceptor; and that they had also a right to insist on proof of notice to the drawers, because without notice the drawers were not liable. But the defendants' remedy against Davenport and Finney was entirely lost, for want of due notice to them of the non-payment, which was not communicated to them till the 16th. The want of notice to the defendants at the same time was also fatal; for if the defendants had on the 14th been apprised of the non-payment, they might have obtained payment of Davenport and Finney, who, for anything that appears to the contrary, were then, and for eight months afterwards, solvent, and who therefore, in the contemplation of the law, might have paid it within that time. All the doctrine of the necessity of notice concerning bills is founded on this supposition. Secondly, to the objection arising on the amount of the bill, the answer made that the defendants are liable in equity for £500 only, is of no weight; for if the defendant stands as party to the bill, [*210] * if the bill is drawn for £1000, he is party to the bill for £1000. *Cur. adv. vult.*

Mansfield, C. J. This was an action against two persons on a guaranty, the terms of which are: "Memorandum. — We jointly and separately promise to guarantee a payment of £500 at £5 per cent., say a bill, dated 10th January, 1808." Then the bill is given, dated 11th January, and accepted, and not having been paid, this action is brought. At the trial there appeared reason to believe that Davenport and Finney, the drawers, and Houghton, the acceptor, were all at this time insolvent, but there was no proof of it. Davenport and Finney first became plainly insolvent in February, 1809, a year after this bill was drawn. There was no evidence of any demand being made on Davenport and Finney for the money; and no notice was given them of the bill not being paid till the 16th; something was said of a threat to arrest them, but there was no evidence of regular notice. As to Houghton, he went abroad; but he left a sister here, of whom a demand might have been made; no demand, however, was made at the place where his sister was to be found. At the trial it was objected that the plaintiff could not recover, for several different reasons: First, that the defendants stood as indorsers of the bill, and that

as indorsers, they had a right to insist on proof of the notice of non-payment both by the drawer and acceptor. On the other hand it was urged, and, as we think, justly, that this was a general guaranty for payment of a bill, not, as usual, a guaranty that the acceptor should pay, but a contract that either the one or the other should pay; and the consequence is, that if the guarantee paid the bill, he would have a right to come both on the drawer and acceptor for repayment; and though want of notice would not discharge the acceptor, *yet the guarantee, as the holder, [*211] had a right to insist on due notice being given to himself of non-payment by the acceptor, and that as to the drawers he had a right to insist on notice being given to them of the same fact, for that otherwise he might pay it in his own wrong if they were discharged. As to the second objection, the question is, what is the meaning of the word "say;" for it is objected, that suppose the bill drawn was for £1000, this would not be a guaranty to pay £500 on the bill for £1000; the guarantee would not be bound to pay it; but if "say" means "about" £500 a bill for £515 might answer the description; and if it were necessary to the deciding this action, to ascertain the meaning of that word, if "say" means to fix precisely the sum, and to restrain it from any larger sum, this objection would be good; but it is not necessary to decide that here, for we are of opinion that, unfortunately for the plaintiff, the defendant is relieved from the consequence of this guaranty. I strongly think the plaintiff knew the state of all these persons, and that they were not good; but as Davenport and Finney did not become insolvent till long after the bill became due, nor Houghton till long after the bill became due, I do not know how to give the plaintiff the benefit of his contract in this case. I thought it possible that cases might have been found on the interpretation of such a guaranty, in the distribution of bankrupt's effects in the Court of Chancery; none such, however, have been mentioned. In the case of *Warrington* v. *Furbor*, 8 East, 245, the expression "say at a credit of six months," seems to be used in a positive sense. That case also arose on a guaranty, and Lord Ellenborough, C. J., expressed the opinion of the Court that although the insolvency of the parties to a bill would not in general dispense with the necessity of presenting it for payment, yet where it was obvious that it could not avail, the same strictness of *proof was not necessary to charge a guarantee, and therefore [*212]

if the parties became bankrupts, and notoriously insolvent, it was the same as if they were dead. Now this case is decided on the ground that the pursuing the course of applying to the acceptor in that case, as here to the acceptors and drawer, would have been of no effect, because there the bankruptcy had already happened before the bill became due. Here the insolvency did not occur till long after the bill became due, and Houghton's bankruptcy was long after that. For anything then that appears, if this gentleman had demanded the money either of the acceptor or drawer, the bill might have been paid. That too was a guaranty of payment of the price of goods; this is for a bill, and the contract necessarily implies that the defendants will pay it if the plaintiffs do not, being called on in a proper manner: and, therefore, although that case has relaxed the strictness of the proof of presentment and notice, and seems to decide that it is not necessary to pursue the same strictness in order to charge a guarantee as to charge the drawer of the bill, yet it may still be inferred from it, that if the necessary steps are not taken to obtain payment from the parties who are liable on the bill, and solvent, the guarantee must be discharged; and therefore the rule for a nonsuit must be made

Absolute.

ENGLISH NOTES.

The neglect to present the bill to the agent would be a want of the "reasonable diligence" required in order to dispense with presentment under sect. 46 (2) of the Bills of Exchange Act 1882.

To dispense with presentment so as to enable the holder to charge the drawer it is not enough that the acceptor has before the bill became due informed the drawer that he would be unable to pay it. *Baker* v. *Birch* (1811), 3 Camp. 107, 13 R. R. 767; or that the acceptor is insolvent, *Esdaile* v. *Sowerby* (1809), *per* Lord Ellenborough, 11 East, 117, 10 R. R. 442; and as to promissory notes, *Bowes* v. *Howe* (Ex. Ch. 1813), 5 Taunt. 30, 14 R. R. 700; *Sands* v. *Clarke* (1849), 8 C. B. 751, 19 L. J. C. P. 84, 14 Jur. 352.

On the other hand where a promissory note was made "payable at Guildford," and was presented at two banks there,— the defendant (the maker) having no residence at Guildford, — the presentment was held sufficient. *Hardy* v. *Woodroofe* (1818), 2 Stark. 319.

AMERICAN NOTES.

Principal case cited, 1 Daniel on Negotiable Instruments, § 590, under name of *Phillips* v. *Astberg*.

No. 33. — WALTON *v.* MASCALL.

(1844.)

RULE.

It is the duty of the maker of a promissory note, as well as of the acceptor of a bill, to find out the holder and pay him the amount when the note becomes due; and a guarantor promising to pay the debt if the note is not duly honoured and paid is not discharged by reason of the note not being presented for payment.

Walton v. Mascall.

13 M. & W. 452–459 (s. c. 14 L. J. Ex. 54–57).

Assumpsit. — The declaration stated, that, before and at [452] the time of the making of the promise of the defendant thereinafter mentioned, one J. Johnson was indebted to the plaintiff in a large sum of money, to wit, £17 11*s.*, and thereupon theretofore, to wit, on the 14th day of August, 1843, in consideration that the plaintiff, at the request of the defendant, would, for and on account of the said sum of £17 11*s.*, so due and owing from the said J. Johnson as aforesaid, accept and receive of and from the said J. Johnson and one J. G. Elphick, the joint and separate promissory note in writing of the said J. Johnson and the said J. G. Elphick, bearing date the day and year aforesaid, whereby the said J. Johnson and J. G. Elphick jointly and separately promised the plaintiff, six months after the date thereof, to pay to him the plaintiff, or his order, the sum of £17 11*s.*, and would thereby give time to the said J. Johnson for the payment of the said debt of £17 11*s.* until the said promissory note should become due and payable, according to the tenor and effect thereof; he the defendant did then guarantee and promise the plaintiff to pay the said sum of £17 11*s.* to the plaintiff, if the said promissory note for that amount was not duly honoured and paid by *the [*453] said J. Johnson and J. G. Elphick, or either of them, when the same should become due and payable according to the tenor and effect thereof. The declaration then averred, that the plaintiff, confiding in the said promise of the defendant, did then accept

No. 33. — Walton v. Mascall, 13 M. & W. 453, 454.

and receive the said promissory note of and from the said J. Johnson and J. G. Elphick, for and on account of the said sum of £17 11*s.*, so due to him from the said J. Johnson as aforesaid, and did give time to the said J. Johnson for payment thereof, from thence until hitherto; nevertheless, although the said promissory note afterwards, and before the commencement of this suit, to wit, on the 17th day of February, 1844, became due and payable according to the tenor and effect thereof, and the said J. Johnson and J. G. Elphick were then, to wit, on the day and year last aforesaid, requested by the plaintiff so to do, yet the said J. Johnson and J. G. Elphick have not, nor has either of them, paid the said sum of £17 11*s.* in the said note specified, or any part thereof, to the plaintiff, and the said note hath been from thence hitherto, and still is, in the hands of the plaintiff over-due and unpaid; of all which premises the defendant then, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the said sum of £17 11*s.*, but the defendant hath not paid the same, or any part thereof.

Plea, that the plaintiff did not request the said J. Johnson and J. G. Elphick *modo et formâ:* concluding to the country.

General demurrer, and joinder.

The plaintiff's points marked for argument were, that the plea is no answer in law, for that it was not necessary in law to make any request to the said J. Johnson and J. G. Elphick for the payment of the amount of the said note; and that, as makers of the said note, they were liable and bound to pay the same without any request; and that the plea tends to raise an immaterial issue.

[*454] *The defendant gave notice of the following objections to the declaration: That the defendant was only to be liable if the note was not duly honoured and paid, — an expression which implies that the holder was to present the note, and no presentment is averred. That the request ought to have been made by the holder, and when the note was due; neither of which facts is averred. That the plaintiff was only to give time "thereby," (*i. e.* by taking the note) until the note became due, and he does not state that he gave time by taking the note, and he does by the word "hitherto" aver that he gave time for too long a period.

Knowles, in support of the demurrer. — The decision in *Hitchcock* v. *Humfrey,* 5 Scott, N. R. 540; 5 Man. & Gr. 559; 12

L. J. C. P. 235, is expressly in point to show that this plea is bad in substance. There the defendant guaranteed the payment of goods supplied to his son, in consideration of the plaintiff's extending the credit already given to the son, and agreeing to draw upon him at three months. To an action on this guaranty, for the amount of a bill of exchange dishonoured by the defendant's son, the defendant pleaded, that the bill was not duly presented for payment, and that the defendant had no notice of its non-payment; and the Court gave judgment for the plaintiff, notwithstanding a verdict for the defendant on these issues. TINDAL, C. J., there says: "The question turns upon the single point, whether a person who guarantees the payment of a bill, drawn by the vendor of goods on the vendee for their price, puts himself in the same situation as the drawer of the bill; because, if so, then by the law merchant he is entitled to insist that the bill should be duly presented to the acceptor, and that he should have notice of its dishonour. But I find no case by which a party so guaranteeing is put upon that footing. On the *contrary, *Warrington* v. *Furbor*, 8 East, 242, and *Swinyard* v. *Bowes*, 5 M. & S. 62; 17 R. R. 274, show the true distinction between the case of a drawer and that of a party giving such guarantee. The latter merely undertakes that the acceptor shall pay the bill; and he can only have a right to insist on notice of dishonour, when some damage would result to him from the want of it." He was then stopped by the Court, who called upon — [*455]

Martin to support the plea. First, the averment of request is a material and traversable averment. The liability of a guarantor has always been construed strictly. *Hitchcock* v. *Humfrey* is not an authority against the defendant. It is not contended that a guarantor of the payment of a bill of exchange or promissory note is in the same position as an indorser, whose liability is governed by the law merchant, and does not arise until after due presentment, and notice of dishonour. But the liability of the guarantor does not arise until there has been an application for payment of the bill or note; the very nature of the instrument requires it, and such is the universal practice. This note is payable to order, and there is no allegation that it was in the hands of the plaintiff when it became due. The contract of the defendant by this guaranty, as set out, is that the note shall be presented for payment in the ordinary way. Supposing the note to have been indorsed away by the plaintiff, can

it be said that the defendant is bound to search out the holder? [PARKE, B. Your argument is, that the word "honoured" implies something more than payment.] *Lewis* v. *Gompertz*, 6 M. & W. 399; 9 L. J. Ex. 182, shows that the word "dishonoured" has a technical meaning, and signifies something more than mere non-payment; that it imports also a due presentment for payment. [PARKE, B. Yes, as against the drawer or indorser; there is no dishonour as against him till the bill has been presented.] If [*456] the term "dishonour" has a * technical meaning as against a third party to the bill, so must it also as against a third party collaterally liable as a guarantor for payment of the bill. The contracting party fixes the time when, and the consideration on which, he is to become responsible, viz., if the note be not duly honoured and paid when due. [PARKE, B. "Duly honoured" means no more than duly paid when due. "Honouring" means payment at maturity.]

Secondly, the declaration is bad for want of an averment that the note was presented for payment. Until then, it could not be said to have been dishonoured. A person whose debt is secured by a bill or note stands in a different situation from creditors holding other securities. *Hansard* v. *Robinson*, 7 B. & Cr. 90; 9 D. & R. 860; 5 L. J. K. B. 242. If the bill or note be lost, the party cannot recover; but in the case of a lost I. O. U. the case is otherwise. Again, on payment, the bill or note must be delivered up to the party paying. But, further, the consideration here stated is, not that the plaintiff would give time, but that he would accept a promissory note for the debt, and thereby give time; and the declaration is therefore defective for not averring that the plaintiff gave time by taking the note, *i. e.*, until the note became due. The allegation is, that he gave time "from thence until hitherto."

POLLOCK, C. B. I am of opinion that the plaintiff is entitled to the judgment of the Court. With respect to the last objection, the declaration shows expressly, not only that the plaintiff did give time by receiving the note, but that he took it under circumstances which compelled him to give time. The case of *Kearslake* v. *Morgan*, 5 T. R. 513, establishes that a creditor who receives a negotiable instrument "for and on account of" his debt is taken to have received it in present satisfaction, and the receipt of it oper- [*457] ates as a suspension of the remedy upon the debt. As * to the other question, it turns a good deal upon what the parties are

to be taken to have meant by the words "duly honoured and paid,' and it seems to me that those words, if they be anything more than mere tautology, must mean, honoured by being paid on the day when the note became due, or paid at any time afterwards. I cannot help thinking that the word "honoured" meant that the note should be presented at any time, and, if paid at any time, then the defendant should be discharged from liability. The real question we have to decide is, whether the averment of a request to pay has a different meaning in a declaration against the maker of a note, and in a declaration against a guarantor for the maker. It seems to me that it means the same thing in both cases; it would lead to much inconvenience to hold the contrary. Now, against the maker of the note, that allegation would be mere form; it must be sufficient to say that he had not paid the sum of money in the note specified according to the tenor and effect thereof. And if that would be sufficient as against him, it must be equally so against the guarantor. The real contract is, that the makers of the note shall pay it according to its tenor and effect; and it is clear that they are bound to find out the holder and pay him the amount, when the note becomes due. It appears to me, therefore, that a presentment and request are immaterial; and that our judgment must be for the plaintiff.

Parke, B. I am of the same opinion. The first question which arises in this case is as to the validity of the plea. The declaration is on a guaranty, which states that, in consideration that the plaintiff would receive the promissory note of two persons therein mentioned, and thereby give time for the payment of a debt due from one of those persons, the defendant promised to pay the plaintiff the amount of the debt, if the note were not "duly honoured *and paid." The declaration then avers, that, [*458] before the commencement of the suit, the note became due and payable according to its tenor and effect, and that the makers, although requested so to do, have not paid it, of which the defendant had notice. The plea traverses the allegation of the request to pay; and to that there is a general demurrer. Now, it is clear that a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due. It is clear, therefore, that the defendant was bound to pay the

amount of the promissory note when it had become due and was dishonoured, unless there was some condition precedent to be performed by the plaintiff, which has not been performed. It is argued, that this condition precedent is that the note shall be presented for payment when due. But it seems to me that the words "duly honoured and paid" are merely tautologous, and mean simply that the note shall be paid when it becomes due. What I am reported to have said in the case of *Lewis* v. *Gompertz*, when taken in connexion with the facts of that case, I hold to be perfectly correct. There can be no doubt that a mercantile man, reading the notice of dishonour which was given in that case, would necessarily infer that the bill had been duly presented for payment when it became due. But no request or presentment is necessary to charge the acceptor of a bill or the maker of a note; he is bound to pay it at maturity, and to find out the holder for that purpose. Upon this contract of guaranty, therefore, it seems to me that the word "honoured" means no more than the words "duly paid," and that, inasmuch as this note has not been paid, the defendant is chargeable. With respect to the other point, the giving of a negotiable security for and on account of a debt operates *prima facie* to suspend [*459] payment * of the debt until it becomes due. I think the declaration is perfectly sufficient, and that the plaintiff is entitled to judgment.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

ENGLISH NOTES.

See Bills of Exchange Act 1882, section 52.

The rule is merely a particular application of the common-law principle that the debtor is bound to seek out his creditor and pay him. Chalmers, 4th ed. p. 176. See *Cranley* v. *Hillary* (1813). 2 M. & S. 120; *per* DAMPIER, J., citing LITTLETON (sect. 340), at p. 122.

AMERICAN NOTES.

This question is somewhat mooted here. The English rule is approved in *Brown* v. *Curtiss*, 2 New York, 228; *Allen* v. *Rightmere*, 20 Johnson (New York), 365; 11 Am. Dec. 288; *Heaton* v. *Hulbert*, 3 Scammon (Illinois), 490; *Wright* v. *Dyer*, 48 Missouri, 526; *Roberts* v. *Hawkins*, 70 Michigan, 566; *Hungerford* v. *O'Brien*, 37 Minnesota, 306; *Clay* v. *Edgerton*, 10 Ohio State, 553; 2 Am. Rep. 122; *Breed* v. *Hillhouse*, 7 Connecticut, 523; *Cowles* v. *Peck*, 55 Connecticut, 251; 3 Am. St. Rep. 11; *Read* v. *Cutts*, 7 Greenleaf (Maine), 126; 22 Am. Dec. 184; *Donley* v. *Camp*, 22 Alabama, 659; 58 Am. Dec. 274;

No. 33. — Walton v. Mascall. — Notes.

Baker v. *Kelly*, 41 Mississippi, 696; 93 Am. Dec. 274; *Taylor* v. *Ross*, 3 Yerger (Tennessee), 330; *Huff* v. *Slife*, 25 Nebraska, 448; 13 Am. St. Rep. 497; *Peck* v. *Frink*, 10 Iowa, 193; 74 Am. Dec. 384; *Weiler* v. *Henarie*, 15 Oregon, 28; *Taussig* v. *Reid*, 145 Illinois, 488; 36 Am. St. Rep. 504; *Kepley* v. *Carter*, 49 Kansas, 72.

The ground of these decisions is well expressed in *Brown* v. *Curtiss*, *supra*, by Bronson, J.: "The undertaking of the defendant was not conditional like that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the defendant should give notice of the non-payment; nor that he should sue the maker, nor use any diligence to get the money from him." (Disapproving Maine, Massachusetts, and Pennsylvania cases.) "With us proceedings are only necessary where there is a guaranty of collection." Selden, J., said: "No condition requiring notice of non-payment is inserted in the contract, nor is any inferred by any rule of law. The guarantor is bound to ascertain for himself whether his contract has been performed, and can easily obtain the requisite information from the party for whose conduct he has assumed the responsibility. If he fails to do that, there is no principle which would authorize him to inflict upon another the consequences of his own neglect." (Citing English cases.) "The English rule has been adopted, and I believe uniformly sustained in this State."

The contrary doctrine has been held in *Douglass* v. *Reynolds*, 7 Peters (United States Sup. Ct.), 126; 12 ibid. 497; *Oxford Bank* v. *Haynes*, 8 Pickering (Massachusetts), 423; 19 Am. Dec. 334; *Gamage* v. *Hutchins*, 23 Maine, 565; *Gibbs* v. *Cannon*, 9 Sergeant & Rawle (Pennsylvania), 202; *Newton Wagon Co.* v. *Diers*, 10 Nebraska, 285; *Second Nat. Bank* v. *Gaylord*, 34 Iowa, 248 (but the guarantor must show injury); *Riggs* v. *Waldo*, 2 California, 485; 56 Am. Dec. 356. In *Marberger* v. *Pott*, 16 Pennsylvania State, 9; 55 Am. Dec. 479, it was held that notice of non-payment was not due to one who became "security" on a note.

The basis of this doctrine is stated by Story, J., in *Douglass* v. *Reynolds*: "By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him and a failure upon his part to perform his engagements are indispensable to constitute a *casus fœderis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose, but have a right to insist that the risk of their responsibility shall be fixed and determined within a reasonable time after the debt has become due." Mr. Daniel approves this doctrine. The principal case is cited in Bigelow on Bills and Notes, pp. 139, 284. That author says: "At most it is only held that if he was prejudiced by failure of demand and notice, he is discharged. And the strong tendency of later authorities is to hold him without notice at all."

No. 34. — CHAPMAN *v.* KEANE.
(1835.)

RULE.

THE holder of a bill is entitled to avail himself of notice of dishonour given by any party to the bill.

Chapman v. Keane.

3 Ad. & Ell. 193–198 (s. c. 4 N. & M. 607).

[193] Assumpsit by indorsee against drawer of a bill of exchange averring, in the usual form, presentment to the drawee, non-payment by him, and notice to the defendant. Plea that the defendant had not due notice of non-payment by the drawee, tendering issue thereupon. Joinder. On the trial before TINDAL, C. J., at the Guildford Summer assizes, 1834, it appeared that the plaintiff had indorsed the bill, before it was due, to one Wiltshire, who left it with the plaintiff's clerk in order that it might be presented at maturity to the drawee. It was dishonoured upon presentment, whereupon the plaintiff's clerk gave notice to the defendant; the notice was regular in all respects, except that the clerk gave it in the name of the plaintiff, the indorsee, and not of Wiltshire. The plaintiff afterwards took up the bill from Wiltshire. It was objected that notice ought to have been given by the holder of the bill, whereas the holder, at the time of the notice, was Wiltshire. His Lordship, being of this opinion, nonsuited the plaintiff. In Michaelmas term last, Law obtained a rule to show cause [*194] why the nonsuit should * not be set aside, and a verdict be entered for the plaintiff.

Thesiger and Platt showed cause (May 6)[1] In *Tindal* v. *Brown*, 1 T. R. 167; 2 T. R. 186; 1 R. R. 171, it was held, that notice of dishonour must be given by the actual holder; and the reason is, that the party to whom the notice is given ought to know where the bill is, that he may take it up; and he is entitled to warning that the holder looks to him. Lord ELDON laid down the same rule in *Ex parte Barclay*, 7 Ves. 597. The decisions in *Hartley* v. *Case*, 4 B. & C. 339, and *Solarte* v. *Palmer*, 7 Bing. 530, which establish that information of the fact of dishonour must be given in the notice, show the importance of the rule that the party, in

[1] Before Lord DENMAN, C. J., LITTLEDALE, PATTESON, and COLERIDGE, JJ.

whose hands the bill was when dishonoured, should be the party to give the notice. In *Stewart* v. *Kennett*, 2 Camp. 177; 11 R. R. 690, Lord ELLENBOROUGH ruled to that effect. His words are, "The notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact." It is true that, in *Rosher* v. *Kieran*, 4 Camp. 87, it was held that notice by the acceptor to the drawer was enough; and, in *Jameson* v. *Swinton*, 2 Camp. 373, and *Wilson* v. *Swabey*, 1 Stark. 34, it was ruled, at *Nisi Prius*, that notice by any party to a bill was sufficient; but it appears that no reference was made, at the time of these decisions, to the earlier authorities. In *Gunson* v. *Metz*, 1 B. & C. 193, the defendant was not proved to have had any notice, except from a *party not [*195] then holding, and he was considered nevertheless to be liable: but there the defect was supplied by proof of an agreement on the part of the defendant, which amounted to an admission of his liability, and was considered evidence of due notice having been given. If the notice here was good in favour of the plaintiff, Wiltshire, on the same principle, may avail himself of it, and sue upon the same bill. A party is not liable to be sued till he has had the opportunity of paying; and, for this purpose, he ought to have notice from the party to whom he is to pay. It may be observed, that in *Jameson* v. *Swinton*, the defendant, as LAWRENCE, J., puts it, was enabled to take up the bill if he pleased. So in *Rosher* v. *Kieran*, the notice stated where the bill was.

Adolphus, *contrà*. The decisions are certainly inconsistent; and it will be necessary for the Court to elect between the two doctrines which have been laid down. *Stewart* v. *Kennett*, however, does not make against the plaintiff; for there the notice was given by a person not connected with any party to the bill; and all that is contended for by the present plaintiff is, that a notice by any party to the bill is sufficient. And this is the principle laid down in *Jameson* v. *Swinton*, and *Wilson* v. *Swabey*. The object of the notice may be considered to be, that the party receiving it may withdraw his effects from the hands of the party who has refused payment. In Chitty on Bills[1] the doctrine, that the notice imports that the holder intends to call *upon the party re- [*196] ceiving notice, is mentioned; but the author afterwards says (p. 527), "However, according to the more recent decisions, it is not

[1] Page 526 (8th ed. 1833).

absolutely necessary that the notice should come from the person who holds the bill when it has been dishonoured, and it suffices if it be given after the bill was dishonoured, by any person who is a party to the bill, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement; and such notice will, in general, enure to the benefit of all the antecedent parties, and render a further notice from any of those parties unnecessary, because it makes no difference who gives the information, since the object of the notice is, that the parties may have recourse to the acceptor:" and *Shaw* v. *Croft* is cited from a MS. note. [Lord DENMAN, C. J. Mr. Justice Bayley says (Bayley on Bills, ch. vii. sec. 2, p. 255, 5th ed. 1830), that it is "prudent in each party who receives a notice, to give immediate notice to those parties against whom he may have right to claim; for the holder may have omitted notice to some of them."] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

On the trial of this action by the indorsee against the drawer of a bill of exchange, the LORD CHIEF JUSTICE of the Common Pleas directed a nonsuit, for want of due notice of dishonour. The bill had been indorsed by the plaintiff, by the desire of Wiltshire, who had discounted it, and left it in the hands of the plaintiff's [*197] clerk, with instructions to obtain payment, or give *notice of dishonour. He did give notice to the defendant, but in the name of the plaintiff, not in that of Wiltshire, the then holder, who had deposited the bill with him.

The objection to the plaintiff's recovery was founded on the case of *Tindal* v. *Brown*, 1 T. R. 167; 2 T. R. 186; 1 R. R. 171, in which all the Judges of this Court, except Lord MANSFIELD, considered a notice given by one who was not the holder as no notice, on the ground that the drawer was not thereby apprised of the holder's intention to look to him for payment; and this case was distinctly recognized, and its principle adopted, by Lord ELDON, in *Ex parte Barclay*, 7 Ves. 597.

Notwithstanding these high authorities, it is clear, from *Jameson* v. *Swinton*, *Wilson* v. *Swabey*, and also from the learned treatises on bills of exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice

given in due time by any party to it. In the *Nisi Prius* cases just referred to, no express allusion was made to *Tindal* v. *Brown*, or *Ex parte Barclay*, but we can hardly conceive that they were not present to the recollection of Lord ELLENBOROUGH and Mr. Justice LAWRENCE, or the counsel engaged. These learned judges, indeed, decided them at *Nisi Prius*, but without question. We are now compelled to determine whether the case of *Tindal* v. *Brown*, as to this point, be good law. We think that it is not. If it were the holder might secure his own right against his immediate *indorser by regular notice; but the latter, and every [*198] other party to the bill, would be deprived of all remedy against anterior indorsers and the drawer, unless each of those parties should in succession take up the bill immediately on receiving notice of dishonour, a supposition which cannot be reasonably made. We may add that this point was not necessary for the decision of the case, as this Court, including Lord MANSFIELD, granted a new trial on a different ground.

Rule absolute.

ENGLISH NOTES.

The rule is, in effect, embodied in sect. 49 (1), (3), and (4) of the Bills of Exchange Act 1882. The word "party" in the rule must be understood to be qualified so as to exclude a person whose name is on the bill, but who (by reason of having been discharged or otherwise) could not sue on the bill on paying it. *Harrison* v. *Ruscoe* (1846), *per* PARKE, B., 15 M. & W. 234, 236, 15 L. J. Ex. 110, 111. "According to the authorities," says CRESSWELL, J., in *Lysaght* v. *Bryant* (1850), 9 C. B. 46, 19 L. J. C. P. 160, 161, "a prior indorsee may give notice of dishonour to the drawer, which notice enures to the benefit of the holder, provided the holder was at that time in a position to sue the person who gave the notice."

AMERICAN NOTES.

The principal case is cited and approved by Daniel (2 Negotiable Instruments, §§ 987, 990). He fortifies the doctrine by *Stafford* v. *Yates*, 18 Johnson (New York), 327; *Bachellor* v. *Priest*, 12 Pickering (Massachusetts), 406; *Stanton* v. *Blossom*, 14 Massachusetts, 116; 7 Am. Dec. 198; *Bank of U. S.* v. *Goddard*, 5 Mason (United States Circ. Ct.), 366; *Triplett* v. *Hunt*, 3 Dana (Kentucky), 126; *Renshaw* v. *Triplett*, 23 Missouri, 213; *Whitman* v. *Farmers' Bank*, 8 Porter (Alabama), 258; *Marr* v. *Johnson*, 9 Yerger (Tennessee), 1 *Swayze* v. *Britton*, 17 Kansas, 627; *Brailsford* v. *Williams*, 15 Maryland, 150; 74 Am. Dec. 559 (citing the principal case).

No. 35. — Berridge v. Fitzgerald, 38 L. J. Q. B. 335. — Rule.

Parsons disapproves the doctrine; but Daniel observes: "But as matter of authority the doctrine seems now to be established, whatever its merit. And as any established rule of mercantile conduct is better than continuous shifting, we suppose the Courts will not be disposed to disturb it whether they find it necessary to adopt the idea of agency or otherwise. It rests upon usage, and is a principle of the law merchant, however unphilosophical it may seem." As the result to be attained is merely notice, it is difficult to understand why the notice may not come from any party to the transaction. The requisite knowledge is the same in any case.

Principal case cited, Bigelow on Bills and Notes, p. 279, reporting *Chanoine* v. *Fowler*, 3 Wendell (New York), 173, agreeing with the principal case.

No. 35. — BERRIDGE *v.* FITZGERALD.

(1869.)

No. 36. — STUDDY *v.* BEESTY & HIGGINS.

(C. A. 25 Jan. 1889.)

RULE.

It is essential to the cause of action by the holder against an indorser, or against the drawer of a bill of exchange, that notice of dishonour has been duly given, or that notice of dishonour had been waived or dispensed with.

Where notice of dishonour has been given at the place which the defendant has held out to be his place of business, that is sufficient.

But if he has given an address (not being that of an ascertainable place of business) by which the plaintiff has failed to find him; and an address at which he is to be found comes to the knowledge of the holder before action brought, notice of dishonour is not dispensed with.

Berridge v. Fitzgerald.

38 L. J. Q. B. 335-337 (s. c. L. R., 4 Q. B. 639; 10 B. & S. 668).

[335] Declaration against the defendant on a bill of exchange for £72 10*s.*, accepted by the Industrial Loan and Interest Company (Limited), and indorsed by the defendant.

Plea, amongst others, denial of notice of dishonour, and issue thereon.

No. 35. — Berridge v. Fitzgerald, 38 L. J. Q. B. 335, 336.

At the trial, before BLACKBURN, J., at the Middlesex Sittings after Michaelmas Term, 1868, it appeared that the Industrial Loan and Interest Company (Limited), was indebted to the plaintiffs for goods supplied to the company, and that the plaintiffs had threatened to bring an action to enforce payment, but ultimately agreed to give further time upon receipt of a bill of exchange for £72 10*s.*, drawn by them upon and accepted by the company, and indorsed by the defendant and a Mr. Johnstone, both of whom were directors of the company and in the habit of attending at its office, 20, Great George Street, Westminster. The bill was taken to the company's office, and there accepted by the manager on behalf of the company, indorsed by the defendant and his co-director, and delivered to the plaintiffs. The company shortly afterwards became insolvent, and the bill, when it became due, was dishonoured. A notice of dishonour was on the 27th of July sent to the defendant, directed 20, Great George Street, Westminster. It appeared that the plaintiffs were ignorant of the defendant's private residence, although the plaintiff Berridge had made inquiries respecting it from one of the directors and at the office of the Provident Union Company, which had had dealings with the insolvent company. The defendant at the time when the notice was sent to him at the office had ceased to attend there, and did not receive the notice till some time afterwards. A writ was, however, issued against the defendant, and his residence having been discovered to be at Petersham, in Surrey, the writ was served there on the 4th of August. It was objected that there had been no due notice of dishonour. A verdict was directed for the plaintiffs for £74, with leave for the defendant to move.

A rule having been obtained to set aside * the verdict and [* 336] enter a nonsuit or verdict for the defendant, on the ground that there was no notice of dishonour or circumstances to excuse it, —

Warton showed cause. The question is, whether the plaintiffs have used due diligence in finding out the place of residence of the defendant. *Rowe* v. *Tipper*, 13 C. B. 249; 22 L. J. C. P. 135. Now, it appears that inquiries were made in every quarter where the information was likely to be obtained. The case of *Beveridge* v. *Burgis*, 3 Camp. 262; 13 R. R. 798, shows that it is not enough to make the inquiries at the place where the bill is payable. And it must not be forgotten that the defendant was a director of the company. So that their office may be said to have been his place of business, or at any rate, supposed to be so.

Hodgson, in support of the rule. It cannot be said that there was anything like due diligence in searching for the defendant's residence. It may be that an inquiry at the office would not, by itself, have been sufficient, but it was a precaution which ought not to have been neglected. The company's office could not have been considered as the defendant's place of business, for he indorsed the bill in his personal capacity, and not on behalf of the company. The case of *In re the Leeds Banking Company, ex parte Prange* L. R., 1 Eq. 1 ; 35 L. J. Ch. 33, shows that without strong and satisfactory evidence that a person to whom notice is sent is the defendant's agent to receive it, the holder is not excused from personally communicating with the defendant.

Cockburn, C. J. I think that this rule should be discharged. There can be no doubt that the holder of a bill is bound to give due notice of its dishonour to the drawer or indorser. If the bill is not met when it falls due, the holder must find, or use due diligence to find the indorser against whom he proposes to bring his action, either at his place of business, if he is engaged in business, or, if not, at his place of residence. In the case in hand, the notice was not sent to the defendant's place of residence, but to the office of the company by whom the bill was accepted. Now, we have to consider whether this office was, in any sense, the place of business of the defendant, or whether he authorized the plaintiffs to treat it as his place of business, or the place where he might reasonably be expected to be found. It appears that the bill was indorsed by the defendant, who was a director of the Industrial Loan and Interest Company, and that the bill was handed to the plaintiffs in respect of a claim against the company. The plaintiffs insisted that two additional names should be put upon the bill, and the defendant indorsed it under an erroneous notion that he would not be liable in his private capacity. By indorsing the bill as director he, as it seems to me, authorized and warranted the plaintiffs in treating the indorsement as a transaction on the part of the company, and in thinking that the company's place of business would be the place where the defendant would be likely to be found, and his place of business with reference to this transaction. If it had been necessary to search for the defendant's place of residence, I should certainly have thought that the plaintiffs had not exercised due diligence in inquiring for it. But, under the circumstances, I think that the company's office was a proper place for the notice to be left at.

No. 35. — Berridge v. Fitzgerald, 38 L. J. Q. B. 336, 337.

BLACKBURN, J. I am of the same opinion. There can be no doubt about the rule of law, that the holder of a dishonoured bill of exchange is under the obligation of giving notice of its dishonour to the indorser, unless something has happened which according to the law excuses him from this liability. Now the holder would be excused if, after searching with due diligence, he was unable to find the indorser, and I agree with the LORD CHIEF JUSTICE that if the plaintiffs had only relied upon the fact that they did not know the private residence of the defendant, it would be very doubtful whether they could be considered to have exercised due diligence in seeking for it, and I should not like to support the verdict upon the supposition that they had. But then comes the question, whether this is a case where the indorser has held out a place of business as being his own, just as where a person drew a bill dating it generally * " London," *Clarke* v. *Sharpe*, 3 M. & W. [* 337] 166, and it was held that proof of a letter containing notice of the dishonour of the bill having been put into the post-office addressed to the drawer generally " London," was evidence of notice, on the ground that he must be taken to have said, " London is the place where I shall be found." In the same manner, the usage of trade and course of business have made a man's place of business for this purpose equal to his residence. It appears that the defendant resided at Petersham, in Surrey, where in all probability no one knew much about him. An action against the company was compromised, and the bill received at the company's office. It was there that the defendant put his name on the bill, the plaintiffs being utterly ignorant of anything concerning him, except that he was one of the indorsers. The question is, Have the plaintiffs fulfilled their duty as to sending notice of dishonour? It seems to me that the decision as to the address " London," is an authority for holding that it was enough to send the notice directed " 20, Great George Street." I wish to guard myself from saying that such an address would in every case be sufficient. I only wish my observations to apply to a case where the defendant as far as the bill was concerned was as it were domiciled at the address, and as it were said, " You may send a notice to me here." With this limitation, I think that what was done by the plaintiffs was sufficient, and that the rule must be discharged.

LUSH, J. I am of the same opinion. A man has sometimes different places of business. Now here, having regard to the fact

No. 36. — Studdy v. Beesty and Higgins, 60 Law Times, 647, 648.

that the defendant had attended at the office, I think that we may consider that he held it out as one of his places of business.

Rule discharged.

Studdy v. Beesty and Higgins.

60 Law Times, 647–649 (s. c. W. N. (1889), p. 14).

[647] This was an appeal by the plaintiff from the judgment of SMITH, J., at the trial of the action before him without a jury, in Middlesex.

The action was brought by the indorsee of a bill of exchange against the defendant Higgins, who was the drawer and indorser, and the defendant Beesty, who was the acceptor.

The bill in question was a three months bill for £60, drawn on the 4th August, 1887. On the 7th November, when the bill became due it was dishonoured. The only address that Higgins had given was Bucklersbury, which is a street in the city. Upon the bill being dishonoured the plaintiff's solicitor went to Bucklersbury and spent some time in searching for Higgins in order to give him notice of dishonour, but was unable to find him. Subsequently it came to the knowledge of the plaintiff that Higgins was living at Budge-row, and the writ in the action was served upon him there. Beesty became bankrupt, and was not served with the writ.

SMITH, J., gave judgment for the defendant Higgins, upon the ground that he had had no notice of dishonour.

The plaintiff appealed.

Lynden Bell for the plaintiff. By sect. 50, sub-sect. (2) of the Bills of Exchange Act 1882, "Notice of dishonour is dispensed with, — when, after the exercise of reasonable diligence, [* 648] notice as required by this Act cannot be given to * or does not reach the drawer or indorser sought to be charged." When this bill became due, and was dishonoured, it was our duty to exercise due diligence in serving notice of dishonour; but, if we exercise due diligence, the fact that we failed to serve the notice is immaterial. After the search for the defendant at Bucklersbury our right of action accrued, because we had exercised due diligence to serve notice of dishonour, and no subsequent negligence on our part could affect the right of action. [FRY, L. J. Is not sub-sect. (2) to be read, "When notice cannot be given to the drawer" before service of the writ? BOWEN, L. J. Surely "a reasonable time"

No. 36. — Studdy v. Beesty and Higgins, 60 Law Times, 648.

within sub-sect. (12) of sect. 49 must depend upon the circumstances of the case?] The Bills of Exchange Act does not alter the law, and, according to the decisions before that Act, the plaintiff would be excused from giving notice. In *Allen* v. *Edmundson*, 2 Ex. 719; 17 L. J. Ex. 293, PARKE, B., refers with approval to the decision in *Crosse* v. *Smith*, 1 M. & S. 545; 14 R. R. 529. He says: "In that case Lord ELLENBOROUGH laid down that the going to the counting-house during business hours and finding no one there to receive the notice was equivalent to a dispensation of notice, since, according to the usage of trade, a merchant who puts his name to a bill ought to be ready at his place of business to receive notice of the bill's dishonour. In fact he engages that he will, by himself or his servant, be there; and it is enough for the party who has to give intimation of dishonour to go to that place and be ready to deliver it. If the merchant be not there it is his own fault; the holder has done all that is required, and the not having found any party at the place of business to receive the notice is equivalent to a dispensation of it. Therefore, there is no doubt of the propriety of the decision of *Crosse* v. *Smith*." In *Crosse* v. *Smith*, Lord ELLENBOROUGH refers to a case of *Goldsmith* v. *Bland*,[1] where a clerk of the holder of the bill went to the counting-house of the indorser, found the counting-house shut up and no person there, saw a servant girl, who said nobody was in the way, and then returned without leaving any message. Lord ELDON told the jury that if they thought the indorser was bound to have somebody there the notice was regular. When Lord ELLENBOROUGH said, in *Crosse* v. *Smith*, that if a man goes to a merchant's counting-house during business hours and finds it shut up, that is equivalent to a dispensation of notice, he did not mean that notice was only temporarily dispensed with. He meant that from that time the duty to give notice was accomplished. No subsequent knowledge that the holder of the bill may obtain can revive that duty. He has to exercise due diligence to give the notice, and having exercised such diligence and been unable to give it he is excused from giving it once for all.

J. E. Palmer and Orr, for the defendant Higgins, were not called upon.

Lord ESHER, M. R. It seems to me that the plaintiff in this case did not fulfil the duty cast upon him as holder of the bill to

[1] Bayl. Bills, 6th ed., by G. M. Dowdeswell, 1849.

No. 36. — Studdy v. Beesty and Higgins, 60 Law Times, 648.

give notice of the fact of its having been dishonoured to the defendant. The law on the subject is quite clearly laid down in the old cases, and is summed up as follows in Byles on Bills (10th ed. p. 279): "The general rule is that notice must be given before action brought within a reasonable time after the dishonour." So that the first rule was that notice of dishonour was to be given before action brought. But that was not all. It must also be given within a reasonable time after the dishonour. Where the parties lived in the same town, and the notice was not sent by the first post on the day after the dishonour, the Court held that that was clearly not within a reasonable time, juries having repeatedly found that notice must be given on the day after the dishonour to be within a reasonable time. I think that the Bills of Exchange Act, 1882, has not altered, and has not assumed to alter the law in any respect. It has simply codified the law. By sect. 48 of that Act, "When a bill has been dishonoured by non-acceptance or by non-payment" — in the present case the bill has been dishonoured by non-payment — "notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged." That is the general rule, and it is obvious that the Legislature merely adopted the old rule on the subject as it is laid down in the passage that I have read from Byles on Bills: "The general rule is that notice must be given before action brought within a reasonable time after the dishonour." Then the Act goes on to say, in the following section (sect. 49): "Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules." And by sub-sect. (12) of that section, "The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless (*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill, (*b*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter." That is to say, that where the circumstances are the same as those in the cases in which the question of reasonable time has been settled, a reason-

able time is still to be what it was before the Act; where there are special circumstances, that is, where the circumstances are different from those of preceding cases, what is a reasonable time under those circumstances is a question of fact in each case. But in every case the general rule is to be borne in mind that the notice must be before action, and within a reasonable time after dishonour. Then by sect. 50: "(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence. (2) Notice of dishonour is dispensed with — (*a*) when, after the exercise of reasonable diligence, notice as required by this Act," that is, before action brought, "cannot be given to, or does not reach the drawer or indorser sought to be charged." *Primâ facie*, the notice must be given, not only before action brought, but within a reasonable time after the dishonour. * If the [*649] cause of delay arises from circumstances beyond the control of the party giving the notice, he is excused for not giving it within what in other circumstances is held to be a reasonable time. But if the cause of delay ceases to operate before action brought, the notice must then be given with reasonable diligence. The only circumstances in which notice of dishonour is dispensed with under sub-sect. (2), paragraph (*a*), is where, after the exercise of reasonable diligence, it cannot be given at any time before action brought. Now in this case the plaintiff did not give notice of dishonour before the issue of the writ. He had attempted to give notice at the time of the dishonour of the bill, but had been unable to find the defendant. That is not enough to excuse him, because he was in a position to have given notice before the issue of the writ. Having made the attempt to serve the notice, he did not take any further pains in the matter. It is said on his behalf that business could not be carried on if such continuous diligence in serving the notice was necessary. The answer to that argument is that that diligence has been required since the time of Lord ELLENBOROUGH, and business has nevertheless been carried on.

BOWEN, L. J. I am of the same opinion. We have to decide this question upon the construction of the statute, but I desire to point out that it depends upon the old law, which the statute merely codifies. Sect. 48 of the Bills of Exchange Act, 1882, pro-

No. 36. — Studdy v. Beesty and Higgins, 60 Law Times, 649.

vides that, "Notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged." What was the old law as to notice of dishonour? Turning to Byles on Bills (10th ed. p. 283), I find the law to be thus stated, "It lies on the plaintiff to show that notice was given in due time and before action brought." A plaintiff cannot, therefore, bring his action until notice of dishonour has been given. Then, going back to the Act, sect. 49, which is the section that explains what the notice must be, provides by sub-sect. (12) that "the notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter." Now under the old law, in an action upon a bill of exchange, it was necessary to allege one of two things. You might either allege that the defendant had due notice of the dishonour of the bill which was one thing; or you might allege that there had been something equivalent to a waiver or dispensation of notice, which was the other. The two things were quite different, and were pleaded quite differently. The case of *Allen* v. *Edmundson*, 2 Ex. 719; 17 L. J. Ex. 293, which was cited on behalf of the appellant, really decided only that that was a case of dispensation of notice, and should have been so pleaded. In giving judgment in that case PARKE, B., says that it is unnecessary to consider whether, if the plaintiff had gone the next day and delivered the notice, that would have been enough, because the point was not taken at the trial. He goes on to say, "Perhaps, if the plaintiff had gone the day after he saw the boy, and delivered a written notice, it would have been a question for the jury, whether he ought not to have left a notice the day before, when he found a person at the counting-house to receive messages. That would depend upon whether the person was a mere boy, or a clerk who kept the books. If he chose to consider the absence of the party from his counting-house as an excuse for delaying the notice, he might treat the notice on Monday as due notice, providing he had no immediate opportunity of serving a better notice. That would again leave the question open, whether, when he saw the boy, he might not have delivered a better notice. But if he chooses to rely on the attempt on the first day as an excuse for notice altogether, the pleadings ought to have stated it." That case is no authority for saying that, where delay arises from the person who has to give the notice not knowing where to give it, he is excused from giving it altogether. Under

those circumstances, the person who has to give the notice must not rest on his inability at the time to find the person to whom it is to be given. He can serve the notice when he does find out where to serve it. That is the old law. The statute only carries out the old law. By the statute notice of dishonour must be given, and must be given within a reasonable time after the dishonour. Then by sect. 50, sub-sect. (1), delay in giving notice is excused when the delay is caused by circumstances beyond the control of the party giving the notice, and not imputable to his default; but the section goes on to say that when the cause of delay ceases to operate the notice must be given with reasonable diligence. By sub-sect. (2), notice of dishonour is dispensed with, first, when after the exercise of reasonable diligence it cannot be given, or does not arrive; secondly, by waiver, express or implied. The class of cases relied on by the appellant are cases of dispensation of notice, where notice is excused altogether, because what has happened is equivalent to a waiver of notice. In this particular case, I am of opinion that notice could have been given before the issue of the writ, and that there was no waiver. I think that the statute is quite clear and quite in conformity with the old law.

FRY, L. J. I am of the same opinion. *Appeal dismissed.*

ENGLISH NOTES.

The rules embodied in these cases are now comprised in sections 48, 49, and 50 of the Bills of Exchange Act 1882, which, as shown by the judgments in the latter case, have not altered the law.

In *Bray* v. *Hadwen* (1816), 5 M. & S. 68, 17 R. R. 277, the indorsee of a bill payable in London deposited it with his bankers at Launceston, in Cornwall. They presented it in London on the due date the 14th July. By post on the 15th, the bill was returned with notice of its dishonour to the bankers at Launceston. The notice reached Launceston on Sunday 17th, and by a post which left on Monday 18th, but not by the earliest possible post, which left that day at 12 o'clock, the Launceston bankers sent notice to the plaintiff (the indorser), who immediately sent notice to the defendant, a prior indorser. The question was whether the notice given by the Launceston bankers was given in due time. The Court held that it was. In giving judgment Lord ELLENBOROUGH said: "It has been laid down, as a rule of practice, that each party, into whose hands a dishonoured bill may pass, should be allowed one entire day for the purpose of giving notice; a different rule would subject every party to the inconvenience of giving an account

of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it." This must be read along with the ruling of the same judge which is quite consistent, in *Smith* v. *Mullett* (1809), 2 Camp. 208, 11 R. R. 695, to the effect that where both parties reside in London, the notice, if posted on the following day to that on which notice was received, must be posted in time to reach the party on the same day. See now Bills of Exchange Act 1882, s. 49 (12) (*a*) and (*b*), which adopts the effect of these cases.

The rules which have been laid down for notice as between parties in England, have been settled on a consideration of the postal arrangements of this country. Where these particular rules are inapplicable, the question of principle is whether such notice has been given as can be reasonably required under the circumstances. And where a bill payable in a foreign country has been indorsed in England by X. to Y., and afterwards indorsed by Y. to a person in the foreign country, the question whether the holder has given due notice of dishonour to Y. so as to charge him depends upon the requirements of the law of the foreign country. And if there has been no such omission as to exonerate Y., there is no exoneration of X. For X. is a mere surety for Y., so that if Y. is exonerated X. is not liable. But where Y. is not exonerated no reason exists why X. should not be called upon, so long as he has timely notice of Y.'s default. *Hirschfeld* v. *Smith* (1866), L. R., 1 C. P. 340, 35 L. J. C. P. 177, 14 L. T. 886; *Horne* v. *Rouquette* (C. A. 1878), 3 Q. B. D. 514, 39 L. T. 219. The judgment of Brett, L. J., in the latter case contains a full exposition of the duties of successive indorsers according to the law of England, in regard to notice.

Where a party is discharged from his liability to a bill by reason of the holder's omission to give notice of dishonour, he is also discharged from liability on the debt or other consideration for which the bill was given. Chalmers, 4th ed. p. 131; *Bridges* v. *Berry* (1810), 3 Taunt. 131, 12 R. R. 618. So, *à fortiori*, if he has omitted his duty as to presentment for payment. *Soward* v. *Palmer* (1818), 8 Taunt. 277 ; *Peacock* v. *Purssell* (1863), 14 C. B. N. S. 728, 32 L. J. C. P. 266, 8 L. T. 636, No. 40, p. 526, *post*.

As instances of cases where notice of dishonour has been waived may be cited *Woods* v. *Dean* (1862), 3 B. & S. 101, 32 L. J. Q. B. 1, 7 L. T. 561, and *Cordery* v. *Colville* (1863), 14 C. B. N. S. 374, 32 L. J. C. P. 210, 8 L. T. 245. In the former case, Cockburn, C. J., says (32 L. J. Q. B. 3): "If with a knowledge of law and fact an indorser of a bill admits his liability, that is evidence that he has waived his right to notice, or it may be taken as an admission of a previous waiver." In the latter case, Byles, J., says (32 L. J. C. P. 211): "A promise to

pay may operate either as evidence of notice of dishonour, or as a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired (inasmuch as notice may be given at any time within the limit prescribed by law), a promise to pay is always evidence from which a jury may infer due notice. But even when the other evidence is conclusive to show that due notice was not given, or when a jury refuses to draw the inference that it was given, yet a promise to pay made within the time for giving notice is a dispensing with notice, and made after that time is a waiver of notice. . . . The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour."

The effect of a waiver of notice by an indorser is to make the bill his own, and the prior indorsers are discharged by the omission just as if there had been no such waiver. *Turner* v. *Leech* (1821), 4 B. & Ald. 451, No. 39, p. 523, *post*.

AMERICAN NOTES.

The first principal case is cited in 2 Daniel's Negotiable Instruments, § 1016.

In *Bartlett* v. *Isbell*, 31 Connecticut, 296; 83 Am. Dec. 146, it was held that notice is sufficient if mailed to the indorser at the place where the collecting agent believes he lives, although he does not live there, and the holder knows his residence, but fails to communicate it to the agent.

Omission to serve notice is only excused when the holder is after due diligence ignorant of the indorser's address. *Beale* v. *Parrish*, 20 New York, 407; 75 Am. Dec. 414. The holder cannot rely upon the fact that the indorser's address is given in the directory of the place of the holder's residence. *Bacon* v. *Hanna*, 137 New York, 379; 20 Lawyers' Rep. Annotated, 495.

Section IV. — *Discharge.*

No. 37. — RALLI *v.* DENNISTOUN.

(1851.)

RULE.

Where the signature of a person liable on a bill is intentionally cancelled by the holder, the liability of that person and of all persons who would have had a right of recourse against him is discharged.

If, according to the law of the country where the bill is drawn and negotiated, and paid when due by the drawer

(for whose accommodation it was made), payment of a smaller sum accepted in satisfaction is a discharge of the liability, it is a good discharge everywhere.

Ralli v. Dennistoun.

6 Exch 483–497 (s. c. 20 L. J. Ex. 278–282).

[483] Assumpsit on six foreign bills of exchange. The defendant paid money into Court on the first count, which was accepted by the plaintiff. The second count alleged, that one A. Shiras, at Trieste, made his bill of exchange in two parts, directed to the defendants; and by the first directed them to pay £835, at three months, to drawer's order, second unpaid; and by the second, directed, etc. (first not paid), setting out the second; that the defendants accepted the said bill; that Shiras indorsed the said second part to Luzzatto & Co., and Luzzatto & Co. to the plaintiff. The five other counts were on similar bills, but for different amounts. The defendants, by certain of their pleas

[* 484] * denied the drawing, the indorsement, and the acceptance, of these bills.

There were other pleas, the effect of which will be found stated in the judgment.

[487] The thirty-sixth plea, which was to the fifth count, stated, that before the bill therein mentioned became due according to its tenor, and whilst the persons called the Reunione Adriatica continued the holders of the second part, and before the indorsement by them to the plaintiff, Shiras, at Trieste, according to the laws there in force, assigned to them a certain debt, and indorsed and delivered to them a certain other bill of exchange; and after the bill was due, and while the Reunione Adriatica were holders thereof, Shiras procured one Schaeffer to pay cer-

[* 488] tain * money to them, and Shiras assigned a certain mortgage security to them, and accepted a certain other bill drawn on him by them, and delivered it to them; and the defendants say, that the assignment of the said debt, and payment of the said money, and assignment of the said mortgage, and acceptance and delivery of the said bill, were given at Trieste, according to the law there, in full satisfaction and discharge of the bill in the fifth count mentioned; and that the same was accepted by the said Reunione Adriatica at Trieste, according to the law there

whilst they were the holders of the said bill after it was due and payable, and before the said indorsement by them, in such full satisfaction and discharge; and that the indorsement to Luzzatto & Co., and subsequent indorsement, were made after the bill was due; and that the acceptance was an accommodation one, without value or consideration from Shiras; and that the value and amount of the said debt, bills, and securities, exceeded the amount of money on the bill in the fifth count mentioned, and all monies at the time of such satisfaction due thereon. — Verification.

The thirty-seventh, thirty-eighth, and thirty-ninth pleas, to the same count, raised almost the same defence.

The plaintiff joined issue upon the traverses, and replied *de injuriâ* to the special pleas. Issue thereon.

At the trial, before POLLOCK, C. B., at the London Sittings after Hilary Term, 1847, a verdict was entered for the plaintiff upon certain issues, and for the defendant on the others, subject to the opinion of the Court upon a case, which in substance is as follows:

In the year 1841 Alexander Shiras, the drawer of the bills in question, carried on business as a merchant at Trieste, partly on his own account, and partly as the agent and correspondent of Messrs. * Dennistoun, of Liverpool and Glasgow, the [* 489] defendants, with whom he was engaged in large mercantile transactions; and he was in the habit of making remittances to them from time to time, and of drawing upon them for large amounts. The bills in the declaration were part of a series of bills which Shiras drew upon the defendants at the latter end of 1841. At the time of drawing these bills the defendants were in advance to Shiras to the amount of upwards of £30,000, and had no funds in their hands to meet the said bills in the declaration mentioned. The first parts of this series of bills were remitted by the drawer to the defendants for acceptance, with directions to send them to Messrs. Glyn, Halifax, & Co., in London, the defendants' bankers, to be held by them at the disposition of the holders of the seconds. The seconds were ordinarily negotiating at Trieste, Paris, or elsewhere; and for the greater facility of negotiation and convenience of the holders, they were addressed at the foot to Messrs. Dennistoun, payable in London — firsts with Messrs. Glyn, Halifax, & Co. The bills, purporting to be the second parts, upon which the action was brought, were negotiated by Shiras; one of them with the agent of Messrs. Arnstein & Eskeles, bankers at Vienna, three with

No. 37. — Ralli v. Dennistoun, 6 Exch. 489, 490.

Messrs. Luzzatto, merchants at Trieste, and another with an Insurance Company at Trieste, called the Reunione Adriatica di Sicurita. Each of these bills was indorsed to the above parties by Shiras for value received by him. At the time of the negotiation of them, Shiras represented to each of the above parties, that the first parts had been already accepted by the defendants; and each of the said parties took the above bills as seconds of bills, of which the firsts had been remitted to England for acceptance. The defendants, by letter of the 3d and 8th of December, addressed to Shiras, announced that they had honoured all the drafts that came to hand, and that they should honour the others which might be [* 490] presented; and a memorandum of acceptance * was written across them, and they were transmitted to Glyn & Co. to be held at the disposition of the holders of the seconds. The seconds in some of the counts mentioned were indorsed by Shiras on the 21st of December, in others on the 22nd and 23rd of December, 1841, to the intermediate indorsees mentioned in those counts, who had no knowledge of the correspondence, beyond the representation of Shiras, that the first parts of the bills had been accepted; and the bills were afterwards indorsed as mentioned in the declaration. At the time of remitting the firsts to the defendants, Shiras had remitted the seconds to Foulds & Co., of Paris, indorsed to them for the purpose of discount. These seconds were returned by Foulds & Co., who did not discount them; some were received by Shiras on the 8th of December, and some on the 13th of December, and were cancelled by Shiras before he remitted the seconds, which were so indorsed as before mentioned, to the plaintiff. On the 4th of December, Shiras wrote the following letters, one to Messrs. Glyn & Co., the other to the defendants; that to Messrs. Glyn was as follows: —

"Trieste, Dec. 4, 1841.

Gentlemen, — I beg you will on receipt of this hand to Messrs. Dennistoun & Co., of Liverpool, all the firsts of exchange in your hands drawn by me on the said gentlemen, and handed by them to you to be held at the disposition of the seconds."

That to the defendants was as follows: —

"Trieste, Dec. 4, 1841.

"Since addressing you there has been no change in business. The parties to whom I sent seconds of my drafts to you on your

own order inform me that they will not negotiate more of them, and I have merely to request you will instruct Glyn & Co. to return all firsts drawn by me, which may remain uncalled for in the hands of the said bankers."

* On the day of the date of this letter or on the day pre- [* 491]
vious, Shiras received intelligence that Messrs. Foulds & Co. had refused acceptance of his bills upon them as after mentioned.

On the 7th of December, Shiras again addressed the defendants as follows: "Learning that the parties to whom I have indorsed several of my drafts on you were much committed with Rogers & Co., of Havre, and Bacquenne, of Bourdeaux, as a measure of protection, I wrote last post to Glyn & Co. to return you immediately all bills in their hands, which remained uncalled for. Knowing to-day that my fears were groundless, I addressed Messrs. Glyn & Co. to annul those instructions; and should they have returned you any of your acceptances, kindly replace them in their hands to be held at the disposition of the seconds."

Messrs. Glyn & Co. received the letter of Shiras on the 15th of December, and in pursuance of it on that day remitted to the defendants the bills in question. They were received by the defendants at Liverpool upon the 16th of December, and on the same day they received the above letter from Shiras, dated the 4th of December, 1841. On the same 16th of December, the defendants wrote to Messrs. Glyn & Co. acknowledging the receipt of the bills, and informing them of the cancellation. On the 18th of December they received Shiras's letter of the 7th of December, as above set out, and replied to it on the 18th, as follows: "We had this pleasure yesterday and have to-day received your favour of the 7th instant. As we stated on the 16th, the firsts of your drafts, which Glyn & Co. returned to us, were immediately cancelled, and it would hardly do therefore to reissue them in their present state; but we have to-day written to Glyn & Co. explaining this, and requesting them to refer the holders of the seconds to us when they are presented to them. In no instance, but that of Baring Brothers & Co., have the holders of seconds protested them, on presentation to Glyn & Co., and not * finding the [* 492]
firsts there, so that we hope no additional expense may be incurred from the cancelling of the firsts."]

It was proved at the trial by the plaintiff (subject to the objec-

tion by the defendants as to the relevancy of the evidence), that it is usual among merchants, drawers of bills, to substitute for seconds first drawn another part. For example, if seconds are sent for negotiation, and they come back to the drawer, and he does not wish the then indorsements to appear upon them, it is a common custom to destroy the original seconds and to substitute fresh sets of the name of thirds; and that often thirds, fourths, and fifths are issued. No evidence was given as applicable to the case where an acceptance has been cancelled by the drawer, with a view of putting an end to the transaction on the bill. In support of the pleas of payment (the 36th, 37th, &c.), the defendants proved payment by Shiras to the Adriatic Reunione Company, while they were the holders of the bill and before the indorsement by the company to Luzzato & Co., of certain sums of money, which, though less in the aggregate than the amount of the bill, were taken in full satisfaction of it. The defendants also proved, that by the law of Austria, which prevailed where the parties and the bill were, and where the payments took place, and which was in force at Trieste, that a debtor may be discharged by an agreement on the part of his creditor to accept less than the full amount of the debt; and that such agreement, though not under seal, cannot be disputed on the ground of inadequate consideration. It was found by the jury, that the directions in the two letters of Shiras of the 4th of December, 1841, were given by him for the purpose of the bills being cancelled by the defendants, and that the said firsts were sent to them for that purpose, and that the said seconds were destroyed by him for the purpose of cancelling the bills; and that the defendants in fact cancelled their acceptances as men-
[* 493] tioned in their letter * of the 16th of December; and further, that Shiras's indorsements of the said fresh bills purporting to be seconds was wrongful, and was made by him without the knowledge or consent of the defendants.

The case was argued last Hilary Term (January 17) by

Crowder for the plaintiff, who contended — First, that there had been a complete acceptance by the defendants of the bills drawn upon them by Shiras; that the bills were accepted by the defendant's letters of the 3d and 8th of December, 1841; and that the acceptance being complete, Shiras had no power to revoke it: *Pierson* v. *Dunlop*, Cowp. 571; *Mason* v. *Hunt*, Dougl. 284; *Clarke* v. *Cock*, 4 East, 57; *Wynne* v. *Raikes*, 5 East, 514; *Cox* v. *Troy*, 5 B. & Ald. 474.

Secondly, that no authority was given to the drawees to cancel their acceptances; that the letters of the 4th of December did not bear any such construction; but that Shiras merely directed the drawees to retain the bills in their hands for a time; and that the defendants' letter of the 18th supported this view.

Thirdly, that the destruction of the seconds returned by Foulds & Co. was not done with the intention of destroying the bills, but merely to enable Shiras to substitute other seconds in their place.

Fourthly, that the seconds so made, after the destruction of those so returned, gave a good title to the indorsees, and consequently to the plaintiff.

And lastly, that the pleas of payment (the thirty-sixth, and three following pleas) were not supported by the evidence. But PARKE, B., said that, inasmuch as it appeared that the accord and satisfaction was sufficient, according to the law of the country where the bill was negotiated and the payment was made, the bill being then due and payable and in the hands of the true holder, the defence * was good; and the rest of the Court concurring in [* 494] that opinion, this point was not further pressed.

Crompton (Ellis with him), for the defendants, contended — First, that the acceptance was not effected by the letters, but by the writing upon the bills themselves.

Secondly, that it was the intention of the parties that they should have the power of cancelling the acceptances, of which power they might legally avail themselves as long as the interests of a third party did not interfere: Byles on Bills, 4th edit., p. 184; *Sweeting* v. *Halse*, 9 B. & C. 365; 7 L. J. K. B. 258; *Grant* v. *Hunt*, 1 C. B. 45; 14 L. J. C. P. 106; *Fairlie* v. *Herring*, 3 Bing. 625.

Thirdly and fourthly, that the facts warranted the finding of the jury upon the questions submitted to them.

And lastly, that if the letter of the 18th of December was to be taken as an acceptance of the bills, the defendants had accepted a new bill; and that, as the special pleas were pleaded to the cancelled bills, the plaintiff ought to have new-assigned: *Rees* v. *Warwick*, 2 B. & Ald. 113; *Bank of Ireland* v. *Archer*, 11 M. & W. 383; 12 L. J. Ex. 353.

Crowder replied. *Cur. ad. vult.*

No. 37. — Ralli v. Dennistoun, 6 Exch. 494, 495.

The judgment of the Court was now delivered by

Pollock, C. B.: This was an action of assumpsit upon six bills of exchange. The bills of exchange were all drawn by one Alexander Shiras on the defendants in the month of November, 1841, for various sums, from £300 up to £835. There was also a count upon an account stated, upon which no evidence was offered. As to the first bill, the defendants pleaded payment into Court of the full amount of that bill, together with interest, which the [*495] * plaintiff accepted. There were thirty-eight other pleas to the different counts of the declaration, denying the drawing, the acceptance, and the indorsement of the bills respectively. The sixth plea, which is a plea to the second count, was in substance that, before the circulation of the bill of exchange in that count mentioned, it was agreed between the drawer and acceptors, that the bill of exchange should be cancelled, and that Glyn & Co., who held the part of the bill for the drawer, should return it to the acceptors, for the purpose of being cancelled; and thereupon the accepted part was returned and cancelled, and the bill became wholly void. A similar defence was somewhat differently, but more specially, stated in the seventh plea. The twelfth and thirteenth pleas were similar pleas to the third bill, the eighteenth and nineteenth to the fourth bill, the twenty-fifth and twenty-sixth pleas to the fifth bill, and the thirty-second and thirty-third to the sixth bill. There were also some pleas of set-off, and special set-off and payment, which it is now unnecessary further to advert to. The replication to the sixth, seventh, twelfth, and the other pleas above particularised was *de injuriâ*.

It was admitted that the plaintiff was answered as to the fifth bill, and the material question in the case arose on the several pleas before mentioned to each of the other bills, and is in effect the same as to all. [His Lordship, after stating the case as above set forth, proceeded.]

On the argument before us, it was contended, on the part of the plaintiff, that the defendants had accepted the bills of exchange (as undoubtedly they had), and that the facts which were stated did not justify the finding of the jury, that the acceptances were afterwards properly cancelled; for it was argued, first, that the letter of the 4th of December did not authorise the defendants to cancel their acceptances, which they did on the 16th of December and that though they did cancel the acceptances on the

face of the bills, they did not and could not cancel * the [*496] acceptances by the letters of the 3rd and 8th of December, which were in themselves complete acceptances. Secondly, it was contended that the acceptances could not be revoked with respect to the parties who were holders for value and without notice; and thirdly, that the letter of the 18th of December above mentioned was a new acceptance and that that acceptance never was revoked.

We are of opinion, that the finding of the jury that the two letters of the 4th of December, 1841, were sent by the drawer for the purpose of the acceptances being cancelled by the defendants, was fully warranted by the evidence. We have no doubt it was the meaning of those letters that the acceptances should be cancelled; and they having been so cancelled, the obligation of the acceptors on the bills themselves was put an end to with respect to Shiras and all persons claiming subsequently under him. As to any persons who might have acquired an interest in these bills as holders of the then existing seconds, the act of the defendants and Shiras, in putting an end to the acceptances, would have no effect. But neither Foulds & Co. nor any other person then had an interest in those bills; and it was perfectly competent for Shiras and the defendants to put an end to the obligation which the defendants had contracted by their acceptances. The letter of the 4th of December refers only to the firsts of the bills, and by implication directs the acceptances on the face of them to be cancelled. It does not refer to the letters of the 3rd and 8th, which could not possibly be known to the writer; but these letters, as Mr. Crompton rightly contended, are rather a narrative of the previous acceptances than acceptances themselves; and the cancellation of the acceptances on the bills, to which they refer, puts an end to the obligation on the acceptances as between Shiras and the defendants altogether. With respect to the suggestion on the part of the plaintiff, that the bills were again accepted by the letter of the 18th of December, it is sufficient to say * that [*497] the original acceptance being answered by the sixth and seventh pleas, it is not competent to the plaintiff to resort to a second acceptance without a new assignment, which would give to the defendants an opportunity of presenting any defence they might have as to such second acceptance. We much doubt whether the letter of the 18th of December was written under such a full communication of the facts, as would have rendered it

available as an acceptance;[1] but whether that be so or not, the question cannot be raised on the pleadings in the present shape, as the only acceptance stated is averred in the pleas, and proved by the evidence, to have been cancelled. Nor is it necessary to say whether, if the letter had so operated, the drawing of new seconds by Shiras, and the endorsement to the plaintiff of those seconds, would have given to him a valid title to sue. Judgment was accordingly pronounced that the verdict be entered for the defendant upon certain issues, and for the plaintiff on the others, — being substantially a judgment for the defendants.

ENGLISH NOTES.

See Bills of Exchange Act 1882, sect. 63, and, as to bills in a set, sect. 71.

If the cancellation had not been apparent and the accepted bill had come before maturity into the hands of a holder in due course, the case would probably have been different, according to the reasoning of WILLIAMS, J., in *Ingham* v. *Primrose* (1859), 7 C. B. N. S. 82, 28 L. J. C. P. 294, 295. But observe the comments on the actual decision in that case in *Baxendale* v. *Bennett*, No. 49, at p. 644, *post*.

And so, if a title had accrued to a holder in due course of the second part of the bill before the acceptance had been cancelled. See judgment, p. 513, *ante* (6 Exch. at p. 496).

Where a signature has been cancelled unintentionally or by mistake, it is no discharge. A crucial instance of mistake is afforded by the case of *Prince* v. *Oriental Bank Corporation* (P. C. 1878), 3 App. Cas. 325, 47 L. J. P. C. 42, 38 L. T. 41, where a clerk at a branch bank cancelled the signature on a promissory note presented there for payment and afterwards, before credit had been given to the maker, the manager of the branch (the maker's store having in the meantime been destroyed by fire), returned the note to the head office as dishonoured and with the words "cancelled by mistake." The judgment does not indeed decide that the cancellation was inoperative; as the question was narrowed to whether money had been received by the bank to the use of the holder; but it may be assumed, having regard to the decision of the Court of Exchequer in *Warwick* v. *Rogers* (1843), 5 Mac. & G. 340, 12 L. J. C. P. 113, that a cancellation under such circumstances would be inoperative as a discharge. See also the Scotch case of *Dominion Bank* v. *Anderson* (1888), Court of Session Cas., 4th series, Vol. 15, 408, where the provisions of the 3rd sub-section of sect. 63 of the Bills of

[1] This was previous to the Act (1856) 19 & 20 Vict. c. 97, s. 6. (embodied in B. E. A. 1882, s. 17) (2), which required the acceptance to be on the bill itself.

Exchange Act 1882, are applied to the case where an agent, either by mistake or without authority, gave up a bill to the acceptor without insisting on the conditions laid down in his instructions.

The latter part of the rule has been stated somewhat more narrowly than it is expressed by PARKE, B., p. 511, *ante* (6 Exch. 493). But the language of the learned Baron must doubtless be read in connection with the statement of the plea at p. 506, *ante* (6 Exch. 487), and the facts of the case. And from these it appears that the bill transaction was for the accommodation of the drawee, and that the Reunione Adriatica who accepted the payment after the bill became due had notice of this. It is not to be assumed that if the defendants had been the principal debtors on the bill, the contract entered into by them as acceptors would have been discharged by the mere fact that the foreign holder had accepted from the foreign drawer a smaller sum in satisfaction. In such a case the principle laid down by the Court of Appeal in *Gibbs* v. *Société Industrielle, &c. des Métaux* (C. A. 1890), 25 Q. B. D. 399, 59 L. J. Q. B. 510, would have to be considered; namely, that the discharge by the law of a foreign country of a liability under a contract made and to be performed in England, is no answer to an action in England upon the contract.

No. 38 — HARMER *v.* STEELE.

(IN ERROR FROM COURT OF EXCHEQUER, 1849.)

RULE.

IT is no objection to the negotiability of a bill that it has during its currency and before it was payable become the property of one of several joint acceptors. But if at the time of maturity it is held by one of the acceptors, — that acceptor being entitled to receive as well as liable to pay the amount of the bill, — the liability upon the contract of acceptance is discharged as to all the acceptors.

Harmer v. Steele.

4 Exch. 1–17 (s. c. 19 L. J. Ex. 34–39).

Assumpsit by the defendant in error (the plaintiff below) against the plaintiffs in error (the defendants * below), on a [*2] bill of exchange, dated the 3rd of December, 1839, drawn by William Wood upon and accepted by the defendants below, for payment to the order of the said W. Wood, six months after date,

of the sum of £400, value received, in final settlement of accounts to that date, and indorsed by W. Wood to the plaintiff below.

The defendant below, Harmer, let judgment go by default: the other defendants, Benham and Laxton, pleaded (*inter alia*) as follows: —

Tenth plea. — That, after the making and accepting of the said bill, and before the same became due, to wit, on the day and year in the declaration mentioned as the day and year when the said bill was accepted, the same was delivered, so accepted by the defendants, to the said W. Wood; and the defendants say, that after the said bill was so accepted and so delivered as aforesaid, and while the said W. Wood was the holder and payee thereof, to wit, on the day and year last aforesaid, the said W. Wood indorsed the said bill to the said defendant James Harmer, and then delivered the said bill so indorsed to the said J. Harmer, with the intention of divesting himself, the said W. Wood, and whereby the [* 3] said W. Wood did divest * himself, the said W. Wood, of all right, title, and interest of, in, and to the said bill, and of the right of suing thereon when the same should become due, and of indorsing the same again. And the defendants further say, that when the said bill was so indorsed to the said J. Harmer, it was indorsed for a good and valuable consideration then therefore paid by the said J. Harmer to the said W. Wood in that behalf, to wit, the sum of £380. And the defendants say, that the said J. Harmer continued to be and was the holder and possessor of, and the person entitled to the said bill, always from the time of the indorsement thereof by the said W. Wood until the said bill was afterwards, to wit, on the 1st day of January, 1845, delivered by the said J. Harmer to the plaintiff. And the defendants say, that the indorsement in the declaration mentioned consists merely of the said last-mentioned delivery by the said J. Harmer to the plaintiff of the said bill so indorsed by the said W. Wood, and that the said bill was never indorsed by the said W. Wood, otherwise than as in this plea mentioned; and that, before and at the time when the said bill was so delivered to the plaintiff by the said J. Harmer, the plaintiff had notice and knowledge of all the facts, matters, and things in this plea mentioned. — Verification.

The eleventh plea differed from the tenth only in stating (instead of the allegation of notice) that no person ever gave or received any consideration for the said delivery of the bill to the plaintiff

so indorsed as aforesaid. The twelfth plea was also similar to the tenth, except that it alleged that the bill was delivered so indorsed by Harmer to the plaintiff *after it had become due and payable*, to wit, &c.

The plaintiff demurred specially to all the above pleas. The causes of demurrer sufficiently appear from the judgment.

On the argument of the demurrers, the Court of Exche- [5] quer gave judgment for the plaintiff below. 14 M. & W. 831; 15 L. J. Ex. 217. Upon this judgment a writ of error was brought into this Court, and the case having been argued on the 27th of November, 1846, before WILDE, C. J., PATTESON, J., COLERIDGE, J., COLTMAN, J., MAULE, J., WIGHTMAN, J., and WILLIAMS, J., the Court took time for consideration.

The judgment of the Court was now delivered by

* WILDE, C. J. [His Lordship stated the pleadings, and [* 11] after disposing of certain pleas, which are unimportant for the purposes of the above rule, proceeded]: The argument in this Court turned principally on the tenth, eleventh, and twelfth pleas, which it will therefore be proper more fully to consider. As to the tenth and eleventh pleas, we agree in the opinion intimated by the Court of Exchequer, though not formally pronounced, that those pleas, supposing them not to contain a denial of the indorsement, are defective in substance, as not affording any sufficient answer to the action. The answer (on this supposition) which is set up by those pleas is, that, before the bill was indorsed to the plaintiff, and before it was payable by its terms, Harmer, one of the acceptors, and through whom the plaintiff claims, was the holder of the bill for a valuable consideration, and that the plaintiff took the bill with notice, or without consideration. But we think that it is no objection to the negotiability of a bill, that it has, during its currency, before it was payable, become the property of one of the acceptors. Until the * time for pay- [*12] ment arrives, the contract of the acceptors is unperformed, and incapable of being performed, and the right to sue upon it may be transferred with the property on the bill by any lawful owner of it; and it is no objection to such transfer, or to an action brought by one claiming under it, that the party making it would have been incapacitated to sue, if he had retained the bill till maturity. The circumstances of the plaintiff having notice of the facts of the pleas, or of no consideration having been given for

the indorsement to him, will not aid the pleas, inasmuch as those facts do not show any reason why the defendants, who plead them, (who must be taken to have had value for the acceptance), should not pay to any *bonâ fide* holder, whether for value or with notice or not. We think, therefore, the tenth and eleventh pleas bad in substance, in so far as they rely on the fact of Harmer having been the holder of the bill; and though, if they contained a traverse of the indorsement, they would be good in substance, yet, as they would be bad in form, for not concluding to the country, it is not necessary, with reference to these pleas, to determine whether they do or do not traverse the indorsement. They are bad on either supposition; in substance if they do not, and in form if they do, contain such traverse.

The twelfth plea, on which the defendants more particularly relied, requires a separate consideration. That plea in effect states, like the tenth and eleventh, that while Wood was the holder and payee of the bill, and before it became due, he indorsed and delivered it to Harmer, one of the acceptors and of the defendants below, for a valuable consideration, who became and continued the holder of it till he delivered it to the plaintiff; and that the indorsement to the plaintiff, mentioned in the declaration, consisted merely of delivery by Harmer to the plaintiff of the bill so indorsed by Wood.

After this statement, which the twelfth plea contains in com-
[* 13] mon with the tenth and * eleventh, the twelfth plea adds, that the bill was delivered by Harmer to the plaintiff *after it became due*. The Court of Exchequer gave no decision as to the validity of this plea in substance, though they appear to have had considerable doubt whether it would not have been, if good in form, a sufficient answer to the declaration. The substantial answer which it was contended the plea gives to the declaration is, that the bill, at the time it became due, was in the hands and the property of one of the three acceptors, who were liable to pay; and that the present liability to pay, and present right to receive, the amount of the bill, concurring in the same person, operated as a payment and performance of the contract of acceptance, on which, consequently, no action could afterwards be maintained. And we are of opinion that this is a good ground of defence in substance. There is no doubt that, when a bill has been paid at maturity by a sole acceptor to a third person, who is the holder, no action can afterwards be brought upon the acceptance; and it is equally certain that if one

of several joint acceptors pays the bill at maturity to such third person, being the holder, the contract of acceptance is performed and no action can be maintained upon it. It is true that, in this latter case, it may be that the acceptor who has paid the bill may have a right of action against the other joint acceptors for contribution, if the state of accounts between them, or the terms on which they agreed with one another to become joint acceptors, should afford ground for such an action; but that action would not be on the contract of acceptance or on the bill, but on a different contract, arising out of the state of accounts between the joint acceptors, or the terms on which they agreed together to accept; and the right to bring it would not be capable of being transferred by act of the parties, by indorsement of the bill or otherwise. If, therefore, the defendant Harmer, instead of becoming the holder, by giving value for it before it was due, and * retain- [* 14] ing it till it was due, had acquired it by paying the amount to a third person, being the holder, when the bill arrived at maturity, there seems to be no doubt that all right of action on the acceptance would have been extinguished. And it appears to us on the authority of the case of *Freakley* v. *Fox*, 9 B. & C. 130; 7 L. J. K. B. 148, and on principle, that the fact of the defendant Harmer, one of the acceptors, being at the time the bill became due the holder, and entitled to receive as well as liable to pay the amount of the bill, operated in respect of all the defendants as a performance of the contract to pay the bill at maturity, and put an end to the contract of acceptance. A case was put in argument: suppose there were three acceptors, one for the accommodation of the other two; he purchases the bill during its currency, and retains it after it is due; may he not indorse it and give a right of action to his indorsee? We think the answer is that he cannot give such right of action; that he may sue the other joint makers for what may be due to him in respect of his having accepted for their accommodation and protected them from the payment of the bill, but that he cannot transfer this or any other right, against the joint acceptors, by indorsing the bill.

For these reasons, we think the twelfth plea is a sufficient answer in substance to the Court on the bill, — a question on which the Court of Exchequer pronounced no opinion, — but assuming it to be as we hold it, that Court decided the plea, in common with the tenth and eleventh pleas, to be bad, as containing an argumentative

traverse or denial of the indorsement mentioned in the declaration. The ground on which it was decided by the Court of Exchequer, and contended for the defendant in error in this Court, that the last three pleas, the tenth, eleventh, and twelfth denied the [* 15] indorsement, was, that those pleas * alleged that the bill was indorsed by William Wood to Harmer for value, and that Harmer delivered it so indorsed to the plaintiff, and that the indorsement mentioned in the declaration consisted merely of the delivery by Harmer to the plaintiff of the bill so indorsed. These allegations, it was considered by the Court of Exchequer and contended by the counsel for the defendant in error, amounted to a denial of the indorsement mentioned in the declaration, inasmuch as the indorsement by Wood to Harmer, mentioned in the plea, may possibly have been a special and restricted one, so that the bill could not pass by delivery only from Harmer to the plaintiff; and thus an indorsement consisting only of the indorsement to Harmer, and the delivery by him to the plaintiff, would be no indorsement to the plaintiff at all. But we think this objection cannot be sustained.

There is no doubt that a statement in pleading that a bill was indorsed by A. to B., comprehends equally a special and a general indorsement. By a special indorsement the indorser directs the money to be paid to a particular person mentioned in the indorsement or his order; and by a general indorsement or an indorsement in blank he directs it to be paid to any lawful holder of the bill; and any particular lawful holder, being comprehended in the class to any one of whom payment is to be made, may properly be described as a person to whom payment is directed to be made, or to whom the bill is indorsed; and such description is in daily use in pleading, in which an indorsement in blank is constantly described as an indorsement to the person to whom a bill so indorsed is delivered as indorsee. In the language of the Court of Queen's Bench, in *Adams* v. *Jones*, 12 A. & E. 459, 9 L. J. Q. B. 407, "a bill may be indorsed to a party in two ways, — either by a special indorsement, making it payable to that party, or by a blank indorsement and delivery to that party. Now, as the deliv- [* 16] ery must * always be to a particular party, to describe an indorsement in blank, with a delivery to him, as an indorsement to him, seems strictly correct; it is an indorsement to him, and to no other person, as much as if it were a special indorse-

ment." The allegation, therefore, that Wood indorsed the bill to Harmer, and that Harmer delivered it to the plaintiff, and that the indorsement mentioned in the declaration consisted in the delivery by Harmer to the plaintiff so indorsed, is not inconsistent with and therefore no denial of the indorsement mentioned in the declaration. The indorsement to Harmer might be in blank, and if it were would be properly described in the plea as an indorsement to him; and the plea, by alleging that the indorsement by Wood to the plaintiff mentioned in the declaration consisted of an indorsement by Wood to Harmer, and delivery by Harmer to the plaintiff, does in effect aver that the indorsement by Wood to Harmer, which was before mentioned generally, was that species of indorsement which would make a delivery by Harmer to the plaintiff amount to an indorsement, that is, an indorsement in blank. The plea, therefore, in stating that the indorsement mentioned in the declaration consists of the indorsement to Harmer and the delivery to the plaintiff, may be considered as not denying the indorsement in the declaration, but expressly admitting it, and specifying the manner in which it took place. But if the true construction of the plea left it uncertain whether the indorsement to Harmer was general or special, it is by no means to be conceded that the plea would therefore be bad. It shows a substantial answer to the declaration in showing that the bill was in effect paid, and the contract of acceptance put an end to before it came to the plaintiff. This is the answer that the plea relies on, and it is difficult to say that the defendant, even if his plea, introducing this answer, showed that there might be another answer (the want of indorsement), which he does not rely on, should * be de- [* 17] prived of the benefit of the more substantial answer which he relies on. We are of opinion, therefore, that the objection to the form of the twelfth plea fails, and that the judgment for the plaintiff on the demurrer to that plea must be reversed, and judgment given for the defendant.

Judgment reversed accordingly.

ENGLISH NOTES.

The rule is impliedly comprised in the Bills of Exchange Act 1882, sect. 59 (1): "Payment" in this section appears to include any satisfaction which would be sufficient to discharge an ordinary contract within the principle of "accord and satisfaction," considered in Vol. 1.,

R. C. p. 368 *et seq.* But a bill may also be discharged by renunciation by the holder of his rights against the acceptor; Bills of Exchange Act 1882, sect. 62; and see *Cook* v. *Lister*, No. 42, p. 552, *post*, 32 L. J. C. P. p. 126, *per* WILLES, J. Payment of a bill by the bankers at whose bank it is payable is made by payment in cash or by (unconditionally) giving credit in account to another bank by whom it is transmitted. *Chambers* v. *Miller* (1862), 13 C. B. N. S. 125, 32 L. J. C. P. 30, 7 L. T. 856; *Pollard* v. *Bank of England* (1871), L. R., 6 Q. B. 623, 40 L. J. Q. B. 233, 25 L. T. 415. But where bills are exchanged at the clearing-house, according to the customary arrangements between bankers as set forth in the special verdict in *Warwick* v. *Rogers* (1843), 5 M. & G. 340, 348 *et seq.*, 12 L. J. C. P. 112, the credit allowed in the first instance between the clerks of the two banks concerned appears to be conditional and subject to be withdrawn if the customer dishonours the bill (whether by countermanding the authority on the day when it is payable or by its being on that day ascertained that he has no funds available to answer it). And credit given between the head office and branch of the same bank so long as it is not communicated to the customer may in like manner be treated as conditional and revocable. *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325, 47 L. J. C. P. 42, 38 L. T. 41, and p. 514, *supra*.

AMERICAN NOTES.

The principal case is cited by Mr. Daniel (2 Negotiable Instruments, § 1285).

In *Central Bank of Brooklyn* v. *Hammett*, 50 New York, 158, it is said that "possession of such an instrument by a party to it only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself," in the absence of special circumstances. This is said respecting the right to transfer paper, and is criticised in *Witte* v. *Williams*, 8 South Carolina, 290; 28 Am. Rep. 294. See Bigelow on Bills and Notes, p. 663.

"The evidence satisfies us that the drafts were transferred by their acceptors after maturity. Being in their possession after maturity, the drafts were extinguished either by payment or novation, and they became mere vouchers for the amounts charged on the books of the acceptors against the defendant; and the acceptors could not resuscitate the drafts or bills of exchange after maturity and after they had taken them up." *Walton* v. *Young*, 26 Louisiana Annual, 164.

If two persons make a promissory note, and one of them afterwards obtains possession of the note as his own property from the payee, the note is discharged. *Cox* v. *Hodge*, 7 Blackford (Indiana), 146.

"It was *functus officio* as a bill, and could not have been negotiated, for it had got into the hands of the acceptor." *Savage* v. *Merle*, 5 Pickering (Massachusetts), 85.

No. 39. — Turner v. Leech, 4 Barn. & Ald. 451. — Rule.

An assignment of a joint and several promissory note by the payee to one of the makers before maturity amounts to payment, and the right of action against the makers is not revived by a subsequent assignment to a third person after maturity. If the subsequent assignment were made before maturity to an innocent person, a right of action would exist in his favour against the makers. *Gordon* v. *Wansey*, 21 California, 77.

Delivery of a note by the payee to the maker in payment of claims cancels the note, and prevents an action on it by a transferee. *Edwards* v. *Campbell*, 23 Barbour (New York Supreme Ct.), 423.

When a bill is payable to a third person who indorses it, and is accepted, but the drawee refuses to pay it, and the drawer takes it up from the indorser, his name remaining uncancelled, it ceases to be negotiable, and the drawer cannot reissue it. *Gardner* v. *Maynard*, 7 Allen (Massachusetts), 456; 83 Am Dec. 699. Citing *Williams* v. *James*, 15 Q. B. 505.

No. 39 — TURNER *v.* LEECH.

(1821.)

RULE.

An indorser of a bill, who has not received due notice of dishonour, is discharged; and, if he pays the bill, he does so in his own wrong, and cannot recover upon it against a prior indorser, although the latter receives notice of dishonour on the same day on which he would have received it if all the notices had been given in due course.

Turner v. Leech.

4 Barn. & Ald. 451–453.

Assumpsit by plaintiff, as indorser, against the defend- [451]
ant, as a prior indorser, of a bill of exchange for £50, payable three months after date. Plea, general issue. The cause was tried at the Guildhall sittings after Hilary Term, 1818, before Lord Ellenborough C. J., when the jury found a verdict for the plaintiff, subject to the opinion of this Court, upon the following case. The defendant was the eighth and the plaintiff the eleventh indorser of the bill of exchange, which was indorsed by him to Bennett, and by him to Fletcher, and by him to Hordern and Co., bankers at Wolverhampton, who transmitted the same to their London correspondents, Messrs. Sansom and Co., who were the holders when the bill became due. The bill was duly presented for payment on

No. 39. — Turner v. Leech, 4 Barn. & Ald. 451–453.

Saturday the 30th August, 1817, and dishonoured. On Monday, the 1st September, 1817, Sansom and Co. wrote to Hordern and Co., at Wolverhampton, duly informing them of such dishonour, which letter was received by them on Tuesday, the 2nd September. Notice of the dishonour was, on the 2nd September, given to Fletcher, and on Wednesday, the 3rd September, a letter giving information of such dishonour, was sent by the post by [*452] Fletcher to Bennett, at *Stockport, where he resided, and which letter was delivered there at his shop, on Thursday, the 4th September. This letter was not opened, and no notice was given to the plaintiff or any other party, before Monday, the 8th September. On the 8th September, the plaintiff first received notice of the dishonour, and immediately paid the amount of the bill to Bennett. John Davies, the tenth indorser, Washington and Horner, the ninth indorsers, and the defendant, the eighth indorser, all resided at Stockport. It was admitted, in addition, that the defendant had notice of the dishonour either on the 8th or 9th September, 1817.

Chitty, for the plaintiff. In this case the defendant received notice of dishonour on the 9th September at the latest; and if notice had been given to each successive indorser in the regular course, he would not have received it at an earlier period. Then he has received no injury by the neglect. Suppose the holder gives notice on the same day to six successive indorsers, and the seventh indorser receives notice of it six days afterwards, surely he ought not to be allowed to defend himself, on the ground of laches, when in the regular course he could not have received notice sooner.

J. Williams, *contra*, stopped by the Court.

Abbott, C. J. In this case the plaintiff, who ought to have received notice of the dishonour of the bill of exchange from Bennett, on the 5th September, did not, in fact, receive notice till the 8th; and, therefore, he was clearly discharged by the laches of the holder. Then can he, by paying the bill, place the [*453] prior *indorsers in a worse situation than that in which they would otherwise have been? I think he cannot do so; and that in paying this bill he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant.

Judgment for the defendant.

No. 39. — Turner v. Leech. — Notes.

ENGLISH NOTES.

See Bills of Exchange Act 1882, ss. 48, 49 (1).

Where the attorney duly authorised by the holder has given notice, but by mistake states it as given by the authority of another person who is also liable on the bill, the notice has been held good, as there was in fact notice authorised by a competent person, and the mistake — the notice being still apparently good — could not mislead the party. *Harrison* v. *Ruscoe* (1846), 15 M. & W. 231, 15 L. J. Ex. 110, cited p. 493, *ante*. It is observed in the judgment of PARKE, B., in this case (15 M. & W. p. 235), that an acceptor — as he could not sue himself upon the bill after taking it up — was excluded from the category of persons who could give notice, and that the instances in which a notice by an acceptor has been held good at *Nisi Prius*, — *e. g.*, *Rosher* v. *Kieran* (1814), 4 Camp. 87, — are explained by Mr. Justice BAYLEY (in his book on Bills) on the supposition, that in these cases the acceptor had a special authority to give notice.

AMERICAN NOTES.

The principal case is cited with approval in 2 Daniel on Negotiable Instruments, §§ 988, 1045, 1127, 1224.

Randolph on Commercial Paper says (§ 1433): "Where the indorser has been himself discharged (*e. g.*, by want of notice), and afterward pays the note, he may still hold a prior indorser who has not been discharged by the holder's laches, either as a purchaser from the holder or in his original capacity as indorsee. *Emerson* v. *Cutts*, 12 Mass. 78. And in suing such prior indorser it is not incumbent on him to prove due notice of dishonour to himself or other legal compulsion. *Ellsworth* v. *Brewer*, 11 Pick. 316. So an accommodation indorser, after paying the note at its maturity, may bring an action against the maker whom he has accommodated, although he paid without waiting for formal demand on the maker or notice of dishonour to himself. *Pinney* v. *McGregory*, 102 Mass. 186. But an indorser who has been himself discharged by laches, and afterward pays a bill or note, cannot sue another and prior indorser who has also been discharged (*Turner* v. *Leech*, 4 B. & Ald. 451), although the indorser who made payment did not know of the laches, by which he was discharged, at the time he made the payment. *Wilson* v. *Ray*, 2 Perry & Dav. 253. In like manner, if an indorser has been discharged, and afterward voluntarily pays a note or bill, he cannot enforce a collateral security which was given to him for his indemnity, such indemnity being only against the legal liability. *Bachellor* v. *Priest*, 12 Pick. 399."

No. 40 — PEACOCK *v.* PURSSELL.

(1863.)

RULE.

A party to a bill who by the omission of another party has been discharged from his liability on the bill, is discharged from any liability which, as between those parties, entered into the consideration for the bill.

If a creditor takes from his debtor a bill of exchange as collateral security for payment of his debt, and retains it until it becomes due, his duty is to present the bill for payment, and if dishonoured to give notice of dishonour, in the same way as if he were absolute owner of the bill. If he omits this, so that the bill is rendered worthless or deteriorated in value, then as between the creditor and the debtor the bill must be treated as payment, to the extent of its full amount, of the debt.

Peacock v. Purssell.

32 L. J. C. P. 266-268; (s. c. 14 C. B. N. S. 728; 10 Jur. N. S. 178; 8 L. T. 636; 11 W. R. 834).

[266] The first count of the declaration in this case was in the usual form by the indorsees of a bill of exchange against the indorser thereof. There were also counts for goods bargained and sold, for goods sold and delivered, and for money due on an account stated.

The defendant, by his fifth plea, denied that he had received notice of dishonour.

Sixth plea to the money counts, that after the accruing of the said alleged debt, the defendant indorsed and delivered to the plaintiffs, and the plaintiffs received from him for and on account of the said last-mentioned debt and cause of action a bill of exchange not then due, drawn by one J. Ferry upon and accepted by F. Angerstein, whereby the said Ferry required the said Angerstein to pay to the order of the said J. Ferry £30, two months after date, and which bill had before then been indorsed by Ferry to the defendant.

No. 40. — Peacock v. Purssell, 32 L. J. C. P. 266, 267.

The cause was tried, before BYLES, J., at the Sittings in London during Hilary Term, when it appeared that the bill of exchange in question was drawn for the amount of £30 by one G. Ferry, on a person named Angerstein, and accepted by him. This bill Ferry had indorsed to the defendant. The defendant was indebted to the plaintiffs in the sum of £40 10*s.* for goods supplied, and payment having been demanded, the defendant sent the above bill to the plaintiffs with a request that they would take it in payment *pro tanto* of the debt. The plaintiffs refused to do this, and returned the bill to the defendant, but the defendant again sent it, requesting them, at any rate, to hold the bill *as a [*267] collateral security, and to give him time to pay the debt. The plaintiffs accordingly retained the bill, which had been indorsed to them by the defendant. When due it was presented by the plaintiffs at the bank of Coutts & Co., at which bank it had been made payable by the acceptor, but it was not paid.

The defendant was subsequently informed by the plaintiffs that the bill had not been honoured, but he refused to pay more than £10 10*s.*, the balance of the debt. The plaintiffs had not given within the proper time any notice that the bill had been dishonoured, conceiving that as they held the bill as collateral security only, they were not bound to do so. The acceptor afterwards became bankrupt, and the plaintiffs had received nothing on the bill.

The defendant contended at the trial that the plaintiffs, as holders of the bill, ought to have given due notice of dishonour, and that inasmuch as the bill was unavailable against any of the parties to it, by reason of the plaintiffs not having done so, it must be considered as a satisfaction of the original cause of action.

The learned Judge was of that opinion, and nonsuited the plaintiffs, leave being reserved to them to move to set aside the nonsuit and to enter a verdict for themselves on the money counts on the ground that the not giving notice of dishonour did not under the circumstances constitute a satisfaction or answer to the claim of the plaintiffs.

H. James having obtained a rule accordingly,

Pulling showed cause. The plaintiffs, having taken the bill, have by their negligence rendered what was a valuable security valueless. This is an answer not only to the claim on the bill, but to that part of the action which is brought on the original debt in respect of which the bill was given. *Crowe* v. *Clay*, 9 Ex. 604; 23 L. J. Ex. 150, No. 50, p. 649, *post*.

James, in support of the rule. The debt is not extinguished. The defendant's remedy against the plaintiffs for not presenting the bill is by cross action.

[Byles, J. If the bill had been mortgaged only, the plaintiffs would still have had to see that due notice was given.]

That is not now disputed, but still it is contended that the original debt is not barred.

Erle, C. J. I am of opinion that this rule ought to be discharged. The sole question arises on the special plea which is pleaded to the money counts. It was proved at the trial that the defendant offered the bill stated in the plea to the plaintiffs for and on account of the debt. The plaintiffs refused to take it on account of the debt, but ultimately retained possession of it as a collateral security. Of course, a bill taken for and on account of a debt suspends the remedy by action to recover the amount of the debt; but I assume in this case that the bill was given as a collateral security only, and that the right of action to recover the debt was not suspended. The bill, however, remained in the hands of the plaintiffs, and, of course, if the bill had been paid at maturity, that would have been a discharge of the defendant's debt. When the time of payment came, the bill was not paid by the acceptor; but the plaintiffs, nevertheless, gave no notice of dishonour. The consequence is, that the bill is, by reason of the laches of the plaintiffs, not available against any of the parties whose names appear on it, except the acceptor, who is insolvent. I think the result of that is, that, as between the plaintiffs and the defendant, the bill must be treated as money in the hands of the plaintiffs, just as much as if paid by the acceptor.

Williams, J. I am of the same opinion. It is clear that the laches of the plaintiffs operated so as to constitute the bill payment *pro tanto* of the defendant's debt.

Willes, J. If this bill had been paid at maturity by the acceptor, that would have been as much a discharge of the defendant's debt as if he had made the payment with his own hands; and if a creditor who holds a bill as collateral security for a debt, by his laches renders the bill worthless or deteriorated in value, this has the same effect, as between the debtor and creditor, as payment of the bill. The plaintiffs here took the bill at first conditionally; but having dealt with it in such a manner as to render it useless to the defendant, they must now be considered as having taken it absolutely.

[* 268] * Byles, J. It is not quite clear what is meant by taking a bill as a collateral security. It seems that the plaintiffs were at liberty to sue for the debt, in respect of which the bill was given as a security, at any time before the maturity of the bill. But they had all the rights of the holder of a bill of exchange, and were entitled to claim payment of the bill from the parties liable on it; and having all the rights, they are also liable to the duties of holder, one of which is to give due notice of dishonour.

Rule discharged.

ENGLISH NOTES.

The case of *Crowe* v. *Clay*, mentioned in the argument of the principal case, will be found *in extenso* as a Ruling Case, No. 50, p. 649, *post*.

In *Soward* v. *Palmer* (1818), 8 Taunt. 277, the plaintiff had agreed to take a negotiable bill drawn by the defendant and accepted by his brother in satisfaction, and as conditional payment, of a promissory note of the defendants for a much larger amount. The bill was not paid on the due date, but a tender of the amount was made by the defendant on the day following. The plaintiff sued for the amount of the original note, insisting that the condition on which the bill was to be taken as payment was not fulfilled. Parke, J., at the trial seems to have been of opinion that it was sufficiently fulfilled by the tender, and a verdict was found for the defendant. The Court refused to disturb the verdict, on the ground that the plaintiff had not proved that he presented the bill for payment. The defendant, as Gibbs, C. J., observes, "agrees to give a negotiable security, which the plaintiff consents to take, and takes it subject to the law incident to all bills, and must make a demand in the same way as on all bills." So where the holder had omitted to give notice of dishonour. *Bridges* v. *Berry* (1810), 3 Taunt. 130, 12 R. R. 618. Conditional payment is the presumed intention where a bill is given for a pre-existing debt. *Currie* v. *Misa* (1875), *per* Lush, J., No. 15, pp. 320–21, *ante*, L. R., 10 Ex. 153, at p. 163. But where the bill has been dishonoured and the acceptor is unable to pay it (notice of dishonour being duly given or waived), the condition fails and the right to sue on the original consideration revives and holds good although by an arrangement made subsequently to the dishonour of the bill it has been cancelled. *Yglesias* v. *River Plate Bank* (1877), 3 C. P. D. 60, 38 L. T. 464.

By a principle clearly allied to that of the above rule, a judgment (although unsatisfied) on a bill of exchange given for the price of goods

sold operates as a bar to an action being afterwards maintained on the original contract. *Cambefort* v. *Chapman* (1887), 19 Q. B. D. 229, 56 L. J. Q. B. 639, 57 L. T. 625 (cited in 1 R. C. 182). "To hold," says Field, J., "that the bill and consideration constitute two separate causes of action, would be inequitable and contrary to *Bridges* v. *Perry*, *supra*."

AMERICAN NOTES.

Mr. Daniel says of this case (1 Daniel's Negotiable Instruments, § 828): "Adopting the view of Byles, J., we might say as well, that 'as the indorsee has the duties, so he has the rights of a holder.' And as those duties, as indicated by Willes, J., do not depend upon whether or not there is a suspension of the original debt, neither should the rights of the holder turn upon that question." See, sustaining the principal case, *Shipman* v. *Cook*, 1 C. E. Green (New Jersey Law), 251; *Mauney* v. *Coit*, 80 North Carolina, 300; 30 Am. Rep. 80; *Hawley* v. *Jette*, 10 Oregon, 31; 45 Am. Rep. 129; *Schierl* v. *Baumel*, 75 Wisconsin, 69; *Cheltenham Stone Co.* v. *Gates Iron Works*, 124 Illinois, 626; *Smith* v. *Miller*, 43 New York, 171; 3 Am. Rep. 690; 52 ibid. 546; *Betterton* v. *Roope*, 3 Lea (Tennessee), 220; *Phœnix Ins. Co.* v. *Allen*, 11 Michigan, 501; 83 Am. Dec. 756 (same principle applied to the indorsement by the debtor of a note turned out in conditional payment); 2 Daniel's Negotiable Instruments, §§ 1276, 1277 *a*; *Pickens* v. *Yarborough's Adm'r*, 26 Alabama, 417; 62 Am. Dec. 728; *Lee* v. *Baldwin*, 10 Georgia, 208; *Haines* v. *Pearce*, 41 Maryland, 221; *Roberts* v. *Thompson*, 14 Ohio State, 1; 82 Am. Dec. 465; *Lawrence* v. *McCalmont*, 2 Howard (United States Sup. Ct.), 426. The American doctrine is that enunciated by Erle, C. J., in the principal case; namely, that the bill becomes money in the hands of the slothful creditor. See Bigelow on Bills and Notes, p. 503.

Section V. — *Order of liability amongst parties to bill.*

No. 41. — MACDONALD *v.* WHITFIELD.

(Judl. comm., 1883.)

RULE.

Primâ facie the liabilities *inter se* of successive indorsers of a bill or note are that every prior indorser must indemnify a subsequent one. But the presumption may be rebutted by circumstances showing the real intention and agreement of the parties.

Where the directors of a company mutually agree to become sureties to a bank for certain debts, and in pur-

suance of the agreement successively indorse certain promissory notes of the company, the presumption is that they are entitled and liable to equal contribution *inter se*, and are not liable to indemnify each other successively according to the priority of their indorsements.

Macdonald v. Whitefield,

8 App Cas 733-750 (s. c 52 L. J. P. C. 70-79, 49 L. T 466).

Appeal from a judgment of the Court of Queen's Bench [733] (Sept. 23, 1881), reversing a judgment of the Superior Court held at St. John's, in the district of Iberville (Sept. 1, 1879), and condemning the appellant to indemnify the respondent in respect of a decree obtained against him by the Merchants' Bank of Canada *on three promissory notes. The notes had [*734] been made by the St. John's Stone Chinaware Company, payable to the order of the appellant, and indorsed by the appellant and respondent in succession.

The facts of the case appear in the judgment of their Lordships.

Matthews, Q. C., and Fullarton, for the appellant, contended that the respondent had framed his action upon an allegation of actual indorsement and delivery by the appellant to him. The evidence did not sustain it. The respondent should prove that the notes had been indorsed to him with the intent that he should be the holder, and the appellant liable to him thereon. Otherwise there was no contract between appellant and respondent by the law-merchant; and no contract to undertake successive liabilities as between themselves and the other directors: see *Denton* v. *Peters*, L. R., 5 Q. B. 475. The footing upon which the indorsements by the directors took place clearly appears upon the correspondence with the bank. From that correspondence and by necessary inference from all the facts and surrounding circumstances it appears that the directors all agreed to become co-sureties to the bank of their company's notes, and that they indorsed the notes in pursuance of that agreement. The right of contribution *inter se* arises independently of contract. It accrues to each co-surety by rules of equity, and the liability so to contribute is imposed by equity independently of contract to that effect. *Dering* v. *Lord Winchelsea*, 1 W. & T. 106; *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561; 30 L. J. C. P. 350. The right and the liability arise from the intention to become

co-sureties. *Whiting* v. *Burke*, L. R., 10 Eq. 539; L. R., 6 Ch. 342; *Gray* v. *Seckham*, L. R., 7 Ch. 680; 41 L. J. Ch. 281; *Wilkinson* v. *Unwin*, 7 Q. B. D. 636; 50 L. J. Q. B. 338; *Steele* v. *McKinlay*; No. 7, p. 218, *ante*, 5 App. Cas. 754. In Canada the authorities in our favour are *Clipperton* v. *Spettigue*, 15 Grant's Ch. Rep. (U. C.) 269; *Cockburn* v. *Johnston*, 15 Grant, 577; while opposed to the appellant's contention are *Janson* v. *Paxton*, 23 C. P. (U. C.)

[*735] 439; and *Fisken* * v. *Meehan*, 40 Q. B. (U. C.) 146, both decided by a majority of the Judges on grounds distinguishable from this case as regards the circumstances connected with the making of the notes. As regards the right of action reference was made to the Civil Code of Lower Canada, arts. 1235, 1955, and 1935.

Hugh Cowie, Q. C., and M. D. Chalmers, for the respondent, contended that he was not a co-surety with the appellant or with any of the other directors. Upon the instruments they had all signed in a manner which imported successive liability; they had not indorsed jointly or in any way which distinguished it from the ordinary form. The Court below relied not merely upon the absence of any written agreement between the directors, but also on the presumptions arising out of the circumstances of the case. There was nothing to displace the inference from the form of the indorsements that the law-merchant applied to the transaction. The strongest evidence was necessary to displace such inference. The co-suretyship of the indorsees was not to be inferred from the indorsements being for the accommodation of the maker. By art. 1935 of the Civil Code suretyship must be express and not presumed. As regards *Dering* v. *Lord Winchelsea*, 1 W. & T. 106, see *Craythorn* v. *Swinburne*, 14 Ves. 160, 164, 9 R. R. 264, where Lord Eldon explains it in a manner favourable to the respondent. In *Whiting* v. *Burke*, L. R., 10 Eq. 544, is a curious misquotation of the passage from 14 Vesey. *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561; 30 L. J. C. P. 350, is the only case of the kind in the reports; it does not appear to have been commented upon in other cases, though it is mentioned in the text-books. Reference was made to *Janson* v. *Paxton*, 23 C. P. (U. C.) 439; *McDonald* v. *M'Gruder*, 3 Peters, 470; 8 Curteis, 491; *Suse* v. *Pompe*, 8 C. B. N. S. 538; 30 L. J. C. P. 75, 80; *Strong* v. *Foster*, 17 C. B. 201; *Wilkinson* v. *Unwin*, 7 Q. B. D. 636; 50 L. J. Q. B. 338. In America the rule is clear that the first accommodation indorser is liable to the second

accommodation indorser unless there is an express agreement to the contrary. *McCarty* v. *Roots*, 21 Howard, 432; *Shaw* v. *Knox*, 98 Massachusetts, 214; * *Kirschner* v. *Conklin*, 40 [* 736] Connecticut, 81. As regards the respondent's right to recover the costs of the action brought against him by the bank, see *Stratton* v. *Mathews*, 3 Ex. 48; 18 L. J. Ex. 5.

Fullarton replied.

The judgment of their Lordships [1] was delivered by

Lord Watson: —

Edward Macdonald and George Whitfield, who are respectively appellant and respondent in this appeal, were in the year 1875 directors of a trading corporation known as the St. John's Stone Chinaware Company, which carried on business at St. John's in the district of Iberville and province of Quebec. At that time the concern was not in a very prosperous condition, and in the month of July, 1875, the balance due by the company in its account current with the Merchants' Bank of Canada was upwards of $17,000. The appellant was president and chairman of the board of directors; and he had indorsed the company's promissory notes, for its accommodation, to the Merchants' Bank to the amount of $65,000. It appears that he had also given his personal guarantee to the bank for the overdrafts of the company upon its account current to the extent of $10,000.

In July, 1875, the company, being in want of funds, applied to the bank, through the appellant, for further credit; and on the 24th of that month the agent of the bank of St. John's sent a written answer to the application, addressed to the late Mr. Lavicount, the secretary of the company, in these terms: —

"Dear Sir, — Respecting your president's application to the bank for further extension of your credit, I have the pleasure to inform you that you have been allowed an extension of four or five thousand dollars in case of need. The bank, however, requires that the present advances, as they mature, be secured by the personal guarantee of your directors, should renewals be required, which could be done by their indorsation of the notes. Your account current is now overdrawn seventeen thousand six * hundred [* 737] and fourteen dollars and fifty-four cents; and by giving me the company's note, indorsed as required, for 8,500 dollars,

[1] Present Lord Watson, Sir Barnes Peacock, Sir Robert P. Collier, and Sir Arthur Hobhouse

you will reduce your overdrawn account, leaving a balance of $700 of above loan.

"I enclose a letter of guarantee along with a note, for signature by your directors, as required by the bank, to take the place of Mr. Edward Macdonald's personal security for the like amount."

Along with this communication there were sent to the secretary of the company the letter of guarantee, and also the note therein mentioned.

The letter in question, which was dated the 24th of July, 1875, and addressed to the agent of the bank, was expressed as follows: —

"Dear Sir, — In consideration of the Merchants' Bank of Canada allowing the St. John's Stone Chinaware Company to overdraw their account to the extent of ten thousand dollars, we herewith deposit with you, as collateral security for the due payment of such overdraft, the demand note of the company, indorsed by the following directors individually. . . . And we hold ourselves liable without prejudice to the ordinary legal remedies. — Subscribe ourselves, your obedient servants."

The note which accompanied the foregoing form of letter for signature by the directors was a promissory note by the company for $10,000, payable on demand to the order of the appellant, at the office of the Merchants' Bank of Canada in St. John's.

Having regard to the pecuniary relations then subsisting between the company and the bank, the arrangements thus proposed by the latter are sufficiently intelligible. The bank had made large advances by discounting, or in other words purchasing, the paper of the company indorsed for its accommodation by the appellant, and had also advanced upwards of $17,000 on current account, which was only secured to the extent of $10,000 by the personal guarantee of the appellant. In these circumstances the bank was willing to make a further advance of from $4000 to $5000, provided the company complied with these three conditions: —

[*738] In the first place, advances upon current notes *which had been discounted by the bank were, in the event of renewals being required at maturity, to be secured by the personal guarantee of the directors of the company, such guarantee to be given by their indorsation of the renewal notes. In the second place, the note of the company for $8500 duly indorsed by the directors as aforesaid was to be delivered to the bank in payment

and extinction *pro tanto* of the advances on current account, so as to reduce the debit balance of the company to nine thousand odd dollars. And, in the third place, the demand note for $10,000, when duly signed and indorsed by the directors, was to be deposited with the bank as a collateral security for overdrafts on account current, and was to be substituted for the appellant's personal security for the like amount.

No mention is made in the bank's letter of the manner in which the additional advance or extended credit of £4000 to $5000 was to be allowed to the company. It is obvious, however, that the bank was not prepared and did not agree to give the extended credit without security; and also that the result of carrying out the conditions upon which it was to be given would be to reduce the balance due on current account about $700 only below the amount of the demand note covering that account. It, therefore, seems matter of reasonable inference that the additional advance was to be made by the bank discounting the promissory note or notes of the company, duly indorsed by its directors.

On the 5th of August, 1875, the directors of the St. John's Stone Chinaware Company met for the purpose of considering the answer returned by the bank to the application made through the appellant, for an extension of the company's credit. At that meeting all the directors of the company, five in number, were present, viz., the appellant, the respondent, and Messrs. Marler, Coote, and Macpherson. The minute of the meeting of the 5th of August, 1875, as entered in the minute-book of the company, bears that "the letter of the agent of the Merchants' Bank of the 24th ultimo was submitted, and the directors agreed to give the personal indorsation asked for by the bank, and the secretary was instructed to have the said notes drawn out, signed as required, and handed over to the Merchants' Bank."

In pursuance of that resolution the secretary of the company *drew out two notes for $8500 and $4500 [*739] respectively which he signed as promisor on behalf of the company, the name of the appellant being inserted as payee, just as it had been in the demand note for $10,000 sent by the bank for signature and indorsation. Mr. Marler, one of the five directors of the company, was also the manager of the Merchants' Bank of Canada in St. John's, and was precluded from signing any of these promissory notes by the regulations of the bank. All the other

directors indorsed the demand note for $10,000 (after it had been signed by the secretary for the company) in the following order, (1) the appellant; (2) the respondent; (3) Mr. Coote; (4) Mr. Macpherson. It does not clearly appear whether Mr. Macpherson did or did not become a party to the two notes for $8500 and $4500; but these were certainly indorsed by the other three directors in the same order in which their signatures were put on the $10,000 note. Neither does it appear at what dates these two bills for $8500 and $4500 were made payable; but it appears to their Lordships to be established that they were new discount bills, and that they were renewed on more than one subsequent occasion, the last renewal of the first of these notes having been made on the 21st of March, and the last renewal of the second upon the 26th of March in the year 1877. These renewal bills were not signed by Macpherson, but they were indorsed by the appellant, by Mrs. Whitfield, per procuration of her husband the respondent, and by Mr. Coote in the same order as before.

The letter of guarantee sent by the bank was subscribed by the appellant as well as by Messrs. Coote and Macpherson, and their names were inserted in the blank left for that purpose; but it was not signed by the respondent, nor was his name entered therein. When thus completed, the letter was handed to the bank along with the $10,000 demand note.

On the 27th of December, 1877, the Merchants' Bank of Canada instituted a suit against the appellant, the respondent, and Mr. Coote, in the Court of Queen's Bench for Lower Canada, for recovery of the sums then due to the bank as holder for value of the said demand note for $10,000, dated the 24th of July, 1875, and of the two renewal notes for $8500 and $4500, dated the 21st and 26th of March, 1877. The demand of the bank was
[* 740] * not resisted either by the appellant or by Mr. Coote, but the respondent appeared and defended the action. After a variety of proceedings, which it is unnecessary for the purposes of this case to notice in detail, Mr. Justice Chagnon, on the first of September, 1879, ordained the three defendants, jointly and severally, to pay to the bank the contents of the two notes of the 21st and 26th of March, 1877; and also ordained the appellant and Mr. Coote, jointly and severally, to make payment to the bank of the contents of the demand note for $10,000.

On the 17th of January, 1878, the respondent, availing himself

No. 41. — Macdonald v. Whitfield, 8 App. Cas. 740, 741.

of the provision of article 1053 of the Civil Code, brought an action *en garantie* before the same Court against the appellant, concluding to have the appellant condemned to acquit and relieve him of any sum of principal and interest, for which decree might be given against him in the suit at the instance of the bank. In the declaration filed by him in that action, the respondent treated the three promissory notes in question as if they had been ordinary commercial paper. His allegations in regard to each of these notes were in substantially the same terms, and after reciting the making of the note by the company, payable to the appellant, thus proceeded: —

"Lequel billet la dite St. John's Stone Chinaware Company remit au dit défendeur Edward Macdonald, qui là et alors signa et endossa le dit billet et le remit au dit demandeur en garantie George Whitfield, qui là et alors signa et endossa le dit billet et le remit au dit Isaac Coote, qui là et alors signa et endossa le dit billet et le remit à la dite Merchants' Bank of Canada, qui en est encore porteur et propriétaire."

The plea founded by the respondent on that allegation was to the effect that the defendant,

"Étant, ainsi qu'il appert par les allégués ci-dessus, endosseur précédent et antérieur au dit demandeur en garantie, sur tous et chacun des trois billets plus haut mentionnés, est obligé et tenu en loi de rembourser, garantir et indemniser le dit demandeur en garantie de tous troubles et de toute condamnation qui pourrait intervenir contre lui, sur et à raison des dits billets, et dans et à *raison de la dite action instituée par la dite [*741] Merchants' Bank of Canada."

In this action of warranty judgment was given by Mr. Justice Chagnon on the 1st of September, 1879. The learned judge held that the evidence given by the respondent himself, with regard to the circumstances in which these notes were made and indorsed, showed that the property of the notes was not passed by the indorsations, and that there was, in point of fact, no delivery by one indorser to another. And, inasmuch as that testimony, in his opinion, contradicted the allegations upon which the respondent's claim of indemnity was based, he dismissed the action as laid, reserving to the respondent any recourse which might be competent to him against the appellant.

An appeal was taken by the Merchants' Bank of Canada against

the judgment of Mr. Justice Chagnon of the 1st of September, 1879, is so far as it absolved the respondent from liability to the bank in respect of the demand note for $10,000. The respondent also appealed against the judgment of the same date, in his action *en garantie*. On the 18th of June, 1881, the two actions were consolidated by an order of the Queen's Bench.

Thereafter, on the 23rd of September, 1881, the Court of Queen's Bench gave judgment in the conjoined causes. The Court, in the suit at the instance of the bank, reformed the judgment of Mr. Justice Chagnon and condemned the respondent in payment to the bank of the $10,000 demand note, with interest and costs. In the action at the respondent's instance, the Court reversed the judgment appealed from and condemned the appellant to guarantee, acquit, and indemnify the respondent from all the condemnation in principal, interest, and costs pronounced against him by the judgment in favour of the bank, and further condemned the appellant to pay to the respondent the whole costs incurred by him in the suit at the bank's instance. The present appeal has been brought against the judgment in the action *en garantie* of the 22nd of September, 1881, by Edward Macdonald, the defendant in that action.

The learned judges of the Court of Queen's Bench were of opinion that the two promissory notes for $8500 and $4500, dated the 21st and 26th of March, 1877, were mere renewals of
[*742] notes * which the company had, prior to the 24th of July, 1875, discounted with the bank, upon the indorsation of the appellant; and a finding to that effect is set forth as one of the considerations on which the formal judgment of the Court proceeds. Chief Justice Dorion, who delivered the judgment of the Court, said, "the two notes of the 21st and 26th of March, 1877, are renewals of other notes which, prior to the 24th of July, 1875, were indorsed by Macdonald alone."

The learned Judges were also of opinion that the note for $8500 was the only one which the bank, by its letter of the 24th of July, 1875, required from the company, in order to cover its overdrafts upon current account; and, further, that it was the only note which the directors of the company, by their resolution embodied in the minute of the 5th of August, 1875, agreed to give, indorsed by them, to the bank. Upon this point Chief Justice Dorion, said: "It is also to be remarked that the bank merely asked the

indorsement of the directors on a note for $8500, to cover the overdrawn account of the company, and that by the resolution it was only agreed to give the indorsation asked for, while the note indorsed by the directors to cover the overdrawn account is for $10,000; the resolution, therefore, does not apply to the note in question, and cannot be invoked as containing an agreement on the part of Whitfield (the respondent) to indorse this note of $10,000 as surety for the company."

The views thus expressed by the learned CHIEF JUSTICE are, in the opinion of their Lordships, founded on a misconception of the true import of the written communication made by the bank to the company on the 24th of May, and of the action taken upon that communication by the directors of the company on the 5th of August, 1875. It must be borne in mind that the company required a further credit, or in other words a further advance from the bank, and as the bank had not asked for the indorsements of the directors, except as a consideration for making the required advance, it is improbable that the directors agreed to give or gave their indorsations, without making provision for the company getting, in exchange for these indorsations, the advance of $4000 to $5000 which the bank was willing to allow. If the note for $4500 which the directors then indorsed was a new note for discount, then the company got the advance, in respect [*743] of which they were asked, and presumably agreed, to give their indorsations upon the notes required by the bank. As regards the note for $8500, the suggestion that the bank merely required the indorsements of directors upon it in order "to cover the overdrawn account of the company" is inconsistent with the terms of the bank's letter, which states expressly that the $8500 note was required, not "to cover," but "to reduce," the account. A renewal note could not possibly reduce the overdrafts. The plain import of the letter is that the bank required, not a renewal, but a new note for $8500, which was to be discounted, and the proceeds, instead of being paid to the company, applied in extinction *pro tanto* of these overdrafts, in order to bring the balance due below $10,000.

The evidence of Mr. Marler and of the appellant is to the effect that these two documents were new discount notes and not renewals, and their testimony is corroborated by that of the respondent himself. He was adduced as a witness for the appellant, and was

examined in regard to the two notes for $8500 and $4500 bearing date the 21st and 26th of March, 1877. These were undoubtedly renewals of the two notes of that amount given to the bank in August, 1875, but the respondent did not assert that they were, as the learned judges have assumed, "renewals of other notes which, prior to the 24th of July, 1875, were indorsed by Macdonald alone." His statement is: "The note for eight thousand five hundred dollars, and the one for four thousand five hundred, are renewals for former notes of like amount between the same parties."

These facts connected with the making and issue of the three promissory notes for $10,000, $8500, and $4500 in August, 1875, are only of importance in so far as they tend to explain the true legal relation in which the appellant and the respondent as parties to these notes stand towards each other. The respondent maintains that, although neither of them gave or received value for the notes, but put their respective indorsations upon them for the accommodation of the St. John's Stone Chinaware Company, the appellant, having first written his name upon the back of the notes, has thereby become liable to him in the same
[* 744] * manner and to the same effect as if he had been a prior indorser upon a proper commercial bill.

Had the appellant been in point of fact the holder of the notes, and had the respondent in these circumstances given his indorsements to the Merchants' Bank of Canada, which was about to discount them, the appellant would have been bound to indemnify the respondent against any demand made upon him by the bank or any subsequent holder to the same extent as if the respondent had been a proper indorser. That was held to be the legal effect of such an indorsement in *Penny* v. *Innes*, 1 C. M. & R. 439; 4 L. J. Ex. 12.

In the present case the appellant although his indorsement was first written, was a stranger to the notes in the same sense as the respondent, and it is not matter of dispute that the indorsements of both were given for one and the same purpose, viz., in order to induce the bank to discount two of the notes and pay the proceeds to the promisor, the St. John's Stone Chinaware Company, and also to give the company credit in account current to the amount of the third note. It was argued, however for the respondent that, in the absence of some special contract or agreement between them, *dehors* the notes themselves, strangers giving their indorsements

successively must be held to have undertaken the same liabilities *inter se* which are incumbent on successive holders and indorsers of a note for value. The appellant and respondent must therefore, it was said, be assumed to stand toward each other in the relation of prior and subsequent indorsers for value, inasmuch as it had not been proved, *habili modo*, that they had specially agreed that their indorsements were to have the effect of making them co-sureties for the promisor. On the other hand, it was contended for the appellant that all the directors who indorsed the notes in question must now be treated as co-sureties, seeing that their indorsements were made without reference to the order of their signatures in pursuance of a mutual agreement to give their joint guarantee to the bank that the notes would be duly retired by the company.

Their Lordships see no reason to doubt that the liabilities *inter se* of the successive indorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined * according to the ordinary principles of the law- [* 745] merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party according to the law-merchant is not altered or affected by reference to such acts and circumstances, he may still obtain relief by showing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds.

The appellant has not attempted to establish an independent

collateral agreement by the respondent to contribute equally with him and the other indorsers in the event of the company's failure to make payment of the notes in question to the bank. He relies upon the facts proved with respect to the making and issue of these three promissory notes as sufficient in themselves to create the legal inference that all the directors of the company, including the respondent, put their signatures upon the notes, in August, 1875, in pursuance of a mutual agreement to be co-sureties for the company. And in the opinion of their Lordships that is the proper legal inference to be derived from the circumstances of the present case.

Their Lordships construe the bank letter of the 24th of July, 1875, as preferring a direct request that the directors should become bound to the bank as co-sureties for the company. [*746] The * bank did not require that the appellant should become surety for the company, that the respondent should then become surety for the appellant, and that Mr. Coote in his turn, should guarantee the solvency of the respondent. What the bank asked was "the personal guarantee of your directors," and what the directors agreed to give, at their meeting on the 5th of August, 1875, was "the personal indorsation required by the bank." Apart from the mere circumstance of the order in which the indorsements were made, the *res gestæ* of the meeting of the 5th of August as disclosed in evidence, make it perfectly plain that the directors were asked and agreed to become co-sureties for the company, without any stipulation whatever as to their becoming *inter se* sureties for each other, or as to the order of their indorsing. Their Lordships attach no weight to the terms of the so-called letter of guarantee which was returned to the bank along with the demand note for $10,000, or to the fact that it was not signed by the respondent. The letter contains no obligation of guarantee, and simply explains what would otherwise have sufficiently appeared from the bank's own letter, that the $10,000 note was not for immediate discount, but was to be held by the bank as a collateral security for the company's debit balance in account current.

But the respondent insists, and the Court below seem to have held, that, in determining the rights and liabilities *inter se* of these indorsers for the accommodation of the company, regard must be had, not to the contract in pursuance of which they became indorsers, but to the order of their indorsements, as evidencing the

terms of their contract. That doctrine appears to their Lordships to be at variance with the principles of the English law. In a case like the present the signing of their names on the note by way of indorsement in order to induce the bank to discount it to the promisor, is not, as between the indorsers, *pars contractus*, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities *inter se*, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement.

The law upon this point was *correctly laid down by the [*747] Court of Common Pleas in *Reynolds* v. *Wheeler*, 10 C. B. (N. S.) 561 ; 30 L. J. C. P. 350. In that case one Cheeseman drew a bill, and asked Reynolds to accept it for his accommodation, which Reynolds did. The bank refused to discount, whereupon Wheeler, at the request of Cheeseman, indorsed, and the bill was then discounted, Cheeseman receiving the proceeds. The bill was renewed at maturity, Reynolds on this occasion being drawer and Cheeseman acceptor, whilst Wheeler indorsed it as he had done before. Reynolds paid the renewal bill, and claimed contribution from Wheeler as a surety with him for the same debt. Wheeler resisted the claim on the same plea which is put forward by the respondent in the present case, viz., that in the circumstances he had only agreed to undertake the liability evidenced by the indorsement, and consequently that he was not liable in relief or contribution to one who, like Reynolds, had previously become party to the bill as drawer or acceptor. But the Court overruled the plea. Erle, C. J., said, "The substance of the transaction is this: Cheeseman was in want of money, and applied to Reynolds and to Wheeler to lend him their names in order to obtain it. If the money had been raised by the joint and several note or bond of the three it could not have for a moment been contended that Reynolds, paying the whole, would not have been entitled to contribution. The machinery adopted here was the drawing of a note by Cheeseman upon Reynolds and the endorsement of it by Wheeler." And Williams, J., stating the law to the same effect, said, "If the relation of surety subsists he [Reynolds] is entitled to contribution, and we are entitled to disregard the form of the instrument."

In the present case the directors of the St. John's Stone Chinaware Company one and all agreed with each other to become

sureties to the bank for the same debts of the company. That was the substance of the agreement to which they came on the 5th of August, 1875, and the fact that the machinery which they adopted for carrying out their agreement was the making of three promissory notes by the company, payable to the appellant, and successively indorsed by him and his co-directors, cannot have, in law, the effect of altering the mutual relations established [* 748] by * that agreement, and of substituting for these the liabilities of proper indorsers of an ordinary commercial note.

It was argued, however, that the respondent gave his indorsements at the request of the appellant, and must therefore be held to have given them on the faith of his having recourse against the appellant as a prior indorser. That contention was rested upon certain statements made by the respondent in his deposition as a witness for the appellant. He stated, "I was asked to indorse the notes in question by Edward Macdonald, in fact urged to do so, to sign them, that it was all right, which I did." Again, in answer to the question by his own counsel, "At whose instance did you indorse the notes in question?" he says, "At the instance of Edward Macdonald." The argument is really without foundation in fact. There is not a word in those statements to suggest that the appellant, Edward Macdonald, did anything more than urge the respondent to carry out the agreement which had already been come to by all the directors present in order to aid the finances of the company.

The authority of *Reynolds* v. *Wheeler*, 10 C. B. (N. S.) 561; 30 L. J. C. P. 350, and similar cases, is in no wise affected by the decision of the House of Lords in the Scotch case of *Steele* v. *McKinlay*, No. 7, p. 218 *ante*, 5 App. Cas. 754, which is referred to in the judgment of the Court below. In that case A., acting on behalf of his sons B. and C., arranged with D. that the latter should make an advance to them of £1000 upon their personal security. D. accordingly drew a bill for that amount on B. and C., and delivered it to A. in order that he might procure their acceptances. A. did obtain their acceptances, and before returning the accepted bill to D., he wrote his own name upon the back of it. The acceptors failed to retire the bill, and D., the drawer, brought an action against the representative of A. (who had died in the meantime) for recovery of its contents, upon the allegation that A. had signed as a co-acceptor, or at all events with the intention and effect of becoming a surety to

him for the acceptors. Parol evidence was led, not only in regard to the making and issue of the bill, but also in regard to statements made at various times by the deceased, tending to prove a separate and independent engagement by him to guarantee payment of the bill by his * sons. The admissibil- [* 749] ity of the evidence, so far as it bore upon the facts and circumstances connected with the making and indorsement of the bill, was not questioned either at the bar or by the House. On the contrary, the House did take that evidence into account, although it was ultimately held that the claim preferred by D. was neither supported by the principles of the law-merchant, nor by any inference derivable from those facts and circumstances. But the House rejected the parol evidence adduced by D. in order to establish an independent contract of guarantee, upon the ground that such a contract could only be proved by a writing properly signed under the 6th section of the Mercantile Law Amendment (Scotland) Act, 1856, which extends to Scotland the provisions of the English Statute of Frauds with respect to mercantile guarantees.

The respondent's counsel, in the course of the argument, referred to the case of *Jansen* v *Paxton*, 28 C. P. (U. C.) 439, decided by the Court of Error and Appeal in Upper Canada, and to three other decisions of the Canadian Courts. With the same view, they cited the case of *Macdonald* v. *Magruder*, 3 Peters, 470; 8 Curtis, 491, decided in 1830 by the Court of New York, United States. These authorities were relied upon as establishing the doctrine that, where several persons mutually agree to give their indorsements on a bill as securities for the holder who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper indorsers, liable to indemnify each other successively, according to the priority of their indorsements, unless it had been specially stipulated that they were to be liable as co-sureties. It is unnecessary to enter into a minute criticism of these cases. Some of them are, in their circumstances, distinguishable from the present case; but there are undoubtedly to be found in the opinions of the learned Judges by whom they were decided *dicta* which seem to recognize the doctrine contended for by the respondent. If they are to be regarded as authorities to that effect, their Lordships cannot accept these cases as conclusive of the law of England, or as precedents which ought to govern the decision of

this appeal. The Civil Code of Lower Canada (article [* 750] 2340) enacts * that "in all matters relating to bills of exchange not provided for in the Code, recourse must be had to the laws of England in force on the 30th day of May, 1849." By article 2346 of the Code, the same law is made applicable to promissory notes as to bills of exchange, in so far as regards the liability of the parties; and seeing that the Code makes no provision regarding the question raised between the appellant and the respondent, that question must, in the opinion of their Lordships, be decided according to the law of England, as laid down by the Court of Common Pleas in *Reynolds* v. *Wheeler*, 10 C. B. (N. S.) 561; 30 L. J. C. P. 350.

Their Lordships will, accordingly, advise Her Majesty that the judgment appealed from ought to be reversed; and that the action *en guarantie* at the respondent's instance ought to be dismissed, with the declaration that the appellant and the respondent made their several indorsements upon the promissory notes in question, along with other directors of the St. John's Stone Chinaware Company, as co-sureties for the said company, and are in that capacity entitled and liable to equal contribution *inter se*.

The respondent must pay to the appellant the costs of this appeal, and also the costs incurred by him in the Courts below.

ENGLISH NOTES

That the contract entered into by the indorser is a question of intention to be inferred from the circumstances, is a point already adverted to in the notes to Nos. 3 and 4, p. 205, *ante*. And cases showing that where a bill is indorsed and delivered conditionally or for a special purpose the condition or purpose (except as against a holder in due course) will be given effect to. Conversely, the intention of the act of a person writing his name upon a bill may be shown so as to make that an indorsement which does not *primâ facie* appear to be so. As in *ex parte Yates. In re Smith* (L.JJ. 1857), 2 De G. & J. 191, 27 L. J. Bk. 9, where the name was signed on the face of a promissory note, so as to appear to be that of one of joint makers.

The rule laid down in sect. 55 (2) (*a*) of the Bills of Exchange Act 1882, is probably intended to be a mere statement of the contract which *primâ facie* is the contract of the indorser, and is doubtless conclusively so as between the indorser and a subsequent holder in due course. The section adopts the statement of BYLES, J., in *Susé* v. *Pompe* (1860), 8 C. B. N. S. 538, 30 L. J. C. P. 75, at p. 78, with the qualification ob-

served upon by Lord BLACKBURN in *Duncan Fox & Co.* v. *North & South Wales Bank*, No. 45, at p. 606, *post*, 6 App. Cas. 1, at p. 18. The statement of BYLES, J., in the former case is as follows: "That contract (*i. e.* of the indorser) is an engagement by the indorser that if the drawee shall not at maturity pay the bill, he, the indorser, will on due notice pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity." The statement of Lord BLACKBURN supplements this by the important condition as to notice of dishonour. "The indorser," he says, "by the law-merchant is liable, on having due notice of dishonour, to pay the amount to the holder for the time being, on having the bill restored to him."

The nature of the contract as between the indorser and his immediate indorsee is stated in a judgment of very high authority delivered in the case of *Castrique* v. *Buttigieg* (1855), 10 Moore, P. C. 94, by the Right Hon. Sir W. H. MAULE, as the judgment of the Judicial Committee of the Privy Council, at which were present the Right Hon. T. PEMBERTON LEIGH; the Right Hon. the Lord Justice KNIGHT BRUCE; the Right Hon. Sir EDWARD RYAN; the Right Hon. Sir JOHN PATTESON, and the Right Hon. Sir W. H. MAULE. The statement (at p. 108 of the report) is as follows: "The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question; but that contract arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties, and their relative situations) under which the delivery takes place."

Construing the Bills of Exchange Act 1882, as it always has been construed, as (with certain exceptions) a declaratory Act, to be interpreted having regard to the principles more fully explained by existing authoritative decisions, it cannot have been the intention of section 55 (2) (*a*) to overrule this weight of authority, and to say that the contract of the indorser is to all intents and purposes the same as if he had made an express contract in writing in the terms of the clause of the Act. To maintain the consistency of the view here put forward with the words of the clause, it may be said that, having regard to the scope and purpose of the Act, the clause must be read with the implied addition "*primâ facie* as between the immediate parties to the act of indorsement, and conclusively as to a subsequent holder in due course." Or else it may be said that, as between the immediate parties, and where

the intention is different from that stated in the clause, the act called an indorsement in the popular sense is not an indorsement within the meaning of the Act. And this view would be supported by the case of *Denton* v. *Peters* (1870), L. R., 5 Q. B. 475, 23 L. T. 281, where the defendant who had indorsed (in the proper sense) to the plaintiff, was permitted to raise the question of intention and to succeed in his defence, under the plea that he did not indorse.

AMERICAN NOTES.

This case is largely quoted from in 1 Daniel on Negotiable Instruments, § 703 *a*.

It is sustained by *Davis* v. *Emerson*, 17 Maine, 61; *Fletcher* v. *Jackson*, 23 Vermont, 581; 56 Am. Dec. 98; *Frevert* v. *Henry*, 14 Nevada, 191.

In *Easterly* v. *Barber*, 66 New York, 433, it was held that in an action by an indorser, who has paid the note, against a prior indorser, defendant may prove by parol that all the indorsers were for accommodation, and by agreement between themselves were co-sureties. To this effect, *Ross* v. *Espy*, 66 Pennsylvania State, 481; 5 Am. Rep. 394; *Smith* v. *Morrill*, 54 Maine, 48; *McCune* v. *Belt*, 45 Missouri, 174.

In *Houck* v. *Graham*, 106 Indiana, 195; 55 Am. Rep. 727, it was held that, in case of an irregular indorsement, it might be shown that apparent indorsers were sureties. See *Monson* v. *Drakeley*, 40 Connecticut, 552; 16 Am. Rep. 74.

In *Sayles* v. *Sims*, 73 New York, 553, a joint and several note was signed by three, the last signer adding "surety." He was allowed to show that he was surety for only one, and that the second signer was also a surety. So in *Chapeze* v. *Young*, 87 Kentucky, 477; *Oldham* v. *Broom*, 28 Ohio State, 41; *Bulkeley* v. *House*, 62 Connecticut, 459.

But in the absence of agreement to the contrary, accommodation indorsers stand like those for value, and are not co-sureties. *McCarty* v. *Roots*, 62 United States, 437; *Gillespie* v. *Campbell*, 39 Fed. Rep. 724; 5 Lawyers' Rep. Annotated, 698, with notes.

A question which has frequently arisen in American jurisprudence, and been variously decided, but which seems not much to have vexed the English Courts, is as to the liability of one who puts his name on the back of a promissory note before it is indorsed by the payee or delivered by the maker — an "indorser before utterance," as he is frequently called.

It has been generally, although not unanimously held, that as between the immediate parties, parol evidence is admissible to show their intention, and this will control. This is based on the ground that the position of the name on the paper is ambiguous; that the contract is not complete, but gives leave to write over it the real contract. *Good* v. *Martin*, 95 United States, 95; *Sylvester* v. *Downer*, 20 Vermont, 355; 49 Am. Dec. 786; *Quin* v. *Sterne*, 26 Georgia, 224; 71 Am. Dec. 204; *Chaddock* v. *Vanness*, 35 New Jersey Law, 517; 10 Am. Rep. 256; *Jennings* v. *Thomas*, 13 Smedes & Marshall (Mississippi), 617; *Taylor* v. *French*, 2 Lea (Tennessee), 257; 31 Am. Rep. 609; *Ives* v. *Bosley*, 35 Maryland, 262; 6 Am. Rep. 411; *Owings* v. *Baker*, 54 Maryland,

No. 41. — Macdonald v. Whitfield. — Notes.

82; 39 Am. Rep. 353; *Houck* v. *Graham*, 106 Indiana, 195; 55 Am. Rep. 727; *Burton* v. *Hansford*, 10 West Virginia, 470; 27 Am. Rep. 571; *Fullerton* v. *Hill*, 48 Kansas, 558; *Eilbert* v. *Finkbeiner*, 68 Pennsylvania State, 243; 8 Am. Rep. 176; *Deering & Co.* v. *Creighton*, 19 Oregon, 118; 20 Am. St. Rep. 800; *Graves* v. *Johnson*, 48 Connecticut, 160; 40 Am. Rep. 162; *Chapeze* v. *Young*, 87 Kentucky, 477; *McKenzie* v. *Wimberly*, 86 Alabama, 195; *Mansfield* v. *Edwards*, 136 Massachusetts, 15; *Heidenheimer* v. *Blumenkron*, 56 Texas, 312; *Eberhart* v. *Page*, 89 Illinois, 550; *Mammon* v. *Hartman*, 51 Missouri, 169.

That such proof is not competent as against a *bonâ fide* transferee for value and without notice, has been held probably by most of the foregoing authorities in which the point was in issue, and also by *Houston* v. *Bruner*, 39 Indiana, 383; *Whitehouse* v. *Hanson*, 42 New Hampshire, 18; *Schneider* v. *Schiffman*, 20 Missouri, 571; *Thacher* v. *Stevens*, 46 Connecticut, 561; 33 Am. Rep. 39. In the last case the Court held that, if the indorsement was regular in appearance, evidence to vary it was inadmissible as between remote parties. Daniel (1 Negotiable Instruments, § 712, n. 4) says "this is clearly correct." Browne (Parol Evidence, § 84) says: "But the apparent relation of the parties may not be changed nor their agreement shown by parol to the detriment of an innocent and ignorant third party." Thus an apparent principal may not show himself a mere surety as to an innocent payee. *Hoge* v. *Lansing*, 35 New York, 136; *Exeter Bank* v. *Stowell*, 16 New Hampshire, 61; 41 Am. Dec. 716. Nor may an apparently regular indorser show that he indorsed to identify the payee. *Stuck* v. *Beach*, 74 Indiana, 571; 39 Am. Rep. 113. See also *Doolittle* v. *Ferry*, 20 Kansas, 230; 27 Am. Rep. 166; *Martin* v. *Cole*, 104 United States, 30; *Goodwin* v. *Davenport*, 47 Maine, 112; 74 Am. Dec. 478; *Carpenter* v. *McLaughlin*, 12 Rhode Island, 270; 34 Am. Rep. 638; *Charles* v. *Denis*, 42 Wisconsin, 56; 24 Am. Rep. 383; *Wright* v. *Remington*, 41 New Jersey Law, 48; 32 Am. Rep. 180; *Bigelow* v. *Colton*, 13 Gray (Massachusetts), 309; 74 Am. Dec. 633; *Knoblauch* v. *Foglesong*, 38 Minnesota, 352; *Farr* v. *Ricker*, 46 Ohio State, 265; *Farwell* v. *St. Paul Trust Co.*, 45 Minnesota, 495; 22 Am. St. Rep. 742.

Recognized exceptions to this rule are in case of a trust. *Dale* v. *Gear*, 38 Connecticut, 15; 9 Am. Rep. 353; *Chaddock* v. *Vanuess*, 35 New Jersey Law, 517; 10 Am. Rep. 256; or where the indorsement was merely for collection, *Ricketts* v. *Pendleton*, 14 Maryland, 320; *McWhirt* v. *McKee*, 6 Kansas, 112; or for collateral security. *Hazzard* v. *Duke*, 64 Indiana, 220.

Other cases hold that if the contract as presented for construction is ambiguous or indefinite, the true intention of the parties may be shown by parol, even where the paper is in the holding of a third party. *Greenough* v. *Smead*, 3 Ohio State, 415; *Good* v. *Martin*, 95 United States, 95; *Frank* v. *Lilienfeld*, 33 Grattan (Virginia), 377. In Browne on Parol Evidence, p. 267, may be found a somewhat formidable list of cases admitting parol evidence to vary the apparent relation even as against a third party. In *Good* v. *Martin* the Court said, there is an "irreconcilable conflict" of the authorities.

In the absence of parol evidence several different degrees of liability have been attached to the irregular indorser, either *primâ facie* or absolutely, according to the character of the parties or the rule concerning parol evidence adopted by the particular Court.

No. 41. — Macdonald v. Whitfield. — Notes.

1. Many authorities hold him a joint maker. *Rey* v. *Simpson*, 22 Howard (United States Supreme Court), 341; *Sylvester* v. *Downer*, 20 Vermont, 355; 49 Am. Dec. 786; *Nat. Pemberton Bank* v. *Lougee*, 108 Massachusetts, 371; 11 Am. Rep. 367; *Perkins* v. *Barstow*, 6 Rhode Island, 507; *Baker* v. *Robinson*, 63 North Carolina, 191; *Robinson* v. *Bartlett*, 11 Minnesota, 410; *Rothschild* v. *Grix*, 31 Michigan, 150; 18 Am. Rep. 171; *Childs* v. *Wyman*, 44 Maine, 433; 69 Am. Dec. 111; *Martin* v. *Boyd*, 14 New Hampshire, 385; 35 Am. Dec. 501; *Carpenter* v. *Oaks*, 10 Richardson Law (South Carolina, 17; *Owings* v. *Baker*, 54 Maryland, 82; 39 Am. Rep. 353; *Barr* v. *Mitchell*, 7 Oregon, 316; *Good* v. *Martin*, 2 Colorado, 218 (approved, 95 United States, 90); *Heise* v. *Bumpas*, 40 Arkansas, 547; *Polkinghorne* v. *Hendricks*, 61 Mississippi, 366; *Houghton* v. *Ely*, 26 Wisconsin, 181; 7 Am. Rep. 52 (case of a non-negotiable note, but not where the note is payable to the order of the maker, *First Nat. Bank* v. *Payne*, 111 Missouri, 291; 33 Am. St. Rep. 520); *Schneider* v. *Schiffman*, 20 Missouri, 571; *Carr* v. *Rowland*, 14 Texas, 275; *Collins* v. *Trist*, 20 Louisiana Annual, 348; *Bank of Jamaica* v. *Jefferson*, 92 Tennessee, 537; 36 Am. St. Rep. 100.

2. Some cases treat the indorser as a maker if the indorsement was contemporaneous with the making, but as a guaranty if made long after. *Powell* v. *Commonwealth*, 11 Grattan (Virginia), 828; *Mammon* v. *Hartman*, 51 Missouri, 168; *Rothschild* v. *Grix*, 31 Michigan, 150; 18 Am. Rep. 171; *Woodman* v. *Boothby*, 66 Maine, 389.

3. Some cases hold the indorser liable only as a guarantor. *Bank* v. *Nixon*, 125 Illinois, 618; *Gillespie* v. *Wheeler*, 16 Connecticut, 410; *Fuller* v. *Scott*, 8 Kansas, 32; *Van Doren* v. *Tjader*, 1 Nevada, 380; *Robinson* v. *Abell*, 17 Ohio, 36; *Crooks* v. *Tully*, 50 California, 251 (before the Code); *Orrick* v. *Colston*, 7 Grattan (Virginia), 189; *First Nat. Bank* v. *Babcock*, 94 California, 96; 28 Am. St. Rep. 94 (non-negotiable note).

4. Some cases hold the indorser as second indorser. *Filbert* v. *Finkbeiner*, 68 Pennsylvania State, 243; 8 Am. Rep. 176; *Coulter* v. *Richmond*, 59 New York, 479, the Court observing: "In this State it has been repeatedly held, and is too strongly settled by authority to be disturbed, that a person making such an indorsement is presumed to have intended to become liable as second indorser, and that on the face of the paper without explanation he is to be regarded as second indorser, and of course not liable upon the note to the payee, who is supposed to be the first indorser. As the paper itself furnishes only *primâ facie* evidence of this intention, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee." Citing *Moore* v. *Cross*, 19 New York, 227; 75 Am. Dec. 326. The same rule in *Blakeslee* v. *Hewett*, 76 Wisconsin, 341; *Fear* v. *Dunlap*, 1 Greene (Iowa), 331; *Deering & Co.* v. *Creighton*, 19 Oregon, 118; 20 Am. St. Rep. 800; *Greusel* v. *Hubbard*, 51 Michigan, 95; 47 Am. Rep. 549; *Sawyer* v. *Brownell*, 13 Rhode Island, 141; 43 Am. Rep. 19.

5. Some cases hold the indorser liable as first indorser *primâ facie*. *Iser* v. *Cohen*, 1 Baxter (Tennessee), 421; *Best* v. *Hoppie*, 3 Colorado, 137; *Browning* v. *Merritt*, 61 Indiana, 425; *Jennings* v. *Thomas*, 13 Smedes & Marshall (Mississippi), 617; *Hooks* v. *Anderson*, 58 Alabama, 238; 29 Am. Rep. 745. So if when the note was negotiated the maker's name stood first on the back.

Dubois v. *Mason*, 127 Massachusetts, 37; 34 Am. Rep. 335; *De Pauw* v. *Bank of Salem*, 126 Indiana, 553; 10 Lawyers' Rep. Annotated, 16.

6. In *Chaddock* v. *Vanness*, 35 New Jersey Law, 517; 10 Am. Rep. 256, the indorser was held liable as second indorser or surety upon parol explanation, but *primâ facie* under no liability whatever. See *Absecom, &c. Ass'n* v. *Leeds*, 50 New Jersey Law, 399; 5 Lawyers' Rep. Annotated, 353; *Hayden* v. *Weldon*, 43 New Jersey Law, 128; 39 Am. Rep. 551.

7. In *Burton* v. *Hansford*, 10 West Virginia, 470; 27 Am. Rep. 571, the indorser was held *primâ facie* liable as guarantor or maker as the payee may elect, subject to evidence that he may show his intention to bind himself only as guarantor or second indorser.

8. The payee may write a guaranty over such indorsement. *Moore* v. *McKenney*, 83 Maine, 80; 23 Am. St. Rep. 753.

Mr. Daniel says (1 Negotiable Instruments, § 714): "Our own views are that the party who puts his name on the back of a negotiable note before it is indorsed by the payee should be presumed to be a first indorser. If he intended to be a second indorser he should have refrained from putting his name on the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterwards, and *primâ facie* the facts would seem to indicate such intention. We do not perceive that there is anything insuperable to this view in the objection that there is no title in him to indorse away." "In England such an irregular indorsement of a bill is considered to render the party liable as a new drawer (*Penny* v. *Innes*, 1 Cromp. M. & R. 139), but, as said by Littledale, J., 'supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker,' and it was accordingly held that an irregular indorser before the payee could not be held as a maker, but must be sued on his collateral undertaking." Citing *Gwinnell* v. *Herbert*, 5 Ad. & Ell. 136. Professor Ames (2 Bills and Notes, 839), says: "In England it would seem that the anomalous indorser is not liable in any capacity, not as indorser (*Lecann* v. *Kirkman*, 6 Jur. N. S. 17), nor as guarantor (ibid.), nor as maker (*Gwinnell* v. *Herbert*, 5 Ad. & Ell. 436)," — a result which he styles deplorable.

The matter is now regulated by statute in some States, as, for example, Pennsylvania and Connecticut.

No. 42. — COOK *v.* LISTER.

(1863.)

RULE

Where the bill is one for the accommodation of the drawer, or where the relation between the drawer and acceptor is such that the drawer is the principal debtor on the bill, the holder, having (with notice of that relation)

received value from the drawer in satisfaction of the bill, is not entitled to sue the acceptor.

But if (as is *primâ facie* the case) the acceptor is the principal debtor, and if the holder has not accepted the payment in satisfaction of his claim against the acceptor and has not parted with the bill, the holder may still recover in an action against the acceptor any damages or costs to which he is entitled beyond the amount received from the drawer. And *semble* that he may (in the interest, and for the use, of the drawer so far as relates to what he has been paid) recover the whole amount due on the bill.

Cook v. Lister.

32 L. J. C. P. 121–128 (s. c. 13 C. B. N. S. 543, 9 Jur. N. S. 823, 7 L. T. 712).

[121] This was an action, which came on for trial, before ERLE, C J., when, by consent, a verdict was entered for the plaintiffs, subject to the opinion of the Court upon a special case.

The facts were very long and complicated, but the following short statement of them will suffice for the present purpose.

The plaintiffs were wool-brokers, carrying on business in London and Liverpool. The defendant, Cheesebrough & Son, and Yewdall & Son, were all wool-merchants, carrying on business at various places, and having large transactions with the plaintiffs and with each other. Considerable quantities of wool were from time to time consigned from one of these parties to the other, against which consignments acceptances were drawn in the usual way, so long as money was plentiful. But in October, 1857, in consequence of an unusual pressure in the money-market, a system of drawing and accepting bills, and renewing them as best they could, was commenced by the defendant, by Cheesebrough & Son, and by Yewdall & Son; and it will be seen by the judgment of the Court, that though the bills so drawn were not, strictly speaking, accommodation bills, they were considered to be very much in the nature of accommodation bills.

When these transactions were brought to a close, there were in the hands of third parties bills drawn by Cheesebrough & Son upon and accepted by the defendant to the amount of £100,000, for which the defendant had received consideration to the amount

of £60,000, only. At the same time Yewdall & Son had drawn upon the defendant and the defendant had accepted a bill for £14,000, the only consideration for which received by the defendant was Yewdall & Son's acceptance for £10,000. In this state of things each of these parties suspended payment, and their estates were, in each instance, wound up under inspection and a deed of arrangement; but the plaintiffs did not sign the defendant's deed of arrangement.

At the time of the suspension of Cheesebrough & Son and the defendant, there were in the hands of the plaintiffs five bills drawn by Cheesbrough & Son upon, and accepted by the defendant, and by Cheesebrough & Son indorsed to the plaintiffs. Upon these bills there were paid to the plaintiffs, as holders, by the inspectors under the defendant's deed of arrangement, two dividends of 6*s.* 8*d.* in the pound, with interest. A further dividend of 1*s.* 4½*d.*, with interest upon the same bills, was paid to the plaintiffs, out of certain wool in the hands of Cheesebrough & Son at the time of their bankruptcy, by a special arrangement between their creditors and those of the defendant, and the plaintiffs. And a fourth dividend of 4*s.* in the pound, with interest on these bills, was paid to the plaintiffs by the inspectors, under Cheesebrough & Son's deed of arrangement.

At the time of Yewdall & Co.'s suspending payment the plaintiffs also held one bill drawn by Yewdall & Co. upon and accepted by the defendant, and by Yewdall & Co., indorsed to Cheesebrough & Son, and * by them indorsed to the plaintiffs. [* 122]. Upon this bill also the plaintiffs, as holders, had received, under the defendant's deed of arrangement, two dividends of 6*s.* 8*d.* in the pound, with interest, a further dividend of 1*s.* 4½*d.*, with interest, was paid to the plaintiffs, out of the wool in the hands of Cheesebrough & Son, under the arrangement above mentioned; and a fourth dividend of 5*s.* 7½*d.* in the pound, with interest, on this bill was paid to the plaintiffs under Yewdall & Son's deed of arrangement.

The defendant now offered to pay to the plaintiffs the amount of principal, interest, and expenses due on all these bills, after taking credit for all the above payments, which the plaintiffs had received upon them. The plaintiffs, however, claimed the balance of principal and interest upon all the bills after crediting the defendant with those amounts only which were received from his

estate, and they refused to credit him with the amounts received from Cheesebrough & Son's and Yewdall & Son's estates respectively; and they brought their action upon the bills for the balance thus calculated accordingly. The defendant paid into court the amount due upon the balance, calculated according to his contention.

The questions for the opinion of the Court raised the point, whether the defendant was entitled, as acceptor, to take credit for the amount paid out of Cheesebrough & Son's and Yewdall & Son's estates respectively.

M. Smith (W. Williams with him), for the plaintiffs.

Bovill (Manisty and Cleasby with him), for the defendant.

M. Smith, in reply.

The question is so fully discussed in the judgments of the Court, that it is not necessary to state the arguments of counsel.

Erle, C. J. I am of opinion that our judgment ought to be for the defendant. The action was brought on a bill accepted by the defendant: money was paid into Court, but by agreement any available defence is open to the defendant. The plaintiffs, as holders, have received (with the money paid into Court) 20*s.* in the pound on the bills, and interest in full, and it is certainly, therefore, a somewhat surprising proposition that they have any further right to maintain this action. Under some circumstances, unquestionably, an action may be maintained upon a bill, even after it has been paid in full. It is said by my Brother Byles, in his work on "Bills of Exchange" (8th edit. p. 205), "The acceptor being the principal, and the drawer the surety, it might seem that a payment by the drawer discharges the acceptor's liability to the holder *pro tanto*, and makes the acceptor liable to the drawer for money paid to his use, and that if the drawer pay the whole bill, nominal damages only can be recovered by the holder of the acceptor. The better opinion, however, seems to be, that to an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer, when the holder afterwards recovers against the acceptor. But payment by the drawer of an accommodation bill is a complete discharge of the bill." On that very peculiar doctrine the plaintiffs rely in this case. They admit that they have got all that they are entitled to; but they claim to go on with this action in order that they may obtain judgment against the acceptor, and so constitute themselves trustees for the drawer to the extent to which they themselves recover.

Now, what is the position of these parties? They were all engaged in trade, and bills passed between them in the usual course. In October, 1857, in consequence of the unusual pressure then existing on the money-market, it became necessary for the defendant, and Cheesebrough & Son, and Yewdall & Son, to raise money by large bill transactions; and though these were not strictly accommodation bills, the result was that there was a very large amount of the defendant's acceptances in the hands of Cheesebrough and Yewdall, and that the balance as between those parties was very largely in favour of the defendant. On these acceptances, which the plaintiffs hold, they are paid from time to time various amounts out of the defendant's estate under his deed of arrangement, and also other amounts out of the estates of Cheesebrough & Son and Yewdall & Son respectively, and the balance is now paid into Court by the defendant. Then it is that the plaintiffs say, "We require the defendant to pay us over again
*the money that has been paid to us by Cheesebrough [*123]
& Son and Yewdall & Son, the indorsers of the bills, in order that we may pay it back to them."

It seems to me, however, that it would be monstrous and irrational that the law should allow the plaintiffs to interfere between the defendant and Cheesebrough & Son, and between the defendant and Yewdall & Son, and that the plaintiffs should recover from the defendant money which they are to hold as trustees for those parties. To a certain extent it may be reasonable that the holder may sue the acceptor, notwithstanding the bill has been paid by the drawer, because it may be more convenient for the holder to sue the acceptor in his own name on the bill than for the drawer to sue him. It has been said that in that case he would become a trustee for the drawer. It may be doubtful whether he is such a trustee as that a bill could be maintained against him by the drawer in a Court of equity. In *Pownal* v. *Ferrand*, 6 B. & C. 439, it was held that, if the indorser paid the bill, he could have his action against the acceptor for money paid to his use, although he was not the holder of the bill. And in *Cullow* v. *Lawrence*, 3 M. & S. 95, 15 R. R. 423, it was held that the drawer of a bill payable to his own order, and indorsed by him to another, could, notwithstanding that he had paid the bill to the indorsee, negotiate the bill afresh, and that the transferee could sue the acceptor.

No. 42. — Cook v. Lister, 32 L. J. C. P. 123.

But the question is, whether, under the circumstances of this case, the plaintiffs can maintain their claim to recover from the defendant money, which they are to hold for the benefit of the drawers.

If it be said that there is a contract by the acceptor of a bill of exchange to pay 20s. of his own money, in some sense that has been sanctioned; but I cannot think it reasonable to apply that strictly to a case like this. The case of *Jones* v. *Broadhurst*, 9 C. B. 173, was much relied on by the counsel for the plaintiffs. But considering that Courts of justice are instituted for the purpose of enabling a creditor to recover his debt, and not a great deal more than his debt, that case went a very long way. It does not warrant the proposition for which it is now cited, namely, that in every case, except that of a strict accommodation bill, the holder is entitled to sue the acceptor for the whole amount due on the bill, notwithstanding that he has received payment, or part payment, from the drawer. All that was necessary to be decided in that case was, whether or not, after verdict, a plea alleging, simply, that goods had been delivered by the drawers to the plaintiffs in satisfaction of the bill, and of all damages and causes of action in respect thereof, was good. The Court held that it was not; but I cannot but observe that much of the learning and industry brought to bear on that judgment is beside the real question.

The case of *Randall* v. *Moon*, 12 C. B. 261; 21 L. J. C. P. 226, is very distinguishable, as I understand it. It is the ordinary case of a class of which in my early days there was a great number at every sittings. The holder frequently brought actions contemporaneously against the drawer and acceptor, and took a verdict and judgment against both. And, if it so happened that the drawer paid the holder of the bill, the Court would not allow the damages in the action against the acceptor (there being no plea of payment) to be reduced thereby. But that is quite a different case from the present, and I do not think it stands at all in our way.

I consider, on the fair view of this case, looking to the position of the parties, and the nature of the transactions between them, and the circumstance that the plaintiffs have got what they are entitled to, to the full amount, that they have no further claim against the acceptor; and that it would be a perversion of law

and of justice to permit them to recover in this action money which is to be held by them as trustees for somebody else, and as my learned Brothers concur in this view, there will be judgment for the defendant.

WILLIAMS, J. I am of the same opinion. There are certain propositions of law connected with this case which cannot now be disputed. I consider that the case of *Jones* v. *Broadhurst*, which was very fully and maturely considered, has established the general proposition, that to an action by the holder of a bill against the acceptor * payment by the drawer [* 124] is no plea. It may be right to consider what is the principle on which this Court arrived at that conclusion, because from the early part of the report of that case it would seem that the LORD CHIEF JUSTICE and Mr. Justice COLTMAN considered that the plea was a good plea. It was an action brought against the acceptor of a bill of exchange, and there was a plea, setting up a satisfaction of the cause of action by the delivery of goods by the drawer to the plaintiff; and it would seem that, when the Court took time to consider, the inclination, at all events in the minds of two of the members of the Court, was, that the plaintiff, the indorsee, had received and accepted the goods that were given to him by the drawer in full satisfaction of all claims upon the bill; and then the only point left to be considered was, whether this, coming from a stranger to the cause of action, was an answer to the action against the defendant; and the Court took time to consider, in order to look into the authorities on that subject, and very fully they were looked into by Lord TRURO, who showed his characteristic diligence in looking into all the cases. But in the course of the investigation the Court appears to have altered their minds as to what the meaning of the plea was, and to have made it unnecessary to decide the point, whether the plaintiff was prevented from maintaining his action by having received the goods in satisfaction of his claim from a third party, by coming to the conclusion that the plea did not set up that the goods were received in satisfaction of the right of action against the acceptor, but only that they were received in satisfaction of the right of action against the drawer, and therefore it was no answer at all to the plaintiff's claim. The principle, no doubt, on which that was decided was, that there being, by the nature of the transaction, a vested right of action in the

No. 42. — Cook v. Lister, 32 L. J. C. P. 124.

holder against the acceptor, that right of action, according to the ordinary rule of law, must be got rid of by a release, or by an accord and satisfaction. There must be either the one or the other.

In the case of *Belshaw* v. *Bush*, 11 C. B. 191, 199; 22 L. J. C. P. 24, the point that was not decided (although the authorities were collected) in *Jones* v. *Broadhurst*, again came on for consideration, and the Court held that, where there was a satisfaction by a third party adopted and assented to by the defendant, that was a good answer to the action; but I only allude to that because my Brother MAULE, in the course of delivering the laborious and learned judgment which he pronounced on that occasion, takes occasion to cite the case of *Jones* v. *Broadhurst*, and he says, "The declaration shows debts, and goods sold and delivered, &c., by the plaintiff to the defendant, and it is not to be presumed that there were other causes of action in respect of such debts than those of the creditor against the debtor. In this respect the plea differs from that in *Jones* v. *Broadhurst*, where the action was by the indorsee against the acceptor of a bill of exchange, and the plea stated that the drawers delivered to the plaintiffs, and the plaintiffs accepted, divers goods in full satisfaction and discharge of the bill of exchange, and of all damages and causes of action in respect thereof. And the Court held that the drawers being parties to the bill, and consequently liable to pay it, the satisfaction and discharge mentioned in the plea must be understood to apply to the liability as drawers of those who delivered the goods, and not to that of the defendant as acceptor."

I apprehend the principle of that case at all events was confirmed in the subsequent case of *Randall* v. *Moon*; but the general proposition is established by those authorities, that to an action by the acceptor payment by the drawer is no plea. To that proposition a qualification has also been established, namely, that which is laid down in my Brother Byles's book, that payment by the drawer of an accommodation bill is a complete discharge of the bill. Now it is not necessary to decide it in this case, but I must admit that I have some doubts whether that proposition as generally laid down is correct, unless you add to it, "supposing the holder has notice that the bill was an accommodation bill at the time of payment." The foundation I have for those doubts is as follows: I have already attempted to show that the reason why it

* was held in *Jones* v. *Broadhurst* that, in an action against [* 125] an acceptor, payment by the drawer is no plea, was, that the Court considered that the money could not be treated as having been paid and received in satisfaction of the claim against the acceptor, and it is quite obvious that in order to get accord and satisfaction, you must have the mind both of the person who pays the money and the person who receives the money, or receives the goods, consenting. My difficulty consists in seeing how — if the holder of the bill is not aware when he receives the money from the drawer that the bill is an accommodation bill — he can be regarded as having accepted the money in satisfaction of his claim as against the acceptor. On the other hand, if he knows that it is an accommodation bill, then he knows that virtually the drawer is in the situation of acceptor, that is to say, he is the person on whom the ultimate responsibility of paying the bill must rest. The doubt I have just mentioned is confirmed by what took place in the case of *Randall* v. *Moon* to which I have before alluded, because there, as my Lord has already said and explained, the attempt was made to set up, in the action brought against the acceptor, the payment made in the action against the drawer; and it being urged that it was an accommodation acceptance, JERVIS, C. J., said: "It seems to me that the payment and acceptance of the money under the Judge's order, in the action by the plaintiff against Turner, the drawer, the plaintiff having no notice that Moon was an accommodation acceptor, cannot be considered as a payment on behalf of the acceptor, or an acceptance in satisfaction and discharge of the causes of action against the acceptor, because the right of action for damages had vested at the time."

However, although I thought it right to express the doubts I feel on the subject, it is, as it seems to me, not material now to decide how the law is with reference to that point, because, assuming that the action can be maintained by the holder against the acceptor, notwithstanding the payment made by the drawer, the question remains to be considered, what is the amount of damages that is recoverable under such circumstances? Now, where the bill is not an accommodation bill, that is to say, the acceptor is the person out of whose pocket the money to meet the bills must come, then it should be held, as was held in the case of *Jones* v. *Broadhurst*, that, notwithstanding the payment by the drawer, the holder may recover the whole sum against the acceptor, because he is the person who

is to pay the whole of the money ultimately; and, that, when the holder has so recovered from the acceptor, to the extent to which he has already been paid by the acceptor, he shall hold the money so recovered as trustee for the drawer.

But a totally different consideration arises where, by reason of its being an accommodation bill, it is impossible to look at the holder, supposing he was allowed to recover the whole amount, as holding that difference as trustee for the drawer. Therefore, it seems to me, that, where it appears that the bill sued on is an accommodation bill, even supposing that the holder had no notice of it at the time he received payment from the drawer, yet that payment must be taken in mitigation of damages, and that the holder can recover no more than the difference between the amount of the bill and that payment.

If that is so with respect to an accommodation bill, it would follow in principle that it would be the same in all cases where, supposing the holder to recover the whole of the money due on the bill, the state of things between the acceptor and the drawer is such that it would be contrary to justice that the money, when recovered, should be held in trust for the party who had first paid it. In such a case as that, I think it is plain that the first payment ought to be allowed in reduction of damages.

If that is so, applying those principles to the present case, and looking at all the circumstances, it is clear to me that enough is paid into Court to satisfy all the damages, and the defendant is entitled to judgment.

Willes, J. I am of the same opinion, and desire to express my entire concurrence in the opinion expressed by my Brother Byles, in the 8th edition of his book, p. 158: "After a partial payment at maturity by the acceptor, or any other party really the [*126] principal debtor, the holder cannot recover of the *acceptor more than the balance." I apprehend that that is good sense and good law; and it is only necessary to bear in mind one or two of the elementary considerations affecting the law of bills of exchange, for the purpose of being satisfied that it is so. Its good sense is obvious. Bills of exchange, as everybody knows, rest on peculiar considerations: that which is most peculiar is, that they pass by indorsement, giving a right of action to successive holders. That which appears to me to be equally elementary is this: that the holder of a bill of exchange is entitled to

no more than the principal, and also interest on the bill if the jury see fit to give it; and if I am told there is any law, that the holder of a bill of exchange, having been paid by, perhaps, the sixth indorser of the bill the amount of the principal and interest up to the date of payment, is entitled afterwards to sue each of the other five indorsers for one farthing each, I say that that is a proposition which is absurd in its statement, and which has no existence in the custom of merchants.

The law as to accord and satisfaction (strictly so called) after breach is in my judgment wholly inapplicable to bills of exchange, because by the custom of merchants to be found laid down, not only in the law of this country, but in the law of all commercial countries that deal with bills, a bill of exchange, even after breach, may be discharged without accord and satisfaction by the assent of the holder. It is only necessary that he should assent to his having no longer any claim on the bill. A very remarkable case of that kind occurred not many years ago, where a person, having lent a relative a large sum of money, took as security a promissory note, payable on demand, and before he died, being anxious that the relative should have the full benefit of the money, handed to him a receipt in full for the amount of the note. He died, and the executors brought an action on the note, contending that accord and satisfaction was necessary for the purpose of discharging the liability on the note after it had become due. Lord CAMPBELL at *Nisi Prius*, and the Court of Exchequer afterwards held that the doctrine of accord and satisfaction was inapplicable to bills of exchange and promissory notes, and that there was a sufficient discharge by the testator having expressed his intention in his lifetime, though after the note was due, not to sue upon it.[1] The law on this subject is referred to in my Brother Byles's book at page 182; and questions arising on bills of exchange are not to be dealt with, in my opinion, upon technical rules with respect to accord and satisfaction; but we are to see whether the holder has got that which he is entitled to on the bill in monies numbered. And I further desire to add, that it appears to me to be perfectly indifferent whether the payment is made by the debtor, or whether it is made by a stranger.

One of the doctrines laid down in *Jones* v. *Broadhurst*, 9 C. B. 173 (perhaps not necessary for the decision of that case: if it were,

[1] The case referred to is that of *Foster* v. *Dawber*, 6 Ex. 839; 20 L. J. Ex. 385.

I should not venture to express any opinion in opposition to it), is this: If a stranger pays A.'s debts, A. not knowing of it, and therefore not assenting to it, until he assents to it it is no payment of the debt at all; but the creditor, having received the whole amount of it, may get it over again against the debtor. I desire to say, that I do not, as at present advised, assent to that proposition. The authorities in this country before the suggestion was made in the case referred to, consisted of one case which is reported, differently by Croke and Rolle.[1] But I apprehend that it is contrary to the maxim of the Civil Law, *debitorem ignarum seu etiam invitum solvendo liberare possumus.* It is also contrary to the well-known principle of mercantile law with respect to payment; because if a stranger pays a portion of a debt in discharge of the whole demand, the debt is gone, though if the debtor pays a part of the debt in discharge of the whole the debt remains due; because it would be a fraud on the stranger to proceed. So in the case of a composition made with several creditors, the debt is discharged; because it would be a fraud on the other creditors to proceed further. And then, [* 127] with respect to the assent of the debtor, I apprehend * that it is a well-known principle of law, that a benefit conferred upon a man is presumed to be accepted by him until the contrary be proved; and if it were necessary to ascertain that, and the *invitum* in the Civil Law is to be excluded from our law, then I say, according to the familiar authorities, the assent of the debtor ought to be presumed. I own I look with very great caution on the path which I am invited to tread, and at the first step of which I am obliged to adopt the affirmative of propositions which appear to me, according to my best judgment of the state of the law, not to be orthodox. There are considerations, no doubt, applicable to the case of payment of part of a debt, which are quite different. If you pay the whole debt, I should have thought the proper conclusion was, that the right goes back to the person who has paid it. I apprehend that the case of *Randall* v. *Moon*, 12 C. B. 261, 21 L. J. C. P. 226, may well be supported, on the ground that it was not a payment of the whole debt, or taken as such, because costs had been incurred in the action against the acceptor, and they had become part of the right of the holder, as accessory to his principal debt.

[1] The case referred to is that of *Grymes* v. *Blofield*. See Cro. Eliz. 541, and Roll. Abr. 471. The question as to which is the true report of that case has been elaborately examined by Lord Truro (see 9 C. B. 195), who comes to the conclusion that that in Croke is correct.

But if payment by an indorser be no answer to the action, ought it to be allowed in mitigation of damages? I apprehend, where the whole debt is paid, that it clearly ought. Where part of it is paid the matter admits of some qualification, because there is another class of cases to which reference ought to be made, for the purpose of determining this: I mean that class of cases in which an attempt has been made to indorse for part, where an indorsement is made, not as on a sale of the bill, but an advance only of part of the money, with an intention of transferring the rights of the bill to the indorsee. There, where the indorsee gets the right to recover the whole money, he would be necessarily the trustee of the drawer for the amount he secures beyond that which he has advanced. That is the case of *Reid* v. *Furnival*, in the 1st Crompton & Meeson, 538, referring to the case of *Johnson* v. *Kennion*, in 2 Wilson, 262, in which the law is so laid down; and in that case the agreement between the parties must have been this, and the indorsement must have been so construed, otherwise the intention of the parties could not be carried into effect. The whole right of action passes to the indorsee, who is necessarily a trustee to the extent of the sum exceeding that which he has advanced upon the bill, and it may be, where part of the sum is paid upon the bill, that the same rule ought to apply. Certainly, I apprehend that it ought not to apply unless there be no other mode of doing justice between the parties. Why the Court of Chancery is to be invoked for the purpose of settling the rights of parties on bills of exchange, I am quite unable to see. That expression, "he is a trustee for the rest," may or may not mean that there is such a trust as may be enforced in the Court of Chancery. I should have thought that an action for money had and received would lie the instant the indorsee himself received more than he was entitled to. I should have thought that the drawer might have brought an action for money had and received, as, in *Pownal* v. *Ferrand*, 6 B. & C. 439, he brought it for money paid. And when it was said by Mr. Baron BAYLEY in the case in the 1st Crompton & Meeson, that the indorsee would be trustee, that meant no more than that the beneficial interest would be in the indorser, and not that a bill in Chancery must be necessarily filed by the drawer for the purpose of getting payment of what he was entitled to. I apprehend that it is not a trust for the Court of Chancery, but that it is a confidence such as arises in many cases out of a contract in a mercantile transaction, from which the law

implies a promise to pay money. If it was a trust, I apprehend that the proper course would be for a Court of law to shut its eyes altogether, and to refuse to acknowledge it at all, rather than to say there is a trust, and not to allow it to be assailed by any evidence. I own I entertain a clear opinion which, perhaps, I might have more properly expressed in the words of my Brother BYLES, that in each case with reference to bills of exchange, if a question arises who is the principal debtor, *primâ facie* the acceptor is the principal debtor; and then, in order, the drawer and the indorsers, as their names appear upon the bill. But the Court is bound to test the evidence to show that in any case the person who is not the principal debtor on the face of the bill is, in fact, the principal debtor; and if he is the principal, he is the agent to pay for all those debtors subordinate to him, including the acceptor; and that is, as it seems to [*128] me, the position * of Cheesebrough & Co., and Yewdall & Co., in respect of the bills to which they are parties.

KEATING, J., concurred.

Judgment for the defendant.

ENGLISH NOTES.

See Bills of Exchange Act 1882, sect. 59 (3).

It will be observed that Vice Chancellor MALINS in *Re Overend, Gurney & Co., ex parte Swan*, No. 22, p. 391, *suprâ* (L. R. 6 Eq. 361), cites this case as an authority for the proposition that payment of an accommodation bill is an equity attaching to the bill itself, and therefore a good defence against the acceptor.

AMERICAN NOTES.

Mr. Daniel lays down the principles of this Rule, on the basis of English cases, not citing the principal case. 2 Negotiable Instruments, § 1237.

Mr. Bigelow says (Bills and Notes, 669), "it is apprehended that our law is in harmony with that of England." Citing *Farmers,' &c. Bank* v. *Rathbone*, 26 Vermont, 19; 58 Am. Dec. 200; *Murray* v. *Judah*, 6 Cowen (New York), 484; *Clopper* v. *Union Bank*, 7 Harris & Johnson (Maryland), 92; 16 Am. Dec. 294; *Parks* v. *Ingram*, 22 New Hampshire, 283; 55 Am. Dec. 153.

In *Madison Square Bank* v. *Pierce*, 137 New York, 144; 33 Am. St. 751; 20 Lawyers' Rep. Annotated, 335, defendant made a note payable to his own order, and indorsed it to B., who indorsed it to plaintiff. The receiver of B. paid part of the amount of the note to plaintiff. *Held*, that plaintiff was entitled to recover the full amount of the note, partly in his own right and partly as trustee for the receiver. Following *Jones* v. *Broadhurst*, *supra*, and citing the principal case. The editor of the Lawyers' Rep. Annotated deems this "sufficiently startling."

No. 43. — In re GENERAL SOUTH AMERICAN COMPANY.

(1877.)

RULE.

The acceptor in England of a bill drawn in a foreign country is bound, in case of the bill being returned dishonoured, to indemnify the drawer against his liability to pay, not only the amount of the bill with interest but also the reasonable expenses caused by the dishonour to be measured by the cost of re-exchange.

In re General South American Company.

7 Ch. D. 637–646 (s. c. 47 L. J. Ch. 67; 37 L. T. 599; 26 W. R. 232).

This was an adjourned summons in the winding-up of [637] the General South American Company on a claim made by the Bank of Lima to a sum of £2469 11*s.* 6*d.*, reduced from the original claim, which was £8119, for money paid by the bank in respect of re-exchange upon various bills of exchange which had been drawn by the bank upon the company, and were subsequently dishonoured by the company.

The General South American Company was established in the year 1868, to carry on the business of general merchants with *America, and this business was pursued successfully [*638] for many years. The company had an agent at Lima named Chavez, who entered into an agreement with the Bank of Lima to grant it a continuing credit of £100,000, upon the terms of a letter of the 11th of April addressed to Mr. Chavez by the managers of the Bank of Lima, which was in the following words: —

Dear Sir, — We have read the basis you have been pleased to fix in order to open a credit to the Bank of Lima, and we take the liberty to state in continuation a project of arrangement in this respect in order to know if we express them rightly, and if they meet with your approbation.

1. The total amount of credit will be £100,000, to dispose of all or part as it may suit the bank, drawing bills on London at ninety days on the General South American Company.

2. As soon as the bank may have drawn the first draft they will pay to the General South American Company ½ per cent. on

No. 43. — In re General South American Company, 7 Ch. D. 638, 639.

full amount of credit, £100,000, as opening commission, that is to say, the sum of £500 sterling, which payment of commission will be for once only.

3. They will also pay to said South American Company a commission of ¾ per cent. for acceptance and payments of bills on the amount of drafts the Bank of Lima may draw on them.

4. The Bank of Lima will allow the South American Company interest at 5 per cent. per annum, or 1 per cent. above bank rate, when it exceeds 5 per cent. per annum.

5. The Bank of Lima are under the obligation to cover their drafts within ninety days after the dates of their acceptance in London with other bills at ninety days' sight which may not be drawn on the same General South American Company.

6. The credit of £100,000 will always be in force for the Bank of Lima according as they place the General South American Company in funds for the amounts as they may have drawn against them.

7. The bills which the Bank of Lima may draw on the General South American Company must be signed by one of the two undersigned managers as follows:— For the Bank of Lima, the managing directory.

We wish that the business may be the beginning of
[*639] larger *transactions that the Bank of Lima may be able to do with the South American Company for our benefit; and we beg to subscribe ourselves

Your obedient servants,

JULIAN LARACONDEGM, } Managing
T. F. LEMBEKE, } Directors.

To this letter M. Chavez replied, on the 13th of April, to the managers of the bank in these terms: —

DEAR SIRS, — In answer to your favour of yesterday I have the pleasure to inform you that you have expressed rightly the basis of the credit I took the liberty to submit to you in favour of the Bank of Lima, and for my part the business remains accepted under the conditions contained in your letter; in virtue of this you can begin drawing when it may suit you, and to this effect I write by the steamer of to-morrow to the General South American Company, informing them of this arrangement, which I am sure will be received with satisfaction. Entertaining the same desire

as yourselves, that this business will be the beginning of others which will be undertaken later on between both companies to their mutual benefit, I subscribe myself

Your obedient servant,

MANUEL C. CHAVEZ.

These terms were confirmed by the General South American Company; and by a subsequent communication from the company it was stipulated that the Bank of Lima should cover their drafts upon the company seventy-five days after their respective dates, and this stipulation was acceded to by the bank. The arrangement was afterwards varied by reducing the amount of the credit from £100,000 to £50,000, but in all other respects it was carried out in the following manner: The Bank of Lima used to draw upon the General Company at ninety days' sight and the General Company accepted these bills. The Bank of Lima used to remit cover fifteen days before the due date of the acceptances, and the business was carried on upon this footing until the stoppage of the General Company on the 18th of March, 1875. On the 5th of April, 1875, resolutions were passed by the company to wind up voluntarily, and on the 16th of April the voluntary winding-up * was continued under supervision by an order of [* 640] the Court, and liquidators were appointed.

The position of matters between the Bank of Lima and the General Company at the date of its suspension on the 18th of March, 1875, was as follows: On the whole transaction the bank were creditors of the company, without any allowance for re-exchange, for about £27,905, and they had been admitted as creditors for that sum, and had received their dividends upon it.

In addition to the above sum the Bank of Lima sought to be admitted to prove for a sum of £10 per cent. for re-exchange on the amount of bills sent back to Peru, which they had had to pay, and which was alleged to be a fair and proper charge in a case like the present, and the amount which the holder of a bill was entitled to charge according to the laws of Peru upon a bill being dishonoured and protested. On the other hand, the liquidators submitted that the bank could only prove for such charges as were properly incurred in respect of protests, notarial charges, and consular fees, or otherwise for the purpose of obtaining substituted credit in respect of acceptances for which cover was held by the company

No. 43. — In re General South American Company, 7 Ch. D. 640, 641.

at the date of the stoppage, and these sums had already been offered to the bank, but were refused.

J. Pearson, Q. C., and Kekewich, Q. C., for the Bank of Lima: —

The contract in this case, which was entered into by the Bank of Lima and the South American Company, upon the terms of the two letters of the 11th and 13th of April, 1875, was an English contract, and was to be performed entirely in England. There was to be a credit of £100,000, subsequently reduced to £50,000. The drawing by the bank was to commence at once, and the moment the bills were drawn the company was bound under the contract to accept those bills. It was an unqualified agreement to accept the bills. We say we have a right to recover £10 per cent. upon the dishonoured bills, in consequence of the loss and damage caused to us by such dishonour. There is no evidence to show that we did not perform our part of the contract, and there were sufficient funds in the hands of the company at the time of the stoppage to answer all the bills drawn by us. We have it in evidence that we have been obliged to pay 10 per cent, [* 641] and that * that is a reasonable amount, and that amount of damage we call re-exchange. Whether we rely on express contract, or on the ordinary contract between drawer and acceptor, we are entitled to these charges.

In *Walker* v. *Hamilton*, 1 D. G. F. & J. 602, it was held that the acceptor in London of a bill of exchange drawn in Louisiana was entitled to prove not only for the amount of the bill, but also for 10 per cent. upon the amount in lieu of re-exchange, which by the law of Louisiana he had been obliged to pay on the bills being dishonoured and protested. The same principle was acted upon in *Francis* v. *Rucker*, 1 Amb. 671, but the amount in that case was £20 per cent., which the acceptor was liable to under the law in force in Pennsylvania. *Rolin* v. *Steward*, 14 C. B. 595, 23 L. J. C. P. 148, and *Prehn* v. *Royal Bank of Liverpool*, L. R., 5 Ex. 92; 39 L. J. Ex. 41, are authorities to the same effect.

They also cited *Mellish* v. *Simeon*, 2 H. Bl. 378; 3 R. R. 418, and Storey on Bills of Exchange, 4th ed. p. 489, sec. 398.

Glasse, Q. C., Higgins, Q. C., and Woolf, for the official liquidator: —

Re-exchange is defined in Byles on Bills, 10th ed. p. 412, to be the difference in the value of a bill occasioned by its being dishonoured in a foreign country in which it was payable. The

theory of the transaction is, that the holder of a foreign dishonoured bill is entitled to immediate repayment by drawing and negotiating a cross-bill, payable at sight on the indorser in London, for as much English money as will purchase in the foreign country the amount of foreign currency at the rate of exchange on the day of dishonour. No cross-bills were drawn in this case, and therefore there is no liability for re-exchange, but it is laid down by the same author that the drawer of a bill is liable to re-exchange, though the acceptor is not so liable. In support of this two cases are cited, *Napier* v. *Schneider*, 12 East, 420, and *Woolsey* v. *Crawford*, 2 Camp. 445; where it was held that the holder of a dishonoured bill has no right to re-exchange from the acceptor. There is evidence here that there has * not [*642] been at any time a quotable exchange in respect of drafts drawn here on Peru; there cannot, therefore, be a claim for the re-exchange on drafts drawn on Peru, if no such thing as re-exchange exists in Peru. It is also laid down in Chitty on Bills, 10th ed. p. 442, that though the drawer of a bill is liable for re-exchange, an acceptor is not liable, and his contract cannot be carried further than to pay the sum specified in the bill, together with legal interest where interest is due.

Then, if the claim is not for re-exchange but for damages, the damages are not proved. It is not enough for the bank to say, We have paid to a third party £10 per cent. on our drafts. They might as well have fixed any other much larger amount. Even if, as against the drawer, the holder might be able to claim £10 per cent., it would not prove, that as between the drawer and acceptor, the claim is one that can be admitted according to English law.

We say, therefore, that the company, as acceptors of the drafts, are not liable, either by the law of England or Peru, to re-exchange; that there is no contract by the company to pay re-exchange, and if there is no contract there can be no damages for its breach; that the claim fails, according to Peruvian law, because there was no cross-bill drawn by the bank; that in any case the company can only be liable for the actual protest and notarial charges and consular fees paid upon those acceptances of the company which were dishonoured and for which the company held cover at the date of the suspension; and that the £10 per cent. is an arbitrary sum and does not represent the amount of damages actually sustained by the claimants.

No. 43. — In re General South American Company, 7 Ch. D. 642, 643.

[They also cited Chitty on Bills.]

J. Pearson, in reply.

Malins, V. C.: —

This is a case raising a question which very seldom occurs in a Court of Equity. If I thought any advantage would arise from deferring my judgment I would certainly do so, but having well considered the authorities which have been cited, I feel that I shall not derive any benefit from further considering the matter.

[*643] *The question arises out of certain mercantile transactions which took place between the Bank of Lima and the General South American Company, which is now going through the process of being wound up. This company has been represented to me as one which was formerly of high repute, but troubles having come upon them they were obliged to stop payment. The transactions which now give rise to this question were commenced in 1871, when a contract was entered into between the company and the Bank of Lima, which was founded upon two letters dated the 11th and 13th of April, 1871, and without reading them I may state that they were to this effect, — that the company was to give the bank credit to the total amount of £100,000, to dispose of all or any part as it might suit the bank, drawing bills in London at ninety days on the General South American Company, and as soon as the bank should have drawn the first draft they were to pay to the company ½ per cent. on the full amount of credit as opening commission, that is, the sum of £500, which payment of commission would be for once only. The bank was also to pay to the company a commission of ¾ per cent. for acceptance and payment of bills on the amount of drafts the bank might draw on them, and the bank were to allow the company interest at 5 per cent. per annum, or 1 per cent. above bank rate when it exceeded 5 per cent. Then the Bank of Lima were to be under obligation to cover their drafts within ninety days after the dates of their acceptances in London, with other bills at ninety days' sight which might not be drawn on the company. The credit of £100,000 to be always in force for the bank, according as they placed the company in funds for the amounts they might have drawn against them. The only doubt which seems to arise upon the letters forming this contract is whether the ninety days were to run from the acceptance of the bills or the time when they arrived at maturity. These transactions went on from April, 1871, till March, 1875, when the com-

pany suddenly stopped payment, and there was no delay in the appointment of a liquidator. It appears on the evidence and the correspondence between the company and the bank that though there might have been some kind of complaint occasionally on the part of the company as to the quality of the bills sent over by the bank, those complaints were rectified *and no [*644] serious difficulty arose, so that it may be fairly said that the business was conducted upon the basis of the original contract, with satisfaction to both parties, and there was no substantial failure on the part of either to fulfil their engagements.

It appears that at the time of the failure of the company in March, 1875, the company held as cover to its acceptances £37,000 in bills and cash, which were afterwards returned by the liquidators to the agents of the bank with the sanction of the Chief Clerk, and at that time the bank were creditors of the company for about £27,905, and they have been admitted as creditors for that sum, and have received their dividend upon it. As a consequence of the stoppage of the bank the acceptances were thrown back dishonoured upon the Lima Bank, and what I have now to consider is the effect of that dishonour.

It is admitted that the company are liable for all the bank claims, except those charges which are called re-exchange. That is, the liability is admitted as to all the claims except for the £10 per cent. Now it has been argued that although a drawer is liable for the re-exchange, or what is substituted for re-exchange, an acceptor is not so liable, and this is supported by the authority of the case of *Woolsey* v. *Crawford*, 2 Camp. 445, and *Napier* v. *Schneider*, 12 East, 420; but it is said that those two cases are overruled by the authority of *Walker* v. *Hamilton*, 1 D. G. F. & J. 602. In that case the Lord Chancellor, in referring to *Napier* v. *Schneider*, said he thought if a fixed sum of £10 per cent. had been asked for that would have been granted; but instead of that an uncertain sum to be fixed by the master was asked for, and on that account the application was refused. Then his Lordship said, in speaking of the case of *Woolsey* v. *Crawford*, that it was at most a *nisi prius* decision, and the point there decided only applied to the re-exchange, not to a sum which was liquidated and which could have been easily ascertained. But as to that *nisi prius* case, if it had been expressly in point, he should have said it could not outweigh the solemn decision of *Francis* v. *Rucker*, Amb. 671.

No. 43. — In re General South American Company, 7 Ch. D. 644–646.

Now I cannot accede to the argument that a drawer is under greater liability than an acceptor. I am of opinion that
[* 645] the * primary liability is in the acceptor. The liability of the drawer is secondary, and if the drawer is liable so must the acceptor be.

The first case in which the acceptor was made liable is that of *Francis* v. *Rucker*. There it was shown that by the law of Pennsylvania a bill drawn or indorsed there on persons in England and protested was to be paid to the holder with 20 per cent. for damages. Bills on a merchant in England were accepted by him. He then became bankrupt before the bills were due. They were protested for non-payment, and the drawer, having paid the money due on the bills and the 20 per cent. to the holder, was permitted to prove both under the commission. Then the case of *Walker* v. *Hamilton* shows the liability of an acceptor. A drawer of bills of exchange in Louisiana upon acceptors in London was held to be entitled to prove, under a deed of arrangement executed by the acceptors upon their becoming insolvent, not only for the amount of the bills, but also for £10 per cent. upon the amount in lieu of re-exchange, which by the law of Louisiana he had been obliged to pay to the holder of the bills on their return, dishonoured and protested for non-payment in Louisiana. But I think the case which governs this in all respects is *Prehn* v. *Royal Bank of Liverpool*, L. R., 5 Ex. 92; 39 L. J. Ex. 41. There the defendants, who were bankers at Liverpool, undertook to accept the drafts of the plaintiffs, who were merchants at Alexandria and Liverpool, the plaintiffs undertaking to put the defendants in funds to meet the bills at maturity, and the defendants receiving ½ per cent. for the accommodation. Bills were accordingly accepted by the defendants, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due the defendants' bank stopped, and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying 2½ per cent. commission, and they were also obliged to pay to the bankers the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expenses in telegraphic communications between Liverpool and Alexandria. The decision was that the acceptors of the bills were liable for the
[* 646] * commission and the notarial and telegraphic expenses

which the drawers had incurred. Lord Chief Baron KELLY said, in giving judgment, that, according to general principles, where parties entered into a special contract they were entitled in case of breach to recover in respect of any damage reasonably flowing from the breach; he was of opinion that the expenses incurred were reasonable, and the plaintiffs were entitled to recover the money as general damage. Baron PIGOTT in his observations said he regarded the amount claimed as special damages, which were to be measured by the $2\frac{1}{2}$ per cent. which the plaintiffs paid, and the other actual expenses they incurred.

The principle there decided is that those necessary expenses incurred by the drawer of a bill in consequence of its having been dishonoured and protested by the acceptor, the drawer is entitled to recover from the acceptor. Therefore I think, on the authority of that case and the other cases I have referred to, the principle is established that where a bill is dishonoured the drawer is entitled to recover from the acceptor not only the amount of the bill and interest, but also all such reasonable amount of expenses as may have been caused by the dishonour, including the expenses of re-exchange, and that in this case the South American Company is liable for what has been reasonably expended by the Bank of Lima.

The only remaining question therefore is what is a reasonable amount. If this were an action tried at law the question of amount would necessarily be submitted to a jury, but it appears that the Bank of Lima has paid £10 per cent. for the re-exchange, and there is no evidence to show that that sum is in any manner unreasonable; therefore, in my opinion, the bank is entitled to have the amount of their claim admitted against the company.

ENGLISH NOTES.

The law as laid down by the above case is not altered by the 1st subsection of section 57 of the Bills of Exchange Act 1882; although the amount of re-exchange is expressly provided for (by the 2nd subsection) only in the case of a bill dishonoured abroad. In the case of *In re Gillespie, ex parte Robarts* (1885, 1886), 16 Q. B. D. 702, 55 L. J. Q. B. 131, affirmed 18 Q. B. D. 286, 56 L. J. Q. B. 74, it was held, both by the Court of Queen's Bench Division and by the Court of Appeal, that the principle of the ruling case and of the case of *Walker* v. *Hamilton* (1860), 1 D. G. F. & J. 602, there followed, is preserved by sect. 97

(2) of the Bills of Exchange Act 1882, although the re-exchange is not expressly provided for by sect. 57 (1).

In the event of a bill dishonoured abroad, and for which a party liable is sued in England, the measure of damages as laid down in subsection 2 of sect. 57 of the Act is, in effect, that which is explained by Byles, J., in his judgment in *Susé* v. *Pompe* (1860), 8 C. B. (N. S.) 538, 565, 30 L. J. C. P. 75, 78. Briefly the explanation is this: The bill is payable in Austria (say at Vienna), so that the holder is entitled to payment at Vienna of so many (say 1000) florins. It is there dishonoured. The holder is entitled, as against the party (X) liable in England to as much English money as would have enabled him on that day to purchase at Vienna 1000 florins and the expenses necessary to obtain them (say 10 florins more). The simplest way for the holder (in Vienna) to obtain this money is to draw on X a bill at sight for so much English money as will purchase 1010 florins at the actual rate of exchange on the day of dishonour. The whole amount is called in law Latin *recambium*, in Italian *ricambio*, in French and English re-exchange. If X accepts and pays the re-exchange bill, he will have fulfilled his contract of indemnity; if not, the holder sues him on the original bill, and will be entitled to recover in that action what X ought to have paid, that is to say, the amount of the re-exchange bill. In English practice the re-exchange bill is seldom drawn; but although no such bill is actually drawn, the theory of the transaction as above described settles the principle on which the damages are to be computed.

The expression "re-exchange" has been sometimes loosely or inaccurately used to signify, not (as the word is explained by Byles, J., and used in sect. 57 (2) of the Act) the whole amount of the damages (exclusive of interest), but the excess of those damages above the amount of the bill, and the charges of noting and protesting (judgment of judicial committee in *Willans* v. *Ayres* (1877), 3 App. Cas. 133, 144, 47 L. J. P. C. 1, at p. 6, and see judgments in the above mentioned case, *Ex parte Robarts, passim*). In *Willans* v. *Ayres* the question was raised, but not decided, whether a custom alleged to exist in the Australian Colonies fixing a certain percentage in lieu of re-exchange (in this sense) and other charges, and in variance of the general Law Merchant, could be recognized as valid in a Court of law. It appears that in some countries there are statutory enactments of this character. In Tobago, for instance, the holder of a bill returned there dishonoured may demand as damages and sue for a fixed percentage in addition to the amount of the bill, together with the interest and the expenses of noting and protesting. In *Ex parte Robarts, supra*, it was admitted that the holder of the bill by returning it to Tobago would be entitled

to recover from the drawer the fixed percentage of £10 per cent. (which the Court of Appeal construed to mean £10 per cent. on the amount remaining due at the date when the action was brought which was only part of the amount of the bill), and he was accordingly, to avoid circuity of action, held entitled to recover that amount from the indorser in England. *Ex parte Robarts, In re Gillespie* (C. A. 1886), 18 Q. B. D. 286, 56 L. J. Q. B. 74.

AMERICAN NOTES.

The principal case is cited in 2 Daniel on Negotiable Instruments, § 1449. But this author says (§ 1450): "But in this country the decisions generally deny the acceptor's liability" (for re-exchange). "Our view is this: If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from the dishonour of the bill. If the holder sues the drawer, and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor should be sued alone, he should be held bound for the re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions," etc. Supported by *Riggs* v. *Lindsay*, 7 Cranch (United States Sup. Ct.), 500.

To the contrary, *Newman* v. *Gozo*, 2 Louisiana Annual, 642; *Trammell* v. *Hudmon*, 56 Alabama, 237; *Bowen* v. *Stoddard*, 10 Metcalf (Massachusetts), 377. In the last case the drawer was allowed to recover damages of the acceptor by reason of "the relations between them," and not "on the ground that the acceptor as such is liable to pay damages by reason of his acceptance." In Louisiana the damages are fixed by statute. *Robert* v. *Com. Bank*, 13 Louisiana, 528; 33 Am. Dec. 570. So in Pennsylvania. *Watt* v. *Riddle*, 8 Watts, (Pennsylvania), 545.

Of text-writers Chitty, Byles, Kent, and Edwards argue that re-exchange is not recoverable; Thomson, Parsons, Bayley, and Kyd, to the contrary. Sedgwick and Story argue that the acceptor is only bound therefor when he has agreed for value with drawer or indorser to pay the bill. What better agreement can there be than his acceptance?

No. 44.—OVEREND, GURNEY, & CO. *v.* ORIENTAL FINANCIAL CORPORATION.

ORIENTAL FINANCIAL CORPORATION *v.* OVEREND, GURNEY, & CO.

(17th July, 1874.)

RULE.

The rule as to discharge of a surety by giving time to a principal applies to bill transactions according to the real relations of the parties, notwithstanding that the surety is acceptor of the bill and so *primâ facie* is the party primarily liable.

Where a bill is drawn and accepted for the accommodation of A., who is not a party on the bill, and A. obtains value for the bill by depositing it with X. along with his own guarantee that the bill will be paid at maturity; and subsequently X., being informed that A. is the real principal debtor in the transaction, agrees with A. without the knowledge of the acceptor of the bill, that the bill shall be held over; the ordinary rule as to giving time applies, to the effect of discharging the acceptor.

Overend, Gurney, & Co. v. Oriental Financial Corporation.

(Oriental Financial Corporation v. Overend, Gurney, & Co.)

L. R., 7 H. L. 348–363 (s. c. 31 L. T. 322).

This was an appeal against a decree of Lord Chan-
[* 349] cellor * Hatherley, made in a suit which the present respondents had instituted against the present appellants, in order to restrain these appellants from prosecuting an action at law against these respondents to recover the amount of four bills of exchange, on which the names of the respondents appeared as acceptors. The facts of the case are set forth in detail in the report in the Court below. L. R., 7 Ch. 142; 41 L. J. Ch. 342. The following is the summary of them necessary for the present report.

No. 44. — Overend, Gurney, & Co. v. Oriental Fin. Corp., L. R., 7 H. L. 349, 350.

James McHenry, who, it afterwards appeared, was the agent in this country for the Atlantic and Great Western Railway Company, had discount dealings with Overend, Gurney, & Co., and in June, 1864, obtained from them discount for bills amounting to £10,000, drawn by Léon Lillo, of Paris, on and accepted by the respondents. These bills formed part of a series of bills to a much larger amount, which the respondents had agreed in like manner to accept on receiving a commission of 4 per cent. These bills were not paid, but they were from time to time renewed, and Overend & Gurney took the renewals. On the 9th of January, 1866, the last renewed acceptances of the respondents fell due, and McHenry gave to the respondents a cheque on the appellants for £10,000, and the respondents then accepted four bills of exchange for £2000, £2000, £3000, and £3000. These bills were drawn on the respondents, not by the former drawer, Léon Lillo, but by Emile Deschamps, of Paris.

They were dated the 22nd of January, 1866, and were to become due three months after date. They were on the same day deposited by McHenry with the appellants, and he gave the appellants a written guarantie in these terms: —

"City Office, 23, Throgmorton Street, E. C.
"Atlantic and Great Western Railway,
"5, Westminster Chambers, Victoria Street, Westminster, S. W.

"London, 9th January, 1866.

"Messrs, Overend, Gurney, & Co. (Limited).

"Gentlemen, — In consideration of your agreeing to discount the bills of Emile Deschamps on and accepted by the Oriental Financial Corporation (Limited), for £10,000, due as per list at foot, I hereby agree to guarantee and indemnify you from all loss *that you may incur by so doing; and in the [*350] event of same not being duly paid at maturity, I hereby engage to pay the amount of said bills on demand, and for the above-mentioned consideration, I hereby give the guarantie of the Atlantic and Great Western Railway Company for the said bills for the said terms and conditions," &c. Signed by W. B. Ford for McHenry.

The list of the bills was then given. They were all to fall due on the 6th of April, 1866.

In the course of March, 1866, McHenry had some interviews

with Messrs. Birkbeck and Henry Edmund Gurney (managing the business of Overend, Gurney, & Co. (Limited),) with whom he had other money transactions to a large amount, and he deposited with them shares of the Atlantic and Great Western Railway Company to the amount of $445,000. The agreement that was then arrived at between the parties was not reduced into writing, and was, in this suit, differently represented by Messrs. Birkbeck and Gurney on the one hand, and by McHenry on the other.

The bills on coming to maturity on the 6th of April were dishonoured. Notice of dishonour was given by the appellants to all the parties whose names were on the bills, and among the rest to the respondents, whose names appeared as acceptors. On the 9th of April, Mr. Farmer, the solicitor of the respondents, called at Overend & Gurney's (Limited) Bank, and informed them that the bills had been accepted by the Financial Corporation for McHenry's accommodation and benefit, and must be paid by him. The answer that Mr. Farmer received was that the managing director would see Mr. McHenry in the course of the day.

On the 27th of April McHenry went to the appellants, who were then largely in advance to him, and had a meeting with Mr. Birkbeck and Mr. Gurney. McHenry delivered to them bills to a very considerable amount, among which were bills on Lillo for £38,000, and an agreement was come to between the parties. What that agreement was, occasioned much discussion in the cause, but the Lords in their judgments adopted ultimately the statement of it as made by Mr. Birkbeck, which, as to the four bills now in question, was to this effect: "That the said four bills for £3000, £3000, £2000, and £2000 should be held over during the currency of the bills on Léon Lillo for
[* 351] £38,000 given as * additional security. The four bills on the plaintiffs' corporation[1] were then unpaid in the hands of the defendant company,[2] and therefore could not be retired by them."

Both companies, the Overend & Gurney Company and the Financial Corporation, went into liquidation. On the 29th of October, 1867, payment of these bills was demanded by the liquidators of the Overend & Gurney Company from the liquidators

[1] The present respondents. [2] The present appellants.

of the Oriental Financial Corporation, but liability on them being denied, an action was brought by the appellants in February, 1868, to recover the amount. In March, 1868, the respondents filed a bill in Chancery to restrain this action, on the ground that they were mere acceptors for accommodation of McHenry, and that he was the principal debtor; that notice of those facts had been given to Overend & Gurney, who by their arrangement with McHenry of the 27th of April, 1866, made after such notice, had in fact released them from all liability on the bills. Evidence was taken on both sides, and in June, 1871, Vice-Chancellor MALINS made a decree whereby the bill filed by the liquidators of the Financial Corporation was ordered to be dismissed. On appeal to Lord Chancellor HATHERLEY, this decree was reversed.[1] The case was then brought up to this House.

Sir J. Karslake, Q. C., and Mr. Stewart Ferrers, for the appellants: —

The respondents were the acceptors of these bills, and were therefore primarily liable upon them. There was no proof whatever that they were merely sureties, and there had been nothing done which in any way released them from their liability as acceptors. McHenry's name was not upon any one of the bills, so that he was not directly a party to them. His deposit of additional security with the holders of the bills was nothing but the act of one who was, in law, a stranger to the transaction, for the benefit of those who were parties to the bills. What he did therefore could have no effect on the legal rights and liabilities of those whose names were upon the bills. An agreement to take additional security from Lillo, and in the meantime not to sue on the * bills, was an agreement for the benefit of [*352] the acceptors — and that was the real character of the arrangement of the 27th of April — and could have no effect in releasing the original acceptors of the bills. The rights against the sureties were here reserved, and where that was done even a release of the principal would not operate to release the surety. The arrangement with McHenry was a mere arrangement for the convenience of all parties, but especially of the acceptors. It left things exactly as they were before. *Price* v. *Barker*, 4 El. & Bl. 760, was a much stronger case than the present. The

[1] L. R., 7 Ch. 142, in a note to which the previous judgment of Vice-Chancellor MALINS is given.

creditor there gave to the principal debtor a deed-poll not to sue him, but that was held not to be a release but only a covenant not to sue, and the creditor was held not to be precluded from suing the surety in respect of breaches of a joint bond accruing before the execution of a deed-poll.

Even on the assumption that McHenry was the principal (though nothing on any of the documents shows him to be so), there was no arrangement not to sue him; there was merely an arrangement that if Lillo's bills were paid the Financial Corporation should not be sued. That was a benefit conferred on that corporation. Taking additional security, which Lillo's bills were, with a view to the relief of that corporation, could not release it from its original liability.

There was no real notice to the appellants as to the actual position of these parties, — on this point McHenry's evidence was not in accord with that of Messrs. Birkbeck and Gurney, — but even if there had been, such notice being conveyed to them long after they had taken the bills, as bills accepted by the respondents, they could not have their original rights affected by it. The appellants were indorsees for value, and even after notice subsequently given, might release the drawer without releasing the acceptor. *Ex parte Graham*, 5 De G. M. & G. 356. The liability of the acceptors had attached, and they could not be released. *Oakley* v. *Pasheller*, 4 Cl. & F. 207; 10 Bli. 548, was not in point, for there the original creditor had himself, with a full knowledge of all the facts, given time to the original debtor. Nor could it be properly argued that *Oakley* v. *Pasheller*, 4 Cl. & F. 207; 10 Bli. 548, was at all in contradiction to *Ex parte Graham*, 5 De G. M. & G. 356.

[*353] *Mr. Cotton, Q. C., and Mr. Jason Smith, for the respondents: —

Anything which releases a principal from his liability must release his surety also. It is said that here time was given to the surety, and that that did not release him. The fact is denied. The agreement not to sue on the original bills till it was known whether certain other bills, which were in fact substituted, were paid, was an agreement to give time to the principals on the first bills, and that agreement was made with McHenry, and for his benefit, he being known at that time to the appellants as the real principal debtor. This case falls within the principle of *Belshaw*

v. *Bush*, 11 C. B. 191; 22 L. J. C. P. 24, where the taking bills in respect of a simple contract debt was held to release the original debtor on the contract, the original creditor having indorsed the bills to C. D., who, as the holder of the bills, was entitled to sue the acceptor of them. That showed that the taking a bill which has time to run is a conditional payment of the debt in respect of which it is given, and that was what had been done here. The bills here were not taken as additional security, but as something which was to prevent or delay suit on the other. That was therefore a discharge of the surety on the original bills. McHenry was to pay on his guarantie if the substituted bills were not paid, and on that condition the original bills were not to be sued upon. That was a giving of time to the principals on those bills, the respondents being at that moment known to the appellants to be mere sureties upon them. And this agreement was made without any condition that could reserve the right of the surety against the principal.

Sir J. Karslake, in reply.

The Lord Chancellor (Lord Cairns): —

My Lords, the bills of exchange, out of which the proceedings in this suit arose, were four in number, and amounted in value to the sum of £10,000; and I will ask your Lordships, in the first place, to observe the position of the persons who are liable upon the face of those bills of exchange. In form, the bills of exchange were drawn by a person, apparently a native of France, of the *name of Deschamps; and they were [*354] drawn upon, and accepted here by, the Oriental and Financial Corporation. The bills drawn and accepted in this way, were drawn for the purpose of being used by a gentleman of the name of McHenry, who was a defendant in the original suit, and who appears to be the agent in this country for a railway company across the Atlantic, and these bills were obviously drawn, and their acceptance was obtained, for the purpose of having the bills used in the financial arrangements of that trans-atlantic railway company.

My Lords, the bills so drawn and so accepted were taken to the firm of the Overend & Gurney Company for the purpose of discount, and they were discounted by that firm; but at the time of the discount, and along with it, there was given by McHenry to this firm a guarantie, to the wording of which I will now

direct your Lordships' particular attention. It is signed by a Mr. Ford, by procuration, for McHenry, and addressed to Messrs. Overend, Gurney, & Co. It runs in these words: "Gentlemen, — In consideration of your agreeing to discount the drafts of Emile Deschamps on, and accepted by, the Oriental Financial Corporation (Limited) for £10,000 due as per list at foot, I hereby agree to guarantee and indemnify you for all loss that you may incur by so doing, and in the event of same not being duly paid at maturity, I hereby engage to pay the amount of said bills on demand; and for the above mentioned consideration I hereby give the guarantie of 'The Atlantic and Great Western Railway Company' for the said bills for the said terms and conditions." This guarantie was, as I have stated, given to Overend, Gurney, & Co. upon the occasion of the discounting of the bills.

Now I will assume, for it is stated by the directors of Overend, Gurney, & Co. positively, and it is not denied, that in January, 1866, the time of the discounting of the bills, they were not aware of any relationship between the parties to the bills and McHenry which would impart to them the knowledge of McHenry being the principal, and the Financial Corporation Company being the surety. But, in point of fact, your Lordships find that that was the relationship between the parties. The giving of these bills of exchange, the drawing of them, and the acceptance of them, were for the benefit of McHenry and his prin-
[*355] cipals. McHenry was *bound to provide the funds for the payment of the bills as between himself and the acceptors; and the relationship of principal and surety plainly existed between the parties.

That being the position of the parties, the bills of exchange became due on the 6th of April, 1866, and they were not paid at maturity. Notice of this fact was given to all the parties concerned: it was given to McHenry, it was given to the drawer, and it was given also, although that perhaps was unnecessary, to the acceptors. That notice was given apparently about the 9th of April, and I find that on the 9th of April the persons constituting the Oriental Financial Corporation informed Overend & Gurney of the exact position in which they stood as to McHenry. I will direct your Lordships' attention to the evidence on that point, because it is given in one affidavit, and is not the subject of any contradiction or of any dispute. Farmer, in his affidavit,

says: "On the 9th of April I called at the place of business of Overend & Gurney; I saw one of the managing directors (whom I believe to be Mr. Birkbeck), and after stating to him that certain bills, namely the bills in question, bearing the acceptance of the plaintiffs in the cause, in respect of which Overend, Gurney, & Co. had claimed payment from the plaintiffs, were accepted by the plaintiffs merely for the benefit and accommodation of McHenry, and that such bills ought to have been paid or provided for by him at maturity, and referred the defendants, the company, to him with respect to the payment of the said bills of exchange, and the managing director informed me in reply that he should probably see McHenry in the course of the afternoon of the same day." Therefore, my Lords, at that time, which was three days after the maturity of the bills, Overend, Gurney, & Co. were distinctly and clearly informed that, upon and in respect of these bills, the Financial Corporation stood in the situation of surety only, and that the person primarily liable to provide for the bills was McHenry.

But your Lordships will observe that it was not merely a formal intimation of this kind which was given to Overend, Gurney, & Co. It was an intimation which was accepted and acted upon by them, because the managing director stated that he intended to see McHenry on the same day upon the subject; and your Lordships *have it in evidence that [*356] from that day, the 9th of April, 1866, until the 5th of November, 1867, no application whatever on the subject of these bills was made to the Financial Corporation. Overend, Gurney, & Co. seem to have thoroughly understood the position in which McHenry stood towards the Financial Corporation, as the person who was bound to provide for the payment of the bills.

Now, my Lords, that relationship having existed between the parties, and having thus been clearly brought to the notice of Overend, Gurney, & Co., your Lordships will, I think, find that the decision of this case will turn upon a very short examination of certain facts which took place upon a subsequent day, the 27th of April, 1866. On that day there was a meeting between Mr. McHenry and two of the directors of Overend, Gurney, & Co., Mr. Gurney and Mr. Birkbeck; there was apparently no person else at the meeting. The evidence which is given by Mr. McHenry upon the subject of what passed at that meeting,

whether from confusion of mind or from want of memory, is so vague, and obviously so inaccurate, that I think both parties at your Lordships' Bar agreed in placing no reliance upon it; and it is clearly evidence which cannot be accepted as a correct narrative of what took place. On the other hand, the evidence of the two directors of Overend, Gurney, & Co. is completely consistent in all its parts, and the appellants at your Lordships' Bar must of course have their case judged, and, indeed, are content to have their case judged, by the statement that those two gentlemen give as to what took place upon the day in question.

Now what is stated by these gentlemen may be taken from the affidavit of one of them, the affidavit of Mr. Birkbeck, who says: "I deny the following statement contained in the 10th paragraph of" McHenry's answer, — "namely, that 'it was also agreed between me' (meaning McHenry) 'and the managing directors, that in consideration of such deposit the defendants should retire the four bills of exchange for £3000, £3000, £2000, and £2000 accepted by the plaintiffs as aforesaid, and also (to the best of my recollection and belief) the acceptance for £3000 re-discounted by the defendants, the company, for the Joint Stock Discount Company as aforesaid,' or that it was agreed between James McHenry and me this deponent to any such or the like [* 357] effect." Your Lordships will * observe that Mr. Birkbeck denies a statement which had been made by McHenry, and then he replaces that statement by his own narrative of what was done. He says: "I say that the agreement was that the said four bills for £3000, £3000, £2000, and £2000 should be held over during the currency of the said bills on Léon Lillo for £38,000 given as additional security." Now it is admitted upon all sides that on this day there were given to Overend, Gurney, & Co. by McHenry, these bills of Léon Lillo for the amount of £38,000. Those bills were drawn by Léon Lillo, but not accepted. And it is also admitted that certain other arrangements were made at the same time which resulted in a part payment of the demand which Overend, Gurney, & Co. had against McHenry.

And, my Lords, I cannot do better than read, in connection with this affidavit which I have last read, another statement from the same gentleman, Mr. Birkbeck, joining in that relation with Mr. Gurney. On the 27th of April, 1866, McHenry "being

unable to take up the last-mentioned bills as well as others which the defendants held unpaid, proposed to us that the defendant company should discount £6000 acceptances of Bailey Brothers, due on the 12th of August, 1866, against which they had made an advance of £5000, and apply the margin of £1000 towards payment of the said bills for £2000, £2000, £3000, and £3000; and he gave to us, on behalf of the defendant company, drafts drawn by Léon Lillo upon the Bank of London," but not then accepted, for the balance.

Therefore, what your Lordships find is that the sum of £1000 was applied, as far as it would go, in part payment, and these Lillo drafts were given for the balance. The explanation of the giving of those drafts, and the narrative of what accompanied the giving of them, is to be found in the second affidavit of Mr. Birkbeck, which I read first: "the agreement was that the said four bills," for the £10,000, "should be held over during the currency of said bills on Léon Lillo for £38,000 given as additional security." Now, my Lords, what is the meaning of these words which really must be taken as the narrative, agreed between the parties, of what took place? What is the meaning of the words, it was agreed that the £10,000 bills "should be held over during the currency * of the bills on Léon Lillo [*358] for £38,000?" If those words mean that the agreement between McHenry and Overend, Gurney, & Co. was that the bills for £10,000 should not be put in suit as against the parties to the bills, namely the acceptors and the drawer, but that Overend, Gurney, & Co. should be left perfectly free to proceed against McHenry upon his guarantie, then I should be decidedly of opinion that there was nothing in an agreement of that kind which in any way discharged the sureties for the debt, but that the creditor remaining at liberty to sue the principal debtor, there was nothing in the transaction of which the sureties could complain. But, on the other hand, if the meaning of these words is that the agreement was that no proceeding should be taken either upon the bills or upon the guarantie given for the payment of the bills, then it appears to me that the agreement would be one entered into to sue neither principal nor surety, but entered into at the instance not of the surety but of the principal, and was therefore one that would be open to all the vice of an agreement to give time to the principal debtor.

I must, my Lords, repeat, what is the meaning of these words? In point of fact, the names upon the bills of exchange no doubt were the names only of the drawer and of the acceptors; but, as I have just now observed to your Lordships, there cannot be a doubt that these bills were discounted by Overend, Gurney, & Co., not merely upon the faith of the names upon the bills, of the drawer and the acceptors, but upon the faith of that guarantie which I have already read. For if not, for what purpose was that guarantie given, and what is the stipulation in that guarantie, "I agree to indemnify you for all the loss that you may incur by discounting the bills, and, in the event of the same not being duly paid at maturity, I engage to pay the amount of the bills on demand?" My Lords, to all intents and purposes, as regarded Overend & Gurney, McHenry was exactly in the same position as to those bills as if his name had been found upon the bills as a party to them. He had promised to pay them on demand when they had reached maturity. Although he had given that promise not upon the face of the bills but upon a collateral writing, to all intents and purposes he was bound by whatever might be the fate of the bills.

[* 359] * I therefore repeat that, when your Lordships find that the agreement which, it is admitted, was come to, not at the instance of the sureties of the bills, not at the instance of the Financial Corporation, nor of Deschamps, but at the instance of McHenry, and that during this long period of eighteen months to which I have referred the sureties were taking no steps to shelter themselves from proceedings under the bills, but the only person who was taking proceedings to prevent the bills being put in suit was McHenry, and that there was obviously an important end to be gained by McHenry, just as much with regard to himself as with regard to the parties to the bills, — namely, that the trans-atlantic railway company should not have its credit endangered by proceedings being taken against him, its agent; when, I say, your Lordships consider those circumstances, it appears to me that you cannot do otherwise than arrive at the conclusion that the agreement, which clearly was everything to him, that the bills should be held over during the currency of the bills of Léon Lillo, was an agreement that no proceedings should be taken in respect of those bills either against McHenry or against the Financial Corporation Company.

And, my Lords, I venture to think that if, after that agreement was entered into, any proceedings had been taken against McHenry upon the guarantie, it would clearly have been open to McHenry to defend himself against any such proceedings by alleging (whether he would do it in the shape of a legal plea or an equitable plea, by a defence in a Court of Law or by proceedings in a Court of Equity, it is unnecessary to consider) that, whereas the guarantie was a guarantie that he would pay the amount of the bills on demand when the bills reached maturity, the holders of those bills had, at his instance, agreed to defer taking any proceedings upon them, and had agreed that the bills should be held over during the currency of the Léon Lillo bills. My Lords, I need not point out to your Lordships that that was a perfectly valid agreement. It was an agreement for good and valuable consideration, and the only question which can arise is as to the construction of those words to which I have referred. In my opinion, the agreement to hold over the bills had the effect of protecting during the continuance of that agreement both the parties * whose names were on the bills, and also [* 360] McHenry himself, from any proceedings.

Now, my Lords, it is said that this case was not sufficiently alleged in the pleadings. It appears to me that it was the supposition of the plaintiffs, when the bill was first filed, that the effect of what was done on the 27th of April was at once to put an end to the £10,000 bills by an arrangement under which the Lillo bills, and other securities, were accepted as payment. It was found out, as the suit proceeded, that that was not the view taken by Overend, Gurney, & Co., although it was the view of McHenry, as to what took place on the 27th of April. On the other hand, Overend, Gurney, & Co., through their directors, alleged that what took place was not an agreement to terminate the bills, or to pay the bills, but an agreement to hold over the bills in the way I have described. Thereupon the bill was amended in a manner which, although it may be criticised as somewhat curt and bare in the allegation, is, as it appears to me, sufficient for the purpose in view. "The plaintiffs charge that even if the agreement was such as the defendants, the company" (that is, Overend, Gurney, & Co.), "allege, the defendants, the company, at the time they made the same, well knew that the plaintiffs were sureties only for James McHenry, and that

the defendants, the company, by giving time to James McHenry without their privity or consent for the payment of the said bills of exchange, have released the plaintiffs from all liability to pay the same."

Then, my Lords, it was said that the knowledge that the Financial Corporation was surety was not obtained by Overend, Gurney, & Co. until after the bills became due; and inasmuch as the contract arising out of and connected with the bills was made before Overend, Gurney, & Co. had any knowledge of that suretyship, their rights and their powers of proceeding under that contract ought not to be interfered with in consequence of knowledge subsequently obtained. My Lords, it appears to me that after the case which was referred to at the Bar, decided by your Lordships' House, that of *Oakley* v. *Pasheller*, 4 Cl. & F. 207, it is impossible to contend, if after a right of action accrues to a creditor against two or more persons, he is informed that [*361] one of them is a surety *only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply.

My Lords, it was then said that at all events you must read the statement made by Mr. Birkbeck as to the agreement that was come to, as if it implied that all the rights were reserved by the agreement against the surety; and that, inasmuch as the words with regard to the Lillo bills are that they were given "as additional security," the giving of additional security does not discharge in any way the surety.

My Lords, it is quite true that the giving of additional security will not of itself discharge a surety; but if the additional security is given upon a contract to give time, in consideration of this giving of the additional security, then time given under those circumstances, apart from the consent of the surety, is a discharge of the liability of the surety. I cannot find in the words which I have read any reservation of right whatever as against the surety. If I am right in the construction which I have put upon it, it is a voluntary agreement entered into with McHenry to sue no person at all for the period of time mentioned. If that is so, it is an agreement not to sue the surety, and there is no reservation of right as against that surety.

My Lords, I certainly think that the conclusion at which the

late LORD CHANCELLOR arrived in this case is entirely correct, and I therefore submit to your Lordships that the appeal should be dismissed with costs.

Lord CHELMSFORD: —

My Lords, the only question in this case is one entirely of fact, which is, whether the agreement by Overend, Gurney, & Co. with Mr. McHenry to hold over the bills upon which he was the principal, and the respondents the sureties, during the currency of the bills drawn by Lillo, involve a giving of time to the principal? The agreement is proved by Mr. Birkbeck, one of the appellants, who states that the agreement was that the four bills should be held over during the currency of the said bills on Léon Lillo for *£38,000 given as additional security. [*362] During the course of the argument I certainly entertained very great doubt as to what was the construction of this agreement; but, upon consideration, I am disposed to agree with the view which has been taken by my noble and learned friend on the woolsack, that it amounted to this, — that they would not, during the currency of Lillo's bills, place McHenry in the position of being sued. That being so, it is quite clear that it was a giving time to the principal; and upon this short ground I agree with my noble and learned friend that the decree of the LORD CHANCELLOR ought to be affirmed.

Lord O'HAGAN: —

I can add nothing material to the reasoning by which my noble and learned friend on the woolsack has sustained an opinion with which I concur. The question is a short and a clear one. It is a question as to the construction of a contract contained in a very few words, and is presented to us without any obscurity arising from a conflict of evidence. It seems to me a case without difficulty in law, or doubt as to facts.

The matter stands simply thus: Mr. McHenry, the person who entered into the contract, had an interest in it, either on his own account or for those whom he represented, — the Atlantic and Great Western Railway Company. He came to make the contract and to settle its terms, and by him it was made accordingly. In entering into that contract he procured the making of it for good consideration. He gave additional security, and upon his giving it, the parties with whom he dealt agreed that they would not, for a certain period, sue upon the bills which were at that time

in circulation and in their hands. I think it clear, under such circumstances, that the agreement was not to have a merely limited effect, protecting only the persons who had become sureties, but that according to the intention of the parties it was to suspend all action upon the bills, or in relation to them, directly or indirectly, for the period during which it was to operate.

Such being, as I conceive, the meaning of the contract, it seems to me that it would have been a complete breach of it [*363] between *Overend, Gurney, & Co. and Mr. McHenry if, during the period of the currency of the bills held by the plaintiffs, they had taken any step whatever for the purpose of obtaining payment. I think, also, that if the guarantie to which my noble and learned friend on the woolsack has referred, had been sued upon at any time during that period, it would have been impossible to enforce that guarantie, or to encounter a defence which might have been presented either in the shape of an equitable suit or a plea at law, relying on the case that there had been, for good consideration, a contract to suspend any action for the recovery of the money affected by the guarantie.

I am, therefore, of opinion that the judgment of the Lord Chancellor ought to be sustained.

Order appealed from affirmed, and appeal dismissed with costs.

ENGLISH NOTES.

The application, by analogy of the law of principal and surety to the ordinary relations between the parties to a bill, will be found further considered in the next ruling case, No. 45, *Duncan, Fox, & Co.* v. *North and South Wales Bank*, at p. 591 *et seq.*, *post*. The cases as to giving time relating to principal and surety generally will be considered under the title "Principal and Surety."

AMERICAN NOTES.

The holder of a note extending the time of payment to the maker, by contract upon sufficient consideration, discharges an apparent maker whom he knows to be a surety, and who did not consent to the extension. *Lime Rock Bank* v. *Mallett*, 34 Maine, 547; 56 Am. Dec. 673.

But "that the holder who expressly and clearly reserves his rights against an indorser after the latter's liability has been fixed, or after he has waived demand and notice, may then require payment of the indorser, is well settled." Bigelow on Bills and Notes, p. 697, citing the principal case; *Pannell* v. *McMechen*, 4 Harris & Johnson (Maryland), 474; *Sohier* v. *Loring*, 6 Cushing (Massachusetts), 537; *Morse* v. *Huntington*, 40 Vermont, 488; *Hagey* v. *Hill*, 75 Pennsylvania State, 108; 15 Am. Rep. 583.

No. 45. — DUNCAN, FOX, & CO. *v.* NORTH AND SOUTH WALES BANK.

(H. L. 1880.)

RULE.

THE indorser of a bill which has been dishonoured, who has received due notice of dishonour, is in a position so far analogous to that of a surety that he is entitled to the benefit of any securities deposited with the holder by the acceptor, being the principal debtor on the bill.

Duncan, Fox, & Co. v. North and South Wales Bank.

6 App. Cas. 1–23 (s. c. 50 L. J. Ch. 355; 43 L. T. 706; 29 W. R. 763).

The two firms of the appellants carried on business at [2] Liverpool as merchants. They were not connected together in business, but the transactions of both with the Radfords were exactly of the same kind. It will be sufficient to refer to one alone.

Radford & Sons were millers and corndealers at Liverpool, the firm consisting really of Samuel Collins Radford and James Radford.

The Radfords were not strictly the customers of the North and South Wales Bank, but had opened a discount account with it, and were indebted to it in respect of discounts of bills of exchange. This discount account was considerable.

On the 1st of December, 1874, Samuel Collins Radford deposited with the bank certain deeds of freehold property belonging to himself, for the purpose of securing payment of the amount then due, and to become due, on discounts, from his firm to the bank. The deposit was effected by two memorandums, one of which, executed by Mr. S. Collins Radford alone, stated that the deposit was made "in pledge to secure to the said bank the balance, for the time being, owing to the said bank by my firm of Samuel Radford & Sons for discounts and advances, and for all other moneys in or for which said firm, whether alone, or jointly with *any [*3] other person or persons, were, or might, from time to time thereafter be or become indebted or liable on their account, or

which the said bank might at any time claim against the said firm." The second memorandum relating to other property of S. C. Radford was in a similar form.

In November, 1875, Duncan & Co., through their brokers Maxwell & Co., sold to S. C. Radford & Co. a cargo of wheat *ex Rima* for cash after delivery. Part of the price was paid in cash, but James Radford applied to Mr Duncan to take the acceptances of Radford and Sons for the residue. Duncan at first declined to do so, on which James Radford said, "You bank with the North & South Wales Bank, if you go there you will find it will be all right with our bills," to which Duncan answered, "If the bank will accept those bills without our indorsement, then I can oblige you." Mr. Duncan went to the bank and saw the manager, who declined to discount the bills without the indorsement of Duncan & Co., stating that it was contrary to all banking customs to discount bills for any one who did not indorse them; he added that he did not think that Duncan & Co. would incur more than a mere nominal responsibility by making the indorsement, — or something to that effect. Mr. Duncan thereon informed Radford that he would consent to take the bills, which he did, and then indorsed them and handed them to the bankers, who discounted them, placing the amount to the credit of Duncan & Co. At that time Duncan & Co. had no knowledge that the bankers held any securities from Radford. In January, 1876, before any of the bills became due, Radford & Sons stopped payment. When the bills became due they were presented for payment; they were dishonoured, and Duncan & Co. became liable to the bankers for the amounts. They received formal notice of the dishonour, and a demand of payment. There were other bills of Radford & Co. held by the bankers under similar circumstances on which Robinson & Co. were indorsers, all of which became due between the 22nd of February and the 27th of March. On the 24th of February, 1876, Radford & Co. executed a deed of inspectorship. The bankers made the property deposited with them available for the purpose of covering their claims, and if the bills in question were not included in the general balance, that balance would be satisfied

[*4] *but if they were included in it, the bankers would still be creditors of Radford & Co. upon the bills. Messrs. Duncan & Fox admitted their liability on the bills; but (having in the meantime heard of the securities held by the bankers) contended

that they were entitled, in calculating the amount due upon the bills, to the benefit of these securities, for that they, Duncan & Fox, being merely, as between themselves and the bankers, sureties on the bills, they were entitled to the indemnity afforded by the securities which the principals on the bills, Radford & Co., had placed in the hands of the bankers.

The appellants, after coming to a knowledge that the bankers held securities to cover discount and balances, applied to them to realize these securities and apply the proceeds in payment of the amounts due on the bills, or to render to the appellants an account of what was due from Radford & Sons, and, on payment of the same by the appellants, to transfer to them the securities for the same amount remaining in their hands. Balfour, Williamson, & Co., and the other unsecured creditors, claimed to have the securities paid over to the inspectors for general distribution under the deed. The bankers declined of themselves to adopt either claim, and required the direction of a Court.

An action was thereupon brought by Duncan & Co. in the Chancery Court of the County Palatine of Lancaster, to determine this question. Messrs. Balfour, Williamson, & Co., creditors of the Radfords, were joined as defendants representing the creditors in general. The VICE-CHANCELLOR (Mr. LITTLE) on the 10th of May, 1878, decided in favour of the claim made by Duncan & Co. The decree, dated the 28th of May, 1878, declared that the appellants were sureties for the payment by the Radfords of the balance due in respect of the bills held by the bankers, and that the equitable mortgages of the 1st of December, 1874, extended to such bills of exchange and to all other acceptances of the Radfords held by the bankers, whether discounted by the Radfords or for third parties, and relief was given to Duncan & Co. upon the principle that they were entitled to the benefit of the securities so deposited with the bankers. On appeal, this decree was ordered to be reversed and the action dismissed with costs. 11 Ch. D. 88; 48 L. J. Ch. 376. This appeal was then brought.

* Mr. E. E. Kay, Q. C., and Mr. W. F. Robinson, Q. C. [* 5] (Mr. Ralph Neville was with them), for the appellants: —

The appellants here bore the character of sureties to the bank for the payment of these bills, and, in that character, were liable on the bills, Byles on Bills, 13th ed., ch. xviii. 245; and were therefore entitled to any benefit from securities held by the

bankers which would diminish the amount of the liability they had incurred. If the acceptors, who were the persons primarily liable, the real principals on the bills, failed to pay them, the appellants made themselves liable as indorsers, *Susé* v. *Pompe*; Byles on Bills, 13th ed. 154; 30 L. J. C. P. 75; 8 C. B. (N. S.) 538; that is, as sureties. If the indorsers discharged that liability they then became entitled to sue the acceptors, — and, suing them, to take their property in execution. Part of that property would be the securities left in the hands of the bankers, who, if they received payment of the bills from the sureties, the indorsers, could have no right to retain, as against them, the securities which had been deposited to cover the debt of the acceptors which they had satisfied. The right of a surety to be indemnified out of the property of the principal was undoubted, Byles on Bills, 13th ed. 249-258; and was not lessened by the fact that, as between the principal and the surety, the liability arose with relation to a bill of exchange. The deposit agreement under which the securities were given was collateral to the bills and could not affect the rights of the parties to those bills, Byles on Bills, 13th ed. 101; *Webb* v. *Salmon*, 13 Q. B. 886; 3 H. L. C. 510; it did not amount to giving time to the acceptor, *Pring* v. *Clarkson*, 1 B. & C. 14, and therefore could not discharge the indorser, for the mere giving of additional security by the principal will not discharge a surety, though giving time to the principal on account of that security, without notice to the surety, will have that effect. *Overend & Gurney* v. *The Oriental Financial Corporation*, L. R., 7 H. L. 348; *ante*, p. 576.

In a transaction of this kind the security given on the bills would be strictly confined to the bills themselves, even in the hands of the bankers, and, the bills being satisfied, those who [* 6] had *been liable upon them became entitled to the securities. *Latham* v. *The Chartered Bank of India*, L. R. 17 Eq. 205; 43 L. J. Ch. 612. In *Praed* v. *Gardiner*, 2 Cox, 86; 2 R. R. 8, A. lodged certain securities in the hands of B. his creditor; A. afterwards incurred a fresh debt with B., for the payment of which C. became security. A. became bankrupt, and B. called on C. to pay the second debt. The securities being more than sufficient to pay the first debt, C. was held entitled to the benefit of the surplus in reduction of the second debt. The indorser, who, as to the holder of the bill is surety for its payment, has not only a right to the benefit of securities in the hands of the holder, but, if the

holder is a debtor to the principal, has a right to the benefit of set-off in respect of such debt. *Bechervaise* v. *Lewis*, L. R., 7 C. P. 372; 41 L. J. C. P. 161. There the payee suing a person whom he knew to have joined in a promissory note merely as a surety, the latter pleaded a set-off of a sum due from the payee to the acceptor, and the plea was held good. The judgment of the Court was delivered by Mr. Justice WILLES, who in the course of it stated, L. R., 7 C. P. at p. 377; 41 L. J. C. P. 162: "A surety has a right as against the creditor, when he had paid the debt, to have for reimbursement the benefit of all the securities which the creditor holds against the principal. The surety has another right, namely, that as soon as his obligation to pay becomes absolute he has a right in equity to be exonerated by his principal." That case the more directly applies here, for here the bankers knew perfectly well that the appellants only indorsed the bills as sureties. The same principle had already been declared by the Exchequer Chamber in the case of *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L. J. Ex. 112. That principle had been explained in *Youngy* v. *Reynell*, 9 Hare, 809, to be derived from the obligation under which the principal debtor lay to indemnify the surety, and Vice Chancellor WOOD in *Newton* v. *Chorlton*, 10 Hare, 646; 2 Drew. 333, declared that the surety was not to have his position deteriorated by any arrangement between the principal debtor and the creditor. Though, therefore, the appellants here knew nothing of the deposit of the securities at the time they became sureties on the bills, it was clear upon all the authorities that they were, in * equity, entitled to the bene- [* 7] fit of those securities as an indemnity against the liability they had incurred.

Mr. Benjamin, Q. C., and Mr. A. G. Marten, Q. C. (Mr. F. Thompson was with them), for the respondents: —

There had not been anything done here which could in any manner vest especial rights in the appellants. They were altogether strangers to what had passed between S. C. Radford and the bankers, and the securities given by him were expressly made liable only to what his firm might owe to the bankers. The appellants were the persons who brought these bills to the bankers, and who had, on their own account, and for their own benefit, obtained from the bankers the amount of the bills. They had therefore made themselves, so far as they and the bankers were concerned, principal debtors. Under no pretence did the

circumstances here warrant them in assuming the character of sureties, nor could the ordinary rules applicable in the case of principal and surety be applied in this case. So to apply them would be disastrous to mercantile transactions. The appellants knew nothing of the securities deposited by S. C. Radford, and had not made themselves liable because of those securities, or on account of any reliance placed on them. The appellants had been told that it was probable their liability would be merely nominal, and they had chosen to incur the chance in order to obtain a present benefit. They had become liable to the bankers as principals on the bills, and were so liable at the moment when the Radfords stopped payment. At that time the only question as to the benefit to be obtained from the deposited securities was one which might arise between the bankers and the Radfords, but with no one else. When the bankers' claims were satisfied the property given to them as security for their possible advances to the Radfords, ought to be returned to those who gave it. In that way it would become liable to the general creditors of the firm, — and for the benefit of those creditors vested in the trustees appointed under the deed of inspection. As general creditors the appellants might possibly claim to participate in the benefit of these securities, but only in that character, and could not specially claim the exclusive advantage of [* 8] them, for they were not sureties * but principal debtors on these bills, which had been discounted at their own request and for their own advantage. [Lord BLACKBURN: Were they not sureties to this extent, — that if the acceptors paid the bills they were free, but if the acceptors did not pay the bills, they undertook to do so?] They undertook to pay the bills because they received the amount for their own use, and were in that way principal debtors. Under the special circumstances of the case they could not be said to bear any other character. The cases therefore where no such special circumstances existed did not apply to the present. As to the case of *Praed* v. *Gardiner*, 2 Cox, 86; 2 R. R. 8, no argument could properly be deduced from it, for the decree there appeared only to be a marshalling of securities held by the creditors according to the different equities of the persons entitled to redeem them; there was no sufficient explanation of the case, and the grounds of the judgment were not stated.

No. 45. — Duncan, Fox, & Co. v. North and South Wales Bk., 6 App. Cas. 8, 9.

This action was premature. The appellants had not paid the bills, which were still held by the bankers, and on that ground could not maintain this action, for there was nothing to entitle them to proceed here on the *quia timet* principle. *Antrobus* v. *Davidson*, 3 Mer. 569, 17 R. R. 130.

Sir H. Jackson, Q.C., Mr. Rotch, and Mr. Charles Peile, appeared for the North and South Wales Bank, which submitted without contest to any order that might be made. They did not, therefore, address the House.

Mr. Kay replied.

The Lord Chancellor (Lord Selborne :—

My Lords, the appellants, Duncan, Fox, & Co., are liable, as indorsers of three bills of exchange, dated the 25th of November, 1875, drawn upon and accepted by a firm of Samuel Radford & Sons, for the total amount of £8920 15*s.* 3*d.*, and given to Duncan, Fox, & Co., in part payment for wheat sold by them to Samuel Radford & Sons. The other appellants, Jonathan Robinson & Co., are liable as drawers and indorsers of two other bills, also drawn upon and accepted by Samuel Radford & Sons, under dates the *19th of November and the 14th of December, [*9] 1875, for the total amount of £5432 7*s.* 6*d.*, on account of other wheat sold to Samuel Radford & Sons. All these bills were discounted, in the usual course of business, with the North and South Wales Bank, without any special agreement; and the bank has never parted with and still holds them. Samuel Radford & Sons stopped payment in January, 1876, and on the 24th of February following executed a deed of inspectorship, under which their joint and separate estates are applicable for the benefit of their creditors, parties thereto, who are represented by the respondents. Neither the appellants nor the bankers are parties to that deed. The first of the five bills in question became due on the 22nd of February, three others on the 28th of Feburary, and the last on the 17th of March, 1876. They were all duly presented for payment, and dishonoured, and notice was duly given of dishonour. Some payments have been made by the acceptors on account; and the amount now remaining due upon them is claimed by the bank, as to three from Duncan, Fox, & Co., and, as to two, from the other appellants. The appellants are ready and willing to meet their liabilities on these bills, but they insist that a sum of £5921 19*s.* 6*d.*, now in the hands of

the bank, which has been realized from securities held by the bank under a certain memorandum of deposit, dated the 1st of December, 1874, ought to be applied to relieve them as far as it will extend, and also that the securities yet remaining unrealized under the same memorandum (valued at about £2000), ought to be handed over to them, on payment of the balance which, after the application of the £5921 19*s.* 6*d.*, will remain due upon the bills. This claim is resisted by the respondents, who, for this purpose, may be regarded as standing in the shoes of Samuel Collins Radford, one of the partners in the firm of Samuel Radford & Sons.

The deposit consisted of the title deeds of certain real estate at Liverpool, belonging absolutely to Samuel Collins Radford, which, by the memorandum of the 1st of December, 1874, were pledged to secure to the bank (whose customers Samuel Radford & Sons were), "the balance for the time being owing to the said bank by Samuel Radford & Sons for discounts and advances, and for all other moneys in or for which the said firm, whether alone [*10] or *jointly with any other person or persons, were, or might, from time to time thereafter be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm." At the time when the present question arose, all dealings and accounts between the bank and Samuel Radford & Sons had been closed, and nothing remained due to the bank under the memorandum of deposit, except the balance then unpaid upon those bills. The property from which the sum of £5921 19*s.* 6*d.* was realized was sold by the bank after the commencement of the action. The bank is before the Court (subject to its right to receive payment of the balance due on the bills and of its costs) merely as a stakeholder. In its answer it professes to be "desirous of acting with entire impartiality, and holding an even hand between the plaintiffs and the defendants, and of dealing with the securities and the proceeds thereof under the direction of the Court;" and it offers, on receiving payment of what is due to it, to pay over any surplus, and to assign any property comprised in its security which may remain unsold, to such persons as the Court may consider entitled.

The question, therefore, as to the proper appropriation of the £5921 19*s.* 6*d.* and the remaining securities, is between the respondents, claiming in right of Samuel Collins Radford (one of

the acceptors), and the appellants, the indorsers of the bills of exchange; and it ought, I conceive, to be determined upon the same principles as if the appellants had actually paid the bills, and as if the bank had paid the proceeds of the securities either to the appellants, or into Court in this action. If, in either of those events, Samuel Collins Radford would have been entitled to an order against the appellants for repayment, or for payment out of Court of such proceeds, to be applied as part of his estate under the inspectorship deed, your Lordships' judgment ought now to be for the respondents: if not, the appellants are right. The VICE CHANCELLOR of the Palatine Court of Lancaster thought that the appellants were right; and, with the utmost respect to the Court of Appeal (which thought otherwise), I am of the same opinion.

In examining the principles and authorities applicable to this question, it seems to me to be important to distinguish between *three kinds of cases: (1) Those in which there [*11] is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

It is, I conceive, to the first of these classes of cases, and to that class only, that the doctrines laid down in such authorities as *Owen* v. *Homan*, 3 Mac. & G. 378; 20 L. J. Ch. 314; affirmed 4 H. L. Cas. 997; *Newton* v. *Chorlton*, 10 Hare, 646; 2 Drew. 333; and *Pearl* v. *Deacon*, 24 Beav. 186; 1 De G. & J. 461; 26 L. J. Ch. 761, apply in their full extent. If, so far as the creditor is concerned, there is no contract for suretyship, if the person who has (in fact) made himself answerable for another man's debt is, towards the creditor, no surety, but a principal, then I think that the creditor would not be subject to those special obligations which were described by Lord TRURO in *Owen*

v. *Homan*, 3 Mac. & G. pp. 396–397, and would not, generally, have his powers of dealing with securities circumscribed and restricted in the manner described by Vice Chancellor Wood in *Newton* v. *Chorlton*, 10 Hare, p. 651, and by Lord Romilly and the Lords Justices in *Pearl* v. *Deacon*. If, for example, in *Pearl* v. *Deacon*, the contract of suretyship had been only between Pearl and Pearson *inter se*, Messrs. Deacon dealing with them both as principals, and not with Pearl as a surety, I should take it to be clear that Messrs. Deacon might have distrained upon goods comprised in their security for the rent due to them from Pearson, without losing (as they did in the actual case) their remedy against Pearl. The difficulties, therefore, which in the present case appear to have weighed most upon the minds of the Judges in the Court of Appeal, would not ordinarily arise, unless there was a contract of suretyship properly so called, not

[* 12] * between the two debtors only, but between them and the creditor also.

It is, however, consistent with this that the person who, as between himself and another debtor, is in fact a surety (though the creditor is no party to that contract of suretyship), has, against that other debtor, the rights of a surety; and that the creditor, receiving notice of his claim to those rights, will not be at liberty to do anything to their prejudice, or to refuse (when all his own just claims are satisfied) to give effect to them. The judgment of Lord Justice Turner in *Davies* v. *Stainbank*, 6 D. M. & G. 694, and the cases of *Ex parte Hippins & Harrison*, 2 Glyn & Jameson, 93, and *Liquidators of Overend, Gurney, & Co.* v. *Liquidators of Oriental Financial Corporation*, L. R., 7 H. L. 348, No. 44, p. 576, *ante*, are founded, as I understand them, on this view of the law. In such cases the equity is direct in favour of the surety-debtor against the principal debtor; but it affects the creditor towards whom they are both principals only as a man who has notice of the obligations of one of his own debtors towards the other. As between the two debtors, the "established principles of a Court of Equity," to which Sir Samuel Romilly referred in his argument in *Craythorne* v. *Swinburne*, 14 Ves. 162; 9 R. R. 264, judicially approved by Lord Eldon, 14 Ves. at p. 163; 9 R. R. 265, are fully applicable. "Natural justice" (it was there argued) "requires that the surety shall not have the whole thrown upon him, by the choice of the creditor not to resort to

remedies in his power." In *Aldrich* v. *Cooper*, 8 Ves. 382, 389; 7 R. R. 86, Lord ELDON speaks of a surety's equity as resting upon the same principles with that of marshalling when one creditor of the same debtor is able to resort to either of two funds, and another creditor to only one. "It is not" (he says), "by force of the contract, but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor." And soon afterwards (where he speaks of marshalling), "The principle, in some degree, is that it shall not depend upon the will of one creditor to disappoint another;" *and (8 Ves. p. 391; 7 R. R. 93) [*13] "The Court has said that if a creditor has two funds the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which, paying him, will leave another fund for another creditor." And in *Younge* v. *Reynell*, 9 Hare, 819, Vice Chancellor TURNER said: "When Lord ELDON says it is against conscience to sue the surety, it must be considered what is the meaning of that expression, and why this Court considers it against conscience that the surety should be sued; and I take it to be because, as between the principal and surety, the principal is under an obligation to indemnify the surety; and it is, I conceive, from this obligation, that the right of the surety to the benefit of the securities held by the creditor is derived. The principle is not, I think, much dissimilar to that which applies where a man directs part of his estate to be employed in carrying on a trade, in which case the creditors of the trade have a right to resort to that part of the estate, because the trustees have a right to be indemnified out of it."

It appears to me that these principles of Equity are not less applicable to cases of the third class, — cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other, — than to those of the second class, in which there is a contract of suretyship to which the creditor is not a party. To this third class of cases, the rights of an indorser

against an acceptor of a bill of exchange may most properly be referred. The liability of the indorser to the holder is, by the law-merchant, conditional, and (as was said by Mr. Justice BULLER, in *Tindal* v. *Brown*, 1 T. R. 170, affirmed 2 T. R. 186; 1 R. R. 171 (and see note to that case, 1 R. R. 176) "only secondary:" but, when the conditions required by that law are fulfilled, it becomes absolute, and is that of a principal; and the indorser's right, if he pays the holder, to recover over against the acceptor is not founded on any agreement between him and the acceptor (who is as likely as not to be a stranger without any communication with him before the indorsement), but is established by the same law. But contracts of this kind, as [*14] well as *suretyships proper, are entered into, by all the parties to them, with a knowledge and in view of the law by which they are governed. The acceptor, though he may know nothing of any particular indorser, knows that by his acceptance he does an act which will make him liable to indemnify any person who may indorse, and may afterwards pay the bills; and he knowingly and intentionally undertakes that liability as much as if the indorsement were the result of direct communication between himself and that person. Lord ELDON, in *Ex parte Younge*, 3 V. & B. 40; 13 R. R. 73, said with his usual accuracy (his language being as applicable to an indorser as to a drawer): "The drawer of a bill of exchange is not strictly a surety for the acceptor. In general cases, the acceptor is primarily liable upon the bill, and the drawer may be in the nature of a surety." The statement in Smith's Mercantile Law (3rd edition, p. 253) is also correct, and is established by many authorities, that "in the contract by bill or note, the maker or acceptor is considered the principal, and the indorsers as his sureties; and consequently, if the holder either discharge or suspend his remedy against the former, the latter, unless they have previously consented to it, or afterwards promised to pay with knowledge of it, are all immediately discharged." Mr. Smith uses, in this passage, the language of Mr. Justice CHAMBRE in *Clark* v. *Devlin*, 3 Bos. & P. 366; 7 R. R. 793, who stated that the case of *Darley* v. *English* [*English* v. *Darley*, 2 Bos. & P. 61, 5 R. R. 543] was decided by Lord ELDON (in the Common Pleas) on that principle. I am unable to conceive any ground on which the principle which prevails in cases of suretyship should go so far as this, in favour of the drawer or the

indorser, and not also extend (when the indorser is compelled to pay the bill, and when the question arises between him and the acceptor only) to securities deposited by the acceptor with the holder. In the present case the holder has actually in his hands a large sum of money, realized by him from such securities. It is very difficult, on any rational principle, to distinguish the receipt of such a sum, under such circumstances from an actual payment on account by the acceptor. Of the creditor's right, if he pleases, to apply it in payment of the bills there can be no possible question; yet it is contended that he may, at his option, give the money back to the acceptor, and sue the indorser on the bills; nay more, that, if he *does compel the indorser to [*15] pay the bills without applying that money to them, a Court of Equity is bound to leave the burden on the indorser, and restore to an insolvent acceptor the money which has been so realized from the securities. I cannot reconcile such a decision with the doctrines of Lord ELDON and Lord Justice TURNER. No case before the present has been cited, in which the right of a drawer or indorser to the benefit of such securities, as between himself and the acceptor, has ever been denied or doubted. The opinion of Sir John Byles, in his very learned Treatise on Bills, is (no doubt) no authority; and I will not lay stress upon the case of *Praed* v. *Gardiner*, 2 Cox, 86; 2 R. R. 8. because, as was observed by Mr. Marten, what was really done in that case was to marshal securities held by the creditor according to the equities of the different persons entitled to redeem them, and the exact grounds of the judgment do not appear. But I think that the principles deducible from all the authorities lead, necessarily, to the conclusion, that, under circumstances like the present, the equity between the indorser and the acceptor is the same as that between a surety and a principal debtor when the creditor is not a party to the contract of suretyship. That equity, according to my view of it, need not interfere with the ordinary operation of such a general covering security as that given by Samuel Collins Radford to the North and South Wales Bank, during the continuance of the dealings between the secured creditor and the acceptor of bills not overdue, which the creditor may hold or part with as he pleases. It will not incapacitate bankers who may hold such a bill, accepted by a customer and indorsed by a third party, from carrying on their dealings with that customer, by varying

the securities received from him according to the ordinary course of those dealings, as long as he remains solvent, and before the acceptance has been dishonoured. It will not, in my opinion, tend to paralyze the business of discounting bills of exchange. But it is an equity which, in my judgment, does certainly attach, when the bills, overdue and dishonoured, and the securities, are found together in the hands of the secured creditor, at the time when he requires payment from the indorser; when the creditor has no other transactions then depending with the customer, [*16] and *no claim upon the securities except for the bills themselves; and when the competition is between the indorser and the acceptor only.

For these reasons, I think that the judgment under appeal is erroneous, unless it can be supported on the ground that the security in this case was given by one only of the partners in the firm by which the bills were accepted. But it appears to me that it can make no difference whether the security was given by all the acceptors or by one of them. In each case alike, the person giving the security is principal debtor as between the indorser and himself; and the interest, whether of a sole debtor or of one of two or more joint debtors, is not (in my opinion) to be regarded in competition with the equity of any one who is in the nature of a surety for him, and whom he is bound to indemnify.

I therefore propose to your Lordships to reverse the decree appealed from, and to restore that of the Vice Chancellor of the County Palatine of Lancaster. The bankers will take their costs here and below out of the fund arising from the securities; and the appellants must have their costs here and below out of any surplus remaining from the securities in the first instance, and (so far as the securities may not be sufficient to pay them) from the respondents.

Lord Blackburn: —

My Lords, the North and South Wales Bank had, amongst its customers, a firm of Samuel Radford & Sons. The bank had taken from Samuel Collins Radford, one of the partners in that firm, the title deeds of some property belonging to him with two memorandums, by which he acknowledged to have delivered the title deeds in pledge to secure to the bank whatever might be owing from the firm to the bank.

I do not think it either necessary or desirable to inquire what might have been the rights of the various parties under all the complicated state of things which might have arisen during the winding-up of the transactions between the bank and Samuel Radford & Sons. It is enough to consider the state of facts which has in this case actually occurred.

The bank had discounted for one of the appellants two bills of *exchange, and for the other appellant three bills [*17] of exchange accepted by the firm of Samuel Radford & Sons, payable at a bank in London. These bills were indorsed by the appellants respectively. At maturity they were dishonoured, and the firm was consequently liable to the bankers as holders of them, so that the equitable mortgage was held in pledge to the bank to cover, amongst other things, those bills. The bank gave due notice of dishonour to the several indorsers respectively, and they became bound to pay, to the bankers as holders, the amount of the bills, on having the bills delivered to them so as to remit them to their former rights as holders against the acceptors and any indorsers prior to themselves.

The estate pledged to the bank has, in fact, been converted into money, and partly from that source and partly from others, most of the liabilities of Samuel Radford & Sons to the bank have been discharged in full, and some payments have been made by the acceptors on account of the bills in question. And now it is ascertained that after all liabilities of the partners to the bank, except those on the five bills in question, have been discharged, there will remain on the equitable mortgage, partly realized, a considerable surplus, though not sufficient to pay the bills in full. The indorsers offer to pay the bills on having credit for the money realized, so far as not applicable to other purposes, and having the equitable mortgage transferred to them. Samuel Collins Radford has not become bankrupt, but the general creditors of the firm insist that the indorsers of the bills ought to be made to pay in full, and then that the surplus of the pledged estates should be delivered to Samuel C. Radford to be applied for the general benefit. The appellants have filed this bill to have the memorandums and the title deeds, together with the bills of exchange, delivered to them, on payment by them of what remains due to the bank on the bills. The bank is sure to be paid in full either way, and having no interest in the matter,

does not wish to favour either party, and submits to deal with the bills of exchange and equitable mortgages, after satisfaction of the principal moneys, interest, and costs, as the Court may direct.

The VICE CHANCELLOR held that the appellants were [* 18] entitled to * what they claim. The LORDS JUSTICES reversed this decision, and the substantial question before the House is, whether the indorsers of the bills have such a right.

I think it is clear that they have no such right by contract. They did not at the time when they got the bills discounted at the bankers so much as know that the bank held any security from Samuel Radford & Sons, and of course, that being the case, made no express stipulation about it; and there is nothing in the nature of an indorsement for value to give the indorser any right, during the currency of the bill, to any security which either his immediate indorsee, or any other holder of the bill, may have from any party to the bill. The indorser, by the law-merchant, is liable, on having due notice of dishonour, to pay the amount of the bill to the holder for the time being, on having the bill restored to him; but till the bill is dishonoured there is nothing to prevent the party who may be the holder for the time being indorsing it, even without recourse, so as to make it impossible that he can ever be the person to whom the prior indorser will have to pay the bill. I think, therefore, with the LORDS JUSTICES, that there is neither principle nor authority for saying that the indorsers are, during the currency of the bill, sureties, or in the nature of sureties to the indorsee, or that they have any equity to prevent the indorsee from dealing as it may seem to him most desirable, with any other parties unless thereby he prevents himself from giving notice of dishonour, so as to give them their remedy against prior parties to the bill; and I agree with them in thinking that any contrary decision would be very mischievous.

But though the indorsers had no such right by contract, yet after the bills were dishonoured and notice of dishonour had been given to the indorsers, the position of the parties is altered. Though the indorser is primarily liable as principal on the bill, and is not strictly a surety for the acceptor, he has this in common with a surety for the acceptor, that he is entitled to the

benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor. And now the state of affairs is so far cleared up, that the bank had, besides the right to come upon the indorsers, a * right to come upon the security pledged to [* 19] the bank by Samuel Collins Radford.

I think it is established by the case of *Dering* v. *Lord Winchelsea*, 2 Bos. & P. 270, and the observations on that case by Lord ELDON in *Craythorne* v. *Swinburne*, 14 Ves. 165; 9 R. R. 266, and Lord REDESDALE in *Stirling* v. *Forrester*, 3 Bli. 575, that where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion. This is quite independent of any contract between the parties thus liable. Lord ELDON, in *Craythorne* v. *Swinburne*, says of *Dering* v. *Lord Winchelsea*: "That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction." And Lord REDESDALE, in *Stirling* v. *Forrester*, says: "The principle established in the case of *Dering* v. *Lord Winchelsea* is universal, that the right and duty of contribution is founded upon doctrines of equity, it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience (if not by contract) to give to the party paying the debt all his remedies against the other debtors. . . . He [the creditor] is bound, seldom by contract but always in conscience, as far as he is able, to put the party paying the debt upon the same footing as with those who are equally bound. That was the principle of decision in *Dering* v. *Lord Winchelsea*, and in that case there was no evidence of contract." And this last principle, that the person making payment of more than his due proportion is entitled to have assigned to him all rights and securities of the creditor for the purpose of, by means thereof, obtaining contributions, is recognized and enacted by the 19 & 20 Vict. c. 97, s. 5.

I think that though the indorser of a bill is not exactly a surety for the acceptor, or a co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety to bring him within the principle of *Dering* v. *Lord Winchelsea*.

No. 45. — Duncan, Fox, & Co. v. North and South Wales Bk., 6 App. Cas. 20, 21.

[*20] *If this be correct, it seems to me that the question in the present case is reduced to this: what are the due proportions as between the indorsers and the security created by one of the acceptors on his separate estate? If a third person, not a member of the firm or liable for its engagements, had become surety or pledged his estate as security to the bank for the general balance due to it from the firm, it might be contended, at least plausibly, that he became only surety for the balance after all indorsers had paid, and was therefore entitled to say that, as between him and the indorser, the indorser should pay all before the surety paid anything. I do not express any opinion how that would be. But the owner of the pledged estate in this case was himself one of the firm, and an acceptor of the bill, and as such liable to the indorser. And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of these bills, it seems quite clear that Samuel Collins Radford could not have come on the indorsers to repay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to pay the whole. And it follows, that if the bank comes upon the indorsers first, they must have the right to be recouped out of the security, unless the bank had an option to favour whichever set of those liable it pleased, which the reasoning of Lord Eldon seems to me to treat as manifestly inconsistent with the doctrine of equity.

I have, therefore, come to the conclusion that the decision below ought to be reversed.

I have not done so without some hesitation. For it is not to be denied that the result is that the indorsers of bills who happen to have discounted them with other banks are worse off than the appellants, who, by what as regards them is a lucky chance, have got the benefit of this security. I am afraid to question the justice of a rule approved by such great lawyers as Lords Eldon and Redesdale, though Lord Eldon does not seem at first to have approved of *Dering* v. *Lord Winchelsea*; but if it were *res integra* I am by no means sure that it would not have been better to say that every one should have the full [*21] extent of his rights *given by contract, express or implied, and no more. But I think the unbroken current of authority from *Dering* v. *Lord Winchelsea*, decided in 1787, very

nearly a century since, renders it impossible now to indulge in such speculations.

I agree to the order as to costs which has been proposed by the noble and learned lord on the woolsack.

Lord Watson: —

My Lords, I shall endeavour very briefly to indicate the grounds upon which I agree with your Lordships in holding that the judgment of the Lords Justices ought to be reversed, and that of the Vice Chancellor restored. I should have had difficulty in coming to that conclusion had it not been that in the present case there are certain special circumstances, and that there are authorities in the law of England applicable to these circumstances, which do not seem to have been taken into consideration by the Court of Appeal.

It does not appear to me that the broad proposition maintained by the appellants at the Bar of the House and elsewhere, to the effect that the indorser of a bill of exchange becomes entitled, in a question with the holder, to the same equities as if he had been a proper surety for the acceptor, has any foundation in law. To give these equities to an indorser before the bill falls due would, in my opinion, be inconsistent with the nature of a bill of exchange, and the rights and obligations which it creates in favour of and against the parties to it; and I entirely agree with the observation of the Master of the Rolls upon the grave inconveniences to which bankers and merchants would be exposed by the introduction of such a principle, so far as these observations apply to the period of the bill's currency.

The special circumstances which appear to me to be of vital importance to the decision of the present case are these: that at the time when the bills in question matured, the bankers had brought their dealings with the acceptors to a close, in consequence, apparently, of the insolvency of the latter, and that the bank then held securities sufficient, when realized, not only to pay off all *other debts due by the acceptors, but [*22] also to cover, if not in whole, at least in great part, the liabilities of the acceptors upon these bills.

That the bankers had power, in terms of the memoranda of deposit by Samuel Collins Radford, to apply the balance of their

securities in extinction of the indebtedness of the firm of Samuel Radford & Sons upon the bills in question, does not admit of doubt. Accordingly, the bank had a legal right to recover from the indorser, who became directly liable to them upon the failure of the acceptors to honour the bills, and had also a legal right under their arrangement with Samuel Collins Radford, a partner of the acceptors' firm, to obtain payment out of the free balance of the securities deposited by him. In a question with the bank the acceptors and the indorsers were alike principal debtors, but the bankers knew, at least it came to their knowledge before they had exacted payment from either, that in a question with the indorsers the acceptors were, in reality, as well as *ex facie* of the bills, primarily liable. In these circumstances it is obviously immaterial to the bankers from which source they obtain payment of their debt.

In the present case Samuel Collins Radford cannot, in my opinion, plead that he did not intend to become liable for the dishonoured acceptances of his firm, discounted with the North and South Wales Bank, and seeing that the real conflict of interests lies between him and the indorsers, I think it would be inequitable to compel payment from the indorsers until the securities given by him to the bank have been exhausted.

But, my Lords, I conceive that there is abundant authority in the law of England conclusive in favour of the indorsers' claim. I shall not refer in detail to the series of decisions which have been fully dealt with by your Lordships. They satisfy me that it has long been a settled rule of Equity that, in circumstances analogous to those of the present case, the creditor is bound to take payment from that one of his debtors who is *inter eos* primarily liable for his debt.

I have only to add that, whilst it is my opinion that the indorser is not in the likeness, and therefore cannot claim [* 23] the equities of a * surety so long as the bill is current, I am not prepared to hold that he becomes necessarily, and in all circumstances, entitled to these equities whenever the bill matures. It is possible that, after maturity, the holder of the bill may have such interest, arising from his relations with the acceptor, as will entitle him even then to deal with his securities without respect to the interests of the indorser. But the solution

of these questions is unnecessary for the disposal of the present case.

Order appealed from reversed; decree of the Vice-Chancellor of the County Palatine of Lancaster restored, with directions as to costs, and cause remitted.

Lords' Journals, 27th Nov., 1880.

ENGLISH NOTES.

As the case of *Tindal* v. *Brown*, referred to in the above case, p. 602, *supra*, is placed by His Honor Judge Chalmers amongst the overruled cases, it may be mentioned here, as has been done in the note to The Revised Reports, Vol. 1, p. 176, that the case is only overruled so far as three of the judges, Willes, J., Ashhurst, J., and Buller, J., held it necessary that notice should be given by the holder, and not by another person liable upon it. But on the other point, that the holder by giving time or credit to the acceptor after the maturity of the bill discharges an indorser, it is an instructive case.

It will be seen that the result of the decision in the above ruling case involves the principle that a surety is entitled to stand in the place of the creditor as to any securities he holds from the debtor freed from any further charge which the debtor may have given the creditor over the property after the date at which the relation of suretyship was established. And for this principle the case is cited as an authority by Hall, V. C., in *Forbes* v. *Jackson* (1882), 19 Ch. D. 615, 622, 51 L. J. Ch. 690, 694.

AMERICAN NOTES.

The principal case is cited in 2 Daniel on Negotiable Instruments, § 1343: Colebrooke on Collateral Securities, § 253. See *Gallagher* v. *Nichols*, 60 New York, 438, holding that where L. entered into a contract with defendant to erect buildings on his land, and made a sub-contract with G. & M. for part of the work, and gave them an order on defendant for moneys thereon, which was accepted by defendant, an assignment by G. & M. of their contract carried with it the order and acceptance.

No. 46. — In re Agra and Masterman's Bank, L. R., 2 Ch. 391. — Rule.

Section VI. — *Collateral and Consequential.*

No. 46. — In re AGRA AND MASTERMAN'S BANK.

Ex parte ASIATIC BANKING CORPORATION.

(ch. ap. 1867.)

RULE.

Where a bill is negotiated on the faith of a letter of credit given by a bank to the drawer with the intention of being shown to various persons as an inducement to them to give value for such bills, there is a contract between the bank and the person having notice of and acting on the letter, binding the bank to accept and pay the bill, and precluding the bank from setting up against such person any equity or claim which may exist between them and the drawer.

In re Agra and Masterman's Bank. Ex parte Asiatic Banking Corporation.

L. R. 2 Ch. 391–398 (s. c. 36 L. J. Ch. 222; 16 L. T. 162; 15 W. R. 414).

[391] This was an appeal by the official liquidator of the Asiatic Banking Corporation from an order of Vice-Chancellor Wood refusing to admit a claim made against the estate of the Agra and Masterman's Bank, Limited, in respect of certain bills of exchange.

On the 31st of October, 1865, Agra and Masterman's Bank gave to Dickson, Tatham, & Co., a letter of credit, addressed to them, which was in the following terms: —

"No. 394. You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit, No. 394, of the 31st of October, 1865."

No. 46. — In re Agra and Masterman's Bank, L. R., 2 Ch. 391–393.

In May, 1866, Dickson, Tatham, & Co., drew bills on the Agra and Masterman's Bank, under this letter, for £6000, and sold them *to the agent of the Asiatic Banking Corporation. The agent, on taking the bills, duly indorsed particulars on the letter of credit. The Agra and Masterman's Bank stopped payment before the bills were presented for acceptance. Both banks were now in course of being wound up, and the official liquidator of the Asiatic Banking Corporation, who were still the holders of the bills, carried in a claim for their amount under the winding-up of the Agra and Masterman's Bank. This was opposed on the ground that Dickson, Tatham, & Co. were indebted to Agra and Masterman's Bank to an amount exceeding what was due on the bills. [*392]

Mr. G. M. Giffard, Q.C., Mr. Hannen, and Mr. Kekewich, for the appellant: —

We contend that the appellant is entitled to prove on three grounds: 1. That Dickson, Tatham, & Co. were agents authorized by Agra and Masterman's Bank to promise that the latter would accept the bills. 2. That the letters shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the bank to accept the bills. 3. That it would be a fraud on the part of the bank to deny their liability to pay the bills after they had been taken on the faith of the letter.

In Lord MANSFIELD's time, a promise like this would have constituted an acceptance; but we admit that even before the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 6, it could not, according to the later decisions, have that effect. *Bank of Ireland* v. *Archer*, 11 M. & W. 383, 12 L. J. Ex. 383. We admit, therefore, that the persons who took the bills could not have sued upon them as bills; but the promise to accept a bill gives a right of action to the person to whom it was made. *Mason* v. *Hunt*, 1 Doug. 296; Story on Bills of Exchange, §§ 459, 461; *Russell* v. *Wiggin*, 2 Story's Rep. 213; *Marchington* v. *Vernon*, 1 Bos. & P. 101, n. Now, looking at the purpose of the letter, it is clear that it was intended to be shown by Tatham & Co., as proof of their authority to pledge Agra and Masterman's Bank to accept the bills. Tatham & Co. were thus constituted agents to make a promise on behalf of the bank. *Pickard* v. *Sears*, 6 Ad. & E. 469, 2 Nev. & P. 488.

*Again, an open offer of this kind constitutes a contract with any one who complies with its terms. *Williams* v. [*393]

Carwardine, 4 B. & Ad. 621, 2 L. J. K. B. 101; *Thatcher* v. *England*, 3 C. B. 254, 15 L. J. C. P. 241. Thus, in *Denton* v. *Great Northern Railway Company*, 5 E. & B. 860, 25 L. J. Q. B. 129, a promise to issue tickets by a particular train was held to give a right of action to a person who came to the station to get one and found that none were issued. The principle of these cases was affirmed in *Warlow* v. *Harrison*, 1 E. & E. 295, 309, 28. L. J. Q. B. 18. It has been urged that there is no privity, but that is a fallacy arising from looking to the time of writing the offer, not to the time of the other person acting on it. In *Bank of Ireland* v. *Archer*, 11 M. & W. 383, 12 L. J. Ex. 383, the point was raised on the pleadings, but the evidence did not support them, for there was only a private letter to the agent. Here, what we rely upon is that the letter was written for the purpose of being shown. In *Pillans* v. *Van Mierop*, 3 Burr. 1663, the money was advanced without any authority from the defendants, and not on their credit; and the subsequent promise to accept was contended to be a mere *nudum pactum*. Yet the promise was held to give a right of action. The point incidentally arose in *Scott* v. *Pilkington*, 2 B. & S. 11, 31 L. J. Q. B. 87, but the case went off on another ground, and the decision does not affect us; there is only an *obiter dictum* of BLACKBURN, J., which makes against us. There is, therefore, a right of action in the person who takes a bill on the faith of a letter like this. Whether such a right of action can pass with the bill if it be negotiated may be a question, but if it cannot, an equitable right is created which will pass; and it would be against conscience for the bank to set up the state of the account between them and Tatham & Co. as a defence against repaying moneys advanced on the faith of a letter like this: *Jeffryes* v. *Agra and Masterman's Bank*, L. R., 2 Eq. 674, 35 L. J. Ch. 686, has really no bearing on the present case.

Mr. Dickinson, Q.C., and Mr. Roxburgh, Q.C., for the official liquidator of Agra and Masterman's Bank: —

There is no agency; the letter of credit was given for the benefit of Tatham & Co., who were not acting on behalf of the [*394] bank; and * the letter would accomplish its object of benefiting them, without attributing to it the force now contented for. In *Pickard* v. *Sears*, 6 Ad. & E. 469, 2 Nev. & P. 488, the principal was standing by; there is nothing of the same kind here. *Pillans* v. *Van Mierop*, 3 Burr. 1663, and *Mason* v.

No. 46. — In re Agra and Masterman's Bank, L. R., 2 Ch. 394, 395.

Hunt, 1 Doug. 296, were decisions by Lord MANSFIELD, who held that a promise to accept a future bill of exchange amounted to an acceptance of it, so that the authority of those cases on the present question, however great his Lordship's authority may be on other points, is but small. *Johnson* v. *Collings*, 1 East, 98, shows that a promise to accept a future bill is no acceptance, and that is all the letter amounts to in the present case. *Bank of Ireland* v. *Archer*, 11 M. & W. 383, 12 L. J. Ex. 383, is in our favour; and the American cases, which Mr. Justice Story admits to be opposed to the last-named case, are not binding here. How can the indorsees be entitled to claim against the bank? They cannot be supposed to have seen the letter of credit, or to have advanced money on the faith of it. The case is distinguishable from *Denton* v. *Great Northern Railway Company*, 5 E. & B. 860, 25 L. J. Q. B. 129, and the cases of that class, in this — that there the advertisment was issued to all the world; here the letter was addressed to an individual firm.

[The Lord Justice CAIRNS: Was not the letter intended to be shown?]

No doubt; but then we get upon the question of equitable, not legal liability. The transferees become equitable assignees of the benefit of a contract between the bank and Tatham & Co., and must take, subject to the same equities as their assignors, *i. e.*, subject to the state of account between the bank and Tatham & Co. No doubt the liability to these equities might be excluded by apt words, but there is nothing of the kind in the instrument. *Jeffryes* v. *Agra and Masterman's Bank*, L. R., 2 Eq. 674, 35 L. J. Ch. 686, supports the claim to set-off. Showing the letter is no more than telling the persons who take bills that the bank has promised Tatham & Co. to accept them; the liberty to communicate this promise cannot extend its *effect, [*395] which is only to give Tatham & Co. a right of action if it is broken.

Feb. 11. Sir G. J. TURNER, L. J.: —

I have had the opportunity of considering this case, with my learned brother, since the conclusion of the argument, and we do not think it necessary to trouble the counsel for the appellant to reply.

The question turns upon the effect of the letter of the 31st of

October, 1865, by the Agra Bank to Dickson, Tatham, & Co. [His Lordship read the letter, and continued.] Now whatever may be the effect of that letter at law, whether there would be a right of action or not, it seems to me to give the persons who took and paid for bills on the faith of it a plain right in equity to compel the Agra Bank to accept and pay the bills. The letter was written in a double form; the first part of it contains the authority which is given to Dickson, Tatham, & Co. to draw the bills; the second part is evidently, though not in terms, yet in substance, addressed to the persons who are to negotiate the bills. It is plain that this letter was giving by the bank with a view to its being shown to persons who were to negotiate the bills, and to make advances upon the faith of the letter; and the last passage contains these words: "Parties negotiating bills under it are requested to indorse particulars on the back hereof." It is plain that this part of the letter is in truth addressed to the person by whom the bills were to be negotiated. The whole effect of the letter is, that the Agra Bank held out to the persons negotiating the bills a promise that it would pay the bills; and it would be impossible, according to my view of the doctrines of Courts of Equity, to allow the bank, after having sent that letter into the world, addressed to the persons who were to negotiate the bills, and so held out to them that it would be answerable for their payment, to say that because there was a debt due to it from the persons to whom it had given the letter of credit, therefore it would not pay the bills. Apart, therefore, from any question as to how the case may stand at law, I think that there clearly is a perfectly good equity to sustain a bill [* 396] filed by any one of the persons by whom bills drawn * under the letter of credit had been negotiated, to compel the Agra Bank to accept and pay these bills which were taken and paid for upon the faith of the statement which was made in the letter.

Sir H. M. Cairns, L. J.: —

It is not disputed in this case that the letter of credit of the 31st of October, 1865, from the Agra and Masterman's Bank, to Dickson, Tatham, & Co., constituted a contract between those parties, based upon a sufficient consideration, moving from Dickson, Tatham, & Co., to the bank; or that the Asiatic Banking Corporation, when they took and discounted or paid for the bills upon which a claim is now made, had notice, and took the bills on the faith, of this letter; or that the bills were drawn in the form prescribed by the letter

No. 46. — In re Agra and Masterman's Bank, L. R., 2 Ch. 396, 397.

But it is contended that the letter, being in form addressed to Dickson, Tatham, & Co., constituted a contract with no one but them; and that this contract, even if assignable in equity, could not be assigned otherwise than subject to all equities between Dickson, Tatham, & Co., and the Agra and Masterman's Bank, and that Dickson, Tatham & Co. are indebted to that bank, in an amount exceeding the bills.

The letter of the 31st of October, 1865, is in form addressed to Dickson, Tatham, & Co., but it is evident that it is written to Dickson, Tatham, & Co., in order that it may be shown by them to those who were to take the bills drawn on the Agra and Masterman's Bank; that it is intended by the writers to be used as an inducement to make persons take those bills; and that the bills were to be taken by such persons "under" the letter, that is, upon the faith and under the protection and security of the letter. It is a general invitation issued by the Agra and Masterman's Bank, through Dickson, Tatham, & Co., to all persons to whom the letter may be shown, to take bills drawn by Dickson, Tatham, & Co., on the Agra and Masterman's Bank, with reference to the letter, and to alter their position by paying for such bills, with an assurance that, if they or any of them will do so, the Agra and Masterman's Bank will accept such bills on presentation.

If it be necessary to determine the question of the legal liability of the Agra and Masterman's Bank, I am of opinion that, upon the offer in this letter being accepted and acted on by the *Asiatic Banking Corporation, there was constituted a valid [*397] and binding legal contract against the Agra and Masterman's Bank, in favour of the Asiatic Banking Corporation. The cases as to the offer of rewards, of which the case of *Williams* v. *Carwardine*, 4 B. & Ad. 621, 2 L. J. K. B. 101, is an example, followed by the somewhat analogous cases of *Denton* v. *Great Northern Railway Company*, 5 E. & B. 860, 25 L. J. Q. B. 129; *Warlow* v. *Harrison*, 1 E. & E. 295, 309, 28 L. J. Q. B. 18 and *Scott* v. *Pilkington*, 2 B. & S. 11, 31 L. J. Q. B. 87, appear to me to be sufficient authority to show that there may be privity of contract in such a case; and if the view be adopted which appears to have been taken in the American Courts, that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road.

But assuming the contract to have been at law a contract with

Dickson, Tatham, & Co., and with no other, it is clear that the contract was in equity assignable, and that Dickson, Tatham, & Co., must be taken to have assigned (if assignment were needed) to the Asiatic Banking Corporation, and to have been by the writers of the letter intended to assign to them, the engagement in the letter providing for the acceptance of the bills. Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities The essence of this letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor, and without reference to any collateral or cross claims. Unless this is done, the letter is useless; Dickson, Tatham, & Co., obtain no benefit from it; the takers of the bills obtain no protection under it. In this view of the case, the Asiatic Banking Corporation are, in my opinion, assignees of the contract with Dickson, Tatham, & Co., free from any equities between Dickson, Tatham & Co., and the Agra and Masterman's Bank.

[* 398] * I think the claim should be allowed, and the Asiatic Banking Corporation, or their liquidators, should have their costs here and in the Court below out of the estate of the Agra and Masterman's Bank.

ENGLISH NOTES.

The principal case is distinguished in *In re Barned's Banking Co., ex parte Stephens* (L. JJ. 1868), L. R., 3 Ch. 753, 19 L. T. 198, where a bank under an arrangement with the drawers of certain bills guaranteed the acceptors that they would supply them with funds to meet the bills. The holder of the bills who had bought them after being informed by the drawer of this guarantee was held to have no equity to enforce the guarantee against the bank. The distinction is that there was nothing to show that the guarantee was given for the purpose of being exhibited to a purchaser of the bills. The same distinction is noted by Brett, L. J., in *Union Bank of Canada* v. *Cole* (C. A. 1877), 47 L. J. C. P. 100, 109, where it is insisted on that the liability arises only from the privity established between the guarantor and the holder by reason of the intention of the former that the latter

should act upon it, and his acting accordingly ; and it is observed that in *The Agra and Masterman's Bank* case there would have been no equity if there had not been a contract at law, and that the question in law and in equity is the same.

The principal case is followed by JAMES, V. C., in *Maitland* v. *The Chartered Mercantile Bank of India, London, and China* (1869), 2 Hem. & M. 440, 38 L. J. Ch. 363, 368, 12 L. T. 372, in which the right of a *bonâ fide* holder of a bill negotiated under an open letter of credit came into question. The letter had been procured by a Scotch merchant, M., from the National Bank of Scotland, and authorized merchants in China to draw upon Messrs. Glyn & Co. in London on the account of the Scotch Bank. The Chartered Bank of India, etc., were holders of the bill for value given on the faith of the letter. The question was raised by a suit in Chancery by M. to restrain the Chartered Bank, etc., from negotiating the bill, and Messrs. Glyn & Co. from accepting them; and the plaintiff in the suit contended that the bills had been negotiated contrary to an agreement between M. and the merchants in China that the letters should only be used on condition that bills of lading of the goods purchased with the proceeds of the bills of exchange should be sent home in security for their payment. The only proof that the Chartered Bank, etc., had notice of this agreement was an alleged custom of the trade between home and foreign merchants. The suit was dismissed by JAMES, V. C., who held that such an agreement could not affect the holder who had purchased the bills on the faith of the open letter of credit; and further that such holder could not be affected with notice of the agreement by reason of any such custom as alleged. The VICE CHANCELLOR considered that the Chartered Bank had a legal as well as an equitable title to sue the grantor of the letter of credit as if he were a party liable on the bill.

The principal case was again followed in *In re General Estates Company, Ex parte City Bank* (1868), L. R., 3 Ch. 758. A public company which had no express power of issuing negotiable instruments, but whose business was such that the power to do so might be implied, issued under their seal, in payment of land, an instrument by which the company "undertake to pay to the order of H. on 1st of July, 1867, the sum of £1000." It was held that this was in effect a promissory note, and that the holder in due course was not affected by any equities between H. and the company. A very similar case, in which the last mentioned decision was followed, was *In re the Imperial Land Company of Marseilles, ex parte Colbourne and Strawbridge* (1870), L. R., 11 Eq. 478, 40 L. J. Ch. 93, 23 L. T. 515.

In the case already referred to of the *Union Bank of Canada* v. *Cole* (C. A. 1877) 47 L. J. C. P. 100, there was a letter of credit from the

defendant addressed to the proposed drawers of the bills, and intended to be shown to persons advancing money on the credit of the bills; but the letter of credit itself contained express conditions to the effect that the drafts were to be represented by equal value in clean bills of lading to be attached to the drafts, and that either the drafts must represent goods actually sold for shipment or that before negotiating the drafts certain arrangements were to be made to secure that they represented sufficient value secured by shipments. It was held that any contract between the defendants and the plaintiffs who on the letters being shown to them advanced money on the bills, was subject to such of the conditions as were not necessarily subsequent to the advance; and that the plaintiffs, having advanced the money on the bills, with notice that the drawer had not complied with the conditions, could not hold the defendants bound by any contract with them.

The principle of *In re Agra and Masterman's Bank* has been applied or considered in numerous cases relating to debentures or bonds of companies issued for the purpose of being made instruments of credit; but as, in several of these cases, the question has also been considered whether the instruments themselves were negotiable securities, it seems more convenient to consider them under the cases relating to negotiable bonds. These will be found in a subsequent volume under the title of "Bond (negotiable)." In the meantime the following may be referred to as cases in which the holder for value of such an instrument has established or claimed against the company or person issuing the instrument a right freed from the equities or defences alleged against the original obligor: *Higgs* v. *Northern Assam Tea Company* (1869), L. R., 4 Ex. 387, 38 L. J. Ex. 233; 21 L. T. 336; *Re Blakely Ordnance Company, ex parte New Zealand Banking Company* (1867), L. R., 3 Ch. 154, 37 L. J. Ch. 418; *In re Natal Investment Company, ex parte Financial Corporation* (1868), L. R., 3 Ch. 355, 37 L. J. Ch. 362 (Distinguished); *Graham* v. *Johnson* (1869), L. R., 8 Eq. 44, 38 L. J. Ch. 374 (Distinguished); *Re South Blackpool Hotel Company, ex parte James* (1869), L. R., 8 Eq. 225, 38 L. J. Ch. 616; *In re Northern Assam Tea Company, ex parte Universal Life Assurance Company* (1870), L. R., 10 Eq. 458, 39 L. J. Ch. 829; *Webb* v. *Herne Bay Commissioners* (1870), L. R., 5 Q. B. 642, 39 L. J. Q. B. 221, 22 L. T. 745; *Goodwin* v. *Roberts* (1876), 1 App. Cas. 476, 45 L. J. Ex. 748, 35 L. T. 179; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194, 46 L. J. Q. B. 346, 36 L. T. 240; *In re Romford Canal Company, Pocock's Claim* (1883), 24 Ch. D. 85, 52 L. J. Ch. 729, 49 L. T. 118; *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333, 57 L. J. Ch. 986, 58 L. T. 735; *London Joint Stock Bank* v. *Simmons* (appeal from *Simmons* v. *London Joint Stock Bank*, H. L. 4 April, 1892), 1892, A. C. 201, 61 L. J. Ch. 723, 66 L. T. 625.

No. 46. — In re Agra and Masterman's Bank. — Notes.

AMERICAN NOTES.

This case is cited as authoritative in 2 Daniel on Negotiable Instruments, § 1798. See *Arents* v. *Commonwealth*, 18 Grattan (Virginia), 758. It is also cited in note, 25 Am. Rep. 348. The doctrine is sustained by *Russell* v. *Wiggin*, 2 Story (United States Cir. Ct.), 213; *Pollock* v. *Helm*, 54 Mississippi, 1; 28 Am. Rep. 342. In the last case it was held that a letter written by the president of a bank, as such president, addressed to W., stating that she was authorized to draw on N. for $300, placed with N. by R. for her account, and that "any amount you may wish to draw on N. we will pay you the money for it here, with usual exchange," was a general letter of credit, that the bank was liable in assumpsit for money advanced by P. on the faith of it, and that parol evidence was incompetent to show that it was intended as an accommodation to W. in response to an inquiry by the bank at her request, and not intended as a letter of credit or authority to draw. The Court said: "It is as if he had said, Wherever you may be, and to whatever banker or capitalist you may show this, we agree that if any party will buy a bill or bills on Mr. Nye, we will pay it or them, at our bank, to the extent of $300."

In *Bank of Michigan* v. *Ely*, 17 Wendell (New York), 508, it was held that a parol promise to accept a *future* bill was not binding, until the bill was taken by the holder upon the faith and credit of such promise. (This was before the statute requiring acceptances to be in writing.) Mr. Bigelow says (Bills and Notes, p. 53): "The converse would seem to follow from this, that if the holder did so take the bill, the parol promise would be binding." To this effect, *Crowell* v. *Van Bibber*, 18 Louisiana Annual, 637; *Williams* v. *Winans*, 2 Green (New Jersey Law), 339; *Kennedy* v. *Geddes*, 8 Porter (Alabama), 263; 33 Am. Dec. 289.

In *Bank of Illinois* v. *Sloo*, 16 Louisiana, 539; 35 Am. Dec. 223, the doctrine of the Rule appears to have been adjudged; but in *Carrollton Bank* v. *Tayleur*, 16 Louisiana, 190; 35 Am. Dec. 219, it seems to be limited to cases where the letter of credit describes the bills. This seems the doctrine of *Coolidge* v. *Payson*, 2 Wheaton (United States Sup. Ct.), 66.

See *Kendrick* v. *Campbell*, 1 Bailey (South Carolina), 522; *Storer* v. *Logan*, 9 Massachusetts, 58; *Steman* v. *Harrison*, 12 Pennsylvania State, 57; 82 Am. Dec. 491; *Vance* v. *Ward*, 2 Dana (Kentucky), 95.

The tendency of the decisions seems to be to hold good the promise of the letter of credit to an amount fixed therein.

No. 47. — BEEMAN *v.* DUCK.

(1843.)

No. 48. — PHILLIPS *v.* IM THURN.

(1866.)

RULE.

THE acceptor of a bill is estopped from denying to a holder in due course the genuineness and validity so far as relates to the drawer of the bill; except that where the drawer to whose order the bill as presented for acceptance is made payable is a real person and his signature as indorser has been forged (or is made without authority), — the acceptor not having knowledge of the forgery (or want of authority), — the acceptor is not estopped from denying the indorsement.

Beeman v. Duck.

11 M. & W. 251–256 (s. c. 12 L. J. Ex. 198, 199).

[251] Assumpsit on a bill of exchange for £175, stated in the declaration to have been drawn by certain persons, under the name, style, and firm of Bradshaw & Williams, upon the defendant, under the name or style of W. Serjeant, payable to the order of Bradshaw & Williams, at three months' date, accepted by the defendant, and indorsed by Bradshaw & Williams to the plaintiff. To this count the defendant pleaded, first, that the said persons therein men-
[*252] tioned did not draw the said bill as alleged; secondly, * that the said persons did not indorse it; and thirdly, that the defendant did not accept it: upon which issues were joined.

At the trial before WIGHTMAN, J., at the last Bristol Assizes, it appeared that W. Serjeant, who was a partner of the defendant, brought the bill to one Johnson, a prior holder to the plaintiff, with the names of Bradshaw & Williams indorsed upon it, and negotiated it with him. The defendant alleged that the bill was accepted by Serjeant on account of a private transaction with him, and *malâ fide*. It was proved that Messrs. Bradshaw & Williams was a really existing firm, with which Serjeant had been accustomed to deal; and those persons being called, they swore that

neither the drawing nor the indorsement of the bill was theirs, but stated also, that the handwriting of both was evidently the same. The learned Judge summed up the case to the jury with reference to the question which had been treated in the course of the trial as the principal point in dispute between the parties, viz. whether there was collusion or knowledge on the part of the plaintiff that the bill was made otherwise than for partnership purposes; and it was not until after the jury had given their verdict for the plaintiff, that his attention was called to the issue denying the indorsement, which, it was alleged, on behalf of the defendant, was proved by the evidence of Bradshaw & Williams.

In Michaelmas Term, Bompas, Serjeant, obtained a rule *nisi* for a new trial, on the above ground, against which

Erle and Montague Smith showed cause (February 8). — The defendant, as acceptor of this bill, was clearly estopped from denying that Bradshaw & Williams drew it: and it being proved that the handwriting of the indorsement and of the drawing was the same, and the bill having been negotiated with that indorsement upon it by the acceptor, the * estoppel applies [* 253] to the indorsement also, and the defendant is concluded from saying that it was not the signature of those persons. *Cooper* v. *Meyer*, 10 B. & Cr. 468; 5 Man. & Ry. 387; 8 L. J. K. B. 171. Lord TENTERDEN there says: "The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it; but it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so; but if there is in reality no such person, I think the fair construction of the acceptor's undertaking is, that he will pay to the signature of the same person that signed the bill." Such is certainly the rule where the acceptance was prior to the indorsement, and the bill has been passed by the indorser; but where, as in this case, the acceptor himself puts the bill into circulation with the forged indorsement on it, he is equally estopped to dispute that indorsement. Having accepted a bill drawn by some person in the name of Bradshaw & Williams, without their authority, he undertakes to pay to the order of the same person. *Schultz* v. *Astley*, 2 Bing. N. C. 544; 2 Scott, 815; 5 L. J. C. P. 130. If it were otherwise, the acceptor might be enabled to commit the grossest fraud, and yet escape liability. [PARKE, B. It was a question for the jury, according to *Cooper* v. *Meyer*, whether the bill was drawn in

a false name. It was not left to the jury in this case whether the handwriting of the drawing and indorsement was the same.]

Butt, *contrâ*. There is a distinction between the case of a fictitious drawer, and that of the forgery of the name of a real person as drawer. It is in the former case only that the act of acceptance admits the indorsement. In the present case, the defendant was estopped to deny the indorsement as alleged by Bradshaw & Williams, and there was a distinct issue upon that.

[Parke, B. You say that *Cooper* v. *Meyer* applies only
[* 254] to the case of wholly fictitious * persons, who never could either draw or indorse; because there the acceptor admits that the bill is drawn by somebody, — that is, by the same person who indorses in the same handwriting: but that here he agrees to pay to the order of Bradshaw & Williams, being estopped only to say that they did not draw the bill.] Yes. The defendant only undertook to pay to their indorsement, and until that is given the plaintiff has no title. The case is not like that of *Gibson* v. *Minet*, 1 H. Bl. 569; 1 R. R. 754, where the acceptors were aware of the forgery; here, for aught that appears, the defendant may have been wholly ignorant that the signature of Bradshaw & Williams was not genuine; and that question was not submitted to the jury.

Cur adv. vult.

The judgment of the Court was now pronounced by

Parke, B. The only question in this case was, whether the indorsement alleged in the declaration to have been made by Bradshaw & Williams was proved. It appears, that the issue raised by the traverse of the indorsement was not brought under the notice of the learned Judge who tried the case, until the jury had given their verdict upon the principal point in dispute, which the Court, on the application for a rule for new trial, refused to disturb; and the argument on showing cause was confined to the question, whether the indorsement was proved by the evidence.

The bill was drawn in the name of Bradshaw & Williams, and indorsed in the same name, and there was some evidence of its being properly indorsed, as it was brought by the defendant's partner, with the indorsement upon it, to be discounted by a prior holder. On the part of the defendant it was shown, that
[* 255] this firm was a real one, * and proved by both members of the firm, that the drawing and indorsement were forgeries.

No 47. — Beeman v. Duck, 11 M. & W. 255, 256.

On the argument before us, it was contended by the plaintiff's counsel, that, the drawing being a forgery, the defendant by his acceptance had undertaken to pay to any one who held the bill by an indorsement in the same handwriting, according to the principle laid down in *Cooper* v. *Meyer*, 10 B. & C. 468; 5 Man. & R. 387; 8 L. J. K. B. 171; and it was said there was evidence in the case, that the signatures in drawing and indorsing were those of the same person. If this were so, the rule ought to be made absolute for a new trial, as the question as to the identity of the signature has not been submitted to the jury.

But on the part of the defendant it is insisted, that the case of *Cooper* v. *Meyer* is distinguishable from the present, for there the drawers were fictitious; here they really existed, though their signature was forged; and that in such a case, the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties; a doctrine which is clearly established, as to bills, wherein the signature is not forged. *Robinson* v. *Yarrow*, 7 Taunt. 455; 1 Moore, 150; 18 R. R. 537. In analogy to that case, the defendant, it is said, admits by his acceptance that the bill was drawn in the name of Bradshaw & Williams, by themselves, or some agent authorized to draw in their name: but it does not admit that it was indorsed by themselves, or some agent authorized to indorse, which is a different species of authority. And we cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery; but if he knew of it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of * that [* 256] of *Cooper* v. *Meyer*. Some doubt however occurs, whether the instrument ought not to be declared upon as payable to bearer, according to the case of *Gibson* v. *Minet*, 1 H. Bl. 569; 1 R. R. 754, as ultimately decided by the majority of Judges, and the House of Lords, and followed by the Court of King's Bench, in the case of *Bennett* v. *Farnell*, 1 Camp. 130, 180 c. It may be remarked that these cases were not cited, or this question raised, in *Cooper* v. *Meyer*.

There must therefore be a new trial.

Rule absolute.

No. 48. — Phillips v. Im Thurn, L. R , 1 C. P. 464, 465.

Phillips v. Im Thurn.

L. R., 1 C. P. 463-473 (s. c. 35 L. J. C. P. 220; 14 L. T. 406; 14 W. R. 653).

[464] This was an action brought by the plaintiffs as indorsees against the defendant as the acceptor for honour of the bill of exchange hereinafter mentioned. The following case was stated for the opinion of the Court, without pleadings: —

1. The plaintiffs are discount-brokers in London. The defendant is a merchant in London, and is the correspondent and agent there for a firm carrying on business at Lima, under the name of Canevaro & Co.

2. In June, 1864, a person calling himself Enrique or Henry Plana, presented to one Sultzberger, at Liverpool, for acceptance, a bill of exchange, in the Spanish language, of which the following is a translation: —

No. 771. Lima, 12 May, 1864.

For £400 0*s.* 0*d.*

At sixty days sight please pay by this first of exchange (second and third not being paid) to the order of Mr. Carlos Raffo, the sum of Four hundred pounds sterling, value received, which place to account according to advice of

Canevaro & Co.

To Mr. H. H. Sultzberger, Liverpool.

3. At the time the bill was so presented to Sultzberger, it bore the following indorsements: "Pay to the order of Mr. Enrique Plana, Lima, 12 May, 1864. Carlos Raffo. Henry Plana."

4. The bill was a forgery on Canevaro & Co., and it was to be taken that no persons named Carlos Raffo or Enrique (or Henry) Plana were known at Lima or to Messrs. Canevaro & Co. A clerk of Canevaro & Co., named Arnaboldi, absconded from Lima, by the mail-packet which left for England on the night of the 13th of May, 1864. A person named Jose Moretti, who was not in the employment of Canevaro & Co., left Lima with Arnaboldi. It was to be taken for the purposes of this case that Arnaboldi assumed
[* 465] * the name of Plana, and that he was the person mentioned in paragraph 2 of the case.

5. The written parts of the bill were undoubtedly in the handwriting of Arnaboldi, and it was to be taken that the indorsement "Henry Plana," was written by him. It did not appear by whom

the other indorsement mentioned in paragraph 3 was made, but it was to be assumed for the purposes of this case to have been made by Arnaboldi or Jose Moretti. These facts, however, were not known to Sultzberger at the time the bill was presented to him for acceptance; nor were they known to the defendant at the time when he accepted the bill as hereinafter mentioned, or to the plaintiffs.

6. Sultzberger, having stopped payment, declined to accept the bill, but wrote to the plaintiffs, with whom he was in the habit of dealing, the following letter: —

"Liverpool, 21st June, 1864.

"Messrs. B. S. & J. Phillips & Co.

"Dear Sirs, — I have this day given your address to Mr. Henry Plana, the holder of two drafts on myself for £400 and £800, which I was prevented from accepting in consequence of having lately been under the painful necessity to suspend my payments. Messrs J. C. im Thurn & Co. will intervene and accept on behalf of the drawers, Messrs. Canevaro & Co., Lima (who themselves are safe for any amount); and, as Mr. Plana is quite a stranger here, and might have some difficulty to get the bills discounted, I wished to render him some service. I therefore gave him your address, thinking that with Messrs. im Thurn's signature you will not object to discount the bills for him.

"H. H. Sultzberger.

"P. S. Mr. Plana tells me he intends making some purchases, and would be glad to get the notes, if possible, by return of mail."

The bill for £400 mentioned in this letter is the bill mentioned above in paragraph 2 of the case.

7. This letter was accompanied by the following letter from the person calling himself Plana, to the plaintiffs, inclosing the bills referred to: —

"Liverpool, 21st June, 1864.

"Messrs. B. S. & J. Phillips & Co.

"Gentlemen, — I am indebted for your address to Mr. H. * Sultzberger, of this town; in consequence of which I [* 466] take the liberty of inclosing you two drafts of Messrs. Canevaro & Co., at Lima, for £400, sixty days sight, and £800, ninety days sight, on the said Mr. Sultzberger, who tells me that certain reasons prevent him from accepting them, but that Messrs. J. C. im

Thurn & Co., London, will accept on behalf of the drawers. I now request you to get these two drafts presented for that purpose to Messrs. J. C. im Thurn & Co., and afterwards to get them discounted for my account as favourably as possible, and remit me the balance in notes per registered letter to the address at foot. In the event of your not feeling disposed to discount the bills, I request you to return them to me, provided with the needful, excusing the trouble.

"HENRY PLANA."

8. Upon receipt of these letters, the plaintiffs showed them, with the bills and the indorsements on them, to the defendant, and inquired whether he would accept for honour of Messrs. Canevaro & Co., and the defendant stated that he would.

9. The plaintiffs afterwards informed Sultzberger and the person calling himself Plana, that they would discount the bills upon their being accepted by the defendant.

10. The bills were thereupon duly protested for non-acceptance, and were then presented to the defendant, and were left in his office for acceptance for twenty-four hours, in the ordinary course of business; and he accepted the same in the following form: —

"Accepted for honour and on account of Messrs. Canevaro & Co., with charges 4s. London, 24 June. J. C. im Thurn & Co."

11. The plaintiffs thereupon discounted the bills, upon the faith of the acceptance of the defendant, and remitted the proceeds as directed in the letter set out in paragraph 7.

12. Shortly after the plaintiffs had discounted the bills, the defendant received information of the facts stated in paragraphs 3 and 4, and informed the plaintiffs thereof; and, upon the bills being presented to the defendant at maturity, he refused to pay the same.

13. The Court was to be at liberty to draw any inference from the above facts which a jury might draw.

[* 467] * The question for the opinion of the Court was, whether, on the above-stated circumstances, the plaintiffs were entitled to recover the amount of the bill from the defendant. If the Court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs for £400 and interest, with costs. If in the negative, judgment was to be entered for the defendant, with costs.

Hannen, for the plaintiffs. When this case was before the Court on demurrer, the plea (which alleged that the payee was a

fictitious person) was held bad on the ground that the defendant by accepting for the honour of the drawer, put himself in the position of the drawer, and was estopped from setting up what the drawer would himself be estopped from setting up. 18 C. B. (N. S.) 694. That is the good sense of the thing; and is decisive of this case. By accepting the bill the defendant vouches the handwriting of the drawer, his correspondent. What were the liabilities of Canevaro & Co.? One who draws a bill payable to a fictitious payee, is estopped from saying that he is not a real person, and from denying his capacity to indorse. In Byles on Bills, 8th edit. 184, it is said: "By acceptance, the drawee admits the signature and capacity of the drawer, and cannot, after thus giving the bill currency, be admitted to prove that the drawer's signature was forged. He moreover admits, and so does the maker of a promissory note, the then capacity of the payee to whose order the bill or note is made payable, to indorse." . . . "But, where the bill is drawn in a fictitious name, the acceptor undertakes to pay to an indorsement by the same hand." For this the learned author refers to *Cooper* v. *Meyer*, 10 B. & C. 468; 8 L. J. K. B. 171, where Lord TENTERDEN says: "It is clear that these acceptances were given on Darby's credit, and indeed the jury found that he drew and indorsed the bills. The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it. But it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so; but, if there is in reality no such person, I think the fair construction of the implied undertaking is, that he will pay to the signature of the same person that "signed for the drawer;" and [*468] BAYLEY, J., expressed himself in similar terms. The plaintiff is entitled therefore to assume that this is an action against Canevaro & Co. The judgment in *Gibson* v. *Minet*, 1 H. Bl. 569; 1 R. R. 754, in the House of Lords, sustains the same proposition. As against the person who sends it forth, the bill becomes a bill payable to bearer. The indorsements were on the bill at the time of presentment for acceptance, and the correspondence was before the defendant; surely, as against him, that operates as an estoppel.

[KEATING, J. The case expressly states that the plaintiffs took the bill on the faith of the acceptance of the defendant.]

In *Ashpitel* v. *Bryan*, 3 B. & S. 474; 32 L. J. Q. B. 91, the

No. 48. — Phillips v. Im Thurn, L. R., 1 C. P. 468, 469.

plaintiff, as executor of B., declared upon a bill of exchange purporting to be drawn by A. and accepted by the defendant, and indorsed by A. to B. The defendant pleaded that A. did not indorse the bill. It appeared that A., who was possessed of goods, being the stock in trade upon his premises, died intestate and indebted to the defendant and other persons; and it was arranged between B. and the defendants, who were two of his next of kin, that the defendant should take possession of the goods and accept a bill of exchange for their value, purporting to be drawn and indorsed by A. The goods were accordingly delivered to the defendant, and the bill declared upon was drawn and indorsed to the plaintiff by procuration in the name of A., and accepted by the defendant. It was held that the defendant could not be allowed to set up as a defence to the action that the bill was not indorsed by A. WIGHTMAN, J., in giving judgment, after referring to the definition of estoppel as given in Les Termes de la Ley, tit. Estoppel, and adverting to the distinction between estoppel by matter of record or deed and by matter *in pais*, says: "There are also cases which show, that, after a person has by his own act warranted that what appears on the face of a bill is perfectly regular, and has received value for it (because my judgment in the present case is founded on the assumption that the defendant did receive value for his acceptance of the bill, which the jury have in effect found), after he has agreed with the person from whom he [*469] received value, and who is the holder of the bill, *that the bill should be drawn and indorsed in the names which appear on it, he is not permitted to show that those names are false or fictitious, and to set up what would be a fraud upon the party who has given value for the acceptance."

[BYLES, J. The acceptor here did not know that Carlos Raffo and Enrique Plana were fictitious persons. Nor did Canevaro & Co.]

Canevaro & Co. must be assumed to have known that the payee and indorser were fictitious persons. The defendant has warranted this to be a genuine bill drawn by Canevaro & Co., and, as against him, the plaintiffs' rights are the same as if Raffo and Plana had been real persons.

J. A. Russell (Mellish, Q. C., with him), for the defendant. The result of the facts stated in the special case is this, that though by his acceptance the defendant may vouch for Canevaro & Co.

he is induced by the representations of Sultzberger and the plaintiffs to assume that the bill is a genuine bill as regards Raffo and Plana. It is said that the acceptor for honour stands in the place of the drawer, with all his liabilities and all his rights. We may assume that to be settled by the former decision of this Court. 18 C. B. (N. S.) 694. But Canevaro & Co. might have defended themselves against any claim on this bill, on the ground that it was not drawn by them; and, if they could deny their signature, why cannot the acceptor for their honour? There is no authority for the contrary proposition. The acceptor for honour ordinarily has a remedy over against the drawer: here the defendant would have none against Canevaro & Co. To entitle them to succeed, the plaintiffs must show that this is a bill payable to bearer. And with this view *Gibson* v. *Minet*, 1 H. Bl. 569; 1 R. R. 754, is referred to. But *Gibson* v. *Minet* does not bear out the proposition, as applied to this case. The ground of the decision there was, as is well put in the opinion of Gould, J., 1 H. Bl., at p. 597, that the facts were known to all the parties, and it must have been their intention to make the bill payable to bearer. To the same effect are the observations made by Willes, J., when that case was cited in *Ashpitel* v. *Bryan*, 5 B. & S. 723; 33 L. J. Q. B. 328, in the Exchequer Chamber. Here, when the bill was
*drawn, Canevaro & Co. knew nothing about it; and, [*470]
when the defendant accepted it, he knew less of the facts
than the plaintiffs did.

[Keating, J. He knew that the plaintiffs were about to part with their money on the faith of his affirmance of the genuineness of the bill.]

If he knew or had the means of knowing that the signature of Canevaro & Co. was a forgery, still the defendant is not estopped from denying the indorsements. *Beeman* v. *Duck*, 11 M. & W. 251; 12 L. J. Ex. 198; p. 622, *ante*. In that case, Parke, B., says: "On the part of the defendant it is insisted that the case of *Cooper* v. *Meyer*, 10 B. & C. 468; 8 L. J. K. B. 171, is distinguishable from the present, for there the drawers were fictitious; here they really existed, though their signature was forged; and that, in such a case, the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties, — a doctrine which is clearly established as to bills wherein the signature is not forged. *Robinson* v.

Yarrow, 7 Taunt. 455; 1 Moore, 150; 18 R. R. 537. In analogy to that case, the defendant, it is said, admits by his acceptance that the bill was drawn in the name of Bradshaw & Williams by themselves, or some agent authorized to draw in their name; but it does not admit that it was indorsed by themselves or some agent authorized to indorse, which is a different species of authority. And we cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery: but, if he knew of it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of that of *Cooper* v. *Meyer*." That, it is submitted, is the true principle upon which this case should be decided. The cases as to estoppel by acts and representations go only to this length, — either, as in *Pickard* v. *Sears*, 6 Ad. & E. 469, the party has made a representation as to some fact; or, as in *Ashpitel* v. *Bryan*, 3 B. & S. 474; 32 L. J. Q. B. 91, he and the other party have mutually agreed to assume a given state of facts to be true, though they knew them to be otherwise. The present

[*471] *case does not fall within either of those; it is a case of mutual mistake.

Hannen, in reply. If Sultzberger had accepted the bill on presentation to him, he clearly could not have denied the signature of the drawers: neither can the acceptor for honour. Nor can he deny the indorsements which were on the bill at the time he accepted. There is nothing to take this out of the principle of *Pickard* v. *Sears*, 6 Ad. & E. 469. That doctrine is well illustrated by Crompton, J., in *Ashpitel* v. *Bryan*, 3 B. & S. at p. 492; 32 L. J. Q. B. 95. "When two parties agree that a commercial instrument shall be taken as founded upon a certain fact, and the position of one, by acting on that agreement, is altered, the other ought not to be admitted to deny it; and, in this class of estoppels, deceit, in which is involved the question whether the party knew the real state of facts, is not necessary."

Erle, C. J. I am of opinion that our judgment must be for the plaintiffs. If need had been, I should have been inclined to decide the case on the ground that, upon the result of the facts, this must be dealt with as a bill payable to bearer. The acceptor for the honour of Canevaro & Co. was not at liberty to deny that the bill was drawn by Canevaro & Co.; and we have already held,

when the case was before us on demurrer, 18 C. B. N. S. 694, that the defendant must be taken to have had all the knowledge that Canevaro & Co. would be assumed to have if they had really been the drawers of the bill. It follows, therefore, that this is to be treated as a bill payable to bearer. But I think there is a second ground upon which our judgment for the plaintiffs may beyond all dispute be rested, and it is this: A bill purporting to be drawn by Canevaro & Co. upon Sultzberger, was, together with two letters containing an intimation that the drawee was not in a condition to accept it, shown by the plaintiffs to the defendant, and the latter was asked if he would accept for the honour of the drawers, which he consented to do; and the plaintiffs upon the faith of that acceptance discounted the bill. It is clear, therefore, that the plaintiffs were induced by the defendant to advance their money upon the faith of his representation that the bill was a negotiable instrument * properly drawn and indorsed. [*472] Upon that ground I am very clear that the plaintiffs are entitled to judgment.*

Byles, J. I am of the same opinion. If the defendant had said to the plaintiffs, "All the names upon this bill are genuine signatures," he clearly could never have disputed the fact. The facts and the letters set out in the case amount to such a representation. Further, I agree with my Lord, if it were necessary to consider what the bill really is, that, as there was no such person existing as Carlos Raffo, it must be treated as a bill payable to bearer.

Keating, J. I am of the same opinion. I think, upon the facts stated in this special case, that it was not competent to the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching by his acceptance of it the authenticity of the drawing. His acceptance amounted to a representation to the plaintiffs which enabled the person representing Plana to obtain money from the plaintiffs on the bill. Not only, therefore, is this a clear case of estoppel within the rule in *Pickard* v. *Sears*, 6 Ad. & E. 469, but the facts bring it within the rule, that, where one of two innocent persons is to suffer from the fraud of a third, he who has enabled such third person to commit the fraud must bear the loss. Here, the defendant has enabled Arnaboldi to obtain a sum of money from the plaintiffs by a representation which was false, and

he therefore is the person who should bear the consequences of the fraud. I entirely agree also with my Lord and my Brother Byles upon the other point, upon which I do not consider it necessary to add anything.

Montague Smith, J. I am of the same opinion. I am disposed to agree that the plaintiffs are entitled to judgment on the ground that the defendant is, under the circumstances, estopped from disputing the genuineness of the bill, and the indorsements which were upon it, when he by his acceptance induced the plaintiffs to part with their money. I am also disposed to think that the bill, in order to give effect to it, may be taken to be a bill payable to bearer. The defendant, by his acceptance for honour, admits that the drawers had put their names to that [*473] which was to take * effect as a negotiable instrument. If, therefore, Carlos Raffo was a fictitious person, Canevaro & Co. must be taken to have drawn a bill payable to bearer; and the defendant must be taken to have affirmed that they have done so. *Judgment for the plaintiffs.*

ENGLISH NOTES.

The principles deduced from the cases of which the two above set forth are selected as the most instructive, are contained in sect. 54 (2) of the Bills of Exchange Act 1882. Compare sect. 24. These may be read in connection with the principle laid down by sect. 7 (3) of the Act, a principle which in a long series of cases from *Gibson* v. *Minet* (or *Minet* v. *Gibson*, K. B. 1789 and H. L. 1790), 3 T. R. 481, 1 H. Bl. 569, 1 R. R. 754, to *Phillips* v. *Im Thurn*, p. 626, *suprà*, had been laid down by a strong consensus of opinion, although in each of the cases there existed other elements on which the actual decision rested. The last mentioned principle — that where the payee is a fictitious person the bill may be treated as payable to bearer — has been since discussed and applied in *Vagliano* v. *Bank of England*, No. 9 of "Banker," R. C. Vol. 3, p. 695.

That the acceptor is estopped from setting up that the signature of the drawer — as drawer — is a forgery appears by *Sanderson* v. *Collman* (Tindal, C. J., and a strong Court in the Common Pleas), (1842), 4 Man. & Gr. 209, 11 L. J. C. P. 270.

The estoppel against the acceptor's denying (in the case of a bill to drawer's order) the "capacity" of the drawer to indorse, is supported by *Braithwaite* v. *Gardiner* (1846), 8 Q. B. 473, 15 L. J. Q. B. 187 (observe *erratum*, "defendant" instead of "plaintiff" at the end of the

last mentioned report). *Smith* v. *Marsack* (1848), 6 C. B. 486, 18 L. J. C. P. 85; *Hallifax* v. *Lyle* (1849), 3 Exch. 446, 18 L. J. Ex. 197.

In some of these judgments there is a confusion of language between capacity and authority. The distinction is well pointed out by His Honour Judge Chalmers, 4th ed. p. 168.

The estoppels available against a drawer and indorser respectively are mentioned in sect. 55 (1) (*b*) and (2) (*b*) and (*c*) of the Bills of Exchange Act 1882. See *Collis* v. *Emett* (1790), 1 H. Bl. 313; *Ex parte Clarke* (1792), 3 Brown C. C. 238; *Steele* v. *McKinlay* (1880), p. 218, *ante*, 5 App. Cas. at p. 769.

The general rule, subject to these estoppels, is set forth in sect. 24 of the Bills of Exchange Act 1882. In brief, even a holder in due course cannot make a title through a forgery. See *Roberts* v. *Tucker*, No. 8 of "Banker," R. C. Vol. 3, p. 681.

In *Cooper* v. *Meyer* (1830), 10 B. & C. 468, 5 M. & Ry. 387, 8 L. J. K. B. 171, the case repeatedly referred to in the arguments and judgments of the former of the above principal cases (*Beeman* v. *Duck*), a bill was drawn in the name of Woodman, and made payable to his order. The bill was accepted for the accommodation of one Darby, and it bore an indorsement purporting to be that of Woodman, as well as an indorsement by Darby. On the trial of the action, which was by an indorsee against the acceptor, no proof was given of the existence of such a person as Woodman, but it was proved that the indorsement purporting to be by Woodman was in the same handwriting as the drawing. This was held sufficient. The gist of Lord TENTERDEN'S judgment is quoted in the above argument, p. 623, *supra* (11 M. & W. 253). That of BAILEY, J., was as follows: "The defendants ought not to have accepted the bills without knowing whether or not there were such persons as the supposed drawees. If they choose to accept without making the enquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bills." PARKE, J., concurred.

Cooper v. *Meyer* is followed and its application extended in *London and South Western Bank* v. *Wentworth* (1880), 5 Ex. D. 96, 49 L. J. Ex. 657, 42 L. T. 188, where the defendant accepted a bill of exchange in blank, and the drawing and drawer's indorsement were afterwards forged by the person to whom the defendant gave the bill. It was held in effect that it was immaterial whether the name inserted as drawer was that of a real person or not, and that even if it was that of a real person, the forgery of the indorsement did not prevent the acceptor from being liable on the bill. It is perhaps not clear that the effect of this last mentioned decision is included in the language of sect. 54 (2) of the Bills of Exchange Act 1882, but if not, the effect of the decision

would be covered by sect. 7 (3) as interpreted in the case of *Bank of England* v. *Vagliano*, No. 9 of "Bankers," R. C. Vol. 3, p. 695.

In the case of *Robinson* v. *Yarrow* (1817), 7 Taunt. 455, 1 Moore, 150, 18 R. R. 537, referred to in the judgment of PARKE, B., p. 625, *supra* (11 M. & W. 255), the bill purported to be drawn and indorsed *per proc.*, but was without authority; and it was held that the defendant by his acceptance admitted the authority to draw the bill, but not to indorse it. There is a similar decision of the Exchequer Chamber in *Garland* v. *Jacomb* (1873), L. R., 8 Ex. 216, 28 L. T. 877, in the case of a bill drawn and indorsed in the name of a non-trading firm by a partner without authority.

A similar rule to that above given applies to the person other than the drawer, to whose order the bill is drawn. *Drayton* v. *Dale* (1823), 2 B. & C. 293, 299. The acceptor admits his existence and capacity to indorse, but not the genuineness or validity of his indorsement. Bills of Exchange Act 1882, sect. 54 (2) (*c*).

AMERICAN NOTES.

Acceptance admits and guarantees the genuineness of the drawer's signature, because the acceptor is presumed to be acquainted with it. *Goetz* v. *Bank of Kansas City*, 119 United States, 556; *Howard* v. *Mississippi Valley, &c. Bank*, 28 Louisiana Annual, 727; 26 Am. Rep. 105; *White* v. *Continental Nat. Bank of New York*, 64 New York, 316; 21 Am. Rep. 612; *Levy* v. *Bank of U. S.*, 1 Binney (Pennsylvania), 27; *Peoria R. Co.* v. *Neill*, 16 Illinois, 269; *Ellis* v. *Ohio Life, &c. Co.*, 4 Ohio State, 628. The American cases extend this to cases where the holder received the bill before acceptance as well as after. *National Park Bank* v. *Ninth Nat. Bank*, 46 New York, 81; *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 43; *Bernheimer* v. *Marshall*, 2 Minnesota, 81; 72 Am. Dec. 79; *Stout* v. *Benoist*, 39 Missouri, 280; 90 Am. Dec. 466. But Mr. Daniel thinks that where the holder presents the bill for acceptance and indorses it, he warrants the drawer's signature to the acceptor. 2 Daniel on Negotiable Instruments, § 1361.

But the acceptor does not guarantee the genuineness of the drawer's signature as indorser on a bill payable to his own order, nor of any other indorsement, because he is not presumed to be acquainted with the signatures of indorsers. 2 Daniel on Negotiable Instruments, §§ 1365, 1366, citing *Beeman* v. *Duck*; *Williams* v. *Drexel*, 14 Maryland, 566. But if the forged indorsement were on the bill when issued by the drawer, the acceptor, having paid it, could not recover the amount from the holder, because he could charge the drawer. *Hortsman* v. *Henshaw*, 11 Howard (United States Sup. Ct.), 177; *Coggill* v. *Am. Ex. Bank*, 1 New York, 113 (the payee having no interest in the bill). See Bigelow on Estoppel, 32.

The principal cases are cited in Bigelow on Bills and Notes, p. 567.

No. 49. — BAXENDALE *v.* BENNETT.

(C. A. 1878.)

RULE.

ALTHOUGH a person who issues a bill leaving a blank in a material part of it, is estopped as between himself and a *bonâ fide* holder for value to whom it has been passed with the blank filled up, from disputing the authority so to fill it up, there is no such estoppel or presumption of authority in the case of a bill which has not been issued — that is to say delivered with the intention of its operating as a bill — by the person charged upon it.

Baxendale v. Bennett.

3 Q. B. D. 525–534 (s. c. 47 L. J. Q. B. 624; 26 W. R. 899).

Action commenced on the 10th July, 1876, on a bill of [525] exchange, dated the 11th of March, 1872, for £50 drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest.

At the trial before LOPES, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill, dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3rd of June, 1872, and was the *bonâ fide* holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then *put it into a drawer, which was not [* 526] locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had

never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled, upon the authority of *Young* v. *Grote*, 4 Bing. 253, 5 L. J. C. P. 165, and *Ingham* v. *Primrose*, 7 C. B. (N. S) 82; 28 L. J. C. P. 294, that the defendant was liable, and directed judgment to be entered for the plaintiff for £50 and costs.

May 4. Bittleston (Rolland, with him), for the defendant. — The question is whether a blank acceptance, lost by the alleged acceptor, before its delivery to any one, and subsequently filled up by a stranger and put into circulation, can be sued on by a *bonâ fide* holder for value. No action can be brought on such an instrument, for it is merely an inchoate bill; and there can be no implied authority to any one to make the bill complete, for it was never intended that it should be issued. In Byles on Bills, 11th ed. p. 87, it is said, "Without the drawer's signature, a bill payable 'to my order' though accepted is of no force either as a bill of exchange or as a promissory note." *Stoessiger* v. *South Eastern Ry. Co.*, 3 E. & B. 553; 23 L. J. Q. B. 293, and *M'Call* v. *Taylor*, 19 C. B. (N. S.) 301; 34 L. J. C P. 365, are authorities for this proposition. *Young* v. *Grote* and *Ingham* v. *Primrose* will be relied on by the plaintiff, but in those cases the documents were complete. *Awde* v. *Dixon*, 6 Ex. 869; 20 L. J. Ex. 295, is in point for the defendant. There is no evidence of negligence on the part of the defendant to make him liable to the plaintiff. On this point *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H. L. C. 389, applies. In that case the trustees having a common seal permitted their secretary to have it in his custody; he fraudulently affixed the seal to a power of attorney, which being presented at the Bank of Ireland certain stock were transferred from the names of [* 527] the trustees. * It was sought to make the bank responsible for having acted on a power of attorney to which the seal of the trustees had been fraudulently attached. The judge who tried the cause told the jury that, if under the circumstances the trustees had so negligently conducted themselves as to

contribute to the loss, the verdict must be for the bank. But PARKE, B., in delivering the opinion of the judges in the House of Lords, said, "that the supposed negligent custody of their corporate seal by the trustees in leaving it in the hands of their secretary, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void, — that the negligence which would deprive the plaintiffs of their right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself." So here leaving the blank acceptance in an unlocked drawer in his chambers is not that species of negligence which disentitles the defendant from insisting that the bill is invalid. In *Swan* v. *North British Australasian Co.*, 2 H. & C. at p. 181; 32 L. J. Ex. at p. 273, BLACKBURN, J., explains that negligence must be the neglect of some duty cast upon the person guilty of it, and then he adds, "A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts on him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt." That passage from the judgment of BLACKBURN, J., is cited with approbation by COCKBURN, C. J., in *Johnson* v. *Credit Lyonnais Co.*, 3. C. P. D. at p. 42; 47 L. J. C. P. 249. On these authorities it is clear that the judge was wrong in ruling that the defendant was guilty of negligence and liable on the bill.

Jeune, for the plaintiff. — The defendant having been guilty of negligence, the plaintiff, being a holder for value, is entitled to recover. It is clear law that it is immaterial whether the name of the drawer be added before or after acceptance: *Molloy* v. *Delves*, 7 Bing. 428; and it is equally clear that it is not necessary that the bill should be drawn by the person to whom it is handed by the *acceptor. *Schultz* v. *Astley*, 2 Bing. N. C. 544; 5 L. J. C. P. 130. There is, however, no direct authority [*528] on the question whether the holder of a bill that has been lost before it has been issued can recover upon it, but there are *dicta* of learned Judges on the point. In *Awde* v. *Dixon*, 6 Ex. 869; 20. L. J. Ex. 295, PARKE, B., laid it down as a general proposition that a person who puts his name to blank paper impliedly authorizes

the filling up to the amount the stamp will cover. In *Swan* v. *North British Australasian Co.*, 2 Hurl. & C. 175; 32 L. J. Ex. at p. 278, Byles, J., is reported to have said "that where a man loses or parts with his name written on a piece of stamped paper he is responsible to any *bonâ fide* holder when it is filled up as a promissory note or bill." In *Montague* v. *Perkins*, 22 L. J. C. P. at p. 189, Cresswell, J., puts the very question: "Suppose the defendant had lost his blank acceptance, would he have been liable upon it if the finder, without his authority, had filled it up?" It seems to have been conceded in the argument that he would; in that case the blank acceptance had been filled up after a lapse of twelve years, and the jury found it had been filled up after the lapse of a reasonable time, nevertheless the acceptor was held liable. *Awde* v. *Dixon* is no authority for the defendant, for it was apparent, on the face of the instrument, that the bill was incomplete. In Byles on Bills, 11th ed. at p. 187, the author seems to be of opinion that the writer of a blank acceptance not delivered, but lost or stolen without any negligence on his part, would not be liable; but in the present case the defendant has been guilty of such negligence as, according to *Ingham* v. *Primrose*, 7 C. B. N. S. 82; 28 L. J. C. P. 294, would make him liable. In that case the defendant gave the bill to M. to get it discounted, and M. failing to do so, returned it. The plaintiff then tore it in half and threw it into the street. M. picked it up, joined the pieces together and negotiated it. The jury found that the defendant intended to cancel the bill; he was, however, held liable on the authority of *Young* v. *Grote*, 4 Bing. 253; 5 L. J. C. P. 165, on the ground that he had led to the plaintiff becoming the holder of it for value. Williams, J., in delivering the judgment of the Court, says: "It is settled law that if the defendant had drawn a cheque and before [* 529] he had *issued it he had lost it, or it had been stolen from him, and it had found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee — see the judgment in *Marston* v. *Allen*," 8 M. & W. 494; 11 L. J. Ex. 122. The defendant has been negligent in the custody of the bill, and the plaintiff is entitled to recover.

Bittleston, in reply. *Cur. adv. vult.*

No. 49. — Baxendale v. Bennett, 3 Q. B. D. 529, 530.

July 2. The following judgments were delivered:—

Bramwell, L. J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a *bonâ fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name *bonâ fide* put by such person. I do not say such person could have recovered on the bill; but I am of opinion he could not; but what I wish to point out is that the bill might * be made a complete instrument without the [* 530] commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he stopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so; suppose there was no stamp law,

and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of *Young* v. *Grote*, 4 Bing. 253; 5 L. J. C. P. 165, and *Ingham* v. *Primrose*, 7 C. B. (N. S.) 82; 28 L. J. C. P. 294, go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland* v. *Evans' Trustees*, 5 H. L. C. 389, shows under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument.

[*531] * Brett, L. J. In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff.

Bramwell, L. J., says that the defendant is not liable, because if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and

he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case it is true that the defendant after writing his name across the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant would be liable, because *he sent it with the intention that it should be [*532] acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by BLACKBURN, J., in *Swan* v. *North British Australasian Company*, 2 H. & C. 175; 32 L. J. Ex. 273, there must be the neglect of some duty owing to some person; here how can the defendant be negligent who owes no duty to anybody. Against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not

owe any duty to any one; and, secondly, he did not act otherwise than in a way which an ordinary careful man would act.

As to the authorities that have been cited; in *Schultz* v. *Astley*, 4 Bing. N. C. 544; 5 L. J. C. P. 130, the blank acceptance had been filled up by a stranger and a fraud had been committed; nevertheless, the acceptor was held to be liable. There, however, the acceptance had been issued, and it was intended that it should be filled up by some one; but CROMPTON, J., in *Stoessiger* v. *South Eastern Ry. Co.*, 3 E. & B. at p. 556, said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham* v. *Primrose*, 7 C. B. (N. S.) 82; 28 L. J. C. P. 294, the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street; they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable because, said the Court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing [*533] *with it is to say we do not agree with it. In *Young* v. *Grote*, 4 Bing. 253; 5 L. J. C. P. 165, Young left a blank cheque with his wife, and in filling up the cheque for fifty pounds the word fifty was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word fifty, the words "three hundred and" were inserted. Notwithstanding the forgery the Court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care, but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland* v. *Evans' Charity Trustees*, 5 H. L. C. 389, PARKE, B., in delivering the opinion of the judges in the House of Lords, remarks, with reference to *Young* v. *Grote*, "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation; and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a person would not be liable and which govern

the present case. "If a man should lose his cheque book or neglect to lock his desk in which it is kept and a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?" Lord CRANWORTH, speaking of *Young* v. *Grote;* says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer there must be something that amounts to an estoppel or ratification — "that the plaintiff was estopped from saying that he did not sign the cheque," and then he says the doctrine of ratification is well illustrated by *Coles* v. *Bank of England*, 10 A. & E. 437; 9. L. J. Q. B. 36. I think the observations made by the Lords in the case of *Bank of Ireland* v. *Evans'* [*534] *Charity Trustees*, have shaken *Young* v. *Grote*, and *Coles* v. *Bank of England*, as authorities. In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, L. J., concurred.

Judgment for the defendant.

ENGLISH NOTES.

The general consequence of signing and issuing a blank bill is dealt with by sect. 20 of the Bills of Exchange Act 1882. The expression in the section "*primâ facie* authority" perhaps hardly expresses the extent of the power of the holder of such an instrument. In *Carter* v. *White* (C. A. 1883), 25 Ch. D. 666, 54 L. J. Ch. 138, 50 L. T. 670, it was held that a person to whom an acceptance blank as to drawer's name is delivered for value can complete the bill even after the acceptor's death by filling in his own name as drawer. The power to complete the bill, as it is shown by COTTON, L. J., is not merely that of an agent, but arises from a contract that the person to whom the bills are given or any one authorised by him should be at liberty to fill them up. That contract is not put an end to by the death of the acceptor. When a bill was made payable to "— order," and issued by the drawer indorsed by him but without filling up the blank, it has been held that the bill was perfect, "— order" being construed as meaning "my order," *i. e.* to order of the drawer. *Chamberlain* v. *Young* (C. A. 1893) 1893, 2 Q. B. 206, 63 L. J. Q. B. 28.

No. 49. — Baxendale v. Bennett. — Notes.

The nature and effect of the contract made by a person who signs and delivers an instrument in blank will be further considered under the title "Blank," and the cases, *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, 32 L. J. Ex. 273, and *Société Générale de Paris* v. *Walker* (H. L. 1885), 11 App. Cas. 20, 55 L. J. Q. B. 169.

It seems hardly possible to reconcile with the above decision in *Baxendale* v. *Bennett* the actual decision in *Ingham* v. *Primrose* (1859), 7 C. B. N. S. 82, 28 L. J. C. P. 294, the facts of which are stated by Brett, L. J., at p. 644, *ante* (3 Q. B. D. 532). And in accordance with the opinion of Brett, L. J., it will probably not be followed. At the same time the reasoning of Williams, J., in *Ingham* v. *Primrose*, quoted on p. 336, *ante* (notes to No. 16), appears to be instructive. And perhaps the decision may still be applicable to a case where the act of cancelling is only partially accomplished, as suggested in note to No. 37, p. 514, *ante*.

Where a bill not signed by the drawer is accepted, the instrument is only inchoate; but such an acceptance when handed to another is presumably an authority to such person to sign as drawer and issue the instrument as a bill; and the acceptor will be liable upon it accordingly. *Goldsmid* v. *Hampton* (1858), 5 C. B. N. S. 94, 27 L. J. C. P. 286; *McCall* v. *Taylor* (1865), 19 C. B. N. S. 301, 34 L. J. C. P. 365, 12 L. T. 461; *Ex parte Haywood* (1871), L. R., 6 Ch. 546, 40 L. J. Bk. 49, 24 L. T. 782. Such an acceptance, although incomplete as a bill, is a security for money within the Larceny Act 24 & 25 Vict. c. 96, s. 75. *R.* v. *Bannerman* (C. C. R. Nov. 8, 1890), 1891, 1 Q. B. 112.

As to the imputation of negligence, a similar question was raised in the case of *Patent Safety Gun Cotton Co.* v. *Wilson* (C. A. 1880), 49 L. J. Q. B. 716. There a cheque which had been drawn by the defendant to the order of the plaintiff company and delivered to them for value, had been stolen by a clerk of the company who forged their indorsement. The defence was that the company employed the clerk, who was a notorious thief, and allowed him access to the drawer in which the cheque had been placed. This defence was held bad on demurrer.

AMERICAN NOTES.

This doctrine of the first branch of the Rule is somewhat mooted in this country. One class of cases hold the English doctrine. *Redlich* v. *Doll*, 54 New York, 234; 13 Am. Rep. 573. There the defendant made and indorsed a note payable to himself, with no place of payment inserted, there being a blank after "at"; he delivered it to J. S. on the agreement that it was not to be stamped nor negotiated, intending it as a mere receipt. J. S. stamped it, filled the blank, and negotiated it. *Held*, that defendant was liable to a *bonâ fide* holder for value. "It carried upon its face an implied authority for

any *bonâ fide* holder to insert the place of payment." Citing *Young* v. *Grote*, 4 Bing. 253; *Garrard* v. *Hadden*, 67 Pennsylvania State, 82: 5 Am. Rep. 412. See *Angle* v. *Ins. Co.*, 92 United States, 330; *Rainbolt* v. *Eddy*, 34 Iowa, 440: 11 Am. Rep. 152; *Gillaspie* v. *Kelley*, 41 Indiana, 158; *Davis* v. *Lee*, 26 Mississippi, 505; 59 Am. Dec. 267; *Frank* v. *Lilienfeld*, 33 Grattan (Virginia), 384; *Bank* v. *McChord*, 4 Dana (Kentucky), 191; *Yocum* v. *Smith*, 63 Illinois, 321: 14 Am. Rep. 120; *Breckenridge* v. *Lewis*, 84 Maine, 349; 30 Am. St. Rep. 353, and note 357.

But in *Knoxville Nat. Bank* v. *Clarke*, 51 Iowa, 264; 33 Am. Rep. 129, the contrary was held, in a case where there was no restriction upon the issue; there was a blank preceding the amount, the place of payment was left blank, and the former blank was fraudulently filled, increasing the amount, and the latter was also filled. It was held that the innocent third person could not recover. Citing *Young* v. *Grote*, and the principal case, and giving a learned review of the authorities. To the same effect, *Holmes* v. *Trumper*, 22 Michigan, 427; 7 Am. Rep. 661; *Washington Sav. Bank* v. *Ecky*, 51 Missouri, 272; *Bank of Limestone* v. *Penick*, 2 T. B. Monroe (Kentucky), 98; 15 Am. Dec. 136; *Toomer* v. *Rutland*, 57 Alabama, 379; 29 Am. Rep. 722; *Coburn* v. *Webb*, 56 Indiana, 96; 26 Am. Rep. 15; *Fordyce* v. *Kosminski*, 49 Arkansas, 40; 4 Am. St. Rep. 18, and note 25; *Burrows* v. *Klunk*, 70 Maryland, 451; 14 Am. St. Rep. 371; 3 Lawyers' Rep. Annotated, 576; *Greenfield Sav. Bank* v. *Stowell*, 123 Massachusetts, 196; 25 Am. Rep. 67, and note 97; *Exchange Nat. Bank* v. *Bank of Little Rock*, 58 Federal Reporter, 140; 22 Lawyers' Rep. Annotated, 686, with notes.

The cases are elaborately discussed in Bigelow on Bills and Notes, pp. 571, 573, etc., citing the principal case. Mr. Bigelow distinguishes between the addition of words to a complete instrument and to an incomplete instrument, holding it valid as to the latter, and invalid as to the former.

On the second branch of the Rule, the principal case is largely quoted from in 1 Daniel on Negotiable Instruments, § 842*a*, the case being distinguished from that of a *complete* instrument undelivered. This doctrine was applied in *Ledwich* v. *McKim*, 53 New York, 315 (negotiable corporate bonds stolen). See *District of Columbia* v. *Cornell*, 130 United States, 659. In the former case Folger, J., observed: "The defendants contend that they or any holder of these instruments, seeing the indorsement of the president in blank, would undoubtedly and justly regard themselves as authorized to fill the blank. Cases are cited to sustain this proposition. In all of them, however, there is an authority from the party to be bound, to him to whom the paper was intrusted, for the filling of the blank, or an actual intrusting of it to him upon some confidence as to its use or disposition. This confidence is either express or it is implied from an actual delivery for future use of the instrument, though still in its imperfect condition. As to an express authority there can be no question or doubt. The implied authority is found in the fact of delivery for use. For as it is not to be presumed that the delivery for use was meant to be a nugatory and unavailing act, and as it is apparent that it would be if the instrument may not be perfected before put to use, the law implies an intention, and hence an authority, that he to whom it is thus delivered may

supply all needs for making it a perfect and binding negotiable instrument. But this authority is not implied from the fact alone that the paper is in hands other than those of him who is to be bound, but from that fact joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation," etc. This case is cited and approved by Mr. Bigelow (Bills and Notes, 572). See *Davis Machine Co.* v. *Best*, 105 New York, 67.

In *Burson* v. *Huntington*, 21 Michigan, 115; 4 Am. Rep. 497 (which Mr. Bennett says is "to the same effect as *Baxendale* v. *Bennett*"), A. executed a complete note payable to B. or order, but did not deliver it; but B., in his absence and contrary to his instructions, took it and put it into circulation. It was held that A. was not liable on it even to an innocent purchaser. The Court said: "But a note in the hands of the maker before delivery is not property, nor the subject of ownership as such; it is in law but a blank piece of paper. Can the *theft* or wrongful *seizure* of this paper *create a valid contract* on the part of the maker *against his will*, where *none existed before?* There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note." In answer to the argument that "where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," the Court observe that this principle "is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person whose acts or negligence have enabled such third person to occasion the loss." — cases of misplaced trust, as, for example, the intrusting the possession of the instrument or *indicia* of ownership. "If I leave my horse in the stable or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible to steal him from that particular locality."

In *Chipman* v. *Tucker*, 38 Wisconsin, 43, the doctrine of the last case was extended to the case of a wrongful delivery of the note by a custodian intrusted with it by the maker, "a position at variance with the authorities," as Mr. Bigelow correctly says. See 1 Daniel on Negotiable Instruments, §§ 843, 844.

No. 50. — CROWE *v.* CLAY.

(EX. CH. 1854.)

RULE.

At common law when a negotiable bill has been lost no action can be maintained either on the instrument or on the consideration for it.

No. 50. — Crowe v. Clay, 9 Exch. 604, 605.

Crowe v. Clay.

9 Exch. 604–609 (s.c. 23 L. J. Ex. 150; 18 Jur. 654).

Error on the judgment of the Court of Exchequer, in the [604] case of *Clay* v. *Crowe*.[1]

Dowdeswell argued for the plaintiff in error (the defendant below) in last Trinity Vacation[2] (June 17). The plea affords a good defence to the action. The judgment of the Court of Exchequer proceeded on the ground that the plea did not show that the bill had arrived at maturity, and, assuming that it was still running, its loss was no answer to the plaintiff's claim. But irrespective of the allegation of the loss of the bill, the plea discloses a sufficient *primâ facie* defence, for it states that the bill was given "for and on account of" the debt. According to the authority of *Kearslake* v. *Morgan*, 5 T. R. 513, which has been followed by *Belshaw* v. *Bush*, 11 C. B. 191; 22 L. J. C. P. 24, and *Ford* v. *Beech*, 11 Q. B. 873; 17 L. J. Q. B. 114, a negotiable bill or note given "for and on account" of a simple contract debt, suspends the remedy for its recovery until the security has become due. Conceding, therefore, that the Court of Exchequer was right in assuming that the bill was still running, there is enough on the face of this plea to bar the action. If, however, it is to be taken * that the bill had arrived at maturity, then according [*605] to the judgment of that Court, its loss is a good answer.

Atherton, for the defendant in error (the plaintiff below). — If the defendant below intends to rely solely on the fact that a negotiable bill was given for and on account of the debt sought to be recovered, the plea should have contained an averment, either that the bill was indorsed to a third person, or that it had not arrived at maturity at the time of action brought. *Price* v. *Price*, 16 M. & W. 232; 16 L. J. Ex. 99. However, that ground of defence (which was not adverted to in the Court below) is not now available, because it is consistent with every allegation in the plea that the bill had arrived at maturity. Therefore, if the statement as to the loss of the bill be struck out of the plea, it will afford no answer whatever to the action. Then what is the effect of the plea, if considered as setting up the defence of a lost bill?

[1] See the case, 8 Exch. 295, where the pleadings are fully stated.

[2] Before Coleridge, J., Maule, J., Cresswell, J., Wightman, J., Williams, J., Talfourd, J., and Crompton, J.

No. 50. — Crowe v. Clay, 9 Exch. 605, 606.

Assuming, as the plaintiff is entitled to do upon these pleadings, that at the time of the loss the bill had not arrived at maturity, and was unindorsed, no stranger could enforce payment of it. In *Hansard* v. *Robinson*, 7 B. & C. 90; 5 L. J. K. B. 242, the bill was indorsed in blank, and was overdue at the time of its loss, and the judgment in that case proceeds in a great measure on the hardship of casting on the acceptor the burthen of proving the loss, and that the holder obtained the bill after it became due. That does not apply here. To bring the case within the principle of that decision, the plea should have contained an averment that the bill was indorsed. *Wain* v. *Bailey*, 10 A. & E. 616, is an express authority that the maker of a note not negotiable cannot refuse to pay the amount when due, on the ground that the payee has not got it in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on pay-
[* 606] ment. And in *Rolt* v. *Watson*, 4 Bing. 273, it was * held no answer to an action for goods sold, that the defendant had accepted a bill for the amount which the plaintiff lost, he never having indorsed it. In this case it must be presumed that the bill was unindorsed, there being no allegation to the contrary. *Price* v. *Price*, 16 M. & W. 232; 16 L. J. Ex. 99, shows that the fact of indorsement ought to come from the defendant.

Dowdeswell in reply. — In either view the plea is a good *primâ facie* answer to the action. [WIGHTMAN, J. It is consistent with every allegation in it, that the bill was unindorsed. Then, according to *Ramuz* v. *Crowe*, 1 Exch. 167; 16 L. J. Ex. 280, a person who has lost a negotiable bill cannot, by the law-merchant, compel payment of it, even though it is unindorsed.] A remedy is provided by the 9 & 10 Will. III. c. 17, s. 3, under which, upon a satisfactory indemnity being tendered, payment may be enforced in a Court of equity. *Ex parte Greenway*, 6 Ves. 812; Byles on Bills, p. 302, 6th edit. *Alexander* v. *Strong*, 9 M. & W. 733; 11 L. J. Ex. 316, also shows that an acceptor has a right to have the bill delivered up on payment. As a general principle of law, a person intrusted with an instrument is bound to take due care of it: *Davidson* v. *Cooper*, 13 M. & W. 343; 13 L. J. Ex. 276; *Pigot's Case*, 11 Co. Rep. 27; and it would be unreasonable to hold that an innocent party should bear the loss arising from the negligence of another. In *Woodford* v. *Whitcley*, Moo. & M. 517, PARKE, J., ruled that a debt for which a bill had been given and lost could not be re-

covered. *Champion* v. *Terry*, 3 Bro. & B. 295, is also an authority that a defence of this kind is available either in an action on the bill or on the original consideration. *Rolt* v. *Watson*, 4 Bing 273, is at variance with *Champion* v. *Terry*, and must be considered as overruled by *Hansard* v. *Robinson*, 7 B. & C. 90; 5 L. J. K. B. 242. *Cur. adv. vult.*

* The judgment of the Court was now delivered by [* 607]

Coleridge, J. — In this case the declaration is for goods sold and delivered, and for money due to the plaintiff on a bill of exchange drawn by him on and accepted by the defendant. The plea, as to the sum of £42 5*s.* 2*d.*, part of the demand, is, that before action the plaintiff drew on the defendant a bill of exchange for the amount, payable to the plaintiff's order five months after date, which the defendant accepted and delivered to the plaintiff for and on account of the said sum, and the plaintiff afterwards lost the bill out of his possession, and from thence hitherto the same has remained so lost, and the plaintiff has been unable to produce it, and ceased to have any power or control over it, and the defendant has never since such loss found such bill, nor known where it was to be found, nor had any power or control over it. To this plea there was a general demurrer, on which the Court of Exchequer gave judgment for the plaintiff.

It is well established that, in an action on a negotiable bill of exchange, the plaintiff must be the holder at the time he sues upon it, and, if he has lost it, cannot maintain an action upon it. In the case of *Hansard* v. *Robinson*, 7 B. & C. 90; 5 L. J. K. B. 242, the Court of Queen's Bench, in giving judgment, points out the inconvenience and injustice which would arise if the plaintiff in such a case could recover, and throw on the defendant the consequences of the plaintiff's negligence, and shows that the proper remedy of the loser of the bill is in equity, where he might call on the party liable on the bill, on due indemnity, to give him another bill or pay him the amount. In the case of *Ramuz* v. *Crowe*, 1 Exch. 167; 16 L. J. Ex. 280, this law was extended to the case of a bill payable to the drawer's order, though not indorsed at the time of the loss, as the bill had been in the case of *Hasard* v. *Robinson*; * and this case seems well decided, the right to have [* 608] the bill on payment, and the possible inconvenience and embarrassment of the defendant in being called on to pay the lost bill, being of the same kind in the two cases.

The present case is not one of an action on the lost bill, but on the demand on account of which the bill was given. A bill given "for and on account" of money due on simple contract operates as a conditional payment, which may be defeated at the option of the creditor, if the bill is unpaid at maturity in his hands; in which case he may rescind the transaction of payment and sue on the original demand. *Griffiths* v. *Owen*, 13 M. & W. 58, 64; 13 L. J. Ex. 345; *James* v. *Williams*, 13 M. & W. 828; 14 L. J. Ex. 220. If the bill be lost, the condition on which the payment may be defeated does not arise. *Belshaw* v. *Bush*, 11 C. B. 191, 201; 22 L. J. C. P. 24; and the defendant, if compelled to pay the original debt, would be subject to inconvenience of the like kind as if compelled to pay the bill. Accordingly, it was held at *Nisi Prius* in *Woodford* v. *Whiteley*, Moo. & M. 517, that a debt paid by a lost bill could not be recovered, and the like law was assumed in the cases of *Mercer* v. *Cheese*, 4 M. & G. 804; 12 L. J. C. P. 56; and *Price* v. *Price*, 16 M. & W. 232; 16 L. J. Ex. 99. It appears, therefore, that the loss of a negotiable bill given on account of a debt is an answer to an action for the debt, as well as to one on the bill.

It was objected to the plea in the present case, that it did not show that the bill was overdue, and that the loss of a bill not due was immaterial; but the loss here is shown to be subsisting at the time the action is brought. To entitle the plaintiff to sue, he ought to be the holder of the bill, and the bill ought to be due: and there seems no reason why the defendant may not rely on a defect of the plaintiff's title in either of these respects, leaving the other unnoticed. It may well be, that a person who has given a bill on account of a debt may be able and willing to [*609] * pay the debt if he can withdraw his bill from circulation, and may object to pay only on the ground that the bill is not forthcoming, without objecting to its not being due. The present plea is therefore a sufficient bar to the action. It discloses a state of facts inconsistent with the plaintiff's right of action; it therefore shows a defence in substance, and is consequently good on general demurrer. The judgment of the Court of Exchequer must therefore be reversed. *Judgment reversed.*

ENGLISH NOTES.

The remedy to the holder of a lost bill, which was imperfectly given by statute 9 & 10 W. III. c. 17, s. 3, was subsequently extended by the

Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), s. 87, and these provisions are embodied in and further extended by sections 69 and 70 of the Bills of Exchange Act 1882. "But," His Honour Judge Chalmers observes, 4th ed., p. 308 "unless he [the creditor] can obtain a new bill under the provisions of sect. 69 [of the Act of 1882], there appears to be nothing to affect the common-law rule that his right of action on the consideration is gone."

AMERICAN NOTES.

The decisions in this country on this point are in harmony with the principal case in most of those States in which the distinction between law and equity is preserved. *Moses* v. *Trice*, 21 Grattan (Virginia), 556; 8 Am. Rep. 609; *Posey* v. *Decatur Bank*, 12 Alabama, 802; *Morgan* v. *Reintzel*, 7 Cranch (United States Sup. Ct.), 273; *Rowley* v. *Ball*, 3 Cowen (New York), 303; 15 Am. Dec. 266; *Thayer* v. *King*, 15 Ohio, 242; 45 Am. Dec. 571; *Swift* v. *Stevens*, 8 Connecticut, 431; *Edwards* v. *McKee*, 1 Missouri, 123; 13 Am. Dec. 474; *Wofford* v. *Board of Police*, 14 Mississippi, 579; *Fells Pt. Sav. Inst.* v. *Weedon*, 18 Maryland, 320; 81 Am. Dec. 603; *McCluskey* v. *Gerhauser*, 2 Nevada, 47; 90 Am. Dec. 512; *Butler* v. *Joyce*, 9 Mackey (Dist. Columbia), 191; 16 Lawyers' Rep. Annotated, 205, with notes.

But in other States the contrary has been held. *Hinckley* v. *Union P. R. Co.*, 129 Massachusetts, 52; 37 Am. Rep. 297; *Union Bank* v. *Warren*, 4 Sneed (Tennessee), 167; *Meeker* v. *Jackson*, 3 Yeates (Pennsylvania), 442; *Anderson* v. *Robson*, 2 Bay (South Carolina), 495; *Bridgeford* v. *Masonville Co.*, 34 Connecticut, 546; 91 Am. Dec. 744; *Bean* v. *Keen*, 7 Blackford (Indiana), 152; *Welton* v. *Adams*, 4 California, 37; 60 Am. Dec. 579; *Robinson* v. *Bank of Darien*, 18 Georgia, 111; *Commercial Bank* v. *Benedict*, 18 B. Monroe (Kentucky), 307; *Bainbridge* v. *Louisville*, 83 Kentucky, 285; 4 Am. St. Rep. 153; *Moore* v. *Fall*, 42 Maine, 450; 66 Am. Dec. 297; *Adams* v. *Baker*, 16 Rhode Island, 1; 27 Am. St. Rep. 721 (holding that the plaintiff may recover at law by showing that the defendant will not run the hazard of being required to pay a second time).

In some States the right to an action at law is sustained, if the paper is lost before and not after maturity. *Thayer* v. *King*, 15 Ohio, 242; 45 Am. Dec. 571; *Citizens' Nat. Bank* v. *Brown*, 45 Ohio State, 39; 4 Am. St. Rep. 526; *Smith* v. *Walker*, 1 Smedes & Marshall Ch. (Mississippi), 432; *Jones* v. *Fales*, 5 Massachusetts, 101; *Chaudron* v. *Hunt*, 3 Stewart (Alabama), 31; 20 Am. Dec. 60; *Mowery* v. *Mast*, 14 Nebraska, 512; *Brent* v. *Ervin*, 3 Martin, N. S. (Louisiana), 303; 15 Am. Dec. 157; *Fales* v. *Russell*, 16 Pick. (Mass.), 315.

But in others this distinction is not recognized as changing the rule. *Moses* v. *Trice*, 21 Grattan (Virginia), 556; 8 Am. Rep. 609; *Rowley* v. *Ball*, 3 Cowen (New York), 303; 15 Am. Dec. 266; *Hopkins* v. *Adams*, 20 Vermont, 407; *Lazell* v. *Lazell*, 12 Vermont, 443; 36 Am. Dec. 352.

Mr. Daniel (2 Negotiable Instruments, § 1478) thinks that, although "there is undoubtedly great force in the reasoning" of *Fales* v. *Russell*, 16 Pick. (Mass.), yet "the weight of authority and reason are both against it, and in those States where the distinction between law and equity is well preserved,

the law may be regarded as settled to the contrary, in accordance with the English precedents." Citing the principal case. But it seems that the division of judicial opinion is almost equal. In some States the matter is regulated by statute. In those called "Code States" the question is of no importance.

No 51. — GERALOPULO *v.* WIELER.

(1851.)

RULE.

WHERE a bill is paid *supra* protest for the honour of a party to the bill, it is not necessary (in order to give the person paying a right of action against the party for whose honour it is paid) that the protest shall have been formally drawn up or extended before the payment; it is sufficient if the bill has in fact been protested, and a declaration that the payment was for honour made before a notary, and these facts recorded in the notarial register, before the payment was made.

Geralopulo v. Wieler.

20 L. J. C. P. 105–111 (s. c. 10 C. B. 690, 15 Jur. 316).

[105] Assumpsit. The first count of the declaration stated that, on the 26th of September, 1849, Jean Petcheneff, in parts beyond the seas, to wit, at Odessa, drew a bill of exchange for £260 at three months, on the defendant, payable to the order of Buba Frères, which period had elapsed; that the defendant accepted the said bill, payable at Prescotts' in London; that Buba Frères indorsed to Fratelli Buba di Moscow, who indorsed to J. F., who indorsed to G. L., who indorsed to the London and Westminster Bank, who became the holders and presented the said bill on the day it became due at Prescotts' in London; that the defendants made default in payment, and the bill was afterwards duly protested for non-payment, and thereupon the plaintiff, on the 11th of December, 1849, appeared before one J. C., then being a notary public duly admitted and sworn, and declared before the said notary public that he would pay the said bill under the said protest for the honour of the said Fratelli Buba di Moscow, the second indorsers of the bill, holding nevertheless the said second indorsers

and the first indorsers, the drawer and acceptor, and all concerned, obliged to him for his reimbursement in the form of law and according to the custom of merchants; and thereupon the plaintiff then according to his said declaration and the custom of merchants paid the said bill under the said protest as aforesaid, together with 18*s.* charges of protest, and the bill was thereupon delivered to the plaintiff according to the custom of merchants, of all which the defendant then had due notice.

The second count was similar, on another bill for £220.

Pleas: First, *non accepit;* second, that the bill was not duly protested for non-payment, *modo et formâ;* third, that the plaintiff did not pay the said bill under the said protest, *modo et formâ;* fourth, that the defendant had not such notice as in the first count mentioned, *modo et formâ.*

There were similar pleas to the second count, and issue was joined on all the pleas.

At the trial, before MAULE, J., at the Sittings in London after Trinity term, 1850, the acceptance was duly proved, and the only questions that arose were upon the second, third, and fourth issues.

It was proved that the bills were presented for payment and dishonoured. They were then handed to J. C., a notary, to be protested, and were protested for non-payment on the 10th of December, 1849. On the 11th, they were paid by the plaintiff, through a notary, under protest, for the honour of the second indorsers. Protests were regularly drawn up, which were forwarded by post on the 11th of December, addressed to the second indorsers at Moscow. These protests were not produced at the trial, but secondary evidence was given of their contents, and * duplicates of them from his protest books (in which [* 106] entries were made at the time of the protest) drawn up by the notary in March and April, 1850, after the commencement of the action, but before the trial, were read in evidence. The defendant's counsel contended that there was no primary evidence of the protests as alleged in the declaration, and that under the circumstance secondary evidence was not admissible. A verdict was found for the plaintiff for £495, with a general leave to the defendant to move for a nonsuit or to enter a verdict for the defendant, if the Court should so direct.

A rule accordingly having been obtained by Byles, Serj.,

Channell, Serj., and Bovill (Jan. 17) showed cause. — The first

question is, whether the plaintiff, having paid the bills for the honour of the second indorsers, could rely at the trial upon a protest drawn up *in extenso* after the day on which such payment was made. It is contended, on the other side, that he could not; and the case of *Vandewall* v. *Tyrrell*, Moo. & M. 87, is relied upon. But that case does not go the length of deciding that the protest must be formally drawn up in writing before the payment is made, but only that a protest in point of fact shall have been made before payment. In that case no act had been done by a notary until after the payment; which was not a compliance with the law-merchant. If *Vandewall* v. *Tyrrell* decides more than this, it is not to be supported, and is at variance with numerous decisions which show that the protest may be extended at any time. *Goostrey* v. *Mead*, Bull. N. P. 271, cited in *Orr* v. *Maginnis*, 7 East, 361. There is a distinction between noting and drawing up the protest, which is pointed out in Selwyn's N. P. p. 381, 11th ed.: "The modern usage is for the notary to make a minute on the bill, consisting of his initial, the day, month, and year when payment was refused, and charges for making the minute. This minute, which is called noting, is unknown in law as distinguished from the protest. The notary, having made his minute, draws up the protest at his leisure." Buller's N. P. 272 is to the same effect, and the decision of Lord KENYON in *Chaters* v. *Bell*, 4 Esp. 49. The same law is laid down in Chitty and Hulme on Bills, 9th ed. p. 464: "It has been held that the protest for non-acceptance or non-payment may be drawn up at any time before the trial, provided the bill be noted in due time." The law-merchant therefore only requires that a formal demand of payment by a notary shall be made on the last day of grace, "and not that the formal protest shall be extended or completed on that day." Chitty and Hulme on Bills, p. 477. To the same effect is Bayley on Bills, 6th ed. pp. 62, 268, and Byles on Bills, 5th ed. p. 190. The duplicate protests therefore, having been drawn up before the trial, were drawn up in good time. They were also good primary evidence, being duplicate originals, as much as those sent to Moscow. *Brain* v. *Preece*, 11 M. & W. 773. Secondly, at all events, secondary evidence of the protests sent out to Moscow was admissible. The original documents were out of the jurisdiction of the Court, and it would have been impossible for the plaintiff to produce them. In *Boosey* v. *Davidson*, 18 L. J. Q. B. 174, secondary evidence was rejected,

because no inability to produce the documents appeared. They also cited *Prince* v. *Blackburn*, 2 East, 250, *Glubb* v. *Edwards*, 2 Moo. & R. 300, *Alivon* v. *Furnival*, 1 Cr. M. & R. 277; 3 L. J. (N. S.) Ex. 241, and Buller's N. P. 242 *a*.

Byles, Serj., in support of the rule. — Upon the first point, it is not disputed that in general a protest may be drawn up at any time; but it is submitted that where there is acceptance or payment *supra* protest for non-acceptance or non-payment, for the honour of a party to the bill, the protest must be formally drawn up before the acceptance or payment, and therefore that the duplicate protests produced at the trial did not prove the allegation of protest having been duly made before the payment by the plaintiff; although it may be admitted that if they had been drawn up in * time these duplicate protests would [* 107] have been good primary evidence, as much as those sent to Moscow. The decision in *Vandewall* v. *Tyrrell* is in favour of the defendant, and the older authorities support that decision. In Beawe's Lex Merc. tit. "Bills of Exchange," pl. 66, it is said: "In case of a person's refusing payment of his accepted bills when due, they ought to be protested and sent with the protest to the remitter or drawer;" and Ibid. pl. 34: "When a bill is made payable to order and indorsed by a substantial man, before acceptance be demanded, and the acceptor scruples to accept it for account of the drawer, or for the account of him it is drawn for, he may, if he thinks proper, do it *supra* protest, for the honour of the indorser; and in this case he must first have a formal protest made for non-acceptance, and should send it without delay to the said indorser, for whose honour and account he hath accepted the bill." These passages evidently contemplate the necessity of the protest being drawn up before the payment or acceptance *supra* protest for honour of a party to the bill. To the same effect is Marius on Bills, pl. 87, tit. "Bill accepted by another Man." "Moreover, if a bill of exchange be drawn on John A. and he refuses to accept it, or if John A. be out of town and have left no legal order for acceptance thereof by letter of attorney under his hand and seal, in due form; and that William C. (a friend of the drawer's) will accept the bill for honour of the drawer; in either of these cases, the party to whom the bill is payable, or his assignees, ought, in the first place, to cause protest to be made for non-acceptance by John A.; and then he may take the acceptance of William C. for the honour of

the drawer: for otherwise, the drawer may allege that he did not draw the bill on William C. but on John A.; and according to the custom of merchants diligence ought to be first used towards John A. and by protest legally to prove his want of acceptance;" and Marius on Bills, pl. 126, tit. "Acceptance for account of Drawer":— "If a bill of exchange be subscribed or drawn by Abraham F. on Benjamin G. for the account of Charles H., and it so happen that Benjamin G., to whom the bill is directed, will not accept the bill for account of Charles H., as it is drawn, but would willingly accept it for account of Abraham F. (being a special friend to Benjamin G., on whom it is drawn), and so this Benjamin G. is very unwilling to suffer the bill to go back by protest for non-acceptance; and therefore he desires to accept it for honour of the drawer, and for his account; in this case, according to the law of merchants, Benjamin G. may so accept the same: but before he do accept the bill he must personally appear before a notary public, and declare before him such his intent, and the notary must make an act thereof in due form, to be sent away by Benjamin G. to Abraham F. that so he may have speedy advice thereof; and the act being entered, then he may accept the bill for the honour of the drawer, and for his account. And when the bill is due, he must cause a like act to be made for payment before he pay the bill, declaring that he will pay it for the honour of the drawer, and for his account, but not for the honour of Charles H. for whose account it was drawn. And thus (Benjamin G. giving honour to the bill, although he do it for another account than for which it was drawn), according to the law and custom of merchants generally observed, Abraham F. is bound to make the same good again to Benjamin G. with exchange, re-exchange, and costs. But Benjamin G. must be sure to make such his declaration before he do accept the bill, or anyways engage or oblige himself thereto: for otherwise, if he should first accept it, and then that it might be lawful for him at any time afterwards to alter the property thereof, and charge it for account of the drawer at the acceptor's pleasure, the drawer Abraham F. might be much prejudiced as in reference to Charles H., by whose order, it may be, or for whose account Abraham F. drew the same bill." This passage clearly shows that a formal instrument of protest must be drawn up before the acceptance or payment. The "act being entered" means the protest being extended. It is important that the protest, which is the regular record, should be drawn up before

the payment, otherwise there is nothing to prevent the party paying *supra* protest from changing the honour for which he pays. He also cited upon this point Smith's Merc. Law, 219, 220, * 4th edit., 1 Noguier, 346, the 6 & 7 Will. IV. c. 58, [* 108] Chitty and Hulme on Bills, 510, 9th edit., and *Williams* v. *Germaine*, 1 M. & Ry. 403.

[MAULE, J., The case of *Vandewall* v. *Tyrrell* does not decide that a formal protest should be drawn up before the payment, only that it should be made. The report does not convince me that in that case everything had been done before the 30th of July, 1825, which ought to have been done to entitle the notary to have drawn up the protest on that day. There does not appear to have been a formal protest before the payment, authenticated by a notary in the proper way.]

The bill was noted, according to the report, which must mean by a notary.

[MAULE, J., suggested that the brief used at *Nisi Prius* should be obtained.]

Secondly, there being no primary evidence of legal protests to support the allegations in the declaration, it was not competent to the plaintiff to give secondary evidence of the protests sent out to Moscow. In *Alivon* v. *Furnival* it appeared that the document was not allowed to be removed by the French law; here the protests might, for all that appeared, have been obtained by the plaintiff without difficulty. *Boosey* v. *Davidson*, cited on the other side, is an authority for the defendant; for secondary evidence was there rejected: so is *The Queen* v. *Douglas*, 1 Car. & K. 670.

Cur. adv. vult.

MAULE, J., — now delivered the judgment of the Court, JERVIS, C. J., MAULE, J., CRESSWELL, J. and WILLIAMS, J. — After stating the facts as above set out, his Lordship proceeded. — As to the first point, it was argued for the plaintiff on showing cause, that the duplicate protests produced were original instruments, and that when the fact recorded on a protest has taken place and been duly entered by a notary in his book at the time of the transaction, it is sufficient if the formal protest be drawn up afterwards, even though after action brought. For this several authorities were cited and the known course of practice relied on. On the part of the defendant, it was not denied that such was the general rule, but it was con-

tended that this rule was liable to an exception in case of a payment *supra* protest for the honour of a party to the bill, in which case it was insisted that it was not sufficient that the facts recorded in the protest should have taken place, but that a formal instrument of protest must be drawn up or extended before the payment for honour, and that, consequently, the allegations that the bills were protested and paid under protest were not proved, inasmuch as the protest mentioned in the declaration must be understood to mean such protests as would give a right of action to a person paying for honour. The authority on which the defendant relied in support of the necessity of extending the protests before payment was that of *Vandewall* v. *Tyrrell*, which has sometimes been considered as supporting the doctrine contended for by the defendant. That case, as reported in Moody & Malkin's Reports, was as follows: "Assumpsit for money paid by the plaintiffs to the use of the defendant. The defendant, who resided in Jamaica, drew four bills dated the 9th of September, 1824, for £1500 on Willis & Co. in London, at nine months after sight. The bills were duly accepted, but were dishonoured and noted for non-payment at the time they became due, which was on the 30th of July, 1825. The plaintiffs, on the request of the acceptors, paid the bills for the honour of the drawer on the 8th of August, 1825, and gave notice to the defendant the first foreign post. In May, 1826, the notary public was instructed to protest the bill for non-payment, which he did. The protest purported to have been made before the payment, and in form asserted that 'the plaintiffs were ready to pay for the honour of the drawer.' He stated the custom to be to protest formally before the payment. 'Lord TENTERDEN, C. J. The plaintiffs must be nonsuited: they sue upon the custom of merchants: that custom clearly is, that a formal protest should be made before payment is made for the honour of any party to the bill. Nonsuit.'"

This report being short and somewhat obscure, the Court took time to consider its authority, and requested the parties to [* 109] obtain further information respecting it. We have * since been furnished with the brief which one of the counsel in the cause held at the trial, and this has thrown much light on the question. It appears from that brief, and the notes of counsel, that the bills in question in that cause were duly presented and noted on the 30th of July, 1825, the day they fell due; that the

plaintiff paid the amount of the bills to the holder on the 8th of August; the payment was made by a clerk of the plaintiffs, no notary being present, and nothing, as far as appeared, being said by the clerk, when he made payment to the holder, as to paying for the honour of any person. There was, indeed, no intervention of a notary with regard to this payment until May, 1826, when the plaintiff applied to the notary who had protested the bills for the holder, who then drew up acts of honour on the same papers as the original protests for non-payment. The protests for non-payment were in the usual form, and stated that the notary on the 30th of July, 1825, presented the bills to the acceptors, who refused payment.

The acts of honour were not dated, but followed the signatures of the notary to the protests for non-payment, and were in these terms: "Afterwards before me the said notary and witnesses appeared Messrs. Vandewall & Tippler, of London, merchants, and declared that they were ready and willing to pay the bill of exchange before protested under protest, for the honour and upon the account of Joseph Tyrrell, Esq., the drawer of the said bill, holding, nevertheless, the said Joseph Tyrrell and the acceptors of the said bill, and all others concerned, always bound and obliged to them, the said appearers, for their reimbursement in due form of law, and according to the custom of merchants, *quod attestor.* — Signed by the notary."

The notary stated in evidence (according to the notes of counsel at the trial) that when a payment is made for the honour of the drawer the protest is made before payment. The same note represents Lord TENTERDEN as saying: "You must recover by the custom of merchants; you have not complied with it by protesting your bills before payment," and, thereupon, the plaintiff was nonsuited. It appears, therefore, that in this case the plaintiff paid the bill on the 8th of August, 1825, without declaring to the notary or otherwise that he paid it for the honour of the drawer, and attempted to remedy this omission by procuring an act of honour to be drawn up nine months afterwards, the fact recorded in that document, that is, the declaration by the plaintiffs of their readiness and willingness to pay for the honour of the drawer, never having actually taken place. Now, it is a part of the mercantile law respecting payments for honour, that they must be preceded or accompanied by a declaration, made in the presence of a notary,

for whose honour such payment is made, which should be recorded by this notary, either in the protest or on a separate instrument. Beawe's Lex M. tit. "Bills;" Marius, 128. It would, indeed, be contrary to a general principle of law and justice if a person who made a payment or did an act simply without limit or qualification, could afterwards, by a subsequent declaration, limiting or qualifying its effect, affect the rights of others. No person, therefore, paying money simply to the holder of a bill could, by the general rules of law, by a subsequent declaration, cause a payment so made to assume the character of a payment for honour.

The custom of merchants requires the declaration which is to qualify the payment to be made in the presence of a notary. In the case of *Vandewall* v. *Tyrrell* there was a substantial omission of the declaration in the presence of a notary which is necessary to give to the payment the quality of a payment for honour, and not merely an omission to draw up a formal statement of such declaration; and this substantial omission was a clear ground of nonsuit, and the decision may be sustained on that ground. But it also appears that it actually proceeded on that ground. The formal protest which Lord TENTERDEN, as reported in Moody & Malkin, says should be made before payment for honour, and the protesting the bill before payment, mentioned in the note of counsel of what Lord TENTERDEN said — "you have not complied with it by protesting your bill before payment," — are to be understood not of the protest for non-payment, or not of that alone, but either of the protest and the declaration before a notary that the
[*110] payment is for honour, together, or of that *declaration alone. In the report in Moody & Malkin the reporters seem to have considered the protest for non-payment and the act of honour as one instrument, which they might naturally do, as they were on the same paper, and it was the plaintiff's interest to treat the protest and act of honour as one instrument. The language of the reporters is, "The protest purported to have been made before the payment, and in form asserted that the plaintiffs were ready to pay for the honour of the drawer." Now the protest for non-payment bore date the 30th of July, 1825, long before the payment, and it is in the act of honour and not in the protest for non-payment that the assertion of readiness and willingness is contained. The reporters, therefore, in speaking of the protest, must mean either the two instruments together, or the act of

honour alone. In either case the word "protest," as used by them, must comprehend the instrument which contains the assertion of readiness and willingness to pay. And Lord TENTERDEN, in speaking of a formal protest, must be understood as speaking of such formal declaration before a notary as is before mentioned. Lord TENTERDEN is represented in the note of counsel as saying: "You have not complied with the custom of merchants by protesting your bill in time." This seems to point to an omission of something which, according to the usual course, the plaintiffs would have to do, and is more properly applicable to the omission of the notarial declaration which they ought to have made before payment, than to any omission of drawing up the protest for non-payment, supposing such omission to have taken place. Protesting the bill for non-payment was a thing to be done not by the plaintiffs on the 8th of August, but by the holders on the 30th of July. It is nowhere stated in express terms at what time the protests for non-payment in the case of *Vandewall* v. *Tyrrell* were drawn up or extended. There is no doubt the bills were protested for non-payment on the 30th of July, the day they became due, and probably the protests were drawn up before the payments; for it appears that the payment was made on the 8th of August, in order to prevent the bills from being sent to Jamaica under protest by the packet which sailed on the 9th.

The brief for the plaintiffs states that "the bills on being dishonoured were regularly protested by the holder and indorsee, Mr. Simon Taylor, of London, for non-payment. The bills of exchange and protests are as follows;" — then it sets out the bills and protests for non-payment; — it afterwards states that the plaintiffs applied "to the notary who had originally protested the bills" to prepare the extension "of the act of honour," and he prepared it on the same sheet of paper as the original protest. There seems no doubt from these circumstances that the protests for non-payment had been extended before the payment, and were on the 8th of August in the hands of the holder, Simon Taylor, who was about to send them to Jamaica the next day.

We have minutely examined this case, because it has sometimes been referred to as affording the high authority of Lord TENTERDEN to a proposition which introduces an inconvenient and anomalous exception to a general rule, with respect to notarial instruments, that a duplicate made out from the original or protocol in the

notarial book is equivalent to an original made out at the time of the entry in the book. It appears on this examination that that case decides only, in conformity with general law, that a subsequent declaration cannot qualify a previous act, but that in order to such effect the declaration must precede or accompany the act; and in conformity to the law-merchant, that in case of a payment for honour the declaration must be formally made before a notary. There is, therefore, nothing in that decision which establishes any exception to the general rule, or prevents its application to the present case; and we are of opinion that the bills having in fact been duly protested, and the declaration that the payments were made for honour duly made before notaries, and the facts recorded in the usual way in the notarial registers before payment, the duplicates produced at the trial were originals, and equivalent in all respects to the duplicates which were sent to Moscow, and that it was not necessary to prove the contents of the last-mentioned duplicates.

[*111] *Taking this view of the first question raised in argument, it becomes unnecessary to determine the second question, whether the contents of the protest forwarded to Moscow might be proved by secondary evidence, inasmuch as in whatever way that question might be decided, our determination of the first question would entitle the plaintiff to have the rule discharged.

Rule discharged.

ENGLISH NOTES.

See Bills of Exchange Act 1882, ss. 68, 93.

As to the rights of the person who pays the bill *supra protest* for honour, see the case of *Ex parte Swan, In re Overend, Gurney, & Co.*, No. 22, p. 375, *ante* (L. R., 6 Eq. 344, 18 L. T. 230).

AMERICAN NOTES.

"It is well settled to this effect in the United States." 2 Daniel on Negotiable Instruments, § 940 (also § 941), speaking of extension of the initial protest, citing the principal case, and *Bailey* v. *Dozier*, 6 Howard (United States Sup. Ct.), 23; *Bank at Decatur* v. *Hodges*, 9 Alabama, 631: *Cayuga County Bank* v. *Hunt*, 2 Hill (New York), 635. The principal case is cited in Bigelow on Bills and Notes, p. 275, where it is also said: "It is not too late to make it after the bringing of suit, and in the course of trial." Citing *Dennistoun* v. *Stewart*, 17 Howard (United States Sup. Ct.), 606; *Orr* v. *Maginnis*, 7 East, 359.

BILL OF LADING.

SECTION I. — *Bill of Lading as a contract.*

No. 1. — McLEAN & HOPE *v.* FLEMING.

(H. L. ON APPEAL FROM SCOTLAND, 1871.)

No. 2. — VALIERI *v.* BOYLAND.

(1866.)

RULE.

A BILL of lading signed by the master is *primâ facie* evidence against the shipowner that the goods mentioned therein have been received on board. But it is not conclusive against the shipowner; and the latter may rebut the *primâ facie* evidence by showing that he received a less quantity of goods to carry than is acknowledged by his agent the master.

And it is not (under the Statute 18 & 19 Vict. c. 111, s. 3 (1)) conclusive against the master if he was led by the fraud of the shipper to sign the bill of lading under a mistake as to the quantity on board.

McLean & Hope v. Fleming.

L. R., 2 H. L. Sc. 128-138 (s. c. 25 L. T. 317).

Ship. — Bill of Lading. — Charter-party. — Estoppel. — Shipowner's lien. — Dead freight.

Cross-actions between a shipowner and the owners of cargo.

By charter-party the shipowner was to have a lien on the cargo for freight and "dead freight."

The bill of lading signed by the master stated the quantity shipped as 701 tons, whereas only 386 tons had been put on board.

No. 1. — McLean & Hope v. Fleming, L. R., 2 H. L. Sc. 128, 129.

Held, that the shipowner might rebut the *primâ facie* evidence of the bill of lading by showing the actual quantity shipped.

Held, further that the shipowner had a lien under the express contract for "dead freight," meaning the difference between the freight for a full cargo and the actual freight.

[128] In 1864 the appellants, merchants in Edinburgh, ordered a cargo of cattle bones from Messrs. Whittaker, of Constantinople; and it was arranged that a ship, then at Constantinople, and belonging to the respondent, a merchant, in London, should carry the goods to some port (in the United Kingdom) to be named by the appellants. The quantity purchased was 701 tons.

The master entered into a charter-party with a broker at Constantinople, acting as freighter on behalf of the appellants, whereby the owner of the ship was to have an absolute lien on the cargo, not only for actual freight, but also for dead freight.

The ship touched at various ports on her way to this country; receiving at each port certain quantities of cattle bones, for which the master signed bills of lading, which were duly indorsed to the appellants. These bills of lading represented the total quantity shipped as amounting to 701 tons;[1] whereas the actual quantity on board when the ship arrived ultimately at Aberdeen, [* 129] the place * of her destination, was but 386 tons, — being 210 tons short of what she could have carried.

The appellants demanded delivery of the quantity specified in the bills of lading of which they were the holders. The captain, on the other hand, offered to deliver the actual cargo on board, which he said was all that he had got, but upon condition of receiving both freight and dead freight; that is to say, real freight for the 386 tons, and dead freight for the 212.

Under these circumstances application was made to the Sheriff of Aberdeenshire, conformably to whose order the cargo was unloaded and stored, to await decision.

After much correspondence between the parties and their solicitors as to their respective claims, cross-actions were brought in the Court of Session, with a view mainly to determine the question of fact as to the quantity of bones actually received by the master; and the question of law as to dead freight arising on

[1] There were, however, above the master's signature these words: "Weight, quality, and contents unknown;" and it appeared that he protested for inadequacy of freight.

the deficiency of the cargo. The LORD ORDINARY (Lord KINLOCH), held the evidence insufficient to prove that any larger quantity of bones than that delivered at Aberdeen had been put on board. He therefore assoilzied the respondent, Mr. Fleming, from the conclusions of Messrs. McLean & Hope's action, — while in the cross-action his Lordship found them liable for the real freight and for the dead freight claimed by the respondent. To the LORD ORDINARY'S judgment the Second Division of the Court of Session adhered on the 5th of June, 1868;[1] and hence the present appeal to the House.

The Lord Advocate (Mr. Young, Q. C.), and Sir Roundell Palmer, Q. C. (Mr. Lanion with them), were heard for the appellants.

Sir George Honyman, Q. C., and Mr. Jessel, Q. C. (Mr. Shiress Will with them), addressed the House for the respondents.

The LORD CHANCELLOR (Lord HATHERLEY), after examining the evidence and the pleadings, proceeded as follows: —

My Lords, we here find a clear case of an omission to supply a *full cargo as contracted for. Messrs. McLean [*130] & Hope say they are not tied to the terms of the charter-party in respect of dead freight. They say, moreover, that they have a right conferred upon them by the bills of lading, which specify the quantity of bones to be delivered on the arrival of the ship. The evidence, however, establishes clearly that whatever lien was conferred by the charter-party must attach to those who availed themselves of it. I apprehend, therefore, if you once get at the principle that a lien for dead freight may exist by a specific contract, there never was a case in which it could be clearer that parties who accepted the services of the ship were bound to submit to the conditions of the charter-party.

I am, therefore, decidedly of opinion that the appeal in this case should be dismissed with costs.

Lord CHELMSFORD[2]: —

My Lords, the first question to be considered is whether there was evidence that the cargo shipped was to the extent only of the quantity found to be in the ship on her arrival at Aberdeen. On this point your lordships entertained so clear an opinion at the close of the argument for the appellants, that you did not require

[1] The case is not reported below; but see *McLean & Hope* v. *Munck*, 14 June, 1867, Third Series, vol. v., p. 893.

[2] Lord CHELMSFORD'S was a written opinion, afterwards printed for revision.

any answer on the part of the respondent. It was contended, and properly contended, by the learned counsel for the appellants that the bills of lading signed by the master were *primâ facie* evidence that the quantities of bones mentioned in them had been received on board the vessel. The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship. And though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. But it being admitted that it lay upon the shipowner to rebut the *primâ facie* evidence arising from the bills of lading, he appears to me to have satisfactorily done so.

If the evidence of the master is to be believed (and there [* 131] seems * no reason to doubt it), it is impossible that the additional quantity of bones could at any time have been on board the vessel. In the course of his evidence, the master said, "I brought to Aberdeen the whole of the cargo that was shipped. No part of it was put away either by myself or any one else. No part of it was interfered with from the time it was put on board till it was landed at Aberdeen." It is no slight confirmation of the evidence that there was not a full and complete cargo when the ship sailed from Enos, the last place of loading, that the quantity of bones delivered on the 3rd of April, 1865, having exhausted all that were there for delivery, the captain on the following day, the 4th of April, went before the vice-consul at Enos, and in a formal document stated that he had informed the agent of Whittaker & Co., in the presence of the vice-consul (who must have known whether the statement was correct), that not having received a full cargo for his vessel, he reserved his right to protest, and formally protested against the freighter. The appellants were not able to meet this evidence by proof that the quantities mentioned in the bill of lading, or any more than the 386 tons, were actually shipped. And this question was therefore properly determined by the LORD ORDINARY, and by the Court of the Second Division, in favour of the respondent.

The questions then remain, first, whether the 210 tons short of a complete cargo can be regarded as dead freight, to which the lien

in the charter-party applies; and, secondly, supposing a lien to have existed, whether it was available against the appellants.

The Lord Advocate argued that the rule as to dead freight was inapplicable to a case where the neglect to supply a full cargo under a charter-party results in a claim to unliquidated damages, and that by law dead freight can exist only where there is an express stipulation for a certain amount to be payable *eo nomine*. Upon the question of enforcing the lien against the appellants in respect of dead freight, he contended that they were indorsees for value of the bills of lading, which bound them merely to pay "freight for the goods as per charter-party," and imposed upon them no liability for dead freight, even if any were payable under the charter-party.

It must be admitted that the term "dead freight" is an inaccurate expression of the thing signified by it. "It is," as Lord * ELLENBOROUGH said, in *Phillips* v. *Rodie*, 15 East, 554; [*132] 13 R. R. 528, "not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight."

The learned counsel for the appellants, in support of their argument that no dead freight properly so called was agreed to be paid under the charter-party in question, cited the cases of *Kirchner* v. *Venus*, 12 Moo. P. C. 361, and *Pearson* v. *Goschen*, 17 C. B. (N. S.) 352; 33 L. J. C. P. 265.

The case of *Pearson* v. *Goschen* was referred to for some *dicta* of the Judges, not defining what dead freight was, but stating what it was not. In the case of *Kirchner* v. *Venus*, there was no attempt to define, and no necessity for a definition of, the term "dead freight." The Judicial Committee merely decided that a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, did not acquire the legal character of freight because it was described under that name in the bill of lading; that it was in effect money to be paid for taking the goods, and undertaking to carry, and not for carrying them. With respect to the observations of the learned Judges upon the subject of dead freight in the case of *Pearson* v. *Goschen*, your Lordships were told that there is a case standing for judgment in the Court of Exchequer Chamber in which their opinions may have to be considered. I shall therefore abstain from any remarks upon them.

No. 1. — McLean & Hope v. Fleming, L. R., 2 H. L. Sc. 132, 133.

It was argued for the appellants that even if a claim for damages for breach of a covenant in a charter-party to furnish a full lading to a ship may be correctly called "dead freight," yet that no lien can exist where the damages are unliquidated. But I understand the case of *Phillips* v. *Rodie*, not to have denied that though the damages were unliquidated, there might have been a lien upon the cargo for them if the contract of the parties had stipulated for it, which it had not. And in the case of *Birley* v. *Gladstone*, 3 M. & S. 205; 15 R. R. 465, cited by the counsel for the appellants, there was no actual decision upon the question of lien for dead freight; but it was held that a clause mutually binding the shipowner and the ship, and the freighter and the cargo, in a penalty could not be considered as intended to give the shipowner a lien for the [* 133] non-performance of the covenant in the * charter-party to load a full cargo. It may be observed that even where there is an express stipulation to pay full freight, as if the goods had been actually loaded on board, and that the master shall have the same lien upon the goods actually on board as if the ship had been fully laden, the case may be one of unliquidated damages, for the master may have filled the vacant space with the goods of other persons, and the freighter would be entitled to have an allowance for the profit thus made.

In construing the charter-party, it must be assumed that the parties understood the meaning of the terms they employed, and that, amongst others, the term "dead freight" meant (according to Lord ELLENBOROUGH'S definition), "an unliquidated compensation for the loss of freight." The freighter, with this understanding, agrees to load on board the respondent's ship a full and complete cargo of cattle bones, and to pay freight at the rate of 35*s.* sterling English, per ton. He knows that if he fail to perform his covenant to load a full and complete cargo he will be liable to the shipowner in damages under the name of dead freight, and he agrees to give the captain or shipowner an absolute lien on the cargo for all freight, dead freight, and demurrage. Why should not his agreement have its intended effect?

This case can hardly be considered to be one of unliquidated damages, because the master, not having brought home any other goods than those of the appellants, the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210

tons of bones. But whether the amount of his damages is to be regarded as ascertained or not, I am of opinion that the charter-party gives him a lien for his claim on account of the deficient cargo. Was this lien then available against the appellants? I quite agree that if they were merely holders of the bills of lading for valuable consideration, the shipowner would not have been entitled to a lien upon the cargo on board the ship for anything more than the freight upon the quantity actually shipped and brought home. But it appears to me that there is evidence to shew that the charter-party was entered into by their agents on their behalf. The appellants were really the charterers; and, therefore, although as indorsees of the bills of lading merely, * they would not be bound by the stipulation as [*134] to lien in the charter-party, yet as the real charterers it is binding upon them.

I am of opinion that the interlocutors appealed from must be affirmed.

Lord WESTBURY: —

Two questions were argued at the Bar. First, what is the meaning of the term "dead freight" in respect of the remedy which it gives the shipowner? Does it entitle him to say that the deficient quantity shall be paid for at the rate assigned per ton in the charter-party? I think that that would be a very unreasonable interpretation; for if the full freight had been furnished to the captain, the charge for loading and the other outlays attendant upon the additional 210 tons which were wanting, would have occasioned some expenditure to the shipowner. The result, therefore, is, that in a charter-party giving no specific sum as the amount to be recovered by way of compensation for dead freight, the shipowner becomes entitled only to a reasonable sum, — which is another phrase for unliquidated damages.

The next question is, whether considerations of convenience would prevent the shipowner from having a lien upon the cargo, seeing that he would become entitled to retain it during the time occupied in ascertaining the amount of the unliquidated damages. There may be some inconvenience in that construction, but that ought to have been considered by the parties when they entered into this express stipulation. I think it is impossible to set up any consideration of inconvenience in answer to the clear terms of the contract.

There remains but one further point, and that is, whether the shipowner has a right in respect of dead freight, and the damage pertaining to it, as against an indorsee of the bill of lading for valuable consideration? Now that has been examined specially by my noble and learned friend who has just sat down; and I agree with him that, substantially, the present appellants are not only indorsees of the bill of lading, but that in reality they were bound as the persons who originally authorized the chartering of the ship, and who remained entitled to the benefit of that charter-party, and were therefore subject to the obligations contained in it.

[* 135] * The result is that their title under the bill of lading is controlled by their liability under the charter-party.

I am of opinion, therefore, that there is no foundation for the appeal, and that it ought to be dismissed with costs.

Lord Colonsay: —

My Lords, there are here two actions, — one at the instance of the appellants against the respondent, and another at the instance of the respondent against the appellants. Both of them arise out of the charter-party, which may be generally stated to be a charter-party for taking on board quantities of bones amounting to a full cargo, to be delivered at some port in the United Kingdom. Bones were taken on board, and the vessel did arrive at Aberdeen, but while it appears from the charter-party that the vessel was a vessel of 596 tons measurement, it appears that the quantity of bones brought by her to Aberdeen amounted only to 386 tons. The vessel was described in the charter-party as of 596 tons registered measurement, and the evidence showed that she was capable of carrying a good deal more. It appeared then that she had not on board goods to the amount of a full cargo, although when the bones were put on board bills of lading had been signed, indicating that she had actually shipped 701 tons. A peculiar state of circumstances arose. On the one hand, the appellants declined to pay the balance of the freight of the 386 tons in respect that there was a disappearance of part of the quantity of bones which the bills of lading bore to have been shipped, and they demanded the delivery of the whole quantity. On the other hand, the shipmaster refused to deliver up any of the bones until he obtained payment of the balance of freight due upon the 386 tons, and also till he obtained what he described as "dead freight," which he said should amount to freight at the stipulated rate for at least 210 tons, being

the difference between the registered measurement of the vessel and the amount of the cargo on board.

In this state of circumstances the consignees of the cargo brought an action to enforce their rights to obtain the full quantity of bones, or to obtain damages in respect of the deficiency. On the other hand, the owners of the vessel brought an action *concluding to have it found that they were entitled to [*136] freight for the 386 tons, and that they were entitled also to "dead freight" at the same rate for 210 tons, and also to a sum for demurrage.

The point as to the right of the appellants to refuse payment of freight until they obtained the delivery of the full quantity of bones which they alleged to have been put on board, turned upon the question of fact, whether the bones had been actually shipped. The bills of lading bore that the quantity shipped was 701 tons, and they insisted that upon the face of the bills of lading they were entitled to maintain that the full quantity had been put on board. It was held, that, although bills of lading might be *primâ facie* evidence, they were not conclusive; and that inquiry ought to be made into the facts of the case. That inquiry took place, and the result is before your Lordships. You are all of opinion that the result of the evidence is that the full quantity of bones had not been shipped.

Now in respect to the claim of the shipowner for the freight of the 386 tons, that was not seriously disputed. The important question in regard to his claim was, whether he was entitled to dead freight. An argument was maintained in the Court below to the effect, in the first place, that no payment for dead freight was due because the full cargo had been actually put on board. But that argument is displaced by the evidence. Then it was maintained that the appellants were not liable for dead freight, inasmuch as they were not the charterers of the vessel. The Court below decided against them upon that point. When the case came up here it was maintained (as I understood the Lord Advocate) that under this charter-party there could be no such a thing as a claim for "dead freight," there having been no stipulation for "dead freight;" and further, that, even supposing there could, under this charter-party, be a claim for dead freight, there was at all events no lien for dead freight.

As to the appellants not being liable in respect they were not

the charterers, I think the argument for the respondents is conclusive. It is alleged on the record that Whitaker & Co. were the agents; and it is sufficiently evident, I think, from the documents that they, as such agents, chartered the vessel.

[* 137] But then the two other questions remain: whether, under this *charter-party there is any claim for dead freight at all; and if there be a claim for dead freight, whether there is a right of lien on the cargo. Now, I cannot find the slightest difficulty in holding that, under such a charter-party as this, there is a claim for "dead freight." We were told that "dead freight" was here an inaccurate expression; that it could not apply where there is merely an obligation to furnish a full cargo, and that in the case of failure to furnish a full cargo the claim must be for damages, and not for "dead freight" or freight of any kind. Now, the term "dead freight" may not be a very happy expression, but it is the only expression we have for the claim which arises in consequence of the failure to furnish a full cargo. It is so described in the English authorities, and also in the Scotch. Professor Bell so represented it in his "Commentaries," vol. i. p. 430; and also in his "Principles," sect. 430; and we find it in the "Law Dictionary," p. 254. It is a name which has obtained a place in our mercantile language as well as in our law authorities. Now in this charter-party there was an obligation to load a full cargo, and that obligation was not fulfilled. Hence arises this claim, which is made out by the subsequent proofs in the case. But there is still the important question whether, in respect of this claim for dead freight, there is a right of lien. There may be a claim for dead freight where there is no right of lien. I think it is clear that where there is merely a failure to fulfil an obligation to furnish a full cargo, there is a claim for dead freight, but no right of lien. On the other hand, I think it is equally clear, both on principle and on authority, that if there be a stipulation in the charter-party that dead freight shall be exigible, and that there shall be a lien for it on the cargo, then there is a lien constituted by contract. Lien is not properly a contract in the strictest sense of the law, because lien is more properly a right which the law gives without contract, but it may be constituted by contract. On that point we have abundant authorities, especially Mr. Bell, to whom I have referred. Whether it be a lien arising out of the usages of trade, or out of express stipulation, it is all the same. I adopt the words of Sir

WILLIAM GRANT in the case of *Gladstone* v. *Birley*, 2 Mer. 401, where he says: "Taken either way, * however, the [*138] question always is whether there be a right to retain goods till a given demand is satisfied. That right must arise from law or contract." The question is, whether any such right exists here. This charter-party says, in so many words, that there shall be a lien for dead freight; that is the contract. We are told that those words are in print, and not in manuscript; I do not think that affects the question. The words being in print were allowed to remain, and the stipulation is a very natural and reasonable one. It is quite plain that the words are introduced there so as to be applicable to the case which does happen, not unfrequently, that there is a stipulation for dead freight; and that being so, and the contract being so expressed, I can entertain no doubt that it is a valid contract. The circumstance that the precise amount is not specified does not affect the principle. In almost any case that might happen, some inquiry might be necessary as to the amount of the dead freight. It might be alleged, on the part of the charterers, that other goods were received; or it might be alleged that certain things must be deducted, and so forth, — but still the contract is there. It may be inconvenient, or not, that it should receive effect, but still there it is, and it is binding on the parties. But in this case I see no inconvenience or difficulty at all. It was not urged in the Court below, that the claim made as for 210 tons was an exorbitant claim, or a claim which ought to be subject to any deduction. It is clear, upon the evidence, that the vessel was capable of carrying a great deal more, and there is no allegation that from that anything ought to be deducted.

I therefore think, upon the whole aspect of the case, that the judgment of the Court below was right, and that this appeal should be dismissed.

Interlocutors affirmed; and appeal dismissed with costs.

Valieri v. Boyland.

L. R. 1 C. P. 382-385 (s. c. 35 L. J. C. P. 215; 12 Jur. N. S. 566; 14 L. T. 362; 14 W. R. 637).

Ship. — Bill of Lading. — Fraud of Shipper. — Estoppel.

Action by indorsee of bill of lading against the master for short delivery. The bill of lading represented a larger quantity of goods than had been

No. 2. — Valieri v. Boyland, L. R , 1 C. P. 382, 383.

actually put on board; and there was evidence that the master had been intentionally misled by the person who put them on board.

Held, evidence that the misrepresentation was "wholly by fraud of the shippers, within the Bills of Lading Act, 18 & 19 Vict. c. 111, s. 3; and that there was no estoppel."

[382] This was an action by the indorsees of a bill of lading against the captain of the vessel for not delivering the goods mentioned therein. The first count of the declaration was on the bill of lading, and there was a second count in trover for the goods. The defendant traversed all the allegations in the first count, and to the second count pleaded not guilty, and that the goods were not the goods of the plaintiffs. Issues thereon.

[* 383] *The case was tried before BYLES, J., at the sittings in London after last Hilary Term; when it appeared that the plaintiffs were the holders of a bill of lading signed by the defendant, the material part of which was as follows: "Shipped in good order and condition by Mr. M. M. Katinakis in and upon the steam-ship called *Brenda* whereof is master for the present voyage James Boyland, or whoever else may go as master in the said ship, and now lying in the port of Constantinople and bound for London, . . . 119 bales of skins being marked and numbered as in the margin, and to be delivered in the like good order and well conditioned at the port of London." In the margin it was written: —

"K. 69	
I. 18	K. 4 bales more in dispute,
B. 32	if on board to be delivered."
119	

Only sixty-five bales marked K. were delivered to the plaintiffs.

After the bales had been put on board, a dispute arose as to the number marked K., between the mate who received and the person who delivered them; the former asserting that only sixty-five, the latter that sixty-nine, had been put on board. The mate, however, gave a receipt for sixty-nine, and wrote on it "four *over* in dispute" by mistake for "four *less* in dispute." On the faith of this receipt the defendant signed the bill of lading, but by whom it was drawn up did not appear. There was some evidence to show that the person who put the goods on board was aware of the mistake in the receipt, and was guilty of fraud in taking it

No. 2. — Valieri v. Boyland, L. R., 1 C. P. 383. 384.

from the chief mate, but he was not Katinakis, the shipper named the bill of lading, though whether he acted as his agent or was the person from whom Katinakis had bought the goods was not shown.

The jury found that sixty-five bales only had been shipped, and that the mistake as to the number arose, not through any default of the defendant, but through the fraud of the person who put them on board. A verdict having been entered for the defendant, leave was reserved to the plaintiffs to enter a verdict for them for £43 15*s.* 2*d.* if the Court should be of opinion that there was no evidence proper to be left to the jury, that the misrepresentation contained in the bill of lading was caused wholly by the fraud of *the shipper or of the holder, or some person [*384] under whom the holder claimed, within the meaning of the 18 & 19 Vict. c. 111, s. 3.[1]

Sir G. Honyman moved, pursuant to the leave reserved, for a new trial, on the ground of misdirection, and that the verdict was against the evidence. The bill of lading is conclusive as to the number of bales that were shipped, unless the misrepresentation was caused by the fraud of the shipper or of the holder, or some person under whom the holder claimed. In this case the misrepresentation arose from a mistake of the mate, and, even if there was some evidence of fraud in the shippers, that fraud was not the sole cause of the mistake. Moreover, neither Katinakis who must be taken conclusively to have been the shipper, as he is mentioned as such in the bill of lading, nor the plaintiffs, who are the holders of the bill of lading, have been personally guilty of fraud, and there are no intermediate parties. The fraud, if it existed, was the fraud of the person who actually placed the goods on board, and who that was does not appear: he may have been the person from whom Katinakis bought the goods, and have deceived him as well as the mate; and if he had any connection

[1] 18 & 19 Vict. c. 111, s. 3, provides that "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims."

with the contract, he was at most the agent of the shipper, and not the shipper himself, and so not within the terms of the section of the Act of Parliament.

Erle, C. J. I think there should be no rule in this case. Whether the person who put the goods on board was the agent of Katinakis, or the person of whom he bought the goods, he was acting with him, and if that person knowingly took ad-
[*385] vantage of *the mate's mistake, and there was some evidence to show that he did, he was guilty of fraud, for which Katinakis is responsible.

Keating and Byles, JJ., concurred.

Montague Smith, J. I think Katinakis cannot dissociate himself from those who put the goods on board: he must derive his rights as shipper from them, and they must have known that the entry made by the mate was an error. The mistake on the part of the mate does not prevent the misrepresentation having been "wholly caused by the fraud of the shipper;" those words only mean that the captain or other person on board the ship must not in any way be mixed up with the fraud. *Rule refused.*

ENGLISH NOTES.

The former of the principal cases was followed by the Court of Common Pleas in *Brown* v. *Powell Duffryn Steam Coal Co.* (1875). L. R., 10 C. P. 566, 44 L. J. C. P. 289, 32 L. T. 621, where the action was brought by the shipowner against the charterer claiming indemnity for having been obliged to pay the consignees of goods the difference between the amount actually shipped and a larger amount for which the master had signed bills of lading. The declaration was held bad on demurrer on the ground that the plaintiffs could have resisted the claim of the consignees by showing the amount which had been actually put on board. There was no charge made of fraud on the part of the defendants; although it was stated that the defendants "caused the master to sign bills of lading" for the larger amount.

AMERICAN NOTES.

This subject is variously decided in this country. Adopting the English view (*Grant* v. *Norway*, 10 C. B. 665) are *The Lady Franklin*, 8 Wallace (United States Sup. Ct.), 325; *Schooner Freeman* v. *Buckingham*, 18 Howard (United States Sup. Ct.), 182; *Pollard* v. *Vinton*, 108 United States, 7; *Friedlander* v. *Texas, &c. Ry. Co.*, 130 United States, 416; *Balt. &c. R. Co.* v. *Wilkens*, 44 Maryland, 11; 22 Am. Rep. 26; *Sears* v. *Wingate*, 3 Allen (Massa-

chusetts), 103; *La. Nat. Bank* v. *Lareille*, 52 Missouri, 380; *Union R. Co.* v. *Yeager*, 34 Indiana, 1 (*obiter*); *Black* v. *Wilmington, &c. R. Co.*, 92 North Carolina, 42; 53 Am. Rep. 450; *Witzler* v. *Collins*, 70 Maine, 290; 35 Am. Rep. 327; *Nat. Bank* v. *Chicago, &c. R. Co.*, 44 Minnesota, 224; 20 Am. St. Rep. 566; 9 Lawyers' Rep. Annotated, 263, citing the first principal case.

To the contrary: *Armour* v. *M. C. R. Co.*, 65 New York, 111; 22 Am. Rep. 603; *Bank of Batavia* v. *N. Y., &c. R. Co.*, 106 New York, 195; 60 Am. Rep. 440; *Lake Shore & M. S. Ry. Co.* v. *Foster*, 104 Indiana, 293; 54 Am. Rep. 319; *Sioux City, &c. R. Co.* v. *First Nat. Bank*, 10 Nebraska, 556; 35 Am. Rep. 488; *Brooke* v. *N. Y., &c. R. Co.*, 108 Pennsylvania State, 529; *Savings Bank* v. *Atchison, &c. R. Co.*, 20 Kansas, 519; *St. Louis, &c. R. Co.* v. *Larned*, 103 Illinois, 293.

In *Baltimore, &c. R. Co.* v. *Wilkens, supra*, it is said: "If any doctrine of commercial law can be regarded as well settled, it is that the master has no authority to sign a bill of lading for goods not actually put on board the vessel, and therefore the owner of the ship is not responsible to parties taking or dealing with, or making advances on the faith of such an instrument, which is untruthful in this particular. The consignee and every other party thus acting does so with notice of this limitation of the power of the master, and acts at his own risk, both as respects the fact of shipment and the quantity of cargo purporting by a bill of lading to be shipped."

On the other hand, in *Armour* v. *Michigan Cent. R. Co.*, *supra*, it is said: "They" (the bills) "were issued with the expectation that they would be acted upon by bankers or other capitalists. It cannot complain if the bills accomplished the purpose for which they were designed. The representations in the bills were made to any one who in the course of business might think fit to make advances on the faith of them. There is thus present every element necessary to constitute a case of estoppel *in pais*, a representation made with the knowledge that it might be acted upon, and subsequent action upon the faith of it to such an extent that it would injure the plaintiffs if the representations were not made good."

The American text-writers generally regard the New York doctrine as the better. 2 Daniel, Negotiable Instruments, § 1733 *a*, citing the first principal case; Mechem on Agency, § 717; Freeman, note, 38 Am. Dec. 411; a reviewer, 23 Am. Law Review, 672; Browne on Parol Evidence, § 107, and pp. 372, 373. The last writer says: "The motto in the premises should not be, let the consignee or indorsee beware of the statement of the bill, but rather, let the carrier beware of his agent's want of integrity or carefulness in putting the false bill afloat." The subject is treated at great length by the last writer, giving copious extracts from the leading decisions.

No. 3. — GRILL *v.* GENERAL IRON SCREW COLLIERY COMPANY (Limited).

(C. P. 1866, Ex. Ch. 1868.)

RULE.

The exceptions to the shipowner's liability contained in the bill of lading do not, unless the terms are express, exempt him from liability for negligence of his servants and mariners.

Grill v. General Iron Screw Colliery Company (Limited).

L. R., 1 C. P. 600-614 (s. c. 35 L. J. C. P. 321; 12 Jur. N. S. 727; 14 W. R. 893; affirmed L. R., 3 C. P. 476; 37 L. J. C. P. 205; 18 L. T. 485; 16 W. R. 796).

Ship. — Bill of Lading. — Excepted Perils. — Barratry and Perils of the Sea. — Negligence.

Action on bill of lading for loss of goods shipped on board *Black Prince*.

The excepted perils were (*inter alia*) "barratry and perils of the seas."

The loss was caused by collision, by which the *Black Prince* was sunk; and the collision was owing to the negligence of the master and crew of the *Black Prince*, by not starboarding her helm according to rule.

Held, that the fault did not amount to barratry, and that the exception of perils of the seas did not exempt the owners from liability for the negligence.

This was an action by the shippers against shipowners for loss of goods sunk in the ship owing to a collision occasioned by negligence on the part of the defendant's servants and mariners.

The facts as proved at the trial and eventually set forth in a special case will be found stated with the report of the case in the Exchequer Chamber (p. 686, *infra*).

[603] The learned Judge left it to the jury to say whether the collision which caused the loss of the goods was occasioned by the negligence of the crew of the defendants, and whether it was proved that there was want of reasonable care on the part of the *Araxes* by the exercise of which the collision could have been avoided. The jury found specially that there was no want of ordinary care on the part of the *Araxes*, and there was negligence on the part of the *Black Prince*, which caused the collision; and they assessed the damages at £1220.

No. 3. — Grill v. General Iron Screw Colliery Co., L. R., 1 C. P. 603–610.

A verdict was accordingly entered for the plaintiff for that amount, leave being reserved to the defendants to enter the verdict, on the ground that the conduct of the persons in charge of the defendants' ship brought the case within the exception of barratry in the bill of lading.

A rule having been subsequently obtained to enter the verdict for the defendants, pursuant to the leave reserved; or for a new trial on the grounds that the judge ought to have told the jury that the loss was caused by peril of the seas within the meaning of the bill of lading; that he ought to have left to the jury whether the peril was caused by gross negligence; that he ought to have left to the jury whether the loss of the goods (and not the collision) might not have been avoided by care on the part of those on board the *Araxes;* and on the ground of the misreception of the depositions taken at Messina; the judges of the Court of Common Pleas (after argument) gave judgment as follows:

WILLES, J. I am of opinion that this rule should be [610] discharged. With respect to the admission of the depositions taken at Messina, I should much regret if it were true that an objection going only to the regularity of the proceedings, and not to the merits, could be taken advantage of to obtain a new trial. It is not necessary, however, to decide whether the objection could be taken at the trial, or whether it should have been taken before, and an application made at chambers to set aside the depositions, because I am not convinced that there was any irregularity. The things complained of are that one of the witnesses named in the commission was not examined, and that the interrogatories and cross-interrogatories were not exhibited, but the witnesses were examined *vivâ voce.* No question, however, has been suggested which might have been asked with advantage to the defendants, and has been omitted, and it appears, therefore, that the objection has no solid foundation, but only amounts to this, that the questions were put *vivâ voce* instead of in writing.

The point which was reserved at the trial was, whether the loss, though it was one for which, but for the exceptions in the bill of lading, the defendants would have been liable, yet fell within the exceptions as being caused by barratry. The Court must see, therefore, whether there was in fact any evidence of a barratrous act. What took place was this: the *Araxes* was steering rightly, for there was no evidence of any negligence on the

part of the *Araxes*, but the *Black Prince* at some time improperly starboarded her helm, which caused the collision. It did not appear what was the extent of the default on the part of the *Black Prince*; it may have been anything from simple negligence to actual malfeasance. It could not, therefore, be contended, on the part of the defendants, that there was any proof of barratry, but for the statute. The case of *Earle* v. *Rowcroft*, 8 East, 126: 9 R. R. 385, and other similar cases, in which it has been held that to use a vessel for smuggling or other illegal purposes is barratrous, were decided on the ground that no one has a right wilfully to risk the property of another, without his per-
[*611] mission, by *doing an illegal act, even though the intention may be to confer a benefit. Here there was no evidence apart from the statute that the act that caused the loss was of any such character: but it is contended that the statute makes it barratrous because it says that it shall be deemed to have been the wilful default of the person in charge of the deck, and it is said that it must therefore be considered for all purposes that the helm was wilfully starboarded. I do not think that that follows. The Act was not passed to decide cases such as that now before us, but to regulate ships and the rights of shipowners *inter se*. It was contended in one case, *The Seine*, Sw. Adm. Rep. 411, that the statute rendered the act one of malfeasance, and beyond the scope of the employment of the person in charge, for which his employer would not be liable. It was there held, however, that the statute had no such effect, and that the words, though not happily chosen, were intended only to mean that the ship by which the regulations were broken should be considered as the one in fault, and the owners answerable for the consequences as if they had done it wilfully, unless they could justify the departure from the regulations. This view is confirmed by the subsequent Act 25 & 26 Vict. c. 63, at which the Court may look to see what the legislature means by the language used. Sec. 28 contains the same provision as the former Act, that the damage arising from a breach of the regulations shall be deemed to have been occasioned by the wilful default of the person in charge of the deck, and s. 29 provides that in case of a collision through the non-observance of the regulations by one of the ships, such ship shall be deemed to have been in fault, and that no doubt is really the meaning of the preceding section likewise.

Secondly, a new trial is asked for on the ground that the loss was caused by a peril of the sea. This has been already decided in the Court of Exchequer in an action arising out of the same accident, and turning on the construction of the same document, and the decision is supported by that of this Court in *Phillips* v. *Clark*, 2 C. B. (N. S.) 156; 26 L. J. C. P. 168. As, however, reference has been made to cases on policies of insurance and the interpretation that has been given to them, I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary * to see whether the loss comes within [* 612] the terms of the contract and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant.

It is further complained that the Lord Chief Justice misdirected the jury because he made no distinction in this case between gross and ordinary negligence. No information, however, has been given us as to the meaning to be attached to gross negligence in this case; and I quite agree with the *dictum* of Lord Cranworth in *Wilson* v. *Brett*, 11 M. & W. 113; 12 L. J. Ex. 264, that gross negligence is ordinary negligence with a vituperative epithet, — a view held by the Exchequer Chamber: *Beal* v. *South Devon Railway Company*, 3 H. & C. 337. Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. Gross, therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use

the expression gross negligence, instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up.

The only remaining point arises from the fact that this is an action by the owners of goods on board the *Black Prince*, and not by the owners of the ship itself; and it is said, therefore, that it ought to have been left to the jury to say whether the loss of the goods was caused by the negligence of the crew of the *Black Prince* and not whether the collision was caused by it. [* 613] It is contended * that though the collision perhaps could not have been avoided by any act of the *Araxes*, yet it might have been so modified that the goods should not have been lost. This either means that the *Araxes* acted wrongly in some way, and so increased the effect of the collision, of which however there was no evidence, or else that the defendants' acts are to be qualified by the fact that if the *Araxes* had in fact acted differently, the goods might not have been lost. It is clear, however, that a person acting wrongfully is answerable for all the natural consequences of his act, *Davis* v. *Garrett*, 6 Bing. 716; and it is also clear that the loss of these goods was a natural consequence of the negligence of the defendants.

Keating, J., concurred.

Montague Smith, J. I also think that this rule should be discharged. The collision which was followed by the foundering of the *Black Prince* and the loss of the cargo, was caused by the negligence of the person in charge of the *Black Prince* in starboarding her helm. It is said that this was in contravention of a positive rule laid down by statute and therefore barratrous. It is quite consistent, however, with the evidence that those on board the *Black Prince* were asleep or below deck, and suddenly awaking, or coming on deck, and perceiving the emergency too late, starboarded the helm, in the hope of avoiding the collision, or by mistake. It would be a strong thing to say that if the person in charge goes to sleep, and an accident happens in consequence, his conduct is barratrous. It is hardly contended, however, that there would have been any evidence of barratry but for the enactment of the Merchant Shipping Act, which says that certain nonobservances shall be deemed to be wilful defaults. I entirely agree with my Brother Willes that the words of the statute have no such force, in a case like the present, as that

contended for. The whole scope of the Act shows that there was no intention on the part of the legislature to alter the effect of contracts made between shipowners and shippers, and to relieve the former of any of their liability. Then it was said that the LORD CHIEF JUSTICE should have told the jury that the loss arose from a peril of the sea. This is the same question that was decided by the Court of Exchequer in *Lloyd* v. *General Iron Screw Collier Company*, 3 H. & C. 284; 33 L. J. Ex. 269. It is said that here it * arises on the facts which were not [* 614] before the Court in that case, but the Court seem to have assumed very much the state of facts that actually occurred, and I think that the LORD CHIEF JUSTICE was bound by that decision, and that we are bound by it too. Next it is objected that he ought to have left the question whether there was gross negligence. I do not see what more he could have said, except it was to use the very word "gross"; but it certainly would not have enlightened the jury to use an indefinite word without explaining it, and no different explanation has been suggested from that which his summing up in fact contained. The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence. In this case it was unnecessary to define the degrees of care, and the replication would have been equally good without the word gross. The other alleged misdirection is that my Lord ought to have left the question to the jury whether the foundering of the *Black Prince*, and not merely the collision, was caused by the conduct of the *Araxes*. I think this objection might prevail if there were any facts to support it, but there is not the slightest evidence that the *Araxes* by other conduct could have lessened the extent of the inquiry. It is a mere speculation of counsel. With respect to the point raised regarding the depositions, the LORD CHIEF JUSTICE could not have refused to receive them unless they were taken without authority, which it seems to me was not the case. If there was any irregularity in the mode of taking them, the proper course would have been to have applied at chambers to have them suppressed.

ERLE, C. J. I have nothing to add.

Rule discharged.

No. 3. — Grill v. General Iron Screw Colliery Co., L. R., 3 C. P. 476, 477.

[L. R. 3 C. P. 476.] The defendants having appealed to the Exchequer Chamber against the decision of the Court of Common Pleas, the questions were argued upon a special case, which stated as follows: —

1. The plaintiff was a merchant at Messina. The defendants were the owners of a line of steamers trading between this country and the Mediterranean, and among others of a steamship called the *Black Prince*.

2. The plaintiff, on the 27th of October, 1860, shipped at Messina on board the *Black Prince* goods to be carried thence to London, under a bill of lading which contained the following exception: "The act of God, the Queen's enemies, pirates, robbers, thieves, barratry of master or mariners, restraint of princes and rulers, fire, accident or damage from machinery, boilers, steam, or from other goods by contact, sweating, [* 477] leakage, or otherwise, and accidents or * damage of the seas, rivers, and steam-navigation of whatever nature or kind soever excepted."

3. The *Black Prince* sailed in due course from Messina bound for London, and in the night of the 8th of November, 1860, when off the coast of Portugal, and bound northwards, met the steamship *Araxes* proceeding to the southward.

4. The two vessels were approaching each other in such a way as to render a collision probable if both vessels held their respective courses, and under such circumstances as to make it the duty of the *Black Prince* to port her helm pursuant to s. 296 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.

5. The *Black Prince*, however, instead of porting her helm, put it a starboard, and the consequence of this was that the two vessels came into collision, and the *Black Prince* went down with all her cargo on board, including the plaintiff's goods.

6. There were no such circumstances as to justify the *Black Prince* in starboarding her helm.

7. It appeared by the evidence that several minutes elapsed between the collision and the sinking of the *Black Prince* and her cargo; and that the *Araxes* obeyed her helm very readily, and could slow and stop her engines with great ease, the engineer having power to stop her in about a minute, and to bring backway on her in about three minutes.

8. It further appeared by the evidence that some four or

five minutes before the collision the *Black Prince's* course was seen from the *Araxes*, and orders given to the helmsman of the *Araxes* to put his helm a-port, and then hard a-port. Orders were also given to stop the engines, and the engines were stopped. One of the witnesses for the plaintiff stated that the stoppage of the engines and the collision were simultaneous. Another of the plaintiff's witnesses (the mate of the *Araxes*) stated that the engines were stopped about a minute before the collision; and a third (the engineer of the *Araxes*) said he thought they were stopped about three minutes before the collision, but that he could not say that it might not have been only a minute.

9. On behalf of the defendants it was contended that the loss was within the excepted perils, and also that under the circumstances the defendants were protected by s. 299 of the Merchant * Shipping Act, 1854; and further, that, even [* 478] assuming the collision to have been caused by the negligence of the *Black Prince*, the loss of the plaintiff's goods was not caused wholly by the alleged negligence of the defendants' servants, but was in part attributable to the *Araxes* not having slackened or backed when the collision was about to take place.

10. The Lord Chief Justice reserved to the defendants leave to move on the question raised as to the bill of lading, and left it to the jury to say whether the collision was caused by the negligence of the defendants' crew, telling them, if they thought not, to find for the defendants; and also whether there was want of ordinary care on the part of the *Araxes* by the exercise of which the collision might have been avoided, telling them, if they thought so, to find for the defendants, but otherwise for the plaintiff. He further ruled that, if the collision was caused by negligence on the part of the *Black Prince*, the loss would not be within the exceptions in the bill of lading, and that, for the purposes of this case, there was no distinction between negligence and gross negligence.

11. The jury found that there was no want of ordinary care on the part of the *Araxes*, and that there was negligence on the part of the *Black Prince* which caused the collision; and under the direction of his Lordship a verdict was entered for the plaintiff for £1220.

Sir G. Honyman, Q. C. (Sir J. B. Karslake, Q. C., A.-G., with him), for the defendants. It is perfectly competent to a

carrier by water to limit his liability; and by this bill of lading the defendants have expressly stipulated that they shall not be responsible for "barratry of master or mariners." By s. 296 of the Merchant Shipping Act, 1854, it was the duty of both vessels under the circumstances to port their helms. And s. 299 [1] enacts that, "in case any damage to person or property arises from the non-observance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the wilful [* 479] default of * the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." The case finds that the *Black Prince* ought to have ported her helm, and that there were no circumstances to justify her not doing so: the collision, therefore, must be deemed to have been occasioned by wilful default. That clearly amounts to barratry, within the definition given by Lord HARDWICKE in *Lewin* v. *Snaps*, Postlethwaite's Dict. 177, tit. Assurance, and by Lord ELLENBOROUGH in *Earle* v. *Rowcroft*, 8 East, 126; 9 R. R. 385. See also 3 Kent's Comm. 305; Arnould on Insurance, 3rd ed. 712.

[BLACKBURN, J. An act may be wilful, without amounting to barratry. The statute never could have meant to declare this to be a wilful default in the sense of excusing the owners from liability to an action.

BRAMWELL, B. It was not meant to apply to a collateral issue; but only where the question of collision is in issue.]

This is an action brought in consequence of the collision.

[BLACKBURN, J. This question arose in the case of *The Seine*, Swab. Adm. R. 411, where it was held that the owners of a steamship were responsible for damage caused by the act of the master in not observing the 297th section of the Merchant Shipping Act, 1854, which prescribes keeping to the starboard side of the mid-channel, notwithstanding s. 299.]

If the Court are of opinion that s. 299 does not apply to conduct of the master as between himself and his owners, it will be useless to refer to authorities.

[KELLY, C. B. We are all decidedly of that opinion.]

Then, this was a loss within the exception of "accidents or

[1] Which, though since repealed by the 25 & 26 Vict. c. 63, s. 2, was in force at the time this collision occurred.

No. 3. — Grill v. General Iron Screw Colliery Co., L. R., 3 C. P. 479, 480.

damage of the sea, of whatever nature or kind soever." These words are large enough to cover a loss by collision. A collision may be the result of default on the part of both or either of the vessels, or it may be pure accident. The object of the exception is to preclude inquiry on the subject. That it is competent to a carrier to so restrict his liability, is clear from *Austin* v. *Manchester, &c. Railway Company*, 10. C. B. 454; 21 L. J. C. P. 168. There, the company carried a * valuable horse [*480] of the plaintiff under a contract which provided that "the company will not be responsible for any damages, however caused, to horses, &c., travelling upon their railway or in their vehicles;" and it was held that this exonerated them from liability where, through neglect of their servants to grease a wheel, it caught fire, and the horse was injured. CRESSWELL, J., says: "Giving the words the most limited meaning, they must apply to all risks, of whatever kind and however arising, to be encountered in the course of the journey; one of which undoubtedly is, the risk of a wheel taking fire, owing to a neglect to grease it." *Carr* v. *Lancashire and Yorkshire Railway Company*, 7 Ex. 707; 21 L. J. Ex. 261, is to the same effect. So here, one of the ordinary risks is the risk of a collision through non-observance of the prescribed sailing regulations.

[BLACKBURN, J. The words of exception are not so extensive as in that case. In *Phillips* v. *Clark*, 2 C. B. (N. S.) 156; 26 L. J. C. P. 168, the Court of Common Pleas held that an exception of liability of the shipowner for leakage and breakage did not apply where the leakage or breakage was the result of the defendants' negligence.

BRAMWELL, B. In order to succeed, you must be prepared to show that that case and the case of *Lloyd* v. *General Iron Screw Collier Company*, 3 H. & C. 284; 33 L. J. Ex. 269, are not law.]

It is competent to this Court to review those decisions. There is nothing unreasonable in a shipowner, having once put on board a competent captain and crew, stipulating that he will not be responsible for accidents arising from their negligence, the owner of the goods having a remedy against the underwriters. Then, the LORD CHIEF JUSTICE ought to have left it to the jury to say whether, though the collision might have been occasioned by negligence on the part of those in charge of the *Black Prince*, the loss of the plaintiff's goods might not have been averted if

No. 3. — Grill v. General Iron Screw Colliery Co., L. R., 3 C. P. 480-482.

the master of the *Arawes* had slackened speed or backed his engines.

[KELLY, C. B. There is no finding that the omission to slacken the speed or to back the engines of the *Arawes* contributed
[*481] to the *loss. Nor was there any evidence of experts or others to warrant the CHIEF JUSTICE in putting that point to the jury.]

Sir R. Collier, Q. C. (C. J. Brett with him), for the plaintiff, was not called upon.

KELLY, C. B. With respect to the question whether a loss by the negligence of the defendants' servants is within the exception in the bill of lading, I am of opinion that is concluded by authority. The cases of *Phillips* v. *Clark*, in the Common Pleas, and *Lloyd* v. *General Iron Screw Collier Company*, in the Exchequer, are expressly in point; and we ought not to overrule those decisions, though sitting in a Court of Error, unless we think them to be opposed to some principle of law or to common sense. I agree with my Brother CHANNELL that, independently of all authority, the loss in this case is not within the exception. If shipowners wish to except losses resulting from the negligence of themselves or their servants, they must do so by express language, though they may thereby make the bill of lading repugnant. To show how impossible it is to construe the exception in this bill of lading in the way contended for by the defendants, I need only refer to what CRESSWELL, J., says in *Phillips* v. *Clark*. The question there arose upon a bill of lading which contained a stipulation that the owner was not to be accountable for leakage and breakage: and that learned Judge says: "Ordinarily, the master undertakes to take due and proper care of goods intrusted to him for conveyance, and to stow them properly: and he is responsible for leakage and breakage. Here he expressly stipulates not to be accountable for leakage or breakage, leaving the rest as before." That is to say, the ordinary obligation of the owner to take due and proper care of the goods was left untouched by the exception. It appears to me, and, I believe, to the rest of the Court, that the loss in question arising from negligence is not within the exception, and that the liability of the owners is only to be excluded by express words.

[*482] *As to the other question raised, it is necessary to look at what was the substance of the case at the trial. It

No. 3. — Grill v. General Iron Screw Colliery Co., L. R., 3 C. P. 482, 483.

appears that a collision having taken place between the *Araxes* and the *Black Prince*, and that collision having been the cause of the loss of the plaintiff's goods, the contention on the part of the defendants was that, even supposing their servants to have been guilty of negligence, the negligence of the crew of the *Araxes* might have contributed to that loss. The learned Judge left it to the jury to say whether the collision which caused the loss of the goods was occasioned by the negligence of the crew of the defendants; and, if they found that it was, then the only remaining question was whether there was any want of care on the part of the crew of the *Araxes* but for which the collision might have been avoided. It is now said that, though the crew of the *Araxes* might not have been guilty of negligence in not starboarding her helm when the collision was seen to be inevitable, she might have backed, and so materially mitigated the loss. But I think the jury could not have found, as they did, that there was no want of care on the part of those on board the *Araxes*, if they thought that they might, by backing or otherwise, have avoided the loss of the plaintiff's goods. Looking at all the facts of the case, I think the jury must be taken to have found that there was no want of care on the part of the crew of the *Araxes*, and that the loss of the plaintiff's goods was solely occasioned by the negligence of the defendants' servants. Upon these grounds I think the charge of the learned Judge to the jury was right, and that the decision of the Court below should be affirmed.

Bramwell, B. I only wish to say a word upon the last point. The learned Judge was not bound to leave it to the jury to say whether the loss might not have been mitigated by the *Araxes* backing when the collision was found to be inevitable, or after it had taken place. There was no evidence of it. Upon the evidence which was given, I doubt whether the *Araxes* ought to have backed. Although those on board of her saw the course of the *Black Prince*, I cannot undertake to say that they were wrong in not backing. They might fairly have supposed that those on board that vessel would have done their duty, or that by holding on they might * have gone clear of her. [*483] Who can say what would have happened?

Blackburn, J., and Channell, B., concurred.

Judgment affirmed.

ENGLISH NOTES.

The remarks of Mr. Justice Willes in this case as to the use of the term "gross negligence" are criticised, not very usefully, by Lord Chelmsford, in delivering the judgment of the Judicial Committee in *Giblin* v. *McMullen*, No. 3 of "Bankers," 3 R. C. 614, 619 (1869, L. R., 2 P. C. 336, 28 L. J. C. P. 25, 21 L. T. 214). They are in effect reiterated by Mr. Justice Willes in *Oppenheim* v. *The White Lion Hotel Co.* (1871), L. R., 6 C. P. 521, 40 L. J. C. P. 232, 25 L. T. 93.

The judgment in the principal case is cited by Willes, J., in delivering the judgment of the Court of Exchequer Chamber in *Notara* v. *Henderson* (1872), L. R., 7 Q. B. 225, 230, 41 L. J. Q. B. 158, 164, 26 L. T. 442, as collecting a series of authorities which thoroughly settle the principle, that the exception in the bill of lading, — which in that case was (*inter alia*) "loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers, and steam navigation of whatever nature or kind," — only exempts the shipowner from the absolute liability of a common carrier, and not from the want of reasonable skill, diligence, and care. The question debated in *Notara* v. *Henderson*, was the liability of the shipowner for the enhanced effects of a damage to a cargo of beans by collision and saturation by sea-water, — the original damage being admittedly within the excepted perils, — by reason of the master having omitted to take reasonable means of drying the cargo. It was proved that the beans had been unshipped pending repairs; that facilities existed for spreading them out and drying them, that this might have been done without unreasonable delay in the voyage; and that this would have been a reasonable course to pursue; as the moderate cost of having it done would have fallen as particular average upon the owners of the cargo. Instead of drying the beans the master had them reshipped and carried them on in their wet state; and deterioration by fermentation took place in consequence. The Court, affirming the judgment of the Court below, held that there was a duty under the circumstances upon the master, as representing the shipowners, to dry the beans, and that for his not doing so the shipowners were liable in damages.

Where a cargo of wheat was shipped under a bill of lading "the dangers of the seas and fire only excepted," it was held that the shipowners were liable to the owners of the cargo for damages caused by the ship making water through holes feloniously bored in the ship's side by some of the crew. *The Chasca* (1875), L. R., 4 A. & E. 446, 44 L. J. Adm. 17, 23 L. T. 838. In the judgment of Sir R. J. Phillimore, the judgment of Mr. Justice Willes, in the principal case (p. 683, *supra*, L. R.,

1 C. P. 611, 612), to the effect that the liability of shipowners to the owners of cargo is not necessarily correlative to that under a contract for insurance against the same perils, is cited and adopted.

Goods shipped in ship K. under a bill of lading, "collision and accidents, loss or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company in navigating the ship," were lost in consequence of a collision between the ship K. and a ship A. belonging to the same owners, for which both ships were to blame. In an action by the owners of the cargo it was held by the Court of Appeal that the defendants as owners of ship A. were relieved from liability under the bill of lading (which the Court held to be an English contract), for the negligence of their servants on board that ship; but that as owners of the ship K. they were liable in tort for the share of the damage which, according to the Admiralty rule, was divisible between the ships. *Chartered Mercantile Bank of India, &c.* v. *Netherlands India Steam Navigation Co.* (C. A. 1883). 10 Q. B. D. 521, 52 L. J. Q. B. 220, 48 L. T. 546.

The foundering of a ship through collision at sea is a danger or accident of the seas within the meaning of the ordinary exception in a bill of lading; and loss thereby occasioned is covered by the exception, where the collision was not due to the fault of the carrying vessel. *Wilson* v. *Owners of cargo ex Xantho* (H. L. 1887), 12 App. Cas. 503, 56 L. J. P. D. & A. 116, 57 L. T. 701. In this case Lord Herschell cited and approved the distinction drawn by Mr. Justice Willes in the principal case between the questions of liability arising under a contract of insurance and under a bill of lading; and pointed out that the difference did not require a construction (which he thought would be objectionable) giving a different meaning to the words "perils of the sea" in two maritime instruments. "I quite agree," he said, "that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause; and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils."

In *Hamilton* v. *Pandorf* (H. L. 1887), 12 App. Cas. 518, 57 L. J. Q. B. 24, 57 L. T. 726, the question of the distinction between liability on a policy and exception from liability on a bill of lading under the expression "dangers and accidents of the seas" is again mooted; and it was agreed on the argument that the rule of construction is the same in both instruments, and that the question was, in a bill of lading, whether you

could go behind the proximate cause. In this case the action had been brought by the shippers, against the shipowners, for damages to a cargo of rice. The excepted perils in the bills of lading were "all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind whatsoever." It was agreed at the trial that the damage was caused during the voyage by sea-water passing through a hole in a pipe connected with the bath-room in the vessel, the hole having been produced by the gnawing of rats; and it was also agreed that all reasonable precautions had been taken during the voyage to keep down the rats. The jury found that the rats which caused the damage were not brought on board by the shippers; and that those on board took reasonable precautions to prevent rats coming on board during the shipping of the cargo. The House of Lords, reversing the judgment of the Court of Appeal, and restoring that of Lores, L. J., held that the sea entering the hole was the immediate or proximate cause of the mischief: and, negligence on the part of the shipowner being negatived by the admissions, the cause of damage was within the exception of "dangers and accidents of the sea," and the shipowners were excused.

As to the effect of a bill of lading expressly excepting the owners from liability for negligence of the master and mariners, see next ruling case, No. 4, p. 697, *infra* (*Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 37 L. T. 333).

In *The Curron Park* (Adm. 5th August, 1890), 15 P. D. 203, 59 L. J. P. D. & A. 74, there was an action by charterers against shipowners for damage to a cargo of sugar shipped under a charter-party which excepted "any act, neglect, or default whatsoever of the crew or other servants of the shipowners during the voyage." It was decided by Sir James Hannen that this exception excused the shipowners from damage to cargo by water escaping through a valve in the engine room which had been negligently left open by one of the engineers. In the case decided two days later in the Court of Appeal of *The Accomac* (C. A. 7th August, 1890), 15 P. D. 208, 59 L. J. P. D. & A. 91, the exception in a charter-party was "any act, neglect, or default whatsoever of the master or crew in the navigation of the ship and in the ordinary course of the voyage." Damage occurred, after the ship was berthed at the docks in her port of destination, owing to a sea-valve having been left open by the negligence of the chief engineer. It was held by the Court of Appeal that this was not negligence "in the navigation of the ship," and therefore not covered by the exception.

Rodocanachi v. *Milburn* (C. A. 1886), 18 Q. B. D. 67, 56 L. J. Q. B. 202, 56 L. T. 594, was a case where the bill of lading excepted "negligence of the master or mariners," but the charter-party, which provided that the master should "sign bills of lading — without prejudice to the

stipulations of this charter-party," contained no such exception. It was held that, as between the charterers and the shipowner, the latter was not relieved from liability by negligent navigation.

The usual clause of exceptions does not exempt the shipowners from liability for goods lost, where the ship has deviated from the voyage contracted for by the terms of the instrument. *Leduc* v. *Ward* (C. A. 1888), 20 Q. B. D. 475, 57 L. J. Q. B. 379, 58 L. T. 908.

AMERICAN NOTES.

The general doctrine in this country is that a carrier cannot by special and express contract exempt himself from liability for any negligence or misconduct of himself or his agents. *Swindler* v. *Hilliard*, 2 Richardson Law (South Carolina), 286; 45 Am. Dec. 732; *Sager* v. *Portsmouth, &c. R. Co.*, 31 Maine, 228; 50 Am. Dec. 659; *School District* v. *Boston, &c. R. Co.*, 102 Massachusetts, 552; 3 Am. Rep. 502; *Ohio, &c. Ry. Co.* v. *Selby*, 47 Indiana, 471; 17 Am. Rep. 719; *Shriver* v. *Sioux City, &c. R. Co.*, 24 Minnesota, 506; 31 Am. Rep. 353; *Kansas City, &c. R. Co.* v. *Simpson*, 30 Kansas, 645; 46 Am. Rep. 104; *East Tennessee, &c. R. Co.* v. *Johnston*, 75 Alabama, 596; 51 Am. Rep. 489; *Merchants', &c. Co.* v. *Cornforth*, 3 Colorado, 280; 25 Am. Rep. 757; *Farnham* v. *Camden & Amboy R. Co.*, 55 Pennsylvania State, 58; *Camden, &c. R. Co.* v. *Baldauf*, 16 Pennsylvania St. 67; 55 Am. Dec. 481; *Erie Ry. Co.* v. *Wilcox*, 84 Illinois, 239; 25 Am. Rep. 451; *Indianapolis Railroad* v. *Allen*, 31 Indiana, 394; *Graham* v. *Davis*, 4 Ohio State, 362; 62 Am. Dec. 285; *Steele* v. *Townsend*, 37 Alabama, 247; 79 Am. Dec. 49; *Roberts* v. *Riley*, 15 Louisiana Annual, 103; 77 Am. Dec. 183; *Ryan* v. *M. &c. Ry. Co.*, 65 Texas, 13; 57 Am. Rep. 589; *Galt* v. *Adams Ex. Co.*, MacArthur & Mackey (District of Columbia), 124; 48 Am. Rep. 742; *Chicago, &c. R. Co.* v. *Moss*, 60 Mississippi, 1003; 45 Am. Rep. 428; *Annas* v. *Milwaukee, &c. R. Co.*, 67 Wisconsin, 53; 57 Am. Rep. 388; *Maslin* v. *Balt., &c. R. Co.*, 14 West Virginia, 180; 35 Am. Rep. 718, overruling *Balt., &c. R. Co.* v. *Rathbone*, 1 West Virginia, 87; 88 Am. Dec. 664.

Some cases admit the power of the carrier to exempt himself from the consequences of the ordinary negligence of himself or his servants, but leave him bound to ordinary care, and liable for gross negligence, and this doctrine is applied in cases of bills of lading containing exemptions. *Whitesides* v. *Thuelkill*, 12 Smedes & Marshall (Mississippi), 599; 51 Am. Dec. 128; *Cole* v. *Goodwin*, 19 Wendell (New York), 251; 32 Am. Dec. 470; *Guillaume* v. *Hamburgh, &c. Co.*, 42 New York, 212; 1 Am. Rep. 512; *Reno* v. *Hogan*, 12 B. Monroe (Kentucky), 63; 54 Am. Dec. 513; *Orndorff* v. *Adams Express Co.*, 3 Bush (Kentucky), 194; 96 Am. Dec. 207; *Levering* v. *Union Trans., &c. Co.*, 42 Missouri, 88; 97 Am. Dec. 320; *Adams Express Co.* v. *Stettauers*, 61 Illinois, 184; 14 Am. Rep. 57; *Westcott* v. *Fargo*, 61 New York, 542; 19 Am. Rep. 300.

Other cases hold that the exemption, when founded on a consideration, may cover negligence of every degree, not amounting to misfeasance or fraud. *Balt. & Ohio R.* v. *Rathbone*, 1 West Virginia, 87; 88 Am. Dec. 664 (words "at owner's risk" importing exemption from gross negligence alone). This

is the New York doctrine in "free pass" cases. *Poucher* v. *N. Y. Cent. R. Co.*, 49 New York, 263; 10 Am. Rep. 364; *Wilson* v. *N. Y., &c. R. Co.*, 97 New York, 87; *Kinney* v. *Cent. R. Co.*, 34 New Jersey Law, 513; 3 Am. Rep. 265; *Griswold* v. *N. Y., &c. R. Co.*, 53 Connecticut, 371; 55 Am. Rep. 115; *Kimball* v. *Rutland R. Co.*, 26 Vermont, 247; *Adams Ex. Co.* v. *Haines*, 42 Illinois, 89; *Balt., &c. R. Co.* v. *Brady*, 32 Maryland, 338; *Levering* v. *Union Trans. Co.*, 42 Missouri, 88; *Hawkins* v. *Gt. W. R. Co.*, 17 Michigan, 57; 18 ibid. 427.

In *Railroad Co.* v. *Lockwood*, 17 Wallace (United States Sup. Ct.), 357, after an exhaustive examination of English and American authorities, it was declared that a common carrier, whether of goods or passengers, may not stipulate for exemption from responsibility for negligence of himself or his servants. The Court observed: "If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of a carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, it could with more reason be said to be his private affair, and no concern of the public; but the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations whose position in the body politic enables them to control it. They do in fact control it, and make such conditions on the travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by the common carrier ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. . . . Conceding, therefore, that special contracts made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable, to the extent, for example, of excusing them for all loss happening by accident, without any negligence or fraud on their part; when they ask to go still further and to be excused for negligence, — an excuse so repugnant to the law of their foundation and to the public good, — they have no longer any plea of justice or reason to support such stipulation, but the contrary."

On the other hand, in *Dorr* v. *N. J. St. Nav. Co.*, 11 New York, 485, where the contract held the carrier "responsible for ordinary care and diligence only," it was said: "Upon principle it seems to me no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interests. No one but the parties can be the losers, and it is only deciding by agreement which shall take the risk of the loss. The law, where there is no special acceptance, imposes the risk on the carrier. If the owner chooses to relieve him and assume the risk himself, who else has a right to complain? Parties to such contracts are abundantly competent to contract for themselves. They are among the most shrewd and intelligent business men in the community, and have no need of a special guardianship for their protection. It is enough that the law declares the liability where the parties have said nothing on the subject. But if the parties will be better satisfied to deal on different terms, they ought not to be prevented

from doing so. . . . To say that the parties have not a right to make their own contract and to limit the precise extent of their own respective rights and liabilities, in a matter no way affecting the public morals, nor conflicting with the public interests, would in my judgment be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Even in those States which permit a carrier to contract for exemption from the consequences of his negligence the rule of the principal case still prevails. The exemption must be clearly expressed, and will not be inferred from general expressions. *Steinweg* v. *Erie Ry. Co.*, 43 New York, 123; 3 Am. Rep. 673; *Edsall* v. *Camden, &c. Co.*, 50 New York, 661.

No. 4. — STEEL *v.* THE STATE LINE STEAMSHIP COMPANY.

(1877.)

No. 5. — TATTERSALL *v.* THE NATIONAL STEAMSHIP COMPANY.

(1884.)

RULE.

In a bill of lading (as in every contract to carry goods by sea) there is an implied warranty that the vessel, at starting, is seaworthy for the voyage, and fit for the purpose of carrying the goods.

Steel v. The State Line Steamship Company.

3 App. Cas. 72–93 (s. c. 37 L. T. 333).

Ship. — Bill of Lading. — Implied Warranty of Seaworthiness.

Action by indorsee of bill of lading against shipowners.

The bill of lading excepted, *inter alia*, "perils of the seas caused by negligence of the crew." The damage took place (as found by a special verdict) through sea-water coming in at an insufficiently fastened porthole.

Held, that the special verdict was not sufficient to determine the question of liability. For it did not appear whether the ship started on the voyage with the ports insufficiently fastened, in which case there would have been a breach of the implied warranty of seaworthiness at starting, or whether it took place by the negligence of the crew during the voyage, in which case it might come within the exception. New trial directed accordingly.

By bill of lading dated at New York, on the 31st of [72] August, 1875, it appeared that upwards of 15,400 bushels

of wheat were shipped "in good order and condition" in the steamship called the *State of Virginia* lying in the port of New York, and bound for Glasgow.

[* 73] * The bill of lading, after the usual stipulations to deliver the wheat in good order and condition, proceeded as follows: —

"Not accountable for leakage, breakage, . . . however caused. Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise: namely, risk of craft or hulk, or transhipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam, or machinery, or from the consequence of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and however caused, excepted."

On the *State of Virginia* arriving at Glasgow, it was found that the wheat had been damaged by sea water to the value of £2793 4*s.* 6*d.* The respondents, owners of the *State of Virginia*, refused to pay this sum to the appellants, the onerous indorsees of the bill of lading; contending that they were exonerated from all liability by the wording of the bill of lading.

The case was heard before Lord YOUNG and a jury on the 24th of January, 1877, when a special verdict was returned as follows: —

"That, through the negligence of some of the crew, one of the orlop deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea. Find, that, as the ship was loaded, the said port was situated about a foot above the water-line, and that if properly fastened by means of the screws thereto attached, the said port would have been watertight throughout the voyage. Find, that the said sea-water was not admitted to the hold until the morning of the 6th of September, and that for the first seven days of the voyage the weather encountered was substantially as set forth in the mate's log."

The jury reserved to the Court to enter up the verdict for the pursuers or defenders, as the Court in the exercise of their judg-

ment should determine. The Court of Session, First Division, entered up the verdict on the 16th of March, 1877, in favour of the defenders,[1] the above respondents.

Against this decision the pursuers appealed to the House.

Mr. Benjamin, Q. C., and Mr. Watkin Williams, Q. C., were heard for the appellants, contending that the verdict should have been entered up for them, because the respondents' vessel was not when she started on her voyage in a reasonably fit condition, as *regarded the cargo of grain, to encounter the ordinary [*74] perils of a voyage from New York to Glasgow; and the damage caused to the appellants was caused by that unfitness. The question was, Were the respondents discharged from the liability involved by the vessel leaving New York with a port-hole insufficiently fastened? There was thrown on the shipowner a direct obligation to supply a seaworthy ship. *Gibson* v. *Small*, 4 H. L. C. 298, 404. The *State of Virginia*, owing to the unfastened port-hole, could not be said to be seaworthy. The extraordinary bill of lading might have protected the respondents, provided the ship was right at starting. It was admitted that if the port-hole had been fastened at starting, and that afterwards one of the crew had unfastened it, they could not say that they would have had a right to a verdict. The negligence occurred before the goods were on board. It was decided in *Gladdell* v. *Thomson*, 56 New York Rep. 194, that exceptions in the bill of lading only relate to negligence occurring while the goods were on the vessel. The clause in the bill of lading in the present case relating to negligence could not be connected with the clause relating to perils of the sea. A responsibility was cast upon the shipowner to furnish a ship fit to carry the cargo the charterers had undertaken to put on board. *Stanton* v. *Richardson*, L. R., 7 C. P. 431; 9 C. P. 390; 45 L. J. C. P. 78; *Daniels* v. *Harris*, L. R., 10 C. P. 1; 44 L. J. C. P. 1. In every contract for the conveyance of merchandise by sea there was, in the absence of express provisions to the contrary, an implied warranty by the shipowner that his vessel should be seaworthy. *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; 45 L. J. Q. B. 436. The question of fact whether going to sea with this port-hole open was going to sea in an unseaworthy condition was not found by the jury; but the jury did expressly find that the port-hole had been insufficiently fastened. The damage was not caused by a peril of

[1] Scotch Cases, 4th Series, vol. iv. p. 657.

the sea, but by unseaworthiness. A case bearing on this point was *The Merchant Trading Company* v. *The Universal Marine Insurance Company*, 9 Q. B. 596, in which case the jury were asked, Was the leak from which the vessel foundered attributable to injury and violence without, or from weakness from within? if the latter, it was unseaworthiness. Although the important fact as to
[*75] seaworthiness was not found by *the jury, yet it was plain the respondents had not fulfilled their contract, they not having delivered the wheat in good condition.

Mr. Cohen, Q. C., and Mr. Mathew, for the respondents, admitted that there might not be sufficient matter before the House to come to a decision; but they contended, that no breach of the special bill of lading had been committed. The shipowner who stipulated for exemption from losses by perils of the sea would be liable for such a loss as had occurred here, when caused by the negligence of the crew, if there was no express provision to the contrary; but here there was an express exemption from liability. There was a distinction between contracts of insurance and of affreightment: *Grill* v. *The General Iron Screw Colliery Company*, L. R., 1 C. P. 612; 3 C. P. Ex. 476, p. 680, *ante*. As to the case of *The Merchant Trading Company* v. *The Universal Marine Insurance Company*, there the vessel must have been unseaworthy, as she sank in a few minutes and in fine weather. It was quite different in this case. The bill of lading covered risks by way of exception, some of which might occur in the loading of the cargo. The loss here was occasioned, either by a peril of the sea, or from the negligence of some of the crew, or from both combined, and from all these the respondents were excepted from liability by the special clauses of the bill of lading.[1]

Mr. Cohen: My Lords, my learned friend, Mr. Benjamin, says, that after the opinion expressed by your Lordships as to the jury not having found the question of fact as to seaworthiness, he will not contend that he can be entitled to a judgment on the finding of the jury now before the House.

The following opinions were delivered by the Law Peers: —

The Lord Chancellor (Lord Cairns): —

My Lords, your Lordships have had the advantage in this case

[1] The following cases were also cited at the Bar: *Taubman* v. *Pacific Steam Navigation Company*, 26 L. T. 704; *Carr* v. *Lancashire and Yorkshire Railway Company*, 7 Ex. 707, 21 L. J. Ex. 261; *Kay* v. *Wheeler*, L. R., 2 C. P. 302, 36 L. J. C. P. 180.

No. 4. — Steel v. The State Line Steamship Co., 3 App. Cas. 75-77.

of a long and interesting argument upon points which are no *doubt of great commercial importance. There is some [*76] difficulty in the case by reason of the course which it has taken in the Court below; but I think when your Lordships consider the whole of the facts, so far as they appear, and the argument which you have heard, there cannot be much doubt as to the result at which we should now arrive.

The question arises upon the shipment of a considerable quantity of wheat at New York in one of the State Line steamers. The present appellants are the indorsees of the bill of lading; but, having regard to the provisions of the Bills of Lading Act, 18 & 19 Vict. c. 111, s. 1, they are onerous indorsees, and they stand in the position of the original shippers; they have whatever right of action the original shippers had, and I may speak of them as if in point of fact they had been the shippers of the wheat.

Now, my Lords, on the shipment of the wheat a bill of lading was given; and I will in the first place direct your Lordships' attention to that bill of lading. It contains an affirmative portion, and also a portion which we may call a negative portion, or rather a portion which by way of exception and curtailment of some antecedent liability, created by the earlier part of the bill of lading, endeavours to protect the shipowners from certain consequences. The affirmative part of the bill of lading states that the wheat in question "has been shipped in good order and condition, and is to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition at the port of Glasgow."

It is an engagement, therefore, to carry and deliver at a certain port in this kingdom the wheat so shipped. What is the meaning of the contract created by those words supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement — a contract — by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy.

* By "seaworthy," my Lords, I do not desire to point to any [*77] technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea

a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic. My Lords, if there were no authority upon the question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract.

I took the liberty of asking the learned counsel for the respondents whether they were prepared to say that if the owner of goods engaged room in a ship of this kind, and, bringing his goods alongside, at the time the ship was ready for departure, found that the ship was not seaworthy, he could not refuse the fulfilment of his promise to put his goods on board, and whether, on the other hand, he could not maintain proceedings against the owner of the ship for not having accommodation for his goods in a ship that was fit to carry them.

I did not understand the learned counsel for the respondents to be able to say that that was not the relative position of the owner of the goods and the shipowner; that on the one hand the owner of the goods was not entitled to refuse to put his goods on board, and on the other hand the owner of the ship did not incur liability by not having a ship fit to fulfil the engagement he had entered into. But, my Lords, if that is so, it must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there can be no doubt that this would be the meaning of the contract; but it appears to me that the question is really concluded by authority. It is sufficient to refer to the case of *Lyon* v. *Mells*, in the Court of Queen's Bench during the time of Lord Ellenborough (5 East, 428; 7 R. R. 726; No. 3, "Carrier." 5 R. C.), and to the very strong and extremely well considered expression of the law which fell from the late Lord Wensleydale when he was a Judge of the Court of Exchequer, and was advising your Lordship's House in the case of *Gibson* v. *Small*, 4 H. L. C. 395.

My Lords, that being, as I submit to your Lordships, the effect of the earlier part of the bill of lading, it then becomes [*78] material * to consider what is the effect of the later part, the qualified or exceptional part of the bill of lading. It is not very happily expressed as regards its grammar and the collocation; but I will assume in favour of the respondents that everything which is mentioned between the words "not responsible"

and the word "excepted" is meant to be matter in respect of which there is to be no liability on the part of the shipowner. But, looking at all that is mentioned between those two termini in the bill of lading, it appears to me that everything which is mentioned is matter subsequent to the sailing of the ship with the goods on board. There is mentioned there the bursting of bags, "the following perils," "risks of craft or hulk," which was found by the verdict, which I shall afterwards have to refer to, not to mean the risk of the ship herself: "Transhipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, boilers, steam, or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and however caused, excepted."

My Lords, the only attempt to give to any of these words a meaning which would refer them to what happened antecedent to or at the time of the departure of the ship, was to construe the words "peril of the seas" "howsoever caused" so as to make them point to unseaworthiness ending in a loss at sea. But it appears to me obvious that what is here referred to as peril of the seas is, as described, something which happens on the transit, whether land or sea transit, and that of course does not commence until the ship leaves the port. Therefore if it be the case, as I submit to your Lordships it is, that there is in the earlier part of the bill of lading an engagement that the ship shall be reasonably fit to perform the service which she undertakes, there is in my opinion nothing in the later part of the bill of lading which qualifies that engagement.

Now, my Lords, that being the view of the construction of the bill of lading which I shall submit to your Lordships, let me proceed to apply it to what is found to have occurred in the present case. With regard to the pleadings, there is a statement in the 5th article of the appellant's condescendence that "when the vessel left New York she was not in a seaworthy condition in
*respect that one of her side ports was open, or, at least, [*79]
not sufficiently secured or fastened to prevent the influx of water into the hold; and the said port was allowed to remain open or insecurely fastened through the gross carelessness of those in charge of the vessel, and the result was that water flowed into the hold through the said port, and so little care was taken of the

No. 4. — Steel v. The State Line Steamship Co., 3 App. Cas. 79, 80.

cargo that there were about fifteen feet of water in the hold before the fact of the leakage was discovered."

It is the damage done to the wheat in consequence of this influx of water which forms the subject of complaint in the action. There is a denial to that, but it is explained that on the 6th of September, when the ship was about 1100 miles from New York, one of her side ports was burst open to some extent by the heavy seas which she encountered, and water flowed into the hold through said port. My Lords, that will show your Lordships sufficiently the character of the allegation on the one side and on the other on that point, and to that I may add in the statement on the part of the defender it is said, "When the said vessel sailed from New York on the said voyage, she was seaworthy," and to that there is a denial that the "vessel" "was seaworthy when she sailed from New York." There is one other statement to which I will refer in the condescendence, but upon the general averment and denial, the first plea in law for the pursuers before the additional pleas was this: "The pursuers, having sustained loss and damage to the extent foresaid, through the unseaworthiness of the defenders' vessel, and the failure of the defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for, with interest and expenses."

My Lords, the case came on for a jury trial in Scotland, and the jury found on the issue, which I need not refer to particularly, a special verdict; and that special verdict finds, first, the shipment of the wheat "'to be conveyed,' in terms of the bill of lading set out in the schedule; finds then that the wheat was carried to Glasgow, and delivered to the pursuers, who are onerous indorsees of the bill of lading; then finds that when delivered it was not in the like good order and condition in which it was shipped." Then it finds as follows: "That through the negligence of some of the crew one of the orlop deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea. Find, that, as the ship was loaded, the said port was [*80] situated about a *foot above the water-line, and that if properly fastened by means of the screws thereto attached, the said port would have been watertight throughout the voyage. Find, that the said sea-water was not admitted to the hold until the morning of the 6th September, and that for the first seven

days of the voyage the weather encountered was substantially as set forth in the mate's log," which forms part of the process. And then it finds that if there is damage to be recovered it is of a certain amount.

Now, my Lords, looking to this special verdict, and looking to that alone, for the facts with which we have to deal, it appears to me that if our attention was confined merely to that special verdict there would be very great incertitude and ambiguity as to what the facts really were. There is mention of a port-hole which at the time the ship sailed was a foot above the water-line. It is stated that there were screws attached to the port-hole by which it could be fastened, and that when fastened by means of those screws, the ship would have been watertight throughout the voyage. It is found that the port-hole was insufficiently fastened, but when and at what time is not stated in the special verdict. Consistently with this special verdict it may well have been that either of two states of things occurred. Consistently with this verdict it might have been that there was no want of fastening the port-hole when the ship sailed, that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors; and if so, probably that would be a matter which would be covered by the exceptions in the bill of lading as a case of negligence occurring during the transit of the goods. Or it may be that, if the port-hole (still looking at this verdict alone) was unfastened at the time of the sailing of the ship, the port-hole may have been so situated and the access to the port-hole such as that at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened; and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken. On the other hand, there is a passage in the condescendence, which if it could be taken along with the special verdict might raise at all events a suspicion, which in various minds might be more or less strong, that the state of things with reference to this port-hole at * the time the ship sailed was such as that the state [* 81] of the port-hole constituted a degree of unseaworthiness which could not at any moment, without considerable trouble, have been got rid of.

My Lords, the passage to which I refer is this. In the condescendence on behalf of the defenders in the action in the 6th number it is said: —

"It was the duty of the master and company of the vessel to see that the said port was properly fastened before the voyage began, and that it was not interfered with thereafter. The defenders have made every inquiry, but have been hitherto unable to discover the cause of the said side-port not resisting the pressure of the seas. The defenders' information is, and they aver, that the master and crew of said steamer did use reasonable care to secure and keep secure said side-port, notwithstanding which, or from the negligence, default, or error in judgment of the master, mariners, or other persons in the service of the ship and/or employed in the stowage of the cargo at New York, for whom the defenders in the absence of stipulation to the contrary would be responsible, the particular person in fault being to the defenders unknown, the port before mentioned in the course of the voyage, from the perils of the sea or navigation, was burst partly open as before mentioned, and the damage alleged by the pursuers happened to the wheat."

And then follows this statement: —

"After the cargo was loaded the inside face of the said port could not be seen or got at without taking out the cargo."

Now, my Lords, whether the ship at the time she left New York was or was not in a condition fit to perform the service which she had undertaken with reference to these goods, — whether she was or was not "seaworthy" in the sense in which I have used that term, was a question of fact, and in the view which I have taken of the construction of the bill of lading, it was a question of fact which lies at the very root of this case. But your Lordships do not find in the special verdict, as I read it, any answer whatever to that question of fact. And, my Lords, although the Court in Scotland thought themselves able to apply the verdict and to enter upon it a judgment for the defenders, and although the appellants in the first instance asked your Lordships here to reverse that judgment and to enter a judgment for them, I think it has come to be admitted in argument on both sides, that if the construction of the bill of lading be such as I have submitted to your Lordships it is, there is not here now any finding upon the question of fact whether the ship was or was not seaworthy upon which judgment can be entered either way. Therefore I fear, although

No. 4. — Steel v. The State Line Steamship Co., 3 App. Cas. 82, 83.

* I regret the result, that nothing can be done by your [* 82] Lordships now but to remit this case to the Court of Session in Scotland, and to direct that a new trial shall be had.

On the occasion of that new trial it appears to me that it will be the duty of the learned Judge who conducts it to obtain from the jury an answer to this question of fact, to direct the jury's attention to those circumstances to which I have referred, and to whatever evidence may be given with reference to those circumstances, and to obtain from the jury an expression of opinion as to whether the ship at the time she left New York was seaworthy in the sense in which I have used the term; of course in arriving at that conclusion the precise and accurate consideration of the state of this port will become very material. It may, on the one hand, be that the port, if open when she left New York, was not occasioning any danger whatever to the ship so long as calm or moderate weather prevailed, and it may be that the port was so circumstanced that, upon any approaching change of weather, it might immediately have been closed and fastened down; or it may be, on the other hand, that the cargo was so loaded that, the fastenings of the port being from the inside, those fastenings were covered over by the cargo and rendered inaccessible, or rendered at all events inaccessible without such a removal or change of the cargo as would occupy a considerable time, and could not conveniently take place when the ship was at sea. Those are questions to which the attention of the jury should be directed in order that they may say, after considering those matters, whether the ship at the time she left was in fact in a condition reasonably to perform the service of the conveyance of these goods without danger.

My Lords, the judgment of the Court of Session has been a unanimous judgment, but I do not see that in point of fact there was any opinion expressed by the learned Judges in that judgment which is at variance with the law as I understand it, and as I have endeavoured to submit it to your Lordships. What I mean is this: I do not understand that any of those learned Judges would have said that if the question is, what is the construction of the affirmative part of this bill of lading, they would have placed that construction on any other footing than I have endeavoured to place it. But what it appears to me was the error, if I may respectfully * say so, of those very learned persons was this, that [* 83] although at one part of the judgment they appear to recog-

nise the construction which I have mentioned of the earlier part of the bill of lading, they seem afterwards to have been entirely occupied with the other part of the bill of lading — with the exceptions in it — and to have assumed that those exceptions would be sufficient to wipe out or destroy what was the stipulation in the earlier part of the bill of lading.

My Lords, I say that for this reason I find that the LORD PRESIDENT, in the earlier part of his judgment,[1] expressed himself thus:

"I think it is conceded on the part of the shipowners, the defenders here, that the object of this clause was to save them from all liability implied in the obligation to deliver in like good order and condition, except a liability which might arise from the unseaworthiness of the vessel. If they provided a seaworthy ship, tight, staunch, and strong, well-manned and equipped for the carriage of goods, they say that, in consequence of the manner in in which the clause of excepted risks is conceived, they are free from all other liability."

I understand the LORD PRESIDENT to recognise and to approve of that which he calls a concession in argument on the part of the shipowners, and I understand it to be a statement by the LORD PRESIDENT that the shipowners were bound to provide a "seaworthy ship, tight, staunch, and strong, well-manned and equipped for the carriage of goods."

And, my Lords, that is simply the proposition which I have submitted to your Lordships to be correct in point of law. I do not understand that any of the learned Judges differed from that proposition, and I again say it appears to me that the only miscarriage which took place was that, having so laid down their view of the law, they did not apply it correctly with reference to the verdict which they had before them and with reference to the exceptions in the bill of lading.

My Lords, I submit therefore to your Lordships that this appeal must be allowed to the extent of reversing the interlocutor of the Court of Session and remitting the case with a declaration that there ought to be a new trial of the case.

[*84] * LORD O'HAGAN: —

My Lords, I completely concur in the observations of my noble and learned friend, and I do not desire to add anything to the precise and lucid words in which he has conveyed the conclu

[1] Scotch Cases, 4th Series, Vol. IV p. 659.

sions at which I believe your Lordships have arrived. Those conclusions result in keeping this case still pending. It will have to go before a Judge and a jury; and I think it more fitting and becoming in such circumstances not to anticipate or affect the inquiry by any unnecessary words.

I shall only say that I entirely concur in the view that a shipowner who accepts goods which he is to deliver in good order and condition, impliedly contracts to perform the voyage in a ship which is seaworthy. The most persuasive reason, and the most conclusive authority, combine to establish that which appears to me to be a very plain proposition. In the second place, I have no doubt myself that the words of exception which are contained in the bill of lading in no degree denude the shipowner in this case from the liability so created. There remains a question of fact, which is not in any decisive or unequivocal way determined by the special verdict in this case. It is, therefore, unfortunately necessary that the case should go back, and I entirely approve of the proposal made by my noble and learned friend.

Lord Selborne: —

My Lords, I entirely agree with my noble and learned friends who have preceded me as to the law to be applied to this case, and also as to the construction of the bill of lading.

It was suggested by Mr. Mathew in his able argument, that the bill of lading covered risks by way of exception, some of which might occur during the loading of the cargo on board and the stowing of it in the ship. I cannot agree to that construction. It appears to me to be clear on the face of the bill of lading that it represents the goods as already shipped. It is given in duplicate in the ordinary course, and I also find that it is expressly stated by the pursuers in their condescendence that the wheat had been loaded on board the ship before and on the day which is the date of the bill of lading. I therefore quite agree that all
* the perils which are excepted are perils subsequent to the [* 85]
loading of the wheat on board the ship, and that they are capable of, and ought to receive, a construction, not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken.

My Lords, I also concur as to the course which it is necessary for your Lordships to take, and in the statement which has been made of the nature of the questions which will have to be in-

vestigated when the new jury trial takes place. Of course nothing that is said or done by your Lordships now will preclude the examination of the case upon the evidence at the new trial upon the substance of it. No words which may have been uttered by my noble and learned friends, or I think by any of your Lordships, were intended or can be taken to indicate any foregone conclusion as to facts not now before us. But we all agree that, looking to the issues raised, and to the nature of the special verdict, those things are not found by the special verdict which are necessary for the satisfactory determination of the case.

My Lords, my noble and learned friend on the woolsack has submitted his views of the opinions given in the Court of Session. I must own mine is upon that point not precisely the same with that of my noble and learned friend. It seems to me from the language, particularly of the Lord President and of Lord Shand, that the course which the case really took in the Court of Session was this. It was assumed by those learned Lords, and I should think by all the Lords, that the contract of the shipowner was to provide "a seaworthy ship, tight, staunch, and strong, well-manned and equipped for the carriage of the goods," and that if he did not do that there was nothing (I should so read the judgments) in the exceptions in the bill of lading to relieve him from that liability. But what I should myself collect is, that the learned Judges, applying themselves to the special verdict alone, and dealing with the case as if they had nothing to do but necessarily to enter a judgment for the one party or the other, found the special verdict to be insufficient to raise a case of anything more than negligence, default, or error in judgment on the part of the pilot, master, or persons in the service of the ship; and, as consistently with the special verdict, that might have been during the course [*86] of the *voyage, and was not found otherwise, I should conjecture that the learned lords thought that the *onus probandi* upon that point lay with the pursuers and not upon the defenders; and on that ground entered the judgment in the defenders' favour. Of course, my Lords, I agree with what has been said that that is not a satisfactory or a proper way of dealing with the case, where the special verdict does not really find the material fact upon which the whole question turns.

Lord Blackburn: —

My Lords, I entirely agree in the course which is proposed to be

taken, of sending the case down for a new trial, on the ground that this special verdict does not really find the cardinal fact upon which it depends whether the judgment ought to be for the respondents or for the appellants.

I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea-carriage, that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of Lord TENTERDEN, as early as the first edition of Abbott on Shipping, at the very beginning of this century, of Lord ELLENBOROUGH, following him, and of Baron PARKE, also, in the case of *Gibson* v. *Small*, without seeing that these three great masters of marine law all concurred in that; and their opinions are spread over a period of about forty or fifty years. I think therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of a contract to carry on board ship.

In the case of *Readhead* v. *The Midland Railway Company*, L. R., 4 Q. B. 379; 38 L. J. Q. B. 169; No. 13 "Carrier," 5 R. C., which was the case of a contract to carry passengers upon land, *there had been a good deal of reasoning in the [*87] Exchequer Chamber to the effect that the obligation there was not to furnish a carriage which was absolutely perfect or landworthy, but only to furnish a carriage which was fit as far as they could reasonably make it, which is a different kind of contract from what is now supposed. In the case of *Kopitoff* v. *Wilson*, where I had directed the jury that there was an obligation, I did certainly conceive the law to be, that the shipowner in such a case warranted the fitness of his ship when she sailed, and not merely that he had loyally, honestly, and *bona fide* endeavoured to make her fit. The Court, when it came to be considered, had to see whether that did not clash with the reasoning in *Readhead* v. *The Midland Railway Company*, and we all agreed that it was immaterial to decide

whether it did or not, because there was nothing in that case to raise the question whether it was an absolute warranty, or merely a duty to furnish it as far as could properly be done. Nor, in truth, do I think that here that question would in all probability really arise, for here if there was such a defect as would make the ship not reasonably fit to carry the wheat across the Atlantic, there can be no doubt that it must have been owing to negligence on the part of the shipowners or some of their servants, and cannot be said to have arisen from that kind of latent defect which no prudence or skill could perceive.

Now, my Lords, taking that to be so, it is settled that in a contract where there are excepted clauses, a contract to carry the goods except the perils of the seas, and except breakage and except leakage, it has been decided both in England and Scotland, that there still remains a duty upon the shipowner, not merely to carry the goods if not prevented by the excepted perils, but also that he and his servants shall use due care and skill about carrying the goods and shall not be negligent. That has been determined in several cases, of which *Phillips* v. *Clark*, 2 C. B. (N. S.) 156; 26 L. J. C. P. 168, is the leading one, and that decision has been followed in many cases. In the case of *Moes* v. *The Leith and Amsterdam Shipping Company*, 5 Macph. 988; 39 Scot. Jur. 546, decided in Scotland, the same thing seems to have been determined,

[*88] * namely, that where there is such an exception if the shipowner or his servants are guilty of negligence producing the misfortune, they are liable on that account. I think myself that the proper and right way of enunciating it would be, in such a case, to say if owing to the negligence of the crew the ship sinks while at sea, although the things perish by a peril of the sea, still inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception. It matters not whether that would be the right mode of expressing it or not, that is clearly established. They may protect themselves against that, and they do so in many cases, by saying, these perils are to be excepted, whether caused by negligence of the ship's crew, or the shipowner's servants, or not. When they do so, of course that no longer applies.

My Lords, I think that exactly the same considerations would arise here as to the implied duty — the duty which, though not expressly mentioned, arises by implication of law — on the part of

the shipowner to furnish a ship really fit for the purpose. If that duty is neglected, as in the case of *Kopitoff* v. *Wilson*, or as in the case here, as it is alleged, — I do not say that it is so, because that is a point not yet determined, — the shipowner is liable. If, as is alleged here, a port gives way and the seas come in and wet the wheat, and if it is a consequence of the ship having started unfit that that mischief is produced, it seems to me to be exactly like the case of *Phillips* v. *Clark*, where negligence, not provided for by the contract, occasioned the breakage or the leakage, which it was said was an exception, but which the Court determined was not an exception of which the shipowners could avail themselves, seeing that it was brought about by their negligence. So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it.

Now, my Lords, I perfectly agree with what has been said by the noble and learned Lords who have already addressed you on * the construction of this contract, that it does not [* 89] provide at all for this case of an unseaworthy ship producing the mischief. The shipowners might have stipulated, if they had pleased (I know no law that would hinder them). We will take the goods on board, but we shall not be responsible at all, though our ship is ever so unseaworthy; look out for yourselves; if we put them on board a rotten ship, that is your look-out; you shall not have any remedy against us if we do. I say they might have so contracted, and perhaps in some cases they may actually so contract. I do not know. Or the shipowner might, and that would have been more reasonable, have said, I will furnish a seaworthy ship, but I stipulate that although the ship is seaworthy, and although I have furnished it, I shall only be answerable for the vitiation of your policy of insurance, if you have one, in case the ship turns out not to be seaworthy; and I will protect myself against any perils of the seas, though the loss should be produced in consequence of, or caused by, that unseaworthiness. They might have contracted in that way. I think that when this contract is fairly looked at it appears that they do not so contract as to apply it to this case. I think, and I agree there with the Court of Ses-

sion (4th Series, vol. iv. p. 660), that they have here sufficiently expressed in the contract they will not be responsible or answerable for the consequences of a loss by perils of the seas or either of the excepted perils, even though it may be produced by the negligence of the mariners. I think that they have done that, and that is what the Court of Session appear to have thought was all that it was necessary to say.

But then, my Lords, for some reasons or other, I cannot exactly make out what, the Court below lost sight of the fact that if there was a want of seaworthiness in the ship — using the common phrase which is used as meaning, if the duty or obligation to make the ship reasonably fit for the voyage had not been fulfilled — if there was a want of seaworthiness in that sense, and that want of seaworthiness caused the loss, this contract did not protect the shipowners, and therefore it was incumbent upon them to see whether there was a want of seaworthiness, and whether it did produce the loss. The point was raised on the first plea in law distinctly, and then there were several additional pleas in law in which

[* 90] * it was not raised, and it seems to have been lost sight of; and though the issue directed was so worded as to leave this open, it is so worded as to lead me to think that those who drew the issue were not thinking of this point (no doubt it would be open upon the issue, but it is not raised by it), and when there came to be a special verdict, it was found that, "One of the orlop deck ports of the said steamship was insufficiently fastened, and that in consequence the said seawater was thereby admitted to the hold after the ship had been five days at sea."

And then it was found that this port was about a foot above the water-line, and that the weather had been as is described in the mate's log.

Now, my Lords, I cannot see that this special verdict finds, either one way or the other, whether or no there was a want of seaworthiness or reasonable fitness to encounter the ordinary perils of the voyage or not. I think that is left quite ambiguous and uncertain. I quite agree with what has been said, that it was a question of fact for the jury, whether or no the vessel was made reasonably fit to encounter these ordinary perils.

I think also that there are some views of the case in which, though it would still be a question of fact for the jury, there could not be much doubt about it one way or the other. If, for example,

this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done, — if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it, — if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open, but * quite [* 91] capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light, — in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or Judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right. If they did not put it right after such a warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship. But between these two extremes, which seem to me to be self-evident cases as to what they would be, there may be a great deal of difficulty in ascertaining how it was here. It may very likely be a contested point as to how far the wheat was put against this port. That may be one of the contests, and there may be many others. I agree with what has been already said, that nothing which is said now about unseaworthiness is at all authoritative. Of course it is not laying down the opinion of the House, but what I have said is not even the expression of a final and concluded opinion formed by myself as an individual advising your Lordships. I merely express it as being what I think might be the case.

I have no doubt what the result will be; it will be a question taking the whole circumstances together, was this ship reasonably

fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon the whole circumstances and the whole of the evidence. I have merely indicated two extreme cases which I think are quite possible, and in one of which I think it is quite clear that nobody would say she was seaworthy; in the other case I think any one would say she was seaworthy. These are only two extreme cases, — there must be plenty of room for dispute between the two. That being so, my Lords, the special verdict not stating enough to enable us to determine that cardinal fact upon which in my mind it depends, whether the appellants or the respondents are entitled to judgment.

I think it is impossible to decide either way, and conse-
[* 92] quently * the case must be remitted to the Court of Session to ascertain in such a way as they have the means of ascertaining (a new trial is the only course which occurs to me) whether or no the ship was seaworthy at the time she sailed, and whether the loss was occasioned by the want of seaworthiness, if such want there was.

Lord GORDON: —

My Lords, I quite concur with the views expressed by the noble and learned Lords who have preceded me. I think that it is quite impossible for your Lordships to dispose of this case upon the evidence afforded by the verdict of the jury.

It is curious, indeed, as Mr. Benjamin observed in opening the case, that in the very first plea in law this question of unseaworthiness, as affording a ground of claim against the defenders, was stated in the inferior Court.

"The pursuers having sustained loss and damages to the extent foresaid, through the unseaworthiness of the defenders' vessel and the failure of the defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for with interest and expenses." And the very last plea in the case for the appellants, which I see is signed by Mr. Benjamin, resumes this plea in the inferior Court, and sets forth that the interlocutor should be reversed, "because the respondents' vessel was not when she started on her voyage in a reasonably fit condition as regards a cargo of grain to encounter the ordinary perils of a voyage from New York to Glasgow, and the damage caused to the appellants was caused by that unfitness." Unfortunately the ad-

visers of the appellants in the Court below do not seem to have brought before the Court the legal effect of these pleas, and the Court evidently, as it appears from the opinion of the LORD PRESIDENT, took this as conceded; for the LORD PRESIDENT says that "If they provided a seaworthy ship, tight, staunch, and strong, well-manned, and equipped for the carriage of goods, they say that in consequence of the manner in which the clause of excepted risks is conceived they are free from all other liability." Having in this way been taken as conceded on the part of the defenders, it unfortunately was not made a point of contest, and, as sometimes happens in cases where a keen argument is not *submitted to the Court, a point which afterwards turned [* 93] out to be material was overlooked. That seems to have been what occurred, first, in framing the issue, and secondly, in framing the special verdict.

I think, however, my Lords, that the course which your Lordships have indicated with reference to obtaining further investigation into the facts of the case will enable the case to be properly decided, and the case will raise some very important principles in point of law. I do not propose to enter upon these now. I think it is better that they should be reserved for discussion when we have the facts fully before us, than that we should state views of the case upon a hypothesis of what may be the result of a future investigation before a jury.

Interlocutor appealed from reversed, and case remitted back to the Court of Session with a declaration that there ought to be a new trial of the issue.

Tattersall v. The National Steamship Company.

12 Q. B. D. 297–302 (s. c. 53 L. J. Q. B. 332; 50 L. T. 299; 32 W. R. 566).

Ship. — Bill of Lading. — Implied warranty of Fitness of Ship.

Action on bill of lading by owner of cattle against shipowner contracting to carry them.

Special condition under no circumstances to be liable for more than £5 per head.

Held, that the condition did not apply to damage sustained by the cattle contracting disease owing to insufficient cleaning of the ship before starting.

Special Case, of which the facts were in substance as follows: — The action was brought by the plaintiff, as owner of certain

No. 5. — Tattersall v. The National Steamship Co., 12 Q. B. D. 298, 299.

[* 298] * cows, to recover from the defendants damages alleged to have been sustained by the plaintiff through the said cows having caught the foot and mouth disease whilst being carried in the defendants' steamer from London to New York.

The plaintiff shipped on board the defendants' steamer *France* ten head of cattle, amongst other animals, to be carried on board the said steamer from London to New York upon the terms of a bill of lading. During the course of the voyage some of the said cattle were affected with foot and mouth disease, and were so affected on being landed in New York. On her voyage from New York to London, immediately preceding the voyage now in question, the *France* had on board cattle affected with foot and mouth disease, and the plaintiff's cattle caught the foot and mouth disease while on board the *France*, owing to the negligence of the defendants' servants in not properly cleansing and disinfecting the said steamer before receiving the said cattle on board, and signing the said bill of lading.

By reason of the said cattle having caught the foot and mouth disease, as above stated, the plaintiff sustained damage amounting to more than £5 for each of the said cattle. The bill of lading contained the following exceptions and conditions: "These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the National Steamship Company, Limited, or its agents or servants, are as respects these animals in no way responsible for either their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than £5 for each of the animals; all dogs to be placed wherever the captain may appoint, but at the sole risk of the shipper and or owner; the act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of master or mariners, restraint of princes, rulers, or people; loss or damage resulting from heat, boilers, steam, or steam machinery, including consequences of defect therein, or damage thereto, collision, stranding, or other perils of the sea, rivers, steam, and steam navigation; and all damage, loss, or injury arising from the perils or matters above mentioned, and whether such [* 299] perils or matters arise from the negligence, default, * or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowner."

The question for the opinion of the Court was whether or not

No. 5. — Tattersall v. The National Steamship Co., 12 Q. B. D. 299, 300.

under the circumstances the defendants were liable for more than £5 for each of the said cattle.[1]

Petheram, Q. C. (J. C. Earle with him), for the plaintiff. The bill of lading attached when the goods had been put on board, and covers the subsequent period, but this action is in respect of a breach of obligation antecedent to the signing of the bill of lading, a matter which the bill of lading does not cover. The position of the parties was, in respect of this matter, that of bailor and bailee, and there was an implied obligation to use due care about receiving the cattle. The exceptions in the bill of lading relate only to certain classes of perils incident to the voyage, against which, in the ordinary course of business, the shipper insures. [He cited *Steel* v. *State Line Steamship Co.*, 3 App. Cas, 72, *ante*, p. 697.]

Fox, for the defendants. There is no reason why the plaintiff should not have protected himself against this peril by insurance. The defendants contend that if liable at all they are liable only to the extent of £5 for each of the cattle. The provision of the bill of lading limiting liability is not confined to matters occurring during the voyage, but is in the most general and absolute terms: "under no circumstances" are the defendants to be liable beyond £5 for each animal. It is previously provided that the defendants shall not be liable for accidents, disease, or mortality, but, assuming that that exception would not cover accidents, disease, or mortality occasioned by the negligence of defendants' servants, the subsequent provision is that in no contingency shall the liability exceed a certain amount.

It is clear that a shipowner is entitled to make such a stipulation, just as a railway company might have done before the Railway and Canal Traffic Act. *McManus* v. *Lancashire and Yorkshire Ry. Co.*, 4 H. & N. 327; 28 L. J. Ex. 353; *Harrison* v. *London, Brighton, and South * Coast Ry. Co.*, 2 B. & S. 122, [*300] 152; 31 L. J. Q. B. 113; *Lewis* v. *Great Western Ry. Co.*, 5 H. & N. 867; 29 L. J. Ex. 425. It could not have been intended that the exceptions and conditions in the bill of lading should apply only to matters occurring during the voyage, for matters occurring through the negligence of "stevedores or other persons in the service of the company" are excepted. The negligence of shore hands

[1] Upon the pleadings in the action all liability was denied by the defendants, but the defendants in the alternative paid into Court £5 in respect of each of the cattle, and it was agreed that this case should be stated to determine whether there could be any further liability.

before the commencement of the voyage is, therefore, contemplated. *Steel* v. *State Line Steamship Co.* is not in point, for the exception here is much wider, and there was no question there as to a limit of liability, which involves different considerations. The bill of lading is evidence of the contract rather than the contract itself; it is not signed until after shipment of the goods, the contract being, in fact, made long before. There is, therefore, no reason why the bill of lading should be treated as necessarily relating solely to the carriage of the goods and matters subsequent to the shipment. *The Warkworth*, 9 P. D. 20; 53 L. J. P. D. & A. 4.

Petheram, Q. C., was not called on to reply.

Day, J. I take it to have been clearly established, if not previously, at any rate since the case of *Steel* v. *State Line Steamship Co.*, that where there is a contract to carry goods in a ship there is, in the absence of any stipulation to the contrary, an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purposes of such carriage. In this case it is clear that the ship was not reasonably fit for the carriage of these cattle. There is, therefore, a breach of their implied engagement by the defendants, and the plaintiff having sustained damage in consequence must be entitled to recover the amount of such damage, unless the defendants are protected by any express stipulation. It is argued that the plaintiff cannot recover this damage, at any rate to a greater amount than £5 in respect of each of the animals, by reason of the stipulations in the bill of lading. We have then to consider whether there are any, and if so, what stipulations in the bill of lading restricting or qualifying the liability of the defendants by reason of their not having pro-
[* 301] vided a reasonably fit vessel for the * purposes of the reception and carriage of these animals. I have considered the terms of the bill of lading, and, as I construe it, its stipulations which have been relied upon all relate to the carriage of the goods on the voyage, and do not in any way affect the liability for not providing a ship fit for their reception. If the goods had been damaged by any peril in the course of the voyage, which might be incurred in a ship originally fit for the purpose of the carriage of the goods, the case would have been wholly different, but here the goods were not damaged by any such peril, or by any peril which, in my opinion, was contemplated by the parties in framing the bill of lading. They were damaged simply because

the defendants' servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them. There is nothing in the bill of lading that I can see to restrict or qualify the liability of the defendants in respect of the breach of this obligation, and therefore I think our judgment upon the question submitted to us must be for the plaintiff.

A. L. SMITH, J. I am of the same opinion. The real question is, what is the true meaning of a very special bill of lading relating to the carriage of certain cattle and other animals; and whether under that bill of lading the plaintiff can recover more than £5 damages in respect of each animal. It is admitted that the damage was occasioned by the negligence of the shipowner's servants before the voyage commenced in not properly cleansing and disinfecting the ship. There is unquestionably a duty on the part of the shipowner to have the ship reasonably fit for the carriage of the goods. The case of *Steel* v. *State Line Steamship Co.* conclusively so decides. Is there then anything in this bill of lading to exempt the defendants from what would *primâ facie* be their liability in respect of the breach of this duty? I do not think there is. The terms of the bill of lading which have been alluded to appear to me to deal with the contract so far as it relates to the carriage of the goods upon the voyage; they do not, in my opinion, relate to anything before the commencement * of the voyage. It [*302] was urged by the counsel for the defendants that the mention of "stevedores" in the bill of lading showed that the acts of servants of the defendants previous to the voyage were contemplated by the bill of lading. Now, the stevedore no doubt is a landsman, but the reason why he is mentioned in this bill of lading obviously is because the mode of stowage of the cargo may very often be the cause of the damage which subsequently arises from sea perils during the voyage. I do not think that the mention of "stevedores" as persons for whose negligence the defendants are not to be liable in any way advances the contention for the defendants. It seems to me that the true construction of the bill of lading is this: as the animals are going to be in the charge of the shipper's servants during the voyage it is agreed that the shipowners shall not be responsible for accidents, disease, or mortality; but it is not denied that this must mean, except accidents, disease, or mortality occasioned by the negligence of the defendants'

servants. Then it is further stipulated on behalf of the shipowners that "under no circumstances" shall they be liable to a greater extent than £5 for each of the animals. I take the meaning of the whole to be that they are not to be liable for accidents, disease, or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease, or mortality so occasioned, they shall only be liable to the amount of £5. So construed the stipulation in no way restricts or affects the primary obligation of the shipowner to have the ship reasonably fit to receive the goods. On these grounds I agree that the judgment should be for the plaintiff.

Judgment for the plaintiff.

ENGLISH NOTES.

A crucial example showing the nature of the implied warranty is supplied by the case of *The Glenfruin* (1885), 10 P. D. 103, 54 L. J. P. D. & A. 49, 52 L. T. 769, where in an action for salvage by the owners, master, and crew of the *S. S. Glenaron*, against the owners of cargo carried by the *S. S. Glenfruin*, there was a defence and counterclaim as against the shipowners, who owned both vessels, that the *S. S. Glenfruin* was not seaworthy for the voyage at its commencement. The facts were that the main shaft of the screw propeller of the *Glenfruin* had broken in mid-ocean through a latent defect, — a serious flaw in the welding, — which could not, until the actual breaking, be discovered by the manufacturers or owners. The engine had been turned out by one of the best firms: and there was evidence that such flaws could not always be prevented by the most skilled makers. The bills of lading of the cargo of the *Glenfruin* excepted (*inter alia*) "loss or damage from machinery, . . . and all . . . accidents . . . of navigation." It was held by Butt, J., that the warranty was absolute; and was neither affected by the circumstance that the defect could not have been prevented by care and skill, nor avoided by the exception "accidents of navigation" in the bill of lading.

The result of this last decision was, as usual, to suggest to shipowners the expediency of a new express exception: and in a very similar case (in 1887), where the bill of lading contained the clause, "Warranted seaworthy only so far as ordinary care can provide. . . . Owners not to be liable for loss, detention, or damage, if arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at the time of shipment, provided all reasonable means have been taken to secure efficiency," and where it was proved that the cause of the accident was a latent defect

in the welding of the fly-wheel, shaft, and that all reasonable means had been taken to secure efficiency, Mr. Justice Butt held that the implied warranty was modified by the express clause, and that the shipowners were not liable. *Cargo ex Laertes* (1887), 12 P. D. 187, 56 L. J. P. D. & A. 108, 57 L. T. 502.

In *Gilroy* v. *Price* (H. L. 1892) 1893, A. C. 56, a cargo of jute had been shipped under a bill of lading "excepting . . . any act, neglect, or default whatsoever of the master and crew in the navigation of the ship in the ordinary course of the voyage." The ship encountering stormy weather, water got to the cargo through the breakage of a pipe by the pressure of the cargo. It was found (*inter alia*), 1st, that the pipe was not cased as it should have been; 2ndly, that the failure to case the pipe was a default or neglect on the part of the master or crew in the navigation of the ship; and (after a remit), 3rdly, that in vessels carrying jute it is usual for such a pipe to be cased before the cargo is loaded. The House held that these findings amounted to a verdict that the ship was not seaworthy on sailing, and that the defendants were liable. The 2nd finding was either immaterial, or a statement founded on an erroneous statement of law contrary to the principal case No. 4.

AMERICAN NOTES.

"This duty is obviously one which must belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it." *The Northern Belle*, 9 Wallace (United States Sup. Ct.), 529.

"A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and stanch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage." *Propeller Niagara* v. *Cordes*, 21 Howard (United States Sup. Ct.), 23. See *Work* v. *Leathers*, 97 United States, 379.

There is an implied warranty in a contract for affreightment that the ship is sufficient for the voyage, and the owner, like a common carrier, is an insurer against everything but excepted perils. *The Lillie Hamilton*, 18 Federal Reporter, 327. To the same effect, *Putnam* v. *Wood*, 3 Massachusetts, 481; 3 Am. Dec. 179; *Bell* v. *Reed*, 4 Binney (Pennsylvania), 127; 5 Am. Dec. 398, observing: "The man who undertakes to transport goods by water for hire is bound to provide a vessel in all respects sufficient for the voyage, well manned, and furnished with sails, anchors, and all necessary furniture. If a loss happens through defect in any of these respects, the carrier must make it good;" but it is incumbent on the plaintiff to show that the unseaworthiness was the cause of the injury, — "it is the consequences of negligence, not the abstract existence of it, for which a carrier is answerable" (*Hart* v. *Allen*, 2 Watts [Pennsylvania], 118).

Parsons says (1 Shipping, p. 285): "The liability of the shipowner, so far at least as it refers to the commencement of the voyage, bears a considerable resemblance to the implied warranty of seaworthiness in a policy of insurance, to which indeed it appears to be entirely assimilated in some cases by the courts. See *Putnam* v. *Wood*, 3 Mass. 481, 485, per PARKER, J. . . . But this could not be set up by a charterer whose goods were not damaged in any way by such unseaworthiness. In other words, seaworthiness is not a condition precedent."

In *Buckhouse* v. *Sneed*, 1 Murphey (North Carolina), 173, the shipowner was held liable for a cargo lost by reason of the breaking of the rudder, internally defective, although outwardly sound.

In *Forbes* v. *Rice*, 2 Brevard (South Carolina), 363; 1 Am. Dec. 589, it was held that in the contract of affreightment it is not a tacit or implied condition that the ship is seaworthy, as it is in insurance. The Court said: "In the case of a charter-party, where the freight does not depend on the same circumstances which will entitle the insurer to the premiums, and where he will be liable for the sum underwritten upon the happening of any of the perils insured against, the contract does not seem to be founded upon the presumption of the general sufficiency of the ship to perform the voyage, although undoubtedly it is the duty of the master to provide such a ship: . . . it is not a condition of the contract, as in the case of a contract of indemnity. The freight is agreed on for the hire of the ship, on the carriage of the goods to the place of delivery. The goods are obliged to the ship for her hire. So is the ship to the owner of the goods, in case of damage or loss through any defect of the vessel or sailors. Each party has a remedy on the charter-party. The contract is not vacated by reason of the general insufficiency of the ship, but stands in force, and the remedy of the freighter is upon it. . . . It seems clear, from all that can be collected from the works of the writers, and from the cases cited by counsel in arguing this case, that the owner of the goods cannot be entitled to vacate the charter-party, or contract of affreightment, on the ground of the unseaworthiness of the vessel; but that his claim for compensation or damages in case of loss, waste, or damage to the goods, or for want of punctuality, care, or despatch in the execution of the contract on the part of the owner or master of the ship, must be founded on the contract, or on an implied contract in law, to compensate for the service performed. There is no authority to support the position that the master shall not earn his freight, although he carries the goods safely and delivers them safely at the port of delivery, if the vessel be unworthy of sea in which he performs his contract. . . . In the present case, however, the ship did not perform the voyage. The putting into Charleston and detention there . . . happened from his (the owner's) fault, — from a breach of duty on his part in not providing a vessel worthy of sea." And it was held that there should be a recovery of the freight, unless the jury should believe that "the defendant was not benefited by the carriage of the goods to Charleston," Boston being the destination.

SECTION II. — *Bill of Lading as an Instrument of Property*

No. 6. — TURNER *v.* THE TRUSTEES OF THE LIVERPOOL DOCKS.

(EX. CH. 1851.)

No. 7. — OGG *v.* SHUTER.

(C. A. 1875.)

RULE.

WHERE an unpaid vendor shipping goods (even on board his own ship) under a contract of sale takes the bill of lading making the goods deliverable to own order, and retains such bill of lading in his own or his agent's hands for his own protection; he reserves not merely his rights (of lien or stoppage *in transitu*) as vendor, but his entire right to dispose of the goods, so long at least as the purchaser continues in default.

Turner v. The Trustees of the Liverpool Docks.

6 Exch. 543–570 (s. c. 20 L. J. Ex. 393–400).

Sale of goods. — Ship. — Bill of Lading. — Reservation of jus disponendi.

Action for detinue of cotton.

The plaintiffs claimed in the right of purchasers under a contract for cotton to be shipped on board purchasers' own ship.

The defendants who defended on the title of the shippers pleaded a traverse of the property in the plaintiffs.

The cotton had been shipped on board the plaintiffs' ship under bills of lading making the same deliverable to order of shippers or assigns, they paying "nothing, being owner's property."

Held that the property and possession of the cotton was not vested by the shipment in the purchasers absolutely, but remained subject to a power of disposal reserved by the shippers under the bill of lading for their own protection and security, according to the intention of the transaction.

Error on a bill of exceptions. — The action was in de- [543] tinue by the plaintiffs, as assignees of Higginson and Dean, bankrupts, to recover certain bales of cotton and a quantity of

plank. The first count of the declaration laid the property in the bankrupts before their bankruptcy; the second count laid the property in the plaintiffs as assignees. The two first pleas, which were respectively pleaded to the first and second counts, traversed the property in the goods as alleged in those counts. — [* 544] Third plea to the whole * declaration: that the goods and chattels were the goods and chattels of certain persons united in copartnership for the purpose of carrying on the trade of bankers, according to the statute in that behalf made, &c., and called "The Bank of Liverpool," as against the plaintiffs as assignees as aforesaid; wherefore the defendants, at the commencement of the suit, detained, and still do detain the said goods; *quæ est eadem*, &c. — Verification. The plaintiffs joined issue upon the two first pleas, and replied to the third by traversing the property in the goods as alleged in the plea.

The cause was tried before Wightman, J., at the Liverpool Summer Assizes, 1849; and the facts stated in the bill of exceptions (so far as material) are as follows: —

On the 13th of November, 1847, a fiat in bankruptcy issued against Jonathan Higginson and Richard Deane, of Liverpool, merchants, who carried on business under the firm of Barton, Irlam, and Higginson, under which they were adjudged bankrupt on an act of bankruptcy committed by them on the 11th of November, 1847. Higginson and Deane were, up to and at the time of their bankruptcy, owners of the ship *Charlotte*, Carter master, and also of the ship *Higginson*.[1]

On the 10th of August, 1847, the *Charlotte* sailed from Liverpool for Charleston, consigned to Menlove & Co., with a cargo of salt and coal, and some goods on freight.

On the 18th of August, 1847, Barton, Irlam, and Higginson wrote to Menlove & Co. as follows: —

"Dear Sirs,— Enclosed we beg to hand you copy of what we wrote you per *Charlotte*, which vessel got well away on the 11th [* 545] inst., and we hope may have a good run out * to your port. We enclose you duplicate bill of lading for 407 tons salt, and 50 tons coals; regarding the disposal of which your Mr. Menlove

[1] The circumstances relating to each vessel being similar, and the same question arising as to each, the argument was, by consent of both parties, confined to the *Charlotte*; and therefore the facts as to the *Higginson* are omitted.

No. 6. — Turner v. The Trustees of the Liverpool Docks, 6 Ex. 545, 546.

will address you per this mail, and you will please give your best attention to the same. He has also written you regarding the plank.

"As regards the homeward voyage, we would wish you to ship on our account about 1000 bales cotton, keeping to that quality which may be relatively the cheapest in your market; and you may be picking up the same in small quantities, if you consider it to our interest, so as not to detain the vessel on your side. The remainder she can take on freight; but if you find any difficulty, or any detention is likely to take place in obtaining freight, we do not mind taking the whole on our own account; and we leave you to carry out the operation for us, feeling sure you will in all respects keep our interests in view. We want the *Charlotte* back as soon as ever you can send her to us.

"We hope to obtain the very best rate for what exchange you have to pass upon us. We remain, &c.

"Per Pro. Barton, Irlam, & Higginson,
"H. Parsons."

"Should freights be under ½ per lb., ship the whole cargo on our account."

To the above letter Menlove & Co. sent the following answer: —

"Charleston, So. Ca., 10th Sept. 1847. Per Boston Steamer of 16th inst. Dup. New York pkt. of 16th inst.

"Dear Sirs, — Your esteemed favour of the 18th ultimo has been received, to which we have given our careful attention, and shall consult your interest in all operations for your account. We have picked up about 260 bales upland cotton for the *Charlotte*, @ 11¼ and 11⅝ per lb.* middling and middling [*546] fair qualities; but our factors do not appear anxious to sell. We, however, keep our eye on the market, and buy when we find a good opportunity.

"The market is quite stiff to-day, owing to the bettered state of the New York market.

"Yours most truly,
"Edward Menlove & Co."

"Sept. 11.

"P. S. We addressed you yesterday per this conveyance; to-day we have purchased 92 bales cotton for your account, in small

parcels, at 11 and 12¼ per lb. middling to fully fair qualities. The market is stiffening, and the weather continues very bad.

"E. M. & Co."

"Sept. 11, P. N. Y. Pkt. 16th inst."

"After the above was mailed to-day, we purchased forty-nine bales upland cotton for your account, @ 11½ per lb."

A letter, dated the 17th of September, advised a further purchase of 150 bales of cotton; and by a letter of the 21st of September, Menlove & Co. announced the arrival of the *Charlotte* on the 19th instant.

On the 23rd of September, Menlove & Co. wrote as follows: —

"Dear Sirs, — We had the pleasure, on the 21st instant of advising the safe arrival of the *Charlotte*, and the sale of her inward cargo, which has been discharging with all possible despatch until to-day, when the rain has somewhat impeded our progress. We hope it will not be of long duration, but at this season the weather is always very unsettled. To-day we valued on your goodselves @ sixty days, favour of A. G. Rose, Esq., cashier, for £4000 sterling, at 7½ % premium of exchange, which please honour, [*547] being on account of purchases of cotton per *Charlotte*. * We have not had a single inquiry for freight, and other vessels partly loaded are brought to a stand.

"Yours truly.

"Edward Menlove & Co."

On the 25th of September, Menlove & Co. wrote as follows: —

"Dear Sirs, — We have just time, by this day's mail, to own receipt of your valued favour of 3d instant, which has had our attention. To-day we have drawn on you @ sixty days for £1000 sterling, @ 8 % exchange, favour Jos. Lawton & Co., and a small draft at sight for £15, @ 9 %, favour Mr. Richard Green, which we sold to Captain Carter, otherwise would not have drawn one so small. Please, honour them. Cotton Market dull. Shall write you fully by to-morrow's mail. Truly, Edward Menlove & Co.

"P. S. — We think the cargo of the *Charlotte* will be entirely discharged by Monday or Tuesday next. E. M. & Co."

On the 9th of October Menlove & Co. wrote a letter containing the following passages: "We hope, although over 1000 bales of the *Charlotte's* cargo was bought before the recent unfavourable advices, that the Liverpool market will have revived before her arrival with you, which we hope will be about the 1st or 5th of November. To-day we bought for the *Charlotte* 141 bales of cotton, @ 10¼, 10¾ per bale, good middling, middling fair, and fair qualities, which please note for insurance; and also about 75 feet planks," &c.

"P. S. — We have engaged a draft on you for about 750 sterling, @ 60 d/s @ 7½ % premium, to be delivered in a few days."

* On the 11th of October Menlove & Co. advised a further [* 548] purchase of 59 bales of cotton; and on the next day they wrote as follows: —

"Charleston, So. Ca., 12th Oct. 1847.

"Dear Sirs. — Referring to our several respects, we have the pleasure of informing you that the *Charlotte* finished her loading to-day, and we have engaged a steamer to tow her to sea at daylight to-morrow. We are unable to forward the invoice of her cotton, as much difficulty has been met with in getting the bills, one of which is still wanting; but you shall have it per next steamer, which may be in time for you.

"Annexed is invoice of 74,871 feet pitch pine plank, amounting to $1201.50, which we hope will be satisfactory, and would remark that several of the two-inch plank were cut on board to make stowage. You have also freight list inwards, amounting to $94.87 to your credit, and account sales of salt and coal $4559.69 in cash 11th November next, and we credit your account in conformity, feeling much pleasure that the shipment has resulted so favourably. We hope that this cargo will arrive to a good market, as we have exercised every precaution and attention in buying, which (for over 1000 bales) was purchased before the recent unfavourable advices from your side, which came to hand a few days ago.

"We shall use our best exertions for the *Higginson* which has not yet arrived; and as the cotton market is inclining a little downwards, we intend waiting a few days before buying for you," &c.

The invoice was as follows: —

"Invoice lumber shipped by E. Menlove & Co. on board the Br. ship *Charlotte*, Carter master, for Liverpool, by
[* 549] * order and for account and risk of Messrs. Barton, Irlam, & Higginson there, and addressed to order.

"Purchased 30th September, 1847: —

44,860 feet 4-inch pitch pine plank	
30,011 feet 2-inch ditto ditto	
74,871 feet, @ $15 p. m.	$1123.06
"Charges: —	
To wharfage and proportion of B. Lading .	37.81
	1160.87
To commission, at 3½ %	40.63
	$1201.50

"Edward Menlove & Co.

"Charleston, So. Ca., 11th Oct. 1847."

On the 16th of October, 1847, Menlove & Co. wrote as follows: —

"Dear Sirs, — The *Charlotte* got safely to sea on the 13th inst., and we hope has had a good run out. Our cotton market is very quiet, and we are looking out for some purchases on your account for the *Higginson* who has not yet made her appearance; but we shall look for her daily, and think her salt will meet a good market.

"Fair cotton is worth 10½*d.* or 10¾*d.* per pound; but if the next advices from you are better, an advance will at once take place here; so we intend buying before the accounts are received, though it is impossible to see what course prices will take.

"We have drawn on you for £4000 @ 7½ %, 23 Sept.; £15 @ 9 %, 25 Sept.; and £1000 at 8 %. £2000 @ 8 %, 13 Oct.; and to-day £3312 11*s.* @ 8 %; all of which please honour, being for the cargo on your account per *Charlotte*. We deferred drawing as long as possible for the early purchases, to give the ship time to be with you before the drafts; and as the money market was so stringent we thought a little time would be acceptable to you.

[* 550] * "Please insure per *Charlotte* $54,832.44 on cotton, and $1201.5 on plank.

"Yours truly, Edward Menlove & Co."

No. 6. — Turner v. The Trustees of the Liverpool Docks, 6 Ex. 550, 551.

On the 19th of October Menlove & Co. wrote to Barton & Co., inclosing the following: —

"Abstract invoice of 1263 bales upland cotton shipped by Edward Menlove & Co. on board the Br. ship *Charlotte*, Carter master, for Liverpool, by order and for account and risk of Messrs. Barton, Irlam, & Higginson there, and addressed to order: —

"A1. 207. 1263 bales upland cotton, amounting, per invoice, to	$52,347.49
"Charges: —	
To shipping expenses	630.71
	52,978.20
To commission	1,854.24
	$54,832.44

"Edward Menlove & Co.

"Charleston, So. Ca., Oct. 13th, 1847."

On the 23d of October, 1847, Menlove & Co. wrote, inclosing the invoice of the cotton, and also duplicate invoice of lumber, and the account current. This letter contained the following passage: —

"The bank, to whom our drafts on you were sold, required the delivery of B. L. which we thought best to comply with, and thereby obtained the very highest rate of exchange that in consequence of the uneasiness felt by purchasers of drafts on England caused by the monetary embarrassments there."

The invoice commenced thus: "Invoice of 1263 bales upland cotton, shipped by Edward Menlove & Company, on board the British ship *Charlotte*, Carter master, for Liverpool, by order, and for a/c of Messrs. Barton, Irlam, & Higginson there, and to them consigned." It then specified the days on and prices [*551] at which the different lots of cotton were purchased, and contained a charge for commission.

On the 12th of October, 1847, the master of the *Charlotte* signed and delivered to Menlove & Co. the following bill of lading: —

"Shipped in good order and condition by Edward Menlove & Company, of Charleston, upon the good ship or vessel called the Br. ship *Charlotte*, whereof Carter is master for this present voyage, and now lying in the port of Charleston, and bound for Liverpool, 1263 bales upland cotton, 74,871 feet plank, under deck, being marked and numbered as per margin, and to be delivered in the

No. 6. — Turner v. The Trustees of the Liverpool Docks, 6 Ex. 551, 552.

like good order and condition at the aforesaid port of Liverpool, all and every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted, unto order, or to our assigns, he or they paying freight for the said goods, viz., for cotton in round bales, cotton in square bales, nothing, being owners' property, without per cent., primage, and average accustomed. In witness, &c. Dated in Charleston, this 12th day of October, 1847.

"W. R. Carter."

The bill of lading was indorsed thus: —

"Deliver the within to the Bank of Liverpool, or order.

"Edward Menlove & Co."

The bill for £15 was paid by Messrs. Barton, Irlam, & Higginson, on the 19th of October, 1847. The bills for £1000 and £4000 were accepted by them on the presentment thereof, but were refused payment. The other bills were, on presentment, refused acceptance.

The *Charlotte* arrived at Liverpool on the 26th of November, 1847, and, on the following day, notice was given to the master that Menlove & Co. claimed to stop the cargo *in transitu*, and required him to deliver it to the Bank of Liverpool on their [*552] account. On the 11th of *February, 1848, the cargo was, by consent, stowed in the warehouse of the defendants.

It was proved that the bills of lading were in the form usual in the American trade; and that when bills of lading are transferred, it is not the practice of merchants to inquire for the invoice or correspondence, or anything but the bill of lading. It also appeared, from the depositions of merchants of experience at Charleston, that when a merchant at that port is placed in possession of an order for the purchase of produce from an English correspondent, the invariable usage is to reimburse, unless otherwise placed in funds, by drawing bills of exchange on the European house. The usual course of business is, for the merchant who executes an order embracing the purchase of produce for a merchant in England, to draw bills on the latter, and to raise the money by negotiating the bills. This negotiation generally takes place with a bank, but sometimes with other dealers in bills; when the bill is taken by a bank, it is always drawn payable to the cashier; when negotiated to a private dealer, it is drawn as he may direct. In such negotiation the bill is not said to be discounted, as it is almost always sold

at an amount exceeding the nominal value. Dealers in exchange, whether banks or individuals, when they have not full confidence in the strength of the bills at both ends, generally require the bill of lading transferred as additional security. The highest exchange, however, is obtained for bills bought without such security, as they are bills drawn on parties whose characters stand high.

The plaintiffs' counsel objected to the reception of certain portions of the evidence offered on behalf of the defendants; but the evidence was admitted by the learned Judge, who expressed an opinion that the evidence objected to did not carry the case further in favour of the defendants. The plaintiffs' counsel also contended, that, under the above circumstances, the property and possession of the goods in question vested absolutely in Barton, Irlam, & Higginson, on the delivery on board their ship, [*553] so that all rights of lien and stoppage *in transitu* of Menlove & Co. were then at an end; and that such rights were not revested by Menlove & Co. taking the bills of lading to their own order, contrary to their contract; that the master had no authority to sign such bills of lading; and even if Menlove & Co. had such rights of lien and stoppage *in transitu*, they could not transfer them. Also, that any defence of lien or stoppage *in transitu* should have been specially pleaded.

It was agreed on both sides that there was no question of fact for the jury, and that the learned Judge should direct them how they should find their verdict; and being of opinion, upon all the facts of the case, that Menlove & Co. had not delivered the cotton on board the ship to be carried for and on account and at the risk of the vendees, but that they intended to preserve their rights as unpaid vendors, he directed a verdict for the defendants.

A bill of exceptions having been tendered to this ruling of the learned Judge, the case was argued, in last Michaelmas Vacation (Nov. 30 and Dec. 2),[1] by

Crompton (Blackburn with him), for the plaintiffs. The principal question is, whether, upon the above documents and evidence, the learned Judge was correct in directing a verdict for the defendants. It is submitted that the property and right of possession of the goods in question vested in Barton & Co. by the delivery on board their vessel. Any right of lien or stoppage *in transitu* was

[1] Before Pattesson, J., Coltman, J., Wightman, J., Erle, J., Williams, J., Talfourd, J

gone when the goods were put on board the vendees' ship, to be carried for them and on their account and risk. *Van Casteel* v. *Booker*, 2 Ex. 691; 18 L. J. Ex. 9; *In re Humberston*, 1 De Gex, Bank. Cas. 262; *Coxe* v. *Harden*, 4 East, 211; 7 R. R. 570. The distinction is well established, that where goods are shipped on board a chartered vessel, the right of stoppage *in transitu*

[* 554] * remains, because the master is the agent of the shipper, and in the situation of a bailee or carrier; but if the contract is to deliver on board the purchaser's own ship, the *transitus* is determined by the delivery. In Abbott on Shipping, part 4, ch. ii, p. 289, 8th ed., it is said: "The doctrine in *Valleja* v. *Wheeler*, Cowp. 143, and *Mackenzie* v. *Rose*, 2 Camp. 482, continued unimpeached; and although it had been determined in the case of *Bohtlingk* v. *Inglis*, 3 East, 381; 7 R. R. 490, that the delivery of goods on board a ship, of which the vendee was the charterer, was not such a delivery to him as would preclude the right of the vendor to stop them *in transitu* in case of the vendee's insolvency; it was held, in a case in which a vessel had been chartered for a term of years, during which period the charterer was to have the entire disposition and control of her, that the vessel was the charterer's own, and that the delivery of goods to his order on board was the same thing as delivery into his warehouse." *Fowler* v. *Kymer*, or *M'Taggart*, cited in *Inglis* v. *Usherwood*, 1 East, 515, and 3 East, 396. The law is stated in similar terms in the same work (pt. 4, ch. xi. p. 522, 8th ed.). The property in these goods having vested absolutely in Barton & Co., the indorsement by the master of the bill of lading, making the goods deliverable to other persons, can be of no avail. In *Ogle* v. *Atkinson*, 5 Taunt. 759; 15 R. R. 647, it was held, that a delivery of goods to the plaintiff's order on board his ship vested the property in him, notwithstanding the master, through a misrepresentation by the agent, signed a bill of lading in blank, which the agent indorsed to another party. Sir W. Scott, in delivering judgment in *The Constantia*, 6 Rob. Adm. Rep. 327, says: "The mercantile law I take to be clear and distinct, that the seller has not a right to vary the consignment, except in the case above stated," that is, where the goods are shipped without orders. "The mischief and inconvenience that

[* 555] would ensue on a contrary * supposition are extreme. The goods might be put on board, and might lie at the risk of the consignee for two or three months; and if the consignor could

come and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object which might be eventually defeated at any moment, by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignor altogether to the mercy of the seller." Here the contract was distinct, that the goods should be delivered to Barton & Co. on board their ship, which was sent to receive them. It is true, the foreign merchant is under no obligation to comply with the order sent, but may ship the goods to his own order, deliverable upon payment of freight; but in that case the consignee may refuse to accept the goods. Here, however, it is clear that Menlove & Co. intended the property to pass to Barton & Co. on delivery; for by the letter of the 16th of October they say, that they have drawn the bills of exchange at a long date, in order to give Barton & Co. time to realise money by the sale of the goods. The fact that the goods are stated in the bill of lading to be the owner's property and freight free, shows that the contract was one of absolute sale, to be executed by delivery on board their vessel. Menlove & Co. could have no right to use the vessel of Barton & Co. for the purpose of carrying their own goods "freight free," neither could they have any right to pledge the goods increased in value by the amount of the freight. The fact that the goods were shipped at the risk of Barton & Co. also shows that the contract was for the delivery of the goods to them on board their ship in America, and not at Liverpool. The master had no authority to sign a bill of lading contrary to his express instructions. Menlove & Co. might have sued Barton & Co. for goods sold and delivered the moment they were put on board their vessel. Suppose the goods had perished at sea before the 23rd of [*556] October, could Barton & Co. on that account have refused to accept the drafts, or could their underwriters have successfully traversed their interest? Again, suppose that by the wrongful act of the mariners the goods had been damaged, could Menlove & Co. have maintained an action on the bill of lading against Barton & Co.? Clearly not, for it was a contract by the master to carry the owner's property for nothing. *Mitchel* v. *Ede*, 11 A. & E. 888, is distinguishable, since in that case it was not contrary to the master's duty to bring home the goods on freight. The Court there considered that the bill of lading was not conclusive as to the vest-

ing of the property, because it was explained by other circumstances. In *Wait* v. *Baker*, 2 Ex. 1; 17 L. J. Ex. 307, the ship was chartered by the vendor for the use of the vendee, and the master was in the situation of agent for both parties. *Van Casteel* v. *Booker* is an authority in the plaintiffs' favour. There the bill of lading was, "he or they paying freight free;" in this case, it is, "nothing, being owners' property, without per cent., primage and average accustomed." That case shows that all the circumstances must be looked at, in order to see whether or not it was the intention of the parties that the property should pass. In *Ellershaw* v. *Magniac*, 6 Ex. 570 n., which is cited in *Van Casteel* v. *Booker*, it was held that the vendor had a right to vary the consignment. In *Jenkyns* v. *Brown*, 14 Q. B. 496; 19 L. J. Q. B. 288, the cargo was, at the time of the shipment, the property of the plaintiff's agent, and there was no evidence of an intention to pass it. A bill of lading in the ordinary form is a mere contract for carriage, and where a person carries his goods in his own ship no bill of lading is necessary. Here the bill of lading, coupled with the other circumstances, shows that the property vested in the consignees, and that the shippers were merely their agents. Where there is a delivery of goods, with an intention to pass the [*557] property, the vendor cannot subject *them to any right of lien or control. *Hawes* v. *Ball*, 7 B. & C. 481. The owners themselves having made a special contract for the employment of their ship, it was not competent for the master to annul such contract, and substitute another for it with the other contracting party. Abbott on Shipping, p. 130, 8th ed.; *Burgon* v. *Sharpe*, 2 Camp. 529; 11 R. R. 788; *Duvall* v. *Moxon*, 1 Taunt. 391. There is a class of cases which show that a bill of lading will not control the rights which a shipowner has reserved to himself by the charter-party. *Small* v. *Moates*, 9 Bing. 574; *Saville* v. *Campion*, 2 B. & Ald. 503. The indorsement of a bill of lading does not of itself operate as a transfer of the property, but is only evidence of it. *Newsom* v. *Thornton*, 6 East, 17; 8 R. R. 378; *Haille* v. *Smith*, 1 Bos. & P. 563. Secondly, even if a right of lien did exist, it could not be transferred. A lien is a personal right, and continues only so long as the possessor holds the goods. *M'Combie* v. *Davies*, 7 East, 5; 8 R. R. 534; *Daubigny* v. *Duval*, 5 T. R. 604; *Legg* v. *Evans*, 6 M. & W. 36. Thirdly, the lien, if any, should have been specially pleaded. As Menlove & Co. had in their hands

No. 6. — Turner v. The Trustees of the Liverpool Docks, 6 Ex. 557, 558.

some funds of Barton & Co., they were not in the situation of unpaid vendors. *Mason* v. *Farnell*, 12 M. & W. 674; 13 L. J. Ex. 142, decided, that in detinue the defendant cannot, under the pleas of *non detinet* and not possessed, show that he had a common interest with the plaintiff in the property sought to be recovered. That decision, however, is at variance with *Lane* v. *Tewson*, 12 A. & E. 116 n., in which the Court of Queen's Bench held, that in detinue a lien might be set up under a plea that the goods were not the goods of the plaintiff. Fourthly, the evidence objected to was improperly received. That would entitle the plaintiff to a *venire de novo*. [WIGHTMAN, J. Nothing was left to the jury, therefore they could not have been influenced by that evidence.]

[*558] Cowling (Knowles and Watson with him), for the defendants. The learned Judge was correct in directing a verdict for the defendants. It is material, in the first place, to advert to the relative position of the parties. At the time the order was sent to Menlove & Company, they were unprovided with funds to make the purchases, with a trifling exception. Then, what is the usage of trade? The course of dealing at Charleston is to purchase produce for cash; and that is obtained by the merchant at Charleston drawing bills on the merchant in England, and when those bills cannot be sold without additional security, the bill of lading is assigned for that purpose. Menlove & Co. were unable to raise money without pledging the bill of lading; and consequently they agreed to indorse it to the bank of Charleston. This negotiation took place before the bills of exchange were drawn, and also prior to any shipment; for the letter of the 25th of September shows, that the outward cargo of the *Charlotte* was not then discharged. Bills were accordingly drawn, by means of which Menlove & Co. were enabled to purchase the great bulk of the cargo; and it is not disputed that the highest rate of exchange was obtained. On the 23d of October, the day before the *Charlotte* sailed, the bill of lading was drawn "to order of Menlove & Co.," and forwarded to the Bank of Liverpool, who are identified with the Charleston Bank. On the same day an invoice of timber was sent, consigned "to order." On the 19th of October, an abstract invoice of cotton was sent in a similar form; and on the 23rd an invoice was sent, dated the 13th. Under these circumstances, the goods when purchased became the property of Menlove & Co.; for they purchased in their own name, and the credit was given to them exclusively, they

having to pay cash. Abbott on Shipping, p. 516, 8th ed.: *Fiese* v. *Wray*, 3 East, 93; 6 R. R. 551. Then, when did the goods
[* 559] cease to be the property of Menlove & * Co.? No doubt they wrote that they had made purchases for Barton & Co.; but those letters only show an intention to purchase goods for the latter, not an irrevocable appropriation of them. The property remained in Menlove & Co., at least until the goods were shipped. *Atkinson* v. *Bell*, 8 B. & C. 277. It is said that Menlove & Co., by acceding to the order of Barton & Co., undertook to ship the goods as their property; but no such consequence follows. If, indeed, Menlove & Co. had undertaken to ship the goods as the unqualified and absolute property of Barton & Co., they would have been bound by such an agreement; but the letter of the 18th of August contains nothing specific as to the mode of payment. It must therefore be read with reference to the usage of trade, and in the sense in which a merchant in the situation of Menlove & Co. would understand it; that is, that they were to raise funds by drawing bills of exchange, and pledging the bills of lading if necessary. That Barton & Co. contemplated the drawing of bills, is clear from the letter itself, and also from the letter to them of the 23rd of September, in which Menlove & Co. inform them that they have drawn the bills. The contract was not to ship the goods absolutely and without reservation, but subject to the special property in respect of the pledge of the bills of lading. Menlove & Co. were therefore justified in shipping the goods in their own name, so as to reserve to themselves the legal property, for the purpose of securing payment of the funds raised. But, whether justified or not, the mere duty to ship the goods in the name of Barton & Co. would not vest the property in them, though the breach of that duty might render Menlove & Co. liable to an action. The words "owners' property" in the bill of lading, mean beneficially so, and were only inserted for the purpose of exculpating the captain for carrying "freight free." The important part of the bill of
[* 560] lading is that which states the person to whose * order it is drawn. *Van Casteel* v. *Booker*, *Jenkyns* v. *Brown*. No real prejudice could ensue from taking the bill of lading in this form, for Barton & Co. were in the situation of mortgagors, and had sufficient interest to insure. 1 Arnould on Insurance, 251; *Smith* v. *Lascelles*, 2 T. R. 187; 1 R. R. 457. A Court of equity would, as in the case of mortgagees, compel the consignors to

No. 6. — Turner v. The Trustees of the Liverpool Docks, 6 Ex. 560, 561.

refund, on sale of the goods, what they might receive beyond what was sufficient to indemnify them. The invoice, which bears date subsequent to the bill of lading, would not affect the property passed to the bank. An invoice is not, like a bill of lading, a symbol of property. The terms "addressed to order" in the invoice, refer to the bill of lading Whether or no the master acted rightly in receiving the goods as those of Menlove & Co. is immaterial, since his wrongful receipt of them would not vest the property in Barton & Co. But the master acted rightly, because he was authorised to receive the goods on the same terms as Menlove & Co. were justified in shipping them, that is, according to the course of trade, and subject to such security as was necessary for the purpose of raising funds. In *Wait* v. *Baker* the terms of the charter-party do not appear, and the vessel was treated as the purchaser's. In *Van Casteel* v. *Booker*, in which the bill of lading was like the present, the question was considered as depending on the intention of the parties at the time of the shipment. *Coxe* v. *Harden* has never been cited with approbation, and, as to one point, has been overruled by *Morison* v. *Gray*, 2 Bing. 260; and *Brandt* v. *Bowlby*, 2 B. & Ad. 932; *Ogle* v. *Atkinson* is not reconcilable with *Mitchel* v. *Ede*, or *Ellershaw* v. *Magniac*, and can only be supported on the ground of fraud. The case of *The Constantia* * has no bearing on the present case, for [* 561] here the question is not, whether if the goods had been consigned to Barton & Co., that consignment could have been altered, but whether they ever were so consigned. *Mitchel* v. *Ede* only shows, that the consignee alone has power to change the destination. Secondly, it is argued that a lien is a personal right, and cannot be transferred. No doubt that is so in the case of an ordinary lien; but it is otherwise where, as here, an unpaid vendor has a property in the goods. His interest differs from, and is greater than, that of an ordinary lien, and is not destroyed by relinquishing possession of the goods. *Hobson* v. *Mellond*, 2 Moo. & Rob. 342, shows that there are cases in which a lien is transferable. Further, it is argued that the lien ought to have been pleaded specially; but that argument altogether fails, inasmuch as this is not a mere lien. At all events, the decision of the Court of Queen's Bench, in *Lane* v. *Tewson* is to be preferred to that of *Mason* v. *Farnell*.

Crompton replied. *Cur. adv. vult.*

No. 6. — Turner v. The Trustees of the Liverpool Docks, 6 Ex. 561–563.

The judgment of the Court was now delivered by

Patteson, J. This was an action to try the right of the plaintiffs as assignees of Messrs. Higginson & Deane, who were merchants in Liverpool, trading under the name of Barton, Irlam, & Higginson, and had become bankrupts, to the possession of a quantity of cotton and timber, as against Messrs. Menlove & Co., who were merchants at Charleston, in America, and the real defendants in this suit. The property in dispute constituted the car-
[*562] goes of *two vessels, of which the bankrupts were owners, called the *Charlotte* and the *Higginson*; and as it is agreed that the same questions arise with respect to both, and that the circumstances are similar, it will be only necessary to advert to the leading facts relating to one of them, the *Charlotte*.

It appears, that in August, 1847, the bankrupts sent orders to Menlove & Co., at Charleston, to ship, on their (the bankrupts') account, a quantity of cotton for the homeward cargo of the *Charlotte*, a ship belonging to the bankrupts, which had been sent to America with a cargo of coals and salt, and which arrived at Charleston on the 19th of September. In the meantime, Menlove & Co. had made considerable purchases of cotton in execution of the order, and continued to make further purchases until within a day or two of the sailing of the *Charlotte* on her homeward voyage with the cotton on board, on the 13th of October. On the 12th of October, the master of the *Charlotte* signed a bill of lading of the cotton, "to be delivered at Liverpool unto order or to our assigns, paying freight for cotton nothing, being owners' property;" and Menlove & Co. indorsed the bill of lading in these terms: "Deliver the within to the Bank of Liverpool, or order. — Edward Menlove & Co."

Messrs. Menlove & Co. informed the bankrupts, from time to time, of these purchases as they were made; and on the 16th of October they informed the bankrupts of the sailing of the *Charlotte*, and that they had drawn bills upon them of several dates (the earliest being of the 23rd of September), being for the cargo "on their account," by the *Charlotte*, and desiring them to insure the cotton. On the 19th of October, Menlove & Co. sent an abstract invoice of the cotton, dated the 13th of October; in which it was stated, that the cotton was shipped by Menlove & Co. on
[*563] board the *Charlotte*, for Liverpool, "by order, and for *account and risk of Messrs. Barton, Irlam, & Co. there, and

addressed to order." And on the 23rd of October, Menlove & Co. sent to the bankrupts a full invoice of the cotton, dated the 13th of October, stating that the cotton was shipped for Liverpool by order and for account of Barton & Co. there, and to them consigned. It appeared that Menlove & Co., having no sufficient funds of the bankrupts' in their hands to pay for the cotton, sold the bills they had drawn upon them to the Bank of Charleston, and delivered to them the bill of lading, indorsed as before mentioned, as security for the due honour of the bills, which, with the exception of one very small one, were dishonoured by the bankrupts, and taken up by Menlove & Co.; and by letter of the 23rd of October, Menlove & Co. informed the bankrupts, that the bank to whom they had sold the bills required the delivery of the bill of lading to them, and that they had so delivered it. On the 13th of November, Higginson & Deane became bankrupts. The *Charlotte* arrived at Liverpool on the 26th of November; and on the 27th notice was given to the master, that Menlove & Co. claimed to stop the cargo *in transitu*, and required him to deliver it to the Bank of Liverpool on their account.

The question is, whether Menlove & Co. could, under the circumstances, insist upon the delivery of the cargo to them or their agents unless the bills were duly honoured. It was contended for the plaintiffs, the assignees, that, by delivery of the goods on board the bankrupts' own ship, specially appointed for the purpose of bringing home those goods, and such delivery being made to the master, who was the bankrupts' agent for the purpose of receiving them, the absolute property vested in them, the sale being complete by the acceptance of the order and the terms of the invoice; and that the terms of the bill of lading, by which the goods were to be delivered at Liverpool to order or to our (Menlove & Co.'s) assigns, did not * prevent such absolute [* 564] property vesting in the bankrupts, nor entitle Menlove & Co., the unpaid vendors, to any right of stoppage *in transitu*, or any other right over them whatever; and more especially as it was stated that no freight was to be paid for the cotton, being owners' property, which was inconsistent with the property remaining in Menlove & Co. It was also further contended for the plaintiffs, that the captain had no power to bind the bankrupts by the special terms of the bill of lading, and that the delivery must be taken to be absolute to the vendees: and further, that if Menlove

& Co. had any lien, the assignment of the bills of lading to the bank divested that lien, and deprived Menlove & Co. of all power over the goods.

The cases mainly relied upon by them in support of their principal point were *Ogle* v. *Atkinson*, *Coxe* v. *Harden*, the case of *The Constantia*, *Bohtlingk* v. *Inglis*, 3 East, 381; 7 R. R. 490, and the case of *Fowler* v. *Kymer* cited in it. All these cases, however, are clearly distinguishable from the present. In *Ogle* v. *Atkinson*, the general circumstances bore a close resemblance to the present. The vendor of the goods delivered them on board a ship of the vendee, which had been sent by him to receive them as the goods of the latter; but the vendor wishing to preserve a control over them, prevailed upon the captain to sign a bill of lading, in which there was a blank for the name of the consignee, assuring him that it was of no consequence, as the goods were to be delivered to his owner; and the vendor then transmitted the bill of lading to a third person, who was to stop the delivery of the goods to the vendee unless he accepted certain bills; but the Court held, that the vendee, under such circumstances, was entitled to the [* 765] goods without accepting the bills, for the blank for the name of the consignee was either immaterial, as represented to the captain, or material, as the vendor proposed to make it: and in that case a fraud was practised upon the captain, which could not avail the consignors. *Gibbs*, C. J., in his judgment, says, "It is true the goods might have been delivered on board the ship on the terms on which the defendant contends they were delivered:" and then goes on to show that they were not, by reason of the circumstances under which the captain was persuaded to sign the bill of lading with a blank for the name of the consignee. This case is therefore clearly distinguishable from the present; but it is important as showing that a delivery on board the vendee's own ship, and to his own master, is not inconsistent with the vendor's annexing terms to the delivery, which may enable him to retain a right to claim the goods, and prevent the delivery if the terms are not complied with. The case of *Coxe* v. *Harden* decides no more than this, "that where goods are shipped on account and at the risk of the vendees, the property is vested in them, subject only to the consignor's right of stoppage *in transitu*, which right is gone unless exercised before the completion of the voyage and delivery into the possession of the vendee." In the case of *The*

Constantia also, it was held, that when orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is *functus officio*, and has no right to vary the consignment except in the case of insolvency. Neither this case nor that of *Coxe* v. *Harden* are authorities upon the point relied upon by the plaintiffs, that the delivery on board the ship of the bankrupts to their master was in effect a complete delivery to them, so as to vest the property absolutely, and deprive the vendors of the power of stopping the goods *in transitu*, or otherwise exercising any right or control over them. The case of *Boldinghi* * v. *Inglis* was cited on the [*566] part of the plaintiffs in support of their distinction between the case of goods loaded on board a general or chartered ship, where the owners of the ship are merely carriers and the master their servant, and that of goods loaded on board the vendee's own ship, the master of which is his servant; but neither that case, nor the case of *Fowler* v. *Kymer* cited in it, show more than this, that where the delivery of goods on board the ship is not for the purpose of conveying them to the consignee, but an absolute delivery to him when put on board, all power over the goods is lost to the vendor, as the relation of consignor and consignee no longer exists, and the property is absolutely vested in the vendee. Other cases were cited on the part of the assignees, to which it is not necessary to refer, as they do not appear to us to add materially to the effect of those to which we have already adverted.

On the part of the defendants it was contended that Menlove & Co. had never parted with the property in the goods to the bankrupts, but had reserved it until they were paid the purchase-money, notwithstanding the terms of the invoice, and the statement in the bill of lading that no freight was payable for the cotton, being owners' property; and we are of opinion that, upon the facts of the case, the Judge was right in directing the verdict to be entered for the defendants upon the trial: and that they are now entitled to our judgment.

It appears by the bill of exceptions, that it was agreed on both sides at the trial that there was no question of fact for the jury, and that the Judge should direct them how they should give their verdict; and he being of opinion, upon all the facts of the case, that Menlove & Co. had not delivered the cotton on board the ship to be carried for and on account and at the risk of the bankrupts

but that they intended to preserve their right as unpaid
[* 567] vendors, * directed the verdict to be entered for the defendants. There is no doubt that a delivery of goods on board of the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case the vendors by the terms of the bill of lading made the cotton deliverable at Liverpool to their order or assigns; and there was not, therefore, a delivery of the cotton to the purchasers as owners, though there was a delivery on board their ship. The vendors still reserved to themselves, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged, and without which it may be assumed that the vendors would not have delivered them at all.

The question really is, whether any and what effect is to be given to the terms in the bill of lading making the goods deliverable to the order of the vendors; for, if by those terms they reserved to themselves the dominion over the cotton, it would not pass to the assignees. The invoice would pass no property, whatever its terms might be; the property would only pass upon delivery, and the only effect to be attributed to the form and expressions of the invoice or bill of lading would be as indicating the terms upon which the goods were delivered.

The plaintiffs in error rely upon the terms of the invoice and the expression in the bill of lading, that the cotton is free of freight, being owners' property, as showing that the delivery on board the ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove & Co. of the 23rd of October, show too clearly for doubt, that notwithstanding the other terms of the bill of lading and the invoice, Menlove & Co. had no intention, when they delivered the cotton on board, of parting
[* 568] with the dominion over it, or * vesting the absolute property in the bankrupts. Upon this part of the case, the decisions of the Court of Exchequer in *Van Casteel* v. *Booker* and *Wait* v. *Baker* are authorities directly in favour of the defendants.

The plaintiffs further insisted, that the captain had no power to bind the bankrupts by such terms in the bill of lading as would leave the property still in the control of the vendors, and yet engage that the cotton should be freight free. Whether, as the

cotton was actually carried, the owners of the ship as such might not be entitled to freight upon a *quantum meruit*, notwithstanding the terms of the bill of lading, is a point not necessary now to determine; but with respect to the question, whether the plaintiffs could set up the want of authority in the master as a ground for contending that there was an absolute delivery of the goods, so as to vest the property in the bankrupts immediately upon the delivery, notwithstanding the special terms upon which they were delivered and accepted by the captain, we are clearly of opinion that it is not competent to them to do so; and that as Menlove & Co. delivered the cotton on board upon special terms, which the captain was not bound to accept, but without which they would not have delivered them, and which would preserve to themselves the control over them, the bankrupts cannot treat the delivery to the captain as a delivery to them as their property, when it was expressly agreed that they were not to be delivered to the bankrupts but to the order of the vendors; and the want of authority of the master to accept them on such terms will not have the effect of vesting the property absolutely in the bankrupts. The case of *Mitchel* v. *Ede* is a strong authority in favour of the defendants.

With respect to the question whether the transfer of * the bills of lading by themselves to the bank of Charleston [* 569] divested their power over the goods, we are of opinion that it did not; Menlove & Co. were the vendors of the goods, and reserved to themselves, by the terms upon which they delivered them on board the ship, the property in those goods until payment duly made. By indorsing and depositing the bills of lading with the bank of Charleston as a security, they did not divest themselves of the property in the goods which they had reserved, and were in a situation to claim the goods as against the bankrupts by their agents at Liverpool. They never had divested themselves of the property in the goods, nor of the possession except by delivery to the captain. This is not the case of delivery to a carrier for the purpose of his delivering them to the vendee, but a delivery for the purpose of the carrier delivering them according to the order of the vendor, who retains more than a mere lien upon the goods. Neither the bankrupts nor the assignees ever had the property in the cotton as against the vendors, and the objection to their title may properly be taken under the plea of not possessed. It

was said, that as Menlove & Co. had funds of the bankrupts in their hands to some, though to a very small extent, they were not unpaid vendors to the full extent; but this really makes no difference, as no particular portion of the cotton was bought with those funds; and the bulk generally being purchased by Menlove & Co. with their own funds or credit, they retained their property in the whole of the goods until payment for the whole.

A question was made as to the admissibility of some of the evidence; but as no matter of fact was in question for the jury, and we are of opinion that, independently of the evidence objected to, there was sufficient unobjectionable evidence to warrant the direction of the Judge, it has become immaterial to consider whether the evidence that was objected to was receivable or not.

[* 570] Our judgment, * therefore, is for the defendants in error, and the judgment in the Court below must be affirmed.

Judgment affirmed.

Ogg v. Shuter.

1 C. P. D. 47–51 (s. c. 45 L. J. C. P. 44; 33 L. T. 492; 24 W. R. 100).

Sale of Goods. — Ship. — Bill of Lading. — Reservation of jus disponendi.

Action for conversion of goods.

Plea that the goods were not the plaintiff's, as alleged.

The plaintiffs were purchasers of the goods under contract for their being shipped f. o. b. a certain vessel, payment in cash against bill of lading.

The defendants were agents of the shippers, and holders of the bill of lading, by which the goods were deliverable to shippers' order. The bills of lading were presented to the plaintiffs, along with a draft for the price, which they refused to accept, alleging, erroneously, that the quantity was short. The defendants then sold the goods. The Court of Appeal, reversing the decision of the Common Pleas, gave judgment for the defendants.

[47] Appeal from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant. L. R., 10 C. P. 159; 44 L. J. C. P. 161.

The declaration was for conversion of 251 sacks of potatoes.

Pleas, not guilty, and that the goods were not the plaintiff's as alleged. Issues thereon.

The facts were as follows: The plaintiffs had, in January, 1874, entered into a contract with Mons. Paresys Loutre, of Merville in France, for the purchase from him of potatoes. The contract was contained in several letters between the purchasers and the ven-

dor. The terms ultimately agreed on were as follows, viz.: for twenty tons of potatoes, at 84 fr. per 1,000 kilograms, *deliverable in the course of the current month, free on [*48] board of a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain. It was also stipulated that there should be a part payment of £30 in earnest of the bargain. The plaintiffs paid £30 in part payment, and the potatoes were shipped by the defendant's agent at Dunkirk under the contract on board the ship *Blonde* at Dunkirk for London, in sacks sent over for the purpose by the plaintiffs. The bill of lading taken by the defendant's agent made the goods deliverable to order.

The *Blonde* arrived in the Thames on the 26th of January, and the potatoes were unloaded at Cotton's Wharf on that or the next day. It was erroneously supposed by the plaintiffs, for some reason which did not very clearly appear, that the shipment was sixteen sacks short.

On the 27th of January the vendor's draft for the balance of the price was presented with the bill of lading annexed by the holders, Messrs. Devaux & Co., to whom it had been indorsed; but the plaintiffs declined to accept for the full amount, and requested the holders of the draft to keep it until the discharge of the vessel, to see what there was on board. This the holders declined to do. The plaintiffs on the same day wrote to the vendor stating that the shipment was short, and that they had consequently refused to accept the draft, and requesting him to write to his agent to present to them the invoice receipted and the bill of lading of what was on board, and promising, on this being done, to send a cheque for the balance of the purchase-money by return of post.

On the discharge of the ship the right quantity of potatoes proved to be on board. On the 27th of January, the draft was again presented by a notary with the bill of lading attached for payment, and payment was again refused by the plaintiffs, and the draft was then noted and returned to the holders. On th 30th of January the defendant, to whom the bill of lading and draft had then been respectively given and indorsed by the vendor's agent at Dunkirk, presented to the plaintiffs the said draft with the bill of lading indorsed by the defendant annexed thereto, and requested the plaintiffs to honour and pay the draft, which the plaintiffs, for the reasons aforesaid, declined to do.

No. 7. — Ogg v. Shuter, 1 C. P. D. 49, 50.

[* 49] * On the 30th of January the plaintiffs wrote to the defendant, giving him notice that the potatoes were their property, and that if he parted with them to anybody else he would be held responsible. On the 2nd of February the plaintiffs wrote to the vendor as follows: "Our Mr. Ogg having left London for Antwerp on Saturday last [30th of January], at that time we were not able to ascertain the correct quantity of potatoes shipped to us per steamer *Blonde*. We wish you to understand that we only want what is right, and we regret that we do not know each other better; and as we have been treated unfairly in business transactions of this nature before, we think it well to see quantity of goods before we pay on bill of lading, especially as the officials inform us of short shipment. Since Mr. Ogg's departure the potatoes have been discharged from vessel to wharf, and find on examination the goods are correct in quantity. I have telegraphed the particulars to Mr. Ogg in Antwerp, and on his return on Thursday he will then take delivery of the goods."

On the 2nd of February the defendant, in consequence of instructions received from the vendor's agent at Dunkirk, sold the goods.

At the trial before KEATING, J., after the foregoing facts and correspondence had been proved, the jury found that the goods were not of such a perishable nature as to render the sale of them necessary; and thereupon the learned Judge directed the verdict to be entered for the plaintiffs, reserving leave to the defendant to move the Court to draw inferences of fact. A rule *nisi* was obtained on the ground that neither the property nor right of possession had passed to the plaintiffs, and subsequently discharged.

Nov. 22. Milward, Q. C., and Willis, for the defendant, contended that the property in the goods had not passed to the plaintiffs, and that even if it had, the vendor's lien still continued, and consequently trover would not lie.

Prentice, Q. C., and Holl, for the plaintiffs, contended that the property had passed, that the plaintiffs were not in default under the contract, and that, consequently, the sale of the goods was tortious and determined the vendor's lien.

[* 50] * The authorities cited were the same as in the Court below, and as follows: *Halliday* v. *Holgate*, L. R., 3 Ex. 299; 37 L. J. Ex. 174; *Donald* v. *Suckling*, L. R., 1 Q. B. 585; 35 L. J. Q. B. 232; *Blocam* v. *Saunders*, 4 B. & C. 941; *Chinnery* v. *Viall*, 5 H. & N. 288; 29 L. J. Ex. 180; *Bussey* v. *Barnett*, 9 M.

& W. 312; *Valpy* v. *Oakley*, 16 Q. B. 941; 20 L. J. Q. B. 380; *Simmons* v. *Swift*, 5 B. & C. 857; *Dixon* v. *Yates*, 5 B. & Ad. 313.

Cur. adv. vult.

Nov. 23. The judgment of the Court (Lord CAIRNS, C.; KELLY, C. B; BRAMWELL, B.; and BLACKBURN, J.) was delivered by

Lord CAIRNS, C. In this case it appears, from the judgments below, that the Court of Common Pleas drew the inference of fact that the plaintiffs were not in default in refusing to accept the draft for £34 which was tendered to them for acceptance along with the bill of lading. We have been unable to reconcile this finding with the statements in the case, more particularly with the statement in paragraph 13,[1] which seems to us to show that the plaintiffs were in default. Taking this fact, as we understand it, we think that the judgment in favour of the plaintiffs is erroneous, and should be reversed. The transactions in which merchants shipping goods on the orders of others protect themselves by taking a bill of lading, making the goods deliverable to the shipper's order involve property of immense value, and we are unwilling to decide more than is required by the particular case. But we think this much is clear, that where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee
* continues in default. It is not necessary in this case to [* 51]
consider what would be the effect of an offer by the plaintiffs to accept the draft and pay the money before the sale, for no such offer in this case was ever made. *Judgment reversed.*

ENGLISH NOTES.

The case of *Schotsmans* v. *Lancashire and Yorkshire Railway Co., Cunliffe & Others* (1867), L. R., 2 Ch. 332, 36 L. J. Ch. 361, 16 L. T. 189, was a simple case of goods shipped on board the purchaser's

[1] The 13th paragraph related to the refusal to accept the draft on the 30th of January.

own ship under a bill of lading making them deliverable to the purchaser or assigns. The vendor having claimed to stop the goods *in transitu* was held by the Appellate Court in Chancery to have no right to stop them. The Lord Chancellor (Lord Chelmsford) in giving judgment observed, — "Although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable. In this case the goods were shipped on board the consignee's own ship, and delivered into the possession of his own servant, the master who signed bills of lading making the goods deliverable to the consignee or assigns. There was, therefore, a delivery to the agent for his principal, and no control over the delivery was in terms reserved to the vendor." In such a case the possession by the vendor of some of the set of bills of lading gave him no control over the goods nor any right to stop them *in transitu*.

Whether a ship chartered by the buyer is to be considered his own ship for this purpose depends on the terms and construction of the charter-party, — whether it is to be construed as a demise of the vessel and a disposal of the services of the master and crew so as to make them the servants of the buyer. *Bohtlingk* v. *Inglis* (1803), 3 East, 381, 7 R. R. 490; *Berndtson* v. *Strang* (1868), L. R., 3 Ch. 588, 37 L. J. Ch. 665, 19 L. T. 40 ; *Ex parte Rosevear China Clay Co., In re Cock* (C. A. 1879), 11 Ch. D. 560, 48 L. J. Bkcy. 100, 40 L. T. 730; and see No. 1 of "Charter-party," Vol. 5, R. C.

Shepherd v. *Harrison* (1869, 1871), L. R., 4 Q. B. 196, 493, L. R., 5 H. L. 116, 38 L. J. Q. B. 105, 177, 40 L. J. Q. B. 148, is a case which settles an important principle of presumption as to the intention and effect of conditional transfer of property in, and right to the possession of, goods under a bill of lading. P. & Co., merchants at Pernambuco, having purchased cotton under orders of the plaintiffs, who were merchants at Manchester, advise them as follows: "We shall value upon you forwarding bill of lading." Subsequently, in a letter advising particulars of the cost, amounting to £916 9*s*. 1*d*., of 200 bales of cotton shipped per *Olinda*, they say: "We have therefore drawn upon you for £916 9*s*. 1*d*., . . . to which we beg your protection." At the same time P. & Co. sent the bill of lading to their own agents, who on receiving it sent it to the plaintiffs in a letter: "Our Pernambuco letters to 12th ult. are just to hand, and we beg to enclose bill of lading for 200 bales of cotton, by Messrs. P. & Co., per *Olinda* S. S., on your account. We hand also the drafts on your good selves, for cost of the cotton, to which we beg your protection, £916 9*s*. 1*d*." The plaintiff refused to accept the bills, alleging an unliquidated claim against the plaintiff; but kept the bill of lading and sent it to his broker to demand the cotton. The cotton, having been also de-

manded from the defendants (bailees) by the agents of P. & Co., with an indemnity, they refused to deliver it to the order of the plaintiff, the latter brought an action of trover against them. The question therefore was whether the plaintiffs were entitled to the property and possession under the bill of lading. The following summary of the judgments in the several Courts is extracted from "Campbell on Sale," etc., 2d ed., pp. 367–371, 1st ed., pp. 258–362: —

"In the Queen's Bench, COCKBURN, C. J., considered the authorities conclusive to show that where the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee, he indicates the intention that the handing over the bills of lading and the acceptance of the bill or bills of exchange should be concurrent parts of one and the same transaction. He thought it a possible view that where a foreign agent buying goods, at once ships them on account and at the risk of his principal, and calls upon the principal to insure the goods, the *property* would at once pass to the consignee (as the risk certainly would). But whether the property passed or not he considered the consignor entitled to impose conditions on the delivery of possession, and that he effectually did impose such conditions by the course he took.

"MELLOR, J., came to the conclusion that it was the intention of the consignors, in sending the bill of lading indorsed in blank accompanied by the bill of exchange, to their agents, to retain the right of property until the bill was accepted. And that the agents, in sending to the plaintiff the bill of lading accompanied by the bill of exchange for acceptance, did so in the confidence that he would not keep the bill of lading without accepting the bill of exchange; and that on the plaintiff so acting, the defendants were entitled on the orders of the consignor's agents, to refuse delivery to the plaintiff.

"HANNEN and HAYES, JJ., concurred, the latter indicating an opinion that the property as well as the right to the possession remained with the consignors.

"In the Exchequer Chamber the judgment of the Queen's Bench was confirmed by the Court, consisting of KELLY, C. B., WILLES, J., CHANNELL, B., MONTAGUE SMITH, J., and CLEASBY, B. The three first named agreed that the intention was only to transfer the property conditionally. MONTAGUE SMITH, J., was of opinion that the judgment of the Queen's Bench should be affirmed. CLEASBY, B., expresses a doubt, but did not formally dissent from the judgment of the rest.

"On the appeal, Lord CHELMSFORD (L. R., 5 H. L. 123), after recounting the facts, said, — 'The question is, whether under these circumstances the plaintiff was entitled to the possession of the goods. The question with regard to the property may perhaps be a different question;

but the question now is, whether he was entitled to have the possession of the goods on the production of the bill of lading, and whether the defendants are liable to an action of trover for refusing to deliver the cotton to him, and for delivering it to P. & Co.' After referring to the cases of *Walley* v. *Montgomery* (1803), 3 East, 585, 7 R. R. 526; *Coxe* v. *Harden* (1803), 4 East, 211, 1 Smith, 20, 7 R. R. 570; and *Moakes* v. *Nicholson* (1865), 19 C. B. N. S. 290, 34 L. J. C. P. 273, 12 L. T. 573, he observed that in Mr. Benjamin's treatise on Sale, a book which he referred to as very ably written, the authorities on the subject of reservation of the *jus disponendi* are all collected, and the whole matter is summed up clearly and distinctly in the following passage: 'The following seem to be the principles established by the foregoing authorities: first, where the goods are delivered by the vendor, in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee; secondly, where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried. This principle runs through all the cases, and is clearly enunciated by Baron Parke and by Mr. Justice Byles in *Wait* v. *Baker* (1848), 2 Exch. 1, 17 L. J. Ex. 307, and *Moakes* v. *Nicholson*, *supra*.'

'Lord Westbury (L. R., 5 H. L. 128) said that the effect of P. & Co. delivering the cotton to the captain of the *Olinda*, and taking from him the ordinary bill of lading to their own order, was, in law and according to mercantile usage, that they controlled the possession of the captain, and made the captain accountable to deliver the cotton to the holder of the bill of lading. The bill of lading was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped on board the vessel. They also kept to themselves the right of demanding possession from the captain. They had therefore all the incidents of property vested in themselves. Now that was by no means inconsistent with the special terms of the shipment, namely, that the cotton was shipped on account of and at the risk of the buyers. That is perfectly consistent with the property, as evidenced by the bill of lading remaining in the possession of the vendors of the cotton in question. Then if that be so, it is incumbent on the buyer to adduce circumstances to control the legal effect of that transaction, and to show that the evidence of ownership and of the right to deal with the property consequent on the authority of the bill of lading, are controlled by other facts, and that it was not

intended to retain the right of possession, and the interest in the property shipped, and the right of disposing of it in the holder of the bill of lading. Undoubtedly the obligation to show this lies upon the individual who contradicts what would otherwise be the ordinary legal conclusion from that transaction.

"Then, after commenting on the circumstances and the mode in which the documents were transmitted, he concludes: I think the truth of the case was this, that the two documents were originally intended to be dependent, the one on the other, and that they were sent together under the conviction and in the confidence that the bill of exchange would be accepted and returned to the sender in consideration of the bill of lading. That, however, was not done, and therefore I take it that the bill of lading acquired in that manner gave no right of property to the present appellant (the plaintiff), and that the judgment of the Court below was therefore correct, and ought to be affirmed.

"Lord COLONSAY thought that the plain meaning and intention of the parties was, that the bill of lading should be retained only if the bill of exchange was accepted, and therefore it was incumbent on the plaintiff, if he meant to refuse the acceptance of the bill of exchange, to return also the bill of lading; and was, therefore, clearly of opinion that the judgment of the Court below was correct.

"Lord CAIRNS said that in order to succeed the plaintiff must show that at some period or another the property in this cotton passed to him, and that the first question necessary to ask was, — When did the property pass to the plaintiff? In the invoice the goods are described as being shipped on account and at the risk of the plaintiff. But along with the invoice a bill of lading was taken from the captain, making the cotton deliverable, not to the plaintiff, but to the shipper on board. It is perfectly well settled that, in that state of things, the entry upon the invoice, stating the goods to be shipped on account and at the risk of the consignee, is not conclusive, but may be overruled by the circumstance of the *jus disponendi* being reserved by the shipper through the medium of the bill of lading. He had no doubt that by what was done at Pernambuco the intention of the shipper, which was communicated to the consignee by the letter informing him that the bills of lading and bills of exchange had been transmitted together to the agent of the shipper in Liverpool, was that the shippers of the cotton should remain and that they did remain masters of the property. Then, as to whether there was any change of property made by what was done at Liverpool, he thought that when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in enclosing these bills

of lading and bills of exchange is, that before you use the bills of lading you shall accept the bills of exchange. Merchants know perfectly well what they mean when they express themselves, not in the language of lawyers, but in the language of courteous mercantile communication. And I do not think that any merchant in England, receiving a bill of lading and a bill of exchange under these circumstances, when he came to reflect on the matter, would feel any doubt that he could not retain the one without accepting the other. . . . I think the conclusion come to in the Courts below was perfectly right. I believe that what was done in Pernambuco did not vest the property in the plaintiff, and that what took place in Liverpool did not vest the property in him, but that the property remained in the shippers; and the action, therefore, in my opinion, ought to fail."

There is therefore an unanimous judgment in all the Courts (if the doubt of Cleasby, B., be disregarded) that the right of possession was only transferred conditionally, and that in the circumstances no right of possession became vested in the plaintiffs; and there is a preponderant concurrence of opinion that the transfer of property was conditional, and that no property passed to the plaintiffs.

Gabarron v. *Kreeft* (1875), L. R., 10 Ex. 274, 44 L. J. Ex. 238, 33 L. T. 365, is an important case in regard to the effect of a bill of lading in completing the transfer of property on shipment. In this case the shipper (A.) had wrongfully made out the bill of lading so as to keep under his own control the goods which he ought to have shipped on account of a purchaser (B.), who had paid for them. The facts were that A. (the defendant) had purchased from X. (f. o. b. at Cartagena) on ships to be chartered by A. or by X. upon certain terms under which, in the event, payments were made considerably in advance of the actual shipment. In March, 1872, *The Trowbridge*, one of the vessels chartered by A., arrived at Cartagena. At that time the payments made under the contract exceeded the price of the ore shipped and ready for shipment; and it was the duty of B. under the contract without any further payment to ship a cargo of the ore on board the *Trowbridge* on account of A. Instead of doing so, and before any ore was put on board, B. picked a quarrel with A., and telegraphed to him that he would not load the *Trowbridge* on his account. B. then put the cargo on board, and took the bills of lading — which according to the charter-party the captain was to sign as presented — making the goods deliverable to order of one S. (a fictitious person). B. then indorsed the name S. and his own on the bills of lading, and pledged the bills with the plaintiffs. The questions in the case were whether the property in this cargo had vested in A., and, secondly, whether A., by authorizing the captain to sign bills of lading as presented, was estopped as against the plaintiff from asserting that the ore was his property.

Bramwell, B., after observing that it was impossible that any quantity of ore which had not been specifically ascertained should become the property of the defendant, put the question thus: "Did the property pass on actual shipment, the shipper having no right to ship except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking when he does take it a bill of lading deliverable otherwise than to the defendants, to whom it ought to have been made deliverable. . . . The cases seem to me to show that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him. It seems to me therefore that in this case the property never passed to the defendants, and the plaintiffs are entitled to recover." Cleasby, B., also gave judgment for the plaintiffs. He agreed substantially with the reasons given by Bramwell, B., and also considered that the defendant was estopped by the clause of the charter-party authorizing the captain to sign bills of lading in the form he did. Kelly, C. B., gave judgment for the plaintiffs on the latter ground alone. But he considered that but for the estoppel the property in the ore, at least so far as put on board, had passed to the defendant.

With reference to the last line of the rule, "so long at least as the purchaser continues in default," — which is in accordance with the reservation made in Lord Cairns' judgment in *Ogg* v. *Shuter* (No. 7, *supra*) — may be mentioned the case of *Mirabita* v. *Imperial Ottoman Bank* (C. A. 1878), 3 Ex. D. 164, 47 L. J. Ex. 418, 38 L. T. 597, where the vendors had caused to be placed in the hands of the defendants bills of lading to be given up to the plaintiff who was the purchaser on payment at maturity of a certain bill of exchange. It was found as a fact that the intention of both the vendors and the plaintiff was that the property in the goods should pass payment of the bill of exchange. It was held that, on tender of payment of the bill of exchange, the property vested in the plaintiffs, although the bill of lading was not in fact given up to them.

AMERICAN NOTES.

The principle of this Rule is accepted in this country. Benjamin on Sales (Sixth Am. ed., Bennett's notes), p. 351; Browne on Sales, p. 86; *The St. Joze Indiano*, 1 Wheaton (United States Sup. Ct.), 208; *Merchants Bank* v. *Bangs*, 102 Massachusetts, 291; *Farmers & Mechanics' Bank* v. *Logan*, 74 New York, 568; *Hobart* v. *Littlefield*, 13 Rhode Island, 341; *Emery* v. *Irving Nat. Bank*, 25 Ohio State, 360; 18 Am. Rep. 299; *Berger* v. *State*, 50 Arkansas, 20; *Bergeman* v. *Indianapolis, &c. R. Co.*, 104 Missouri, 77. If the bill of lading

is transferred by a third person, in whose favour it runs, before the property comes into the buyer's possession, title passes to that transferee. *Bank of Rochester* v. *Jones*, 4 New York, 497; 55 Am. Dec. 290; *First Nat. Bank* v. *Crocker*, 111 Massachusetts, 163; *Michigan Cent. R. Co.* v. *Phillips*, 60 Illinois, 190; *Schumacher* v. *Eby*, 24 Pennsylvania State, 521; *St. Paul Co.* v. *Gt. West. Co.*, 27 Federal Reporter, 131.

No. 8. — LICKBARROW *v.* MASON.
(1787.)

No. 9. — SEWELL *v.* BURDICK.

BURDICK *v.* SEWELL.
(H. L. 1884.)

RULE.

THE indorsement and delivery by the consignee of a bill of lading for valuable consideration to a person not proved to have taken it *malâ fide*, transfers to the indorsee according to the intention of the transaction the right and property of the consignee in the goods, freed from any right of the consignor, to stop the goods *in transitu*.

Where a bill of lading is indorsed and delivered by way of security for a loan, the "property" in the goods does not pass to the indorsee (within the meaning of the Bills of Lading Act, 18 & 19 Vict., c. 111), so as to make them liable in an action for the freight.

Lickbarrow v. Mason.

(2 T. R. 63-76; 5 T. R. 683-686; 1 H. Bl. 357-368; Brown, P. C., vol. iv., pp. 57-65; 6 East, 20-36 n; 1 Sm. L. C. C.; 1 R. R. 425-429.)

Bill of Lading. — Stoppage in Transitu.

Trover for goods.

Plaintiff was holder for value of bill of lading.

Defendant, unpaid vendors, had stopped the goods *in transitu*, got possession of them and sold them.

After an inconclusive trial which resulted in a judgment of *venire de novo* given by the House of Lords on a technical point, the plaintiff, in a second trial, succeeded on a special verdict that by the custom of merchants the indorsement and delivery for value of the bill of lading transfers the property in the goods.

No. 8. — Lickbarrow v. Mason, 2 T. R. 63-76.

This was an action of trover for a cargo of corn by the indorsee for valuable consideration of the bill of lading, as plaintiffs, against certain defendants who, on behalf of the shippers, being unpaid vendors, had obtained possession of the cargo and sold it.

T., a merchant in Zealand, had, by order of F. of Rotterdam, shipped the cargo on board the *Endeavour*, of which one Holmes was master, for Liverpool. Holmes signed the bill of lading in a set of four "unto order or assigns;" two of the set were indorsed by T. in blank and sent, with an invoice, to F: another of the set was retained by T., and the remaining one kept by Holmes. T. drew upon F. for £477, for the price of the cargo by bills of exchange, which F. accepted. F. on the same day sent the plaintiffs the bill of lading (consisting of the two of the set in his hands) and invoice, and drew upon the plaintiffs for £520 by bills of exchange which the plaintiffs accepted and subsequently duly paid. During the currency of the bills of exchange drawn by T. upon F, F. became a bankrupt; and T., on hearing of the bankruptcy, indorsed and sent to the defendants the bill of lading (*i. e.*, the one of the set) which he had retained, authorizing them to obtain possession of the cargo on his (T.'s) account. On the arrival of the vessel the defendants accordingly did obtain possession of the cargo, and subsequently sold it on T.'s account for £557. Before the bringing of the action, the plaintiffs, whose claim against F. amounted to £542, demanded the goods of the defendants and tendered them the freight and charges. T. had been, of course, obliged to take up the bills which he had drawn upon F., and had since duly paid them; and F. had wholly failed to pay for the goods, nor did the plaintiffs offer to pay the defendants for them.

The case was argued before the King's Bench on a demurrer to the evidence, and the Court, Ashhurst, J., Buller, J., and Grose, J., concurrently gave judgment for the plaintiff, holding that the right of the consignor was divested by the assignment for value of the bill of lading (2 T. R. 63). This judgment was reversed in the Exchequer Chamber by a judgment delivered by Lord Loughborough (*Mason* v. *Lickbarrow* in error, 1 H. Bl. 357). The record was afterwards removed into the House of Lords, who (after receiving elaborate opinions from the judges, Buller, J., Ashhurst, J., and Grose, J., in favour of reversing, and Eyre, C. J., Gould, J., Heath, J., Hotham, B., Perryn, B., and Thomson, B., for affirming the judgment of the Exchequer Chamber), directed a *reaire*

facias de novo, on the ground that the demurrer appeared informal on the record (6 East, 20 n; Brown, P. C., vol. iv., 2nd ed., p. 57).

On the second trial before the King's Bench (5 T. R. 683), the jury found a special verdict setting forth the facts substantially as above stated, with this addition: —

"By the custom of merchants, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills of lading with his, her, or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be delivered or transmitted to such other person or persons; and by such indorsement and delivery or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons, and, by the custom of merchants, indorsements of bills of lading in blank, that is to say, by the shipper or shippers with their names only, have been, and are, and may be, filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading to be made to such person or persons; and, according to the practice of merchants, the same when filled up, have the same operation and effect as if the same had been made or done by such shipper or shippers when he, she, or they indorsed the same bills of lading with their names as aforesaid."

Upon this verdict the Court of King's Bench without further discussion, declared that they retained their former opinion and gave judgment for the plaintiff.

Sewell v. Burdick.

(Burdick v. Sewell.)

10 App. Cas. 74–106 (s. c. 54 L. J. Q. B. 156; 52 L. T. 445; 33 W. R. 461).

Ship. — Bill of Lading. — Freight. — Bills of Lading Act (18 & 19 *Vict.* c. 111).

Action for freight, &c., by shipowners against indorsees of bill of lading.

The defendants had become indorsees of the bills of lading by way of security for a loan, but had never interfered with the possession or claimed delivery of the goods.

No. 9. — Sewell v. Burdick, 10 App. Cas. 74, 75.

Held, that the defendants were not "owners" of the goods, within the meaning of the Bills of Lading Act, so as to render them liable upon the contract with shipowners contained in the bill of lading.

Appeal by the defendants from an order of the Court of [74]
Appeal (13 Q. B. D. 159; 53 L. J. Q. B. 399), reversing a decision of FIELD, J. Briefly the facts were as follows: —

In September, 1880, Nercessiantz shipped machinery on the respondent's ship to be carried from London to Poti in the Black Sea, under bills of lading whereby the goods were made deliverable to the shipper or assigns, freight, primage, and disbursements to be paid at destination, in default the owners or agents to have an absolute lien on the goods and liberty to sell by auction and retain freight and all charges. The bills of lading indorsed in blank were in November, 1880, deposited by Nercessiantz with the appellants, bankers in Manchester, as security for a loan of £300 * advanced by [*75]
them to Nercessiantz. The ship meanwhile had arrived at Poti in September, and the goods were landed and warehoused at the Russian custom-house in October. Nercessiantz disappeared, and after a year the goods, in accordance with Russian law, were sold to pay custom-house duty and charges, and realized no more than enough for that purpose. Meanwhile the appellants had indorsed the bills of lading to their agents at Tiflis with instructions to protect their interests, and had informed the shipowners that if the goods were sold to pay freight, &c., the appellants claimed all the proceeds over and above the amount due to the shipowners for freight, &c, but the appellants never claimed delivery of the goods. The respondent having brought an action for £174 8*s.* 9*d.* for freight and charges, against the appellants as indorsees of the bills of lading, FIELD, J., who tried the case without a jury, gave judgment for the defendants. 10 Q. B. D. 363; 52 L. J. Q. B. 428. The Court of Appeal (BRETT, M. R., and BAGGALLAY, L. J., BOWEN, L. J., dissenting) set aside this judgment, and gave judgment for the plaintiff for the amount claimed. 13 Q. B. D. 159; 53 L. J. Q. B. 399. The defendants appealed.

Nov. 4, 6, 7. Sir F. Herschell, S. G. (Danckwerts with him), for the appellants: —

The transaction between Nercessiantz and the appellants was not intended to be and was not a sale out and out of the goods, but a pledge only. A contract of pledge leaves the property in the pledgor and passes only a special property to the pledgee.

Franklin v. *Neate*, 13 M. & W. 481; 14 L. J. Ex. 59. If the object of the indorsement of the bill of lading be to create a contract of pledge, the indorsement will not pass the property any more than delivery of the goods would. According to BRETT, M. R., *Lickbarrow* v. *Mason*, 1 Sm. L. C. 753 (8th ed.); in K. B., 2 T. R. 63; in Ex. Ch., 1 H. Bl. 357; in H. L., 2 H. Bl. 211; 6 East, 20, n., and 5 T. R. 683; 1 R. R. 425, decided that the indorsement of the bill of lading passed the property in all cases, and the judgment of the majority of the Court of Appeal went entirely on that ground. But the only question decided there was whether the consignor had the right to stop *in transitu*. It seems from BULLER, J's., direction in *Hibbert* v. *Carter*, 1 T. R. 745, 748; 1 R. R. 388, and [* 76] his * reference to that case in his opinion in *Lickbarrow* v. *Mason*, 6 East, 24, n., that he cannot have intended to go the length generally attributed to him. The history of the decisions in *Lickbarrow* v. *Mason*, 1 Sm. L. C. 753 (8th ed.), their true effect, and the weight to be given to the opinion of BULLER, J., are fully discussed in Blackburn on Sale, pp. 279–289. See also 1 Arnould on Insurance, p. 71 (4th ed.) part i. c. 3. The true method of approaching the question is to inquire what is the real contract between the owner of the goods and the lender. The indorsement of the bill of lading has no magical effect. By the custom of merchants the indorsement and delivery of the bill of lading is equivalent to the taking possession of the goods; but the property in the goods does not pass unless it is intended by the contract that it shall pass. There is no direct decision that the mere indorsement of a bill of lading passes the whole property in the goods when it is not so intended; and there are decisions inconsistent with such a proposition. An indorsement by way of pledge passes no property, and is not valid as a pledge where the pledgor has no authority to pledge. *Newsom* v. *Thornton*, 6 East, 17; 8 R. R. 378. There are two direct decisions that on an assignment of the bill of lading by way of pledge a special property only, and not the general property in the goods passes. *Turner* v. *Trustees of Liverpool Docks*, p. 725, *ante*; 6 Ex. 543; 20 L. J. Ex. 393; and *Jenkyns* v. *Brown*, 14 Q. B. 496; 19 L. J. Q. B. 286. There are *dicta* both ways in *Meyerstein* v. *Barber*, L. R., 2 C. P. 44, 675; 4 H. L. 317; 39 L. J. C. P. 187, and *Glyn* v. *East and West India Dock Co.*, 6 Q. B. D. 475; 50 L. J. Q. B. 62; p. 818, *post*. Such transactions are pledges, not mortgages, and do not require a mortgage stamp. *Harris* v. *Birch*,

9 M. & W. 591; 11 L. J. Ex. 219. As to the nature of pledges, see *Donald* v. *Suckling*, L. R., 1 Q. B. 585; 35 L. J. Q. B. 232, approved in *Halliday* v. *Holgate*, L. R., 3 Ex. 299; 37 L. J. Ex. 174. There is nothing in the Bills of Lading Act (18 & 19 Vict. c. 111) to show an intention in the legislature that indorsees should be liable on the bill in the case of a pledge. The words in s. 1, "to whom the property in the goods shall pass," refer to cases where it is intended that the whole property shall pass. *Smurthwaite* v. *Wilkins*, 11 C. B. (N. S.) 842; 31 L. J. C. P. 214, and *Short* v. *Simpson*, L. R., 1 C. P. 248; 35 L. J. C. P. 147, decide that where the whole property has *passed to the indorsee, the [*77] indorsee is the only person liable, which would be unreasonable in the case of a mere pledgee for a small amount.

C. Hall, Q. B., and Edwyn Jones, for the respondent, contended that the whole property in the goods passed by the indorsement and delivery of the bill of lading, the Courts having adopted the special verdict found in *Lickbarrow* v. *Mason*, 1 Sm. L. C. 753 (8th ed.); that the evidence in the present case showed that the parties intended that the whole property should pass; that unless the creditor in such a transaction took the whole property he could not sell the goods or transfer the bill of lading to secure himself; that the indorsement entitled the indorsee to sue on the one hand, and made him liable in every respect on the other; *e. g.* for a general average contribution. They also relied on the reasoning in the judgment of the majority of the Court of Appeal, and referred to the following cases: *Case* v. *Harden*, 4 East, 211, 217; 7 R. R. 570; *In re Westzinthus*, 5 B. & Ad. 817; 3 L. J. K. B. 56, No. 13, p. 845, *post*; *Spalding* v. *Ruding*, 6 Beav. 376; 12 L. J. Ch. 503; *Kemp* v. *Falk*, 7 App. Cas. 573; 52 L. J. Ch. 167; *Short* v. *Simpson*, L. R., 1 C. P. 248; 35 L. J. C. P. 147; *Pease* v. *Gloahec*, L. R., 1 P. C. 219; 35 L. J. P. C. 66; *The Figlia Maggiore*, L. R., 2 A. & E. 106; 37 L. J. Adm. 52; *The St. Cloud*, Brown. & Lush. 4, 18; *Fox* v. *Nott*, 6 H. & N. 630; 30 L. J. Ex. 259; *The Nepoter*, L. R., 2 A. & E. 375; 38 L. J. Adm. 63; *The Freedom*, L. R., 3 P. C. 594, 598; 38 L. J. Adm. 25.

Danckwerts in reply discussed the authorities and referred to *Lloyd* v. *Guibert*, [No. 12 of "Conflict of Laws," 5 R. C.]; L. R., 1 Q. B. 115; 3 B. & S. 100; 35 L. J. Q. B. 74.

The House took time for consideration.

Dec. 5. EARL OF SELBORNE, L. C.: —

My Lords, this appeal raises the question whether under the

Bills of Lading Act of 1855 (18 & 19 Vict. c. 111) every holder of a bill of lading, indorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it) is liable, by reason of such indorsement only, to
[* 78] an * action for freight by the shipowner; although he may not have obtained delivery of the goods or derived any other benefit from his security.

The goods in this case were, by the terms of the bill of lading, deliverable at Poti, a Russian port on the Black Sea, and had been landed and warehoused there in a public warehouse (no one appearing to claim or take charge of them) before the date of the indorsement. This was their position when the present action was brought by the respondent, the shipowner, against the appellants, who are bankers at Manchester, and who had advanced £300 to the shipper upon the security of the bill of lading. In his statement of claim the plaintiff alleged that the goods still remained at Poti under the care of the Russian authorities; that the plaintiff had under Russian law no power of selling them for the purpose of paying himself the amount claimed in the action (£174 8*s.* 9*d.* and interest); and that the Russian authorities were about to sell the same for a sum barely sufficient to cover the Customs duties and Government charges thereon. They were, in fact, sold by the Russian authorities, and did not realise more than the amount of those duties and charges.

Under these circumstances, Field, J. (who tried the case without a jury) gave judgment for the defendants (the appellants here). That judgment was reversed by a majority (Brett, M. R., and Baggallay, L. J.) of the judges in the Court of Appeal, Bowen, L. J., dissenting.

The difference between those learned judges mainly (if not altogether) turned upon the question, whether, according to the authorities from *Lickbarrow* v. *Mason*, downwards, the effect of an indorsement and deposit of a bill of lading, while the goods are *in transitu*, by way of security for a loan, is to pass the whole legal title to the goods, or only to pledge them, passing at law a "special property" and leaving the "general property" in the shipper. That question was much debated in *Glyn, Mills & Co.* v. *East and West India Dock Company*, where Brett, L. J., expressed the same opinion on which he acted in the present case, Bramwell, L. J., taking the opposite view. My noble friend Lord Blackburn, in his opinion on that case, when it reached

* this House adverted to the point, but thought it unne- [* 79]
cessary to express any opinion upon it. 7 App. Cas. 606.

In the present case the true question is whether "the property" in the goods "passed to the indorsee upon or by reason of the indorsement," within the meaning of those words, as used in the Bills of Lading Act of 1855? It was considered by BRETT, M.R., and BAGGALLAY, L.J., that if the effect of the indorsement and deposit was (as they thought) to pass the whole legal title to the goods to the appellants as indorsees, leaving an equitable interest only in the shipper, it was a necessary consequence that "the property passed" to them within the meaning of the statute, and that the respondent, the shipowner, was entitled to recover under the statute in this action. They clearly used the words "legal" and "equitable" in that technical sense which they have acquired in English law.

I am not myself satisfied that this consequence is necessary; but I admit that there are difficulties in the way of the contrary view; as there are also difficulties (arising from the strong and unqualified language used by judges of great authority, from the time when *Lickbarrow* v. *Mason*, was decided downwards) in the way of the opinion that an indorsement and deposit of a bill of lading in a case like the present operates by way of pledge, and not as an assignment of the whole legal title to the goods. The facts here are simply an indorsement in blank and deposit of the bills of lading, so indorsed, by way of security for money advanced. There are no special circumstances, except that the indorsee never did obtain, and that it was never possible for him (in fact) to obtain, delivery of the goods.

I should not feel greatly embarrassed (if there were no other authority) by the mere terms in which the custom of merchants was found in *Lickbarrow* v. *Mason*; namely, that "bills of lading are after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, . . . and that by such indorsement and delivery *the property* in such goods is transferred." This, it may be said, is the language of the Bills of Lading Act. But I do not understand it as necessarily meaning more than that "the property" * which it might be the intent of the transaction to [* 80]
transfer, whether special or general, passes by such an indorsement, according to the custom of merchants. The finding

must be reasonably understood; it cannot (for instance) mean that the property will be transferred when there is no consideration.

But, although the custom as found seems to be consistent with the view taken by FIELD, J., and BOWEN, L.J., in the present case, I have more difficulty in saying that the language of BULLER, J., in the earlier stages of *Lickbarrow* v. *Mason*, is so. And, in some later cases, other great Judges have not only followed, but have even gone beyond that language. The Court of Queen's Bench, in *In re Westzinthus*, held that a right of stoppage *in transitu* might be exercised against the interest remaining in the shipper subject to the security created by an indorsement and deposit of the bill of lading, but they did so on the ground, not that the shipper retained any legal title or interest, but that he had an equity of redemption, of which the form in which the question then arose enabled the Court to take notice. And, although it is true that in *Harris* v. *Birch*, the Court of Exchequer, then composed of Barons PARKE, ALDERSON, GURNEY, and ROLFE, decided a question of stamp duty upon the ground that an indorsement and deposit of a bill of lading by way of security operated as a pledge, and COLERIDGE, J., in *Jenkyns* v. *Brown*, considered it to pass a special property only to the indorsee, leaving the general property in the shipper, and in *Meyerstein* v. *Barber*, L. R., 2 C. P. 38, 661, 36 L. J. C. P. 48, 289, all the judges of the Common Pleas and in the Exchequer Chamber concurred in that view, — yet, on the other hand, when *Meyerstein* v. *Barber* came to the House of Lords (where the judgments of those Courts were affirmed), Lord HATHERLEY and Lord WESTBURY used strong language of an opposite kind. Lord HATHERLEY said: "If anything could be supposed to be settled in mercantile law, I apprehend it would be this, that, when goods are at sea the parting with the bill of lading is parting with the ownership of the goods:" and afterwards, "I apprehend that it would shake the course of proceeding [* 81] * between merchants, as sanctioned by decided cases, if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would arise from that state of facts." These words are hardly, if at all, qualified by the context, "so that," &c., although in a later sentence (as

to which see the remarks of Lord BLACKBURN, in 7 App. Cas. p. 604), the proposition is less absolute: "When the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property, is the property itself." Pages 805, 806, *post*: L. R., 4 H. L., 325, 326.

Lord WESTBURY's language is similar, perhaps stronger: "No doubt" (he said) "the transfer of it" (the bill of lading) "for value passes the absolute property in the goods." He quoted some words of ERLE, C. J., to which I shall afterwards refer, as having the same sense; he spoke of the first holder for value of the bill of lading as having "the legal ownership of the goods," "the legal right in the property," "both the right of property and the right of possession passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession." L. R., 4 H. L. 335–337.

To reconcile these expression with those used in the same case by the Judges of the Common Pleas and in the Exchequer Chamber is scarcely possible, and yet no dissent from the views of those learned Judges was expressed in this House; on the contrary their reasoning, and especially that of WILLES, J., was referred to with apparent approval, particularly by Lord HATHERLEY and Lord CHELMSFORD. In such a conflict, not of decisions but of judicial phraseology, if not doctrines, it becomes important to remember that it is often dangerous to infer, even from very strong words, when used *diverso intuitu*, conclusions on other subjects which if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified. None of the cases to which I have referred arose upon * the statute with which your Lordships have now to [* 82] deal; they related, some to the right of stoppage *in transitu*, some to competing claims between holders for value of different parts of the same set of bills of lading. It may well be that, as against all such claims, and against parties setting up interests adverse to the title of the indorsee for value, such words as "the legal ownership," "the legal right," "the right of property in the goods," might be used, and the property which passed to the indorsee might be described as "absolute" in a sense substantially true, even though such property might, as between

the indorsee receiving and the shipper depositing the bill of lading by way of security, be special only and not general; and though the most apt term for a scientific definition of the transaction as between the borrower and the lender, may be, not assignment or transfer, but pledge.

In such a state of authority it is important to see how the matter stands in principle.

In principle the custom of merchants as found in *Lickbarrow* v. *Mason*, seems to be as much applicable and available to pass a special property at law by the indorsement (when that is the intent of the transaction), as to pass the general property when the transaction is, *e. g.*, one of sale. In principle also there seems to be nothing in the nature of a contract to give security by the delivery of a bill of lading indorsed in blank, which requires more in order to give it full effect, than a pledge accompanied by a power to obtain delivery of the goods when they arrive, and (if necessary) to realize them for the purpose of the security. Whether the indorsee when he takes delivery to himself may not be entitled to assume, and may not be held to assume towards the shipowner, the position of full proprietor, is a different question. But, so long at all events as the goods are *in transitu*, there seems to be no reason why the shipper's title should be displaced any further than the nature and intent of the transaction requires. This is not inconsistent with what was said by Erle, C. J., in *Meyerstein* v. *Barber*, that "the indorsement and delivery of the bill of lading while the ship is at sea, operate exactly the same as the delivery of the goods [* 83] themselves to the assignee after * the ship's arrival would do." That learned Judge cannot have meant that possession of the symbol is for every purpose the same thing as actual possession of the goods: what he did mean was, that the indorsement and delivery of the bill of lading by way of pledge (which he considered to be the effect of the transaction in that case) was equivalent, and not more than equivalent, to a delivery by way of pledge of the goods themselves. Lord Hardwicke, 1 Atk. 249, thought that there was a difference between an indorsement of a bill of lading in blank and a personal indorsement, and (for some purposes) I think there is much reason for that opinion. If, from a personal indorsement, the inference might properly be drawn that a title by assignment, as distinguished from pledge,

was meant to pass to the indorsee, it would not, in my opinion, follow that the same inference ought to be drawn from an indorsement in blank. Part of the custom of merchants, found in *Lickbarrow* v. *Mason*, was that "indorsements of bills of lading in blank may be filled up by the person to whom they are delivered or transmitted, with words ordering the delivery of goods to be made to such person; and, according to the practice of merchants, the same when filled up have the same operation as if it had been done by the shipper." Whether it is or is not usual in practice to fill up the blank with any name before taking delivery, it is certainly not to be implied from the custom as thus found that the operation of the indorsement, while it remains in blank, is necessarily to all intents and purposes the same as if it were filled up with the holder's name. So long as it remains in blank it may pass from hand to hand by mere delivery, or it may be redelivered to the shipper without any new transfer or indorsement, which would not be the case if there were a personal indorsement. It would be strange if the Bills of Lading Act has made a person whose name has never been upon the bill of lading, and who (as between himself and the shipowner) has never acted upon it, liable to an action by the shipowner upon a contract to which he was not a party.

I am not however sure, that, for the decision of the present appeal, it is really necessary to rely, either upon any difference between a personal indorsement and one in blank, or upon the * distinction between such a form of security as (in [* 84] English law) might be held to pass the whole legal title, and a simple pledge.

The statute with which your Lordships have now to deal is introduced by a preamble, the material part of which is, that "by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property." The 1st section enacts, that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all

rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The 2nd section provides that "nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement." There is nothing else material in that Act.

The statute contemplates the passing of "the property in the goods" by the indorsement of the bill of lading, as a thing which may, or may not, happen, according to the nature and intent of the contract or dealing, for the purpose of which that indorsement is made; and it seems to provide for those cases only in which the property so passes, as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be "transferred to" the indorsee, and should not any longer "continue in the original shipper or owner." One test of the application of the statute may perhaps be, whether, according to the true intent and operation of the contract between the shipper and the indorsee, the shipper still retains any such proprietary right in the goods, as to make it just and reasonable that he should also retain rights of suit (the word is suit, [* 85] not action) * against the shipowner, under the contract contained in the bill of lading. If he does, the statute can hardly be intended to take from him those rights, and transfer them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to the shipper's liabilities.

It is very difficult to conceive that when the goods are still *in transitu*, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the indorsee all rights of suit under the contract with the shipowner. That some proprietary right (his original right, subject only to the creditor's security) remains in him is indisputable. If that proposition needed illustration from authority, it would be found in the cases of *Re*

Westzinthus, *Spalding* v. *Ruding*, and *Kemp* v. *Falk*. Can it be that he is by the statute deprived of all remedies, legal and equitable, under the bill of lading, as long as it remains in the hands of the secured creditor? The creditor, in the ordinary course of things, will do nothing until the time for payment or delivery of the goods arrives. Can it then be material whether the proprietary right, thus remaining in the shipper while the goods are *in transitu*, is legal or equitable? The statute relates to a subject of general mercantile law, in which not Englishmen only but foreigners also may be, and often are, concerned. Foreign as well as British indorsements of bills of lading by way of security for advances (which may be made abroad, perhaps in countries not governed by English laws) are liable to be affected by it, whenever recourse must be had to British Courts. It seems to me to be inconceivable that the construction of the words "the property in the goods," in such a statute can have been intended to depend upon any such technical distinction as that made in English law (but by no means in the laws of all other countries in which the customs of merchants prevail) between legal and equitable titles.

It is to be observed further that the statute contemplates **beneficium cum onere* and not *onus sine beneficio*. It may [*86] be reasonable if the indorsee has the benefit (as he would if he were a purchaser out and out, or if under his title as indorsee of the bill of lading he obtained delivery of the goods to himself), that he should take it with its corresponding burden, *quoad* the shipowner. But it would be the reverse of reasonable to impose upon him such a burden, when he has neither entered into any contract of which it might be the natural result, nor (having taken a mere security) has obtained any benefit from it. This observation is fortified by the fact that the statute does not appear to distinguish between indorsements subsequent and those anterior to its enactment.

On the other hand it seems impossible to suppose the Legislature to have passed this statute without some reference to the custom proved in *Lickbarrow* v. *Mason*, and to the law (whatever may be the true view of it) established on the same subject by later authorities in the English Courts. And if (as I think) it ought to be understood with some reference to that custom and to those authorities, I cannot persuade myself that its operation

is altogether restricted to cases of out-and-out sale, or that an indorsee of a bill of lading by way of security, who converts his symbolical into real possession by obtaining delivery of the goods, ought never to derive any benefit from it. The authorities decided upon the statute itself appear to me to be most easily reconciled with its apparent objects, and with each other, by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense; viz. that the indorsee by way of security, though not having "the property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and that he actually does so as between himself and the shipowner, if and when he claims and takes delivery of the goods by virtue of that title.

The authorities decided upon the statute are *Fox* v. *Nott*,
[* 87] * *Smurthwaite* v. *Wilkins*, *The Figlia Maggiore*, and *The Freedom*. Another case, *Short* v. *Simpson*, was also cited during the argument at your Lordships' bar.

In *Fox* v. *Nott* (A.D. 1861) the only question determined was, that the shipowner retained his remedy by action against the shipper, after the indorsement of the bill of lading (a case provided for by the 2nd section); but some of the learned Judges expressed opinions bearing upon the general construction of the statute. POLLOCK, C. B., said, "The indorsee of the bill of lading may be sued under the statute, because by taking the goods he also takes the liability to the freight." MARTIN, B., said, "The statute means an actual vesting of the property as by bargain and sale;" and WILDE, B., said, "I agree with my Brother MARTIN that the Act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight."

In *Smurthwaite* v. *Wilkins* (A.D. 1862) the indorsee of a bill of lading, who had indorsed it over to a third party, was held not to be liable to the shipowner. ERLE, C. J., said, "The contention on the part of the plaintiff is, that, the property in the goods passing to the defendants by the assignment of the bill of lading,

under the Act, they are liable for the freight, although they never received the goods. . . . The contention is, that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party, before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parliament. The person who received the goods was always considered liable for the freight; but that was not by virtue of an original liability as a contracting party, but on a contract implied from his acceptance of the goods. Looking at the whole statute, it seems to me that the obvious meaning is, that the assignee *who receives the cargo* " (the italics are in the * report) " shall [* 88] have all the rights and liabilities of a contracting party; but that, if he passes on the bill of lading by indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it." Sir E. VAUGHAN WILLIAMS agreed. " Looking " (he said) " at the preamble, and at the general scope and intention of the statute, I can entertain no doubt that the view presented by my Lord is the true one;" and he explained the effect of " the general scope " of the Act to be, " that, where the right of property leaves the party, the rights and liabilities under the contract leave him also." A case like the present, of a security on an indorsed bill of lading, not acted upon (and which, in fact, never could be acted upon) by taking delivery of the goods, but at the same time not transferred to any other person, differs (in specie) from that of a man who has transferred the bill of lading by indorsing it over to another. But I cannot see that it would be more reasonable to make the holder of such a security, which he has never realized, and never can realize, liable under the statute, than if he had parted with the bill of lading to somebody else.

The cases of *The Figlia Maggiore*, and *The Freedom*, were determined in the Court of Admiralty under another statute, which (as Dr. Lushington and his successor, in my opinion, rightly held) gave that Court jurisdiction when, and only when, there was, independently of that statute, a right of action or suit; and, in those particular cases, it appears to have been held, that there was no such right of action or suit, unless it was given by

the Bills of Lading Act. In both of them the plaintiffs, indorsees by way of security of bills of lading, had claimed and obtained delivery of the goods, and then had brought actions against the shipowners for damages which they had sustained through breaches of the contracts contained in the bills of lading; and they were held entitled to recover. This was right if an indorsee under such circumstances may rightly be held entitled to the benefit of the statute, as having elected to complete his potential and inchoate title by taking possession of the goods, and so placing himself towards the shipowner in the position of proprie-
[* 89] tor. May it not be said that "the property in the * goods" then (if not before) "passes" to him "by reason of the indorsement." The principle of the liability, which under some circumstances was held, even before the statute, to attach to the indorsee taking delivery, was regarded by Erle, C. J., in *Smurthwaite* v. *Wilkins*, as elucidating the policy and the objects of the statute itself; and both he, and Pollock, C. B., in *Fox* v. *Nott*, spoke of "taking the goods," and "receiving the cargo," as the test of its application. The authorities on that subject (*Jesson* v. *Solly*, 4 Taunt. 52; 13 R. R. 557; *Stindt* v. *Roberts*, 17 L. J. Q. B. 166; *Wegener* v. *Smith*, 15 C. B. 285; 24 L. J. C. P. 25; *Chappel* v *Comfort*, 10 C. B. (N. S.) 802; 31 L. J. C. P. 58), seem from this point of view to deserve consideration.

The decision in the Court of Admiralty in the case of *The Freedom*, was affirmed by Her Majesty in Council, upon the advice of the Judicial Committee, and although it was on a point as to which the Admiralty had only a statutory jurisdiction concurrent with the Courts of Common Law, and though in all English Admiralty cases the appeal now lies to this House, still this, as the decision of a Court of final appeal, ought not, in any later case, to be lightly departed from.

The case of *Short* v. *Simpson* did not really require anything to be decided as to the effect of the statute, and nothing was in fact so decided. It was there held that, *quocunque modo*, whether under the statute or independently of the statute, the shipper, to whom a bill of lading which he had indorsed and delivered to his creditor by way of security was reindorsed and redelivered upon payment of the loan, was remitted to his original rights.

Upon the whole I cannot dissemble that this case appears to me to be attended with some considerable difficulties. But those

difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression found in authorities not decided with a view to any such consequences as those which the statute would produce. They deal with questions between unpaid vendors of * goods comprised in bills of lading and *bonâ fide* [* 90] indorsees of the same bills of lading for value, or between competing and adverse claimants to priority as *bonâ fide* holders for value of the bills of lading themselves. The statute, on the other hand, deals with questions between shippers and indorsees of bills of lading claiming under them, and between indorsees and shipowners. The preponderance of principle and reason appears to me to be against the proposition, that, as between those parties, it can have been intended by, or can be the effect of, the statute to make the creditor of the shipper liable (in effect) as his surety to the shipowner (with whom he was never brought in contact), by reason only of the deposit with him, by way of security, of a bill of lading indorsed in blank; his right under that deposit, being (whether at law or in equity) special and not general, and the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined by any authority that such is the effect of the statute.

My conclusion is, that the appellants ought to be exonerated by your Lordships' judgment from the respondents' action; and that the order of the Court of Appeal ought to be reversed, with costs.

Lord BLACKBURN: —

My Lords, the judgment of FIELD, J., was reversed by the order now under appeal. The case was tried before him without a jury, and I think it is necessary to see what he had to determine. There was no question between vendor and vendee, nor of stoppage *in transitu*, raised, for there was neither a vendor nor a stoppage. The law and decisions as to stoppage *in transitu* might be relevant in construing the statute 18 & 19 Vict. c. 111, but did not otherwise affect the rights of the parties.

It will be seen by reference to the statement of claim and of defence that it was not suggested that the defendants were, at the time the goods were shipped, in any way interested in the

goods; nor that they were, either as undisclosed principals or otherwise, parties to the contract in the bill of lading until it was delivered to them, after the ship had sailed and the [* 91] goods were * in the hands of the shipowners to be carried under the bill of lading and were not yet delivered with an indorsement in blank by Nercessiantz, the consignee named in the bill of lading.

I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, or by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract.

Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the indorsement of the bill of exchange; but I think since the decision in *Thompson v. Dominy*, in 1845, 14 M. & W. 403; 15 L. J. Ex. 320, it has been undisputed law that under no circumstances could any one not a party to the contract from the beginning sue on it in his own name. Any action on the contract at common law must be brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor.

But ten years later the 18 & 19 Vict. c. 111, was passed. The preamble states this as one of the objects which the Legislature had in view, "Whereas by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee" (which I think for a long time before the 18 & 19 Vict. A.D. 1855 was undisputed), "but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner" (this, it is to my mind clear, refers to *Thompson* v. *Dominy*), "and it is expedient that such rights should pass with the property."

The mode in which the Legislature carry out the object thus

expressed in the preamble is by sect. 1: "Every consignee of * goods named in a bill of lading, and every indorsee of [* 92] a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

The case made on the statement of claim was that "the" property had passed upon or by reason of the indorsement to the defendants. Not that they were before that a party to the contract in the bill of lading, but that by virtue of the Act 18 & 19 Vict., when the property passed they became subject to the same liabilities as if the contract contained in the bill of lading had been made with themselves.

It is not disputed that the delivery of the bill of lading to the defendants with the indorsement of the consignee on it in blank was an indorsement, nor that whatever interest then passed to them still remained in them. What was in issue was whether upon or by reason of that indorsement "the" property passed.

The first and most important question to be decided in this case is, what is the true construction of 18 & 19 Vict. c. 111? Does "the property" in the goods there mean any legal property in the goods: so as to be satisfied by proof that a legal property passed accompanied by a right of possession so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common-law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien; or the whole property at law having passed by way of mortgage the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a Court of Equity?

I think that all the Judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying no doubt a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against * any one who wrongfully interfered with his right), [* 93] though "a" property, and "a" property against the indor-

No. 9. — Sewell v. Burdick, 10 App. Cas. 93, 94.

ser, passed "upon and by reason of the indorsement," yet the property did not pass. And I agree with them. I do not at all proceed on the ground that this, being an indorsement in blank followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name.

The case of *The Freedom* was cited, and I think there are expressions used in the judgment delivered in that case by Sir Joseph Napier which indicate that the Judicial Committee were not of that opinion. It is said (page 599), "The plaintiffs were consignees for sale; but as part of the transaction a bill of exchange was drawn by the consignors for nearly the full value of the goods, the bills of lading were indorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course." If that was the transaction (and whether it was so or not, the Judicial Committee proceeded on the assumption that such was the transaction), the plaintiffs in *The Freedom*, were in exactly the position of Church, in the case of *Newsom* v. *Thornton*, 6 East, 17; 8 R. R. 378, the case to which I shall have to refer afterwards. Church had the bill of lading indorsed to him as a factor, or consignee for sale, and had therefore a right to hold the goods as against the indorser as a security for all his advances, and he had authority at common law to sell the goods, and before the arrival of the ship to transfer the bill of lading in furtherance of a sale, but he had no authority to pledge either the goods or the bill of lading. It is true that by the Factor's Acts the plaintiffs in *The Freedom*, would have had a power, which Church had not, to pledge the bill of lading, but as they did not exercise that power it could make no difference.

The judgment then proceeds: "The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs: the right of suing upon the contract in the bills of lading was transferred to them by force of the statute 18 & 19 Vict. c. 111." The judgment then proceeds to show, I think correctly, that the *dictum* of Martin, [* 94] B., reported in * *Fox* v. *Nott*, was not necessary for the decision in *Fox* v. *Nott*, and goes on: "Their Lordships are satisfied that it was intended by this Act that the right of suing upon the contract under a bill of lading should follow the

property in the goods therein specified; that is to say, the legal title to the goods as against the indorser." It certainly seems to me that their Lordships thought that "the property passed within the meaning of 18 & 19 Vict. c. 111, if any legal right to hold as against the indorser passed."

The statute which their Lordships had to construe was the 24 Vict. c. 10, s. 6, which is in these terms, "The High Court of Admiralty shall have jurisdiction over any claim by the owner" (*i. e.* of the goods) "or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." It is not necessary to put a construction on 24 Vict. c. 10, s. 6.

I think that there are very good reasons for contending that a person who has possession of an indorsed bill of lading without any right at all to hold it against the indorser, without being owner of any interest in the goods, is not an "assignee" within the meaning of this enactment, and consequently that what I understand to be the actual decision of Dr. Lushington in *The St. Cloud*, that such a person could not sue under the Admiralty Act, may have been right enough. It is not necessary to decide that. But I agree with what was said in *The Nepoter*, that it is contrary to all rules of construction to interpolate any reference to the Bill of Lading Act into the Admiralty Act. I think, therefore that the actual point decided in *The Freedom* might be quite right, for the plaintiff in that action had a property, and a very substantial property, in the goods, as against the indorsers, and every one else, and was in every sense an assignee of the bill of lading. The opinion expressed on the con- [* 95] struction of the 18 & 19 Vict. c. 111, that in that Act the property meant a legal title as against the indorser, was perhaps unnecessary, and, I think, not sound.

The words used in the statute are not such as *primâ facie* to express such an intention. No one, in ordinary language, would say that when goods are pawned, or money is raised by mortgage on an estate, the property, either in the goods or land, passes to

the pledgee or mortgagee, and I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of his borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities which the Legislature has, by the Factors Acts, shown it thinks ought rather to be encouraged.

It is not uncommon to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. Such was the case in *Glyn* v. *East and West India Dock Company*, 5 Q. B. D. 129; 6 Q. B. D. 475; 50 L. J. Q. B. 62; 7 App. Cas. 591; 52 L. J. Q. B. 146, p. 818, *post*, as to which I shall have more to say hereafter.

When there is such a writing, it is, in the absence of fraud, conclusive as between the parties as to what they intended. And I do not in the least question that such a writing may be so expressed as to show that between the parties the transfer was a mortgage, though of goods, in the manner with which every one is familiar with regard to lands. The equity of redemption in such a case was an equitable estate only, and in 1855 enforceable in equity, not at law.

Where there is neither a symbolical delivery by a transfer of a bill of lading, nor an actual delivery of the goods themselves, there may be (though there seldom is) a substantial difference in the rights of the lender according as the transaction is of the one kind or the other.

In *Howes* v. *Ball*, 7 B & C. 481; 6 L. J. Q. B. 106, Ball sold and delivered a coach to John Howes (since deceased) under an agreement in writing, in which there was this clause, "And further I, John Howes, do agree that Thomas Ball do [* 96] have and hold a claim upon the coach until the * debt be duly paid." John Howes died without having paid the debt. Ball, after his death, seized the coach, for which seizure the action was brought by the executor. Had that agreement amounted to a mortgage by John Howes to Ball, I take it there could have been no doubt that the mortgagee would have had as much right against the executor of John Howes as he would have had against John Howes himself. But it was held that it did not amount to a mortgage, but only to an agreement that Ball

should have a right of hypothec, and, there having been no delivery by Howes to Ball, the decision was that though so long as John Howes lived and held the property in the coach Ball might have justified the seizure, as against him, he could not justify a seizure as against the representatives.

In *Flory* v. *Denny*, 7 Ex. 581; 21 L. J. Ex. 223, where the agreement was "as an additional security for a loan to assign all the debtor's right and interest in a chattel," it was held to be a mortgage, and to operate so as to transfer the property, without any delivery, as a bargain and sale out and out of the goods would, though an agreement to create a pledge would, according to *Howes* v. *Ball*, have conveyed no property of any kind in the goods without a delivery.

But where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession, symbolical, it is true, but all that can be given. The question whether there was a mortgage or only a common-law pledge, or hypothec, it being accompanied by delivery, might affect the question what was the Court in which those rights were to be enforced, but does not affect the substance of the rights. The borrower, if ready and willing to pay the money, might in the one case be able to bring an action at law against the lender who refused to allow him to redeem, and in the other have to sue in Equity, but as it would equally be a pledge his rights would be the same in substance. I am therefore strongly inclined to hold that even if this was a mortgage there would not have been a transfer of "the" property within the meaning of 18 & 19 Vict. c. 111. This is contrary to the opinions not only of Brett, M. R. and Baggallay, L. J., but of Field, J., also.

* Bowen, L. J., who agreed with Field, J., in thinking that [*97] this was not a mortgage but only a pledge, did not express any opinion as to what would have been the law if it had been a mortgage. I believe all the noble and learned Lords who heard the argument are agreed with him in thinking that in this case it was only a pledge. I do not therefore intend to express a final decision that an assignee of a bill of lading by way of mortgage is not as such liable to be sued under 18 & 19 Vict. c. 111; but only to guard against its being supposed that even if Brett, M. R., and Baggallay, L. J., were right in holding this a mortgage, I, as at present advised, should agree in their conclusion that the defendants could be sued.

I now proceed to consider the question on which the Court of Appeal were divided in opinion, but the majority made the order now appealed against. The question is stated by Brett, M. R., to be, "Does the indorsement of a bill of lading as a security for an advance, by a necessary implication which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee with an equity in the indorser, the borrower to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?" 13 Q. B. D. 161.

Field, J., had held, and Bowen, L. J., agreed with him, that it might so operate, if so intended by the parties at the time, but did not so operate if it was intended to be no more than a pledge as distinguished from a mortgage.

I do not understand that any one of the Judges below disputed that if it was a question of intention depending on the evidence, the finding of Field, J., was right; but the majority in the Court of Appeal proceeded on the principles laid down by Brett, L. J., in *Glyn* v. *East and West India Dock Company*. In that case the terms on which the bill of lading was delivered to Glyn & Co. were reduced to writing, and the question therefore whether it was intended to deliver it by way of pledge only, or by way of a mortgage, depended on the construction of that writing. Whether Brett, L. J., thought that on the construction of the written instrument it was intended to be a mortgage I do not know; I do not think he proceeded on that ground. He said it was a mort-
[* 98] gage, * and that the effect of the statute 18 & 19 Vict. c. 111 was to transfer the right to sue and the liability to be sued to Glyn & Co.

Lord Bramwell, then Bramwell, L. J., was of an opposite opinion on both points. He thought that Glyn & Co. had a special property and a right of possession, and no more.

In the House of Lords I said, "I do not think it necessary to express any opinion, on a question much discussed by Brett, L. J., I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession subject to the shipowner's lien, and were entitled to maintain an action against any one who, without justification or

legal excuse, deprived them of that right." All the noble and learned Lords agreed in this. I think therefore the decision of this House is a strong authority in support of the position which I have before advanced, that the rights of a mortgagee having taken a bill of lading, and the rights of a pawnee having taken a bill of lading, are in substance the same.

I did not think it necessary to point out that the question which the House in *Glyn* v. *East and West India Dock Company*, had to decide, and did decide, would have been just the same if 18 & 19 Vict. c. 111 had never been passed or had been repealed, and consequently that it was unnecessary to express any opinion on the construction of that Act, but it obviously was so.

Before proceeding further I wish to point out what in my opinion is a great misapprehension as to the effect of the decision of this House in *Lickbarrow* v. *Mason*, 6 East, 20 n., and as to the weight to be given to the opinion of BULLER, J., delivered in this House and reported in a note to 6 East.

I have already said that in this case there is no sale, no vendor, and no vendee, and no stoppage *in transitu* so that this misapprehension, as I think it is, is not so material as it might be in some other cases.

* A demurrer on evidence, as is pointed out by EYRE, C. J., [* 99] in delivering the unanimous opinion of the Judges in *Gibson* v. *Hunter*, 2 H. Bl. 205, 206, not *Gibson* v. *Minet*, as is by mistake said in the note in 6 East, though not familiar in practice, was a proceeding known to the law. He explains it, and states his very confident expectations (which have been justified by the result) that no demurrer on evidence would again be brought before the House.

It may be well to point out the dates. The demurrer to evidence in *Lickbarrow* v. *Mason* was in 1787. The only case of a demurrer on evidence in what were then recent times, was *Cocksedge* v. *Fanshawe*, 1 Doug. 118, 134, on which judgment had been given in this House in 1783. Neither in the King's Bench nor in the Exchequer Chamber was any question raised in *Lickbarrow* v. *Mason*, as to the mode in which the questions discussed were raised. In 1790 the writ of error from the decision of the Exchequer Chamber was brought before the House of Lords. The law peers at that time were Lord THURLOW, Lord LOUGHBOROUGH, and Lord KENYON. When it was argued does not appear, but it

was argued, and the same question as had been asked of the Judges in *Cocksedge* v. *Fanshawe* was asked of the Judges. Six Judges (including all the survivors of those who had joined in Lord LOUGHBOROUGH'S judgment in the Exchequer Chamber) answered in favour of the respondent. The three Judges who had given judgment in the King's Bench answered in favour of the appellant. This House delayed giving its opinion till 1793. In the meantime, in 1791, there was a demurrer to evidence in *Gibson* v. *Hunter* which was brought before this House. The case in this House is reported, 2 H. Bl. 187. On the 7th of February, 1793, this House gave judgment, awarding a *venire de novo*. One week afterwards, on the 14th of February, 1793, this House delivered judgment in the long pending case of *Lickbarrow* v. *Mason*, awarding in that case also a *venire de novo*. Lord LOUGHBOROUGH was himself at that time Lord Chancellor.

I should have thought, if anything was clear, it was that this House did not decide anything, except that on that [*100] demurrer to *the evidence no judgment could be given; certainly the last conclusion that I should draw is that stated by FIELD, J., that the House in which Lord LOUGHBOROUGH was Chancellor decided "presumably" on the opinion delivered by BULLER, J., against the judgment of Lord LOUGHBOROUGH, which six Judges to three had thought right. Neither can I at all agree in the opinion expressed by FIELD, J., that the opinion of BULLER, J., has always been taken as the law, and been adopted and followed as the law up to the present day. It never was published till 1805 in a note to 6 East, 20. I have for many years been of opinion and still remain of opinion, that much of what BULLER, J., expresses in that opinion as to stoppage *in transitu* was peculiar to himself, and was never adopted by any other Judge, and is not law at the present day. But it is not necessary to pursue the subject further, as I agree with BOWEN, L. J., that neither the statement of the custom of merchants in the special verdict in *Lickbarrow* v. *Mason*, nor the opinion of BULLER, J., justifies the inference that the indorsement of a bill of lading for a valuable consideration must pass the entire legal property, whatever was the intention of the parties.

In *Lickbarrow* v. *Mason*, Turing was an unpaid vendor to Freeman. He had indorsed the bill of lading to Freeman, and had not therefore any right, except that of stopping the goods

whilst *in transitu* if Freeman became insolvent without having paid for the goods, and that right he had, though the indorsed bill of lading had been sent on to the vendee, so long as that bill of lading remained in the vendee's hands. But before any such stoppage Freeman, for valuable consideration, indorsed the bill of lading to Lickbarrow, who, whether as mortgagee or pledgee, had a legal property accompanied by a right of possession. The point which I understand to have been decided in *Lickbarrow* v. *Mason* was, that on the transfer of the bill of lading to Lickbarrow the goods ceased to be *in transitu*, the shipowner from that time no longer holding them as a middleman to carry the goods from the unpaid vendor, Turing, to Freeman his vendee, but holding them as agent for Lickbarrow. It was held, first in *Re Westzinthus* and then in *Spalding* v. *Ruding*, that where *the [*101] *transitus* was thus put an end to by what was in reality only a pledge, the stoppage might be made available in equity so far as the rights of the pledgee did not extend. I thought, and still think, that the reason why the stoppage could not be made available at law was because the shipowner no longer held the goods as a middleman, as the transferee of the bill of lading for valuable consideration and *bonâ fide* so as to give him a security whether by way of mortgage or by way of pledge, had a legal property in the goods which he could enforce as against the shipowner. Such being my view of the law, whether it was right or wrong, I expressed myself accordingly in *Kemp* v. *Falk* so as to show that I thought so; but there was nothing in that case to call for a decision on the point now before this House.

In *Newsom* v. *Thornton* Lord ELLENBOROUGH says: "I should be very sorry if anything fell from the Court which weakened the authority of *Lickbarrow* v. *Mason* as to the right of a vendee to pass the property of goods *in transitu* by indorsement of the bill of lading to a *bonâ fide* holder for a valuable consideration and without notice. For as to *Wright* v. *Campbell*, 4 Burr 2047, though that was the case of an indorsement of a factor, it was an outright assignment of the property for value. Scott, the indorsee, was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor, at least, purported to make a sale of the goods transferred by the bill of lading, and not a pledge. Now this was a direct pledge of the bill of lading, and not intended by the parties

as a sale. A bill of lading, indeed, shall pass the property upon a *bonâ fide* indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do if so intended. But it cannot operate further."

Lawrence, J., at page 43, says, speaking of *Lickbarrow* v. *Mason*, "All that that case seems to have decided is, that where the property in the goods passed to a vendee, subject only to be devested by the vendor's right to stop them while *in* [* 102] *transitu*, * such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and *bonâ fide*, and by indorsement of the bill of lading given him a right to recover them." And Le Blanc, J., says that what they then determine "will not break in at all on the doctrine of *Lickbarrow* v. *Mason* that the indorsement of a bill of lading upon the sale of the goods will pass the property to a *bonâ fide* indorsee, the property being intended to pass by such indorsement."

In *Glyn* v. *East and West India Dock Co.*, Brett, L. J., says (speaking of an opinion of Willes, J.), "To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of *Lickbarrow* v. *Mason*, namely, that such an indorsement passes the legal property," by which I understand him to mean the whole legal property. But neither in that case nor in the case now at bar does he refer to any authority to that effect. Expressions used by Judges have been cited which, I think, only show that they did not carefully consider their language, where no question of the kind before us was under discussion. And, as far as I know, there is no decision subsequent to *Lickbarrow* v. *Mason* which proceeds on such a ground, whilst *Newsom* v. *Thornton* proceeds expressly on the ground that the indorsement of a bill of lading, when intended to be a pledge only, is not valid if made by one who has no authority to make a pledge. I do not know that I am justified in saying that it is a decision that, if it was made by one who had authority to make a pledge, it would be good as such, though I think that appears to have been Lord Ellenborough's opinion, and I do not think any authority was cited on the argument at the bar to show that such is not the law. No case was cited at the bar, nor am I aware of any in

which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property. The MASTER OF THE ROLLS says: "If the general understanding of merchants had not been in accordance with the verdict of the jury in *Lickbarrow* v. *Mason*, accepted in its largest sense, there would, one would think, have been cases
* in the books raising the question." 13 Q. B. D. 162. With [* 103]
submission to the MASTER OF THE ROLLS, I think no weight can be given to this absence of authority until it is shown that there have been cases in which it became material to consider whether an indorsement intended to be and operating as a pledge at law had a less effect than an indorsement operating against the intention as a mortgage. I have already given my reasons for thinking that in substance the rights would be the same. Without, therefore, deciding the question whether a mortgage would render the mortgagee liable under 18 & 19 Vict. c. 111, I decide that, mainly for the reasons given by BOWEN, L. J., this transfer did not operate as a mortgage.

I therefore am clearly of opinion that the order made by the Court of Appeal should be reversed with costs, and the judgment of FIELD, J., restored.

Lord BRAMWELL: —

My Lords, I concur. This action would not have been maintainable at common law. Is it maintainable under 18 & 19 Vict. c. 111? That depends upon whether the appellants are indorsees of the bill of lading "to whom the property in the goods therein mentioned has passed upon or by reason of such indorsement." It is found as a fact, and rightly found, as is admitted, that all that was intended in the transaction was a pledge. This would give the appellants a property, but, as put by BOWEN, L. J., not "the" property. As I understand the MASTER OF THE ROLLS, if this could be, then the appellants are right; but he thinks it could not be, — that *Lickbarrow* v. *Mason*, or rather the opinion of BULLER, J., shows that when a bill of lading is indorsed to give any title to the transferee the entire property is passed, and that in such a case as this nothing but an equitable right to redeem remains in the transferor. It is for those who assert this to prove it. I cannot prove the negative that it is not so; and logically and reasonably I might content myself with saying that it is not proved to me; that I see no reason and no authority in support of it. But I go further; I think that authority and reason are against it. The cases do not,

[* 104] in my opinion, justify the * contention. I will not discuss or examine them in detail; that has been done by the Lord Chancellor. I understand his conclusion to be that the expressions of learned Judges which have been relied upon should be read and interpreted *secundum subjectam materiam*. I agree. In no case has the present matter been under consideration. As to the reason and principle which should govern, I ask why should the transfer of the bill of lading have a greater effect, contrary to the parties' intention, than the handing over of the chattels themselves? They could be pledged if on shore, but being at sea no actual delivery, which is necessary to a common-law pledge, can take place. There can, however, be a symbolical delivery by transferring the bill of lading. Why should the effect be different?

Then consider the inconvenience of holding that the pledgor has only an equitable right: that he may repay the loan at the day appointed, but thereby acquire no legal title to the possession of the goods; that the pledgee may sell and pass the entire property to one not having notice of the equitable title. Consider what difficulties would be put on those who lend on such securities if this action was maintainable. The banker who lent money on a bill of lading for goods which arrived *in specie*, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be that the transferee of the bill of lading, though only interested to the amount of the loan on it, would be the person to bring actions on the contract to carry. It is true that unless he can do so in all cases, he can in none, even where his interest is to the extent of the full value of the goods. Either this was not thought of by the Legislature, or, if it was, they thought that no case could be included unless all were, and that it was better to include none than all. It is to be observed that the statute in its preamble says that by indorsement the property "may" pass. It is to be remembered also, as pointed out by my Lord Chancellor, that this law bears upon foreigners out of the kingdom.

I am the more surprised at this contention on the part of the Master of the Rolls, as he has always so ably and powerfully contended that mercantile laws, contracts, and usages should be free as possible from technicality. I am of opinion that [* 105] the appeal * should be allowed. I cannot truly say that I have any doubt on the matter.

No. 9. — Sewell v. Burdick, 10 App. Cas. 105. 106.

I take this opportunity of saying that I think there is some inaccuracy of expression in the statute. It recites that, "by the custom of merchants, a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee." Now, the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to show that the property passes by the contract. So if the contract was one of security, — what would be a pledge if the property was handed over, — a contract of hypothecation, the property would be bound by the contract, at least as to all who had notice of it, though the bill of lading was not handed over.

There is, I think, another inaccuracy in the statute, which, indeed, is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take, for instance, goods shipped under a charter-party, and a bill of lading differing from the charter-party; as between shipowner and shipper at least the charter-party is binding. *Gledstanes* v. *Allen*, 12 C. B. 202.

These distinctions are of a verbal character, and not perhaps of much consequence; but I am strongly of opinion that precision of expression is very desirable, and had it existed in such cases as the present there would not have been the contradictory opinions which have been given.

Lord FitzGerald: —

My Lords, Field, J., in the Court below, came to the conclusion that the transaction under investigation was intended by the * parties to operate as a pledge only. There can be no [* 106] doubt that the inference thus drawn by the learned Judge was correct in fact. It seems to follow that the pledgees acquired a special property in the goods with a right to take actual possession, should it be necessary to do so for their protection or for the realisation of their security. They acquired no more, and subject thereto the general property remained in the pledgor

I am of opinion that the delivery of the indorsed bill of lading to the defendants as a security for their advance did not by necessary implication transfer the property in the goods to the defendants. They were not, therefore, "indorsees of a bill of lading to whom the property in the goods passed by reason of the indorsement," so as to make them without more "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with them."

The judgments which have been just delivered are so very full, and so able and satisfactory, that it would be mere affectation on my part to attempt to do more than express my concurrence.

Order appealed from reversed. Order of FIELD, J., *restored. Respondent to pay the costs in the Court below and in this House. Cause remitted to the Queen's Bench Division.*

Lords Journals, 5th December, 1884.

ENGLISH NOTES.

The former of the principal cases, *Lickbarrow* v. *Mason*, has played too important a part in the education of the commercial lawyer, to be altogether omitted in a selection of "ruling cases." But, for modern purposes, the short summary above given, appears sufficient. To set forth the various judgments at length would be bewildering to the student, and possibly misleading to a practitioner not specially conversant with commercial law. In the result, the judges of the King's Bench appear to have been right in their decision: but their reasons, both as stated in their own Court and as elaborately set forth by BULLER, J. in advising the House of Lords, involve a serious misapprehension of the nature of bills of lading, by treating them, in effect, as negotiable instruments. The judgment of Lord LOUGHBOROUGH delivered in the Exchequer Chamber is, on the other hand, instructive on some points as to the nature of bills of lading, but comes to a conclusion which is wrong in fact, owing to the absence of information upon the custom which was found by the special verdict on the second trial. The House of Lords, as Lord BLACKBURN shows in *Sewell* v. *Burdick*, p. 773 *et seq.*, *ante*, decided nothing except a now obsolete question of procedure. The special verdict (p. 758, *ante*) is all that is now of real importance in the case. Taken with the correction supplied by *Sewell* v. *Burdick*, it is still the ruling authority on this branch of law.

It will be seen that in the above case of *Sewell* v. *Burdick*, reference

is made to some of the judgments in *Glyn* v. *East and West India Dock Co.* The question had been there discussed (and opinions divided upon it), whether the right by way of security held by an indorser of a bill of lading was a mortgage or a pledge. Upon this point, if it has any importance, the case of *Sewell* v. *Burdick* seems an authority for saying that *primâ facie*, at all events, the indorsement, when intended merely to create a security, confers a special property, or right in the nature of a pledge only. The case of *Glyn* v. *East and West India Dock Co.*, in which some other important points were considered and settled, will be found fully set forth as itself a ruling case, No. 12, p. 818, *infra* (7 App. Cas. 591, 52 L. J. Q. B. 146, 47 L. T. 309).

In regard to the latter part of the rule as to the effect of the Bills of Lading Act, it is to be observed that if the holder, although he is an assignee by way of security only, of the bill of lading has demanded and obtained possession of the goods, it becomes immaterial whether he has the "property" within the meaning of the Act; for the demanding and taking of the goods from the master by the assignee of the bill of lading is evidence of a new contract on the part of that assignee with the shipowner to pay the freight and perform the stipulations of the bill of lading. *Cock* v. *Taylor* (1811), 13 East, 399, 2 Camp. 587, 12 R. R. 378; *Allen* v. *Coltart* (1883), 11 Q. B. D. 782, 52 L. J. Q. B. 686, 48 L. T. 944.

AMERICAN NOTES.

Lickbarrow v. *Mason* is universally accepted in this country. Benjamin on Sales (6th Am. ed., Bennett's notes), p. 858; Browne on Sales, p. 187. "There are numerous decisions, both in England and America, to the effect that when goods are consigned by the vendor to the vendee, under bills of lading in the usual form, as in this case, an attempt by the vendor to stop the goods *in transitu* will be unavailing as against an assignee of the bill of lading, who took it in good faith, for a valuable consideration, in the usual course of business, before the attempted stoppage. The leading case on this point is *Lickbarrow* v. *Mason*, 2 Term R. 63, the authority of which has been almost universally acquiesced in by the courts and text-writers in this country and in England. There being little or no conflict in the authorities on the point adjudicated in that case, it would be useless to recapitulate them here." *Newhall* v. *Cent. Pac. R. Co.*, 51 California, 345; 21 Am. Rep. 713. (In that case the assignment and delivery of the bill was held to operate in spite of a previous notice to the carrier to stop the goods.) See *Hollingsworth* v. *Napier*, 3 Caines (New York), 182; 2 Am. Dec. 268; *Chandler* v. *Fulton*, 10 Texas, 2; 60 Am. Dec. 188, citing *Lickbarrow* v. *Mason*. Mr. Bennett says (note, Benjamin on Sales, p. 858): "The American law entirely accepts the doctrine of *Lickbarrow* v. *Mason*, and the cases need not be cited." Mr. Daniel says (2 Negotiable Instruments, § 1730), this decision "may now be regarded as the settled law of England and of the United States." See *Becker* v. *Hallgar-*

No. 10. — Leask v. Scott, 2 Q. B. D. 376. — Rule.

ten, 86 New York, 167; *Emery* v. *Irving Nat. Bank*, 25 Ohio State, 360; 18 Am. Rep. 299; *McDonald* v. *McPherson*, 12 Canada, 116; *Shaw* v. *Railroad Co.*, 101 United States, 564; *Winslow* v. *Norton*, 29 Maine, 419; 50 Am. Dec. 601.

If the original purchase was fraudulent, the right of stoppage is not defeated by transfer of the bill before the goods actually reach the buyer. *Dows* v. *Perrin*, 16 New York, 325; *Dean* v. *Shipper*, 35 Pennsylvania State, 239; 78 Am. Dec. 334; *Pollard* v. *Vinton*, 105 United States, 7.

No. 10. — LEASK *v.* SCOTT.

(C. A. 1877.)

RULE.

THE valuable consideration given by the *bonâ fide* transferee of a Bill of Lading, in order to entitle him to defeat the right of stoppage *in transitu*, need not be a new consideration given at the time of the indorsement; nor is it necessary that the value is given on the faith of the documents. The consideration may be a pre-existing debt due by the transferor to the transferee, or a pre-existing obligation by the former to the latter so to transfer it.

Leask v. Scott.

2 Q. B. D. 376–382 (s. c. 46 L. J. Q. B. 576; 36 L. T. 784; 25 W. R. 654).

Bill of Lading. — Bonâ fide Transferee for Value. — Stoppage in Transitu.

Interpleader to try the title as between plaintiff and defendant, to a cargo of nuts.

Plaintiff had lent a sum of money upon a promise of the borrower to give him cover. In fulfilment of this promise, but without any new consideration, the borrower afterwards handed to plaintiff indorsed bills of lading of the nuts.

Subsequently, on the borrower becoming insolvent, the defendant, an unpaid vendor, stopped the nuts *in transitu*.

Held that, the transaction with the plaintiff, being *bonâ fide*, defeated the defendant's right to stop the goods.

[376] Interpleader action to try the right of the plaintiff as against the defendants to 100 bags of nuts.

At the trial before FIELD, J., at the London Michaelmas sittings, 1876, the following facts appeared in evidence: On the 22nd of

No. 10. — Leask v. Scott, 2 Q. B. D. 376, 377.

December, 1875, Geen, Stutchbury, & Co., fruit merchants in London, agreed to purchase of the defendants a shipment of nuts from Naples to London by the *Trinidad*, "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On Saturday, the 1st of January, 1876, being prompt day, Geen & Co., being already indebted to the plaintiff, their fruit broker, in between £10,000 and £11,000, Mr. Geen applied to him for a further advance of £2000. The plaintiff said, "You may have it, but you must first cover up your account." Geen said that he would give him cover, and the
* plaintiff's cashier at once handed to Geen a cheque for [* 377] £2000. On Tuesday, the 4th of January, the bill of lading, dated the 29th of December, 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to Geen & Co., and they at once accepted a draft for the price, £224 16*s.* 2*d.*; and on the next day Geen & Co. handed to the plaintiff the bill of lading and other similar documents to the value of about £5000, in performance of their promise on the Saturday to give the plaintiff cover. On Saturday, the 8th of January, Geen & Co. stopped payment. The *Trinidad* arrived off Liverpool on the 3rd of February, and the defendants sought to stop the nuts *in transitu*, the plaintiff claiming them under the bill of lading. The nuts were landed, warehoused, and sold, the price being held to abide the result of this interpleader action.

In answer to questions by the Judge, the jury found that the plaintiff received the bill of lading honestly and fairly; that valuable consideration was given on the understanding of security being given; and that the security given was to secure the £2000, and also the old account.

The learned Judge, after argument, directed judgment to be entered for the defendants, being of opinion that the facts of the case brought it within the principle of *Rodger* v. *Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393; 38 L. J. P. C. 30, affirmed by the decision of *Chartered Bank of India, &c.* v. *Henderson*, L. R., 5 P. C. 501.

April 16, 17. Watkin Williams, Q. C., moved to enter judgment for the plaintiff. Geen & Co. became the lawful holders of the bill of lading on it being handed to them by the defendants indorsed in blank, and on their accepting the defendants' draft at

three months for the price, and the plaintiff became lawful holder on it being handed to him by Geen & Co. And according to the findings of the jury, the plaintiff was *bonâ fide* transferee for valuable consideration from the lawful holder of the bill of lading, and was, therefore, legally entitled to it as against the original vendor. This has been the law ever since the leading case [* 378] of *Lickbarrow* v. *Mason* 2 T. R. 63; 6 East, 21, n.; 1 R. R. 425; and the distinction, as to past and present consideration, was first taken in *Rodger* v. *Comptoir d'Escompte de Paris* and is not to be found in any other case, in the *dicta* of any Judge, or in any text-writer. Moreover, the case of *Chartered Bank of India, &c.* v. *Henderson*, before the same tribunal, while it recognises the previous decision, very much narrows its application, and the facts of the present case bring it within the later decision. For, assuming that the existing debt alone would not have been sufficient consideration, being past, to give a valid title to the plaintiff; here the handing over of the bill of lading was in consequence of a binding contract made on the Saturday to give cover, which could have been enforced both at law and equity.

[Lord COLERIDGE, C. J. *Alliance Bank* v. *Broom*, 2 Dr. & Sm. 289; 34 L. J. Ch. 256, is an authority that performance of the contract would have been decreed in equity.]

Moreover, although not expressed, it is clear that part of the consideration for giving cover was the forbearance in not taking proceedings to enforce the debt, and this is a continuing present consideration. The distinction, however, between past and present consideration is inconsistent with all the cases. [He then went through the judgment in *Rodger* v. *Comptoir d'Escompte de Paris* at length, and referred to *Currie* v. *Misa*, L. R. 10 Ex. 153, at p. 168; 44 L. J. Ex. 94; No. 15, "Bill of exchange," p. 317, *ante*; *Lempriere* v. *Pasley*, 2 T. R. 485; *Holroyd* v. *Marshall*, 10 H. L. C. 191; 33 L. J. Ch. 193; *Meyerstein* v. *Barber*, L. R. 2 C. P. 674; 36 L. J. C. P. 289, citing Blackburn on Sale, pp. 297, 298; *Maria Joseph*, L. R., 1 P. C. 219.]

R. E. Webster (with him Murphy, Q. C.) for the defendants. [The arguments for the defendants are so fully given in the judgment of the Court that it is unnecessary to repeat them.]

W. Williams, Q. C., was heard in reply. *Cur. adv. vult.*

May 5. The judgment of the Court (Lord COLERIDGE, C. J., and BRAMWELL and BRETT, L.JJ.), was delivered by —

No. 10. — Leask v. Scott, 2 Q. B. D. 378, 379.

Bramwell, L. J. The defendants have stopped *in transitu* the 'goods, the subject of this proceeding. They [*379] have done so effectually and rightfully, unless the plaintiff has obtained a title to them which cannot be defeated by such stoppage. Whether he has is the question. The facts are few, and as follows: Geen & Co., the consignees of the goods, were indebted to the plaintiff. On Saturday, the 1st of January, they applied to the plaintiff for a further advance, which he agreed to make on being first covered. Geen & Co. promised to give him cover (not naming anything in particular), and the plaintiff advanced them a further sum of £2000, the plaintiff being content with their promise. On the following Tuesday the bill of lading of the goods in question, consigned by the defendants to Geen & Co., came to the possession of the latter, who, on the following day, Wednesday, deposited it with the plaintiff in fulfilment of their promise to cover him. No question turns on the quantity of property so handed over, nor in any way as to the validity of the transfer; for the jury on this have found entirely in favour of the plaintiff.

This being so, the plaintiff contended that he was a *bonâ fide* holder of the bill of lading for valuable consideration by transfer from the former lawful holder and proprietor thereof and of the goods mentioned in it. This was not denied by the defendants. Their contention was that, though the plaintiff was such holder effectually as against Geen & Co., and their assignees, if they had become bankrupt, or any one claiming through or against them, except the defendants, yet they, the defendants, had not lost their right to stop *in transitu*. That the right of stoppage *in transitu* is available and effectual against every one, except the assignee of a bill of lading for valuable consideration, and unless that valuable consideration had been got by means of the bill of lading; that, if the consideration were past, it was not such a consideration, and the title gained by it was not such a title as would defeat the equitable right of stoppage *in transitu*. That such right was only defeated where there was a transfer for present consideration. That it was so in such case, because the consignor, or stopper *in transitu*, had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it: and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so where

[* 380] the * consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage *in transitu* should be lost.

Mr. Webster, for the defendants, at first put it that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But, on it being pointed out to him that the title of the transferee was legal, he altered his argument to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration no part of which was caused to be given by the bill of lading. The distinction of the two propositions is material.

In support of his argument Mr. Webster cited *Rodger* v. *Comptoir d'Escompte de Paris* before the Judicial Committee of the Privy Council. We think that that case justifies his argument, and is in point. There may be differences in the facts of the two cases, but the *ratio decidendi* was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect and rejoice if we could agree with it. But we cannot. There is not a trace of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way; but wherever the rule is laid down it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a *bonâ fide* transferee defeats the right of stoppage *in transitu*. It is true, no doubt, that opinions must be taken *secundum subjectam materiam*, but it is strange that no Judge, no counsel, no writer ever guarded himself against appearing to lay down the rule too widely by mentioning this qualification, if he thought it existed. We cannot help saying then that not only is the case a novelty, but it is a novelty opposed to what may be called the silent authority of all the previous Judges and writers who have dealt with the subject. More than that, in *Vertue* v. *Jewell*, 4 Camp. 31, where Lord Ellenborough goes out of his way to say that the plaintiff was not a transferee [* 381] for valuable * consideration so as to defeat the right of stoppage, he puts it, not on the ground that the consideration was past, as was the fact, but on the ground that the transferee

had notice of the transferor's insolvency. Further, it is noticeable that this point does not seem to have been mentioned in *Rodger* v. *Comptoir d'Escompte de Paris* till the reply. The cases cited in the argument at the opening of counsel in that case seem directed to the question of *bona fides*. Still further, with all respect be it said, the reason given in the judgment is not satisfactory. It is said, L. R., 2 P. C. at p. 405, "The general rule, so clearly stated and explained by Lord ST. LEONARDS in the case of *Mangles* v. *Dixon*, 3 H. L. C. 702, is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it." No doubt. But that rule does not apply here. Lord ST. LEONARDS said that in reference to a case where the title was to a *chose in action*, an equitable title only, or dropping such an expression, a right against a person liable on a contract; and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in *Rodger* v. *Comptoir d'Escompte de Paris*, a title to property in ownership, and to use the old expression, a legal right.

If besides dealing with the authorities, we look at the reason of the thing, we are led, with deference, to the same conclusion. All the arguments used by Mr. Justice BULLER, in *Lickbarrow* v. *Mason*, apply to such a case as the one before us. Practically such a past consideration as is now under discussion has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the plaintiff or not, was no doubt such an understanding that if the plaintiff had taken proceedings against Geen & Co. the day after he had received the security, he would have committed a breach of faith? If in this case the plaintiff had bought the goods out and out and been paid part of his debt with the [*382] price, the consideration would have sufficed, if the transaction was not colourable. If the plaintiff had said, "I cannot take this bill of lading safely as the consideration would be past; do it with the broker next-door and give me his cheque," that would have been valid. Is it desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration. It is not necessary to consider whether specific per-

formance would be decreed as to this document which was not specified to the plaintiff; but the case of *Alliance Bank* v. *Broom* shows that a general performance would be decreed; and certainly an action would lie for not covering. Therefore the assignor, for such consideration as this, always gets the benefit of performing his contract, and so saving himself from a cause of action. If Geen & Co., in this particular case, had said that this bill of lading was coming forward, and they would hand it to the plaintiff, then value would have been obtained by means of the bill of lading; so if they had said generally that they had securities coming forward and would deposit them; and what is the difference between a promise with such a statement and a promise without it? In the analogous cases of goods obtained under a fraudulent contract where the vendor loses his title if there is a transfer for value, there is no authority to show that a past value is not sufficient.

On these grounds we are unable to concur in the opinion of the Judicial Committee in *Bodger* v. *Comptoir d' Escompte de Paris*, or with the argument for the defendants. As to the judgment of Mr Justice FIELD, it is enough to say that it proceeded wholly on that case and in deference to it.

We are of opinion that judgment should be reversed, and entered for the plaintiff.

Judgment reversed and entered for the plaintiff.

ENGLISH NOTES

It is curious that on so important a point of commercial law there should be a direct conflict of authority between the Judicial Committee of the Privy Council and the Court of Appeal. It seems as if there was at present one law for England and another for the Colonies. Nor does it appear that there is any authority capable of reconciling the conflict, — unless the Judicial Committee should see fit in a future case to review their own decision by the light of that of the Court of Appeal. In this conflict of opinion the editor has ventured, in accordance with an opinion expressed in a recent text-book (Campbell on Sale, 2d ed. p. 495), to prefer the authority of the Court of Appeal: and as the case decides an important question of law upon an intelligible principle, to select it as a ruling case. It has been already shown to be in accordance with the analogy of the cases upon Bills of Exchange. See *Currie* v. *Misa*, No. 15 of "Bill of Exchange," p. 317, *ante* (Ex. Ch. 1875, L. R., 10 Ex. 153, 44 L. J. Ex. 94. Affirmed in House of Lords, but on another ground, *s. n. Misa* v. *Currie* (1876), 1 App. Cas. 544, 45 L. J. Q. B. 852, 35 L. T. 411).

No. 11. — Barber v. Meyerstein. — Rule.

AMERICAN NOTES.

The transfer is operative when made to *pay* an antecedent debt. *Lee* v. *Kimball*, 45 Maine, 172; *Clementson* v. *Grand T. Ry. Co.*, 12 Upper Canada, Queen's Bench, 273. But not so, when designed as mere collateral security, with nothing advanced or surrendered. *Loeb* v. *Peters*, 63 Alabama, 243; 35 Am. Rep. 17.

In *Chandler* v. *Fulton*, 10 Texas, 2; 60 Am. Dec. 188, a transfer of the bill "to secure an indebtedness" was held valid, and it was held that a transfer by way of sale or of mortgage was effectual. See *Missouri Pac. R. Co.* v. *Heidenheimer*, 82 Texas, 195.

Mr. Bennett cites the principal case. Notes, Benjamin on Sales, 6th Am. ed., p. 859.

No. 11. — BARBER *v.* MEYERSTEIN.

(MEYERSTEIN *v.* BARBER.)

(H. L. 1870.)

No. 12. — GLYN, MILLS, CURRIE, & CO. *v.* THE EAST AND WEST INDIA DOCK COMPANY.

(H. L. 1882).

RULE.

THE bill of lading remains in force, so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it.

Where, as is usually the case, the bill of lading is made out in parts "one of which accomplished, the others to stand void," the indorsement and delivery of one of the set (while the bill of lading is in force) transfers the property in the goods according to the intention of the transaction.

But if subsequently, and while the bill of lading is still in force, another of the set is fraudulently indorsed and delivered to a person who presents it to the custodier of the goods; the latter, acting *bonâ fide* and without notice of any prior claim, may safely deliver them accordingly.

11. Barber v. Meyerstein.

L. R., 4 H. L. 317–338 (s. c. 39 L. J. C. P. 187; 22 L. T. 808; 18 W. R. 1041).

Bill of Lading. — Bills in a Set. — Delivery. — Sufferance Wharf.

Action for money had and received and for conversion.

Plaintiff had indorsed to him for value a bill of lading consisting of two out of a set of three (the third being supposed by him to be in the hands of the captain). At the time of the indorsement the goods had been landed at a sufferance wharf.

The defendants were persons to whom the consignee had, after the indorsement and delivery to the plaintiff, indorsed for value the third of the set which he (the consignee) had fraudulently retained.

The defendants, on this latter bill, had obtained possession of the goods and sold them.

The Exchequer Chamber affirming the judgment of the Court of Common Pleas decided in favour of the plaintiff.

[317] This was an appeal, under the Common Law Procedure Act, 1854, against a decision of the Court of Exchequer Chamber, by which a previous decision of the Court of Common Pleas had been affirmed. L. R., 2 C. P. 38, 661; 36 L. J. C. P. 48, 289.

The facts were these: In August, 1864, De Souza & Co., of Madras, shipped on board the *Acastus* 227 bales of cotton consigned for sale on commission to Azémar & Co., of London. There were three bills of lading making one set. They were in the usual form, except as to the last sentence, which concluded thus: "In witness whereof I, the said master of the said ship, have affirmed to three bills of lading, all of this time and date, one of which being accomplished, the others to stand void." In August, [* 318] 1864, the vessel * sailed for London. De Souza & Co. drew bills of exchange against this cotton upon Azémar & Co. for £3000, £1000, £1000, and £1000, to fall due between the 12th of January, 1865, and the 22nd of March, 1865. These bills were duly accepted by Azémar & Co., and were then, with the three bills of lading, deposited with the London branch of the Chartered Mercantile Bank of India. At the end of 1864, Azémar & Co. transferred their business, including the consignment by the *Acastus*, to one Abraham, who had formerly been in their employment.

The *Acastus* arrived in London on the 31st of January, 1865, and went into the St. Katherine's Docks. On the 2nd of February

No. 11. — Barber v. Meyerstein, L. R., 4 H. L. 318, 319.

Abraham made an entry of the cargo at Cotton's Wharf (which is a public sufferance wharf) in the form given by one of the Customs Acts, the 16 & 17 Vict. c. 107, s. 60. The Sufferance Wharf Act, 11 & 12 Vict. c. xviii., contains (cl. 5) the following enactment, important for the consideration of this case, that "all goods which after the passing of this Act shall be landed at any of the public sufferance wharves aforesaid" (of which Cotton's Wharf was one), "from, or out of, any ship within the port of London, and lodged in the custody of the wharfinger for the time being in the occupation of such wharf, either at such wharf or elsewhere, shall, when so landed, continue and be subject to the same lien or claim for freight in favour of the master and owner of the ship from or out of which such goods shall be landed, or of any other person interested in the freight of the same goods, as such goods were subject to whilst the same were on board such ship, and before the landing thereof: and the said wharfinger, his servants and agents, are hereby required, on due notice in writing in that behalf given by such master or owner or other person aforesaid to the said wharfinger, &c., to detain such goods in the warehouse of the said wharfinger, &c., until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage rent and other charges to which the same shall have become subject and liable." There were two "stops" lodged against this cotton from the *Acastus*, one by the Chartered Mercantile Bank of India, the other by the master for the freight. On the 9th of February Abraham instructed Barber & Co., as brokers, to sell the cotton, and they obtained from him an order, in virtue of which *they were allowed to take samples. On the 4th [*319] of March Abraham gave a cheque which covered the sums due to the Chartered Mercantile Bank, and thereupon the bank delivered up to him the three parts of the bill of lading, and so put an end to the "stop" which had been lodged on account of the bank. On the same day he deposited with Meyerstein (with whom he had other transactions) one of the three parts of the bill of lading for the cotton by the *Acastus*, together with the original consignment to Azémar & Co., and thereupon Meyerstein gave to Abraham a cheque for £2500, which was duly paid. Meyerstein asked for the second part of the bill of lading, and received it. He did not, however, ask for the third part, believing that the third part was retained by the captain of the vessel.

No. 11. — Barber v. Meyerstein, L. R., 4 H. L. 319, 320.

Barber & Co. were wholly ignorant of these transactions, and on Monday, the 6th of March, Mr. C. Barber advanced to Abraham, by cheque, £1500 on the cotton by the *Acastus*, and on the next day, the 7th of March, made, by cheque, a farther advance of £500 upon receiving the third of the set of bills of lading (which had been fraudulently kept by Abraham), and on being at the same time informed of the fact that the stop order for freight had been removed. On the 11th of March Meyerstein heard for the first time that the Barbers had been employed by Abraham to offer the cotton for sale. On that day the Barbers lodged their third copy of the bill of lading at the wharf. On the same day Meyerstein obtained from Abraham a letter addressed to Messrs. Barber, requesting them to pay over to him "the surplus net proceeds of the undermentioned goods, after satisfying the advances you have made us (Abraham & Co.) upon the same." Among the goods thus mentioned was the cotton by the *Acastus*. Meyerstein, on receiving this note, struck his pen through this item, saying he did not want to have stolen goods transferred to him. He, however, forwarded the note to Messrs. Barber, and stated the fact of his making the advance of £2500, though the evidence left it doubtful whether he stated the exact date at which it had been made. On the same day Messrs. Barber wrote to Meyerstein: "We have this day received a letter from Messrs. Abraham & Co. requesting us to pay over to you the surplus net proceeds of 324 bales of cotton, as per memorandum at foot, which shall receive our attention in due course." This
[*320] *memorandum was a copy of that sent by Abraham, and the *Acastus* was struck out of it, — the total number of bales in each case being only 324, while if those of the *Acastus* had been retained in the list there must have been 277 added to that number. On the 13th of March the Barbers obtained from the wharfingers at Cotton's Wharf delivery warrants made out in their own names for the 277 bales of cotton, which they sold to different purchasers, who received them under the warrants delivered by the Barbers to them. The Barbers claimed to satisfy themselves in the first instance for their advances out of the proceeds of the sales. Meyerstein, who insisted that his claim took precedence of theirs, thereon brought his action against Barber & Co. The declaration was in the form of money had and received, with a count for wrongful conversion. The defendants pleaded, never indebted, not guilty, and that the goods never were the plaintiff's. Issue was taken on all these pleas.

No. 11. — Barber v. Meyerstein, L. R., 4 H. L. 320, 321.

At the trial, before Lord Chief Justice ERLE, in June, 1866, he directed a verdict to be entered for the plaintiff for the whole sum he claimed, reserving leave for the defendants to move to enter a verdict for them. The rule was obtained, and was, on argument, discharged. On appeal to the Exchequer Chamber, the judgment of the Court of Common Pleas was affirmed. This appeal was then brought.

Sir R. Palmer, Q. C., and Mr. Grantham, for the appellant: —

The delivery of the cotton here was complete when the goods had been landed, and landed under the order of Abraham. *Bourne* v. *Gatliffe*, 11 Cl. & F. 45. As between the captain of the ship and Abraham the voyage was then at an end; Abraham then stood in the condition of absolute owner, with all the rights belonging to an absolute owner. The goods were sold under his direction. A subsequent purchaser for value could not be affected by a previous indorsement of one of the bills of lading. The very form of the bill of lading was sufficient to put any one on his guard. No stop was put upon the cotton by Meyerstein, nor notice given by him to anybody of anything that had been done to give him a title to the cotton. Nay, when a list of goods sent by different vessels was forwarded * to Meyerstein, in which list the [*321] cotton of the *Acastus* was included, he said that he did not want goods which had been stolen from other people transferred to him, and struck his pen through the name of the vessel and its cargo. In no way, therefore, had the Barbers any notice of Meyerstein's claim. The shipowners' right was a mere maritime right, and could not, therefore, affect that of the consignee as between him and a purchaser for value. When the goods are once landed the wharfinger, who is not bound to decide upon contending titles, is justified in delivering them to the first person who presents a sufficient voucher of title to them. The bill of lading held by the Barbers was sufficient. Here the goods were sold in the market, and the title to them was complete. A mere pledge of them without actual delivery will not pass the property. *Ryall* v. *Rowles*, Tudor's Leading Cases, 2nd ed. vol. ii. p. 651; 3rd ed. p. 670, and the cases there cited. Here there was a mere pledge of the goods, and *Reeves* v. *Capper*, 5 Bing. N. C. 136; 8 L. J. C. P. 44; and *Martin* v. *Reid*, 11 C. B. (N. S.) 730; 31 L. J. C. P. 126, referred to by Mr. Justice WILLES in the Court below, do not, therefore, apply to weaken the effect of that general doctrine.

No. 11. — Barber v. Meyerstein, L. R., 4 H. L. 321, 322.

The wharfinger may deliver up the goods on production of the bill of lading, or on a delivery warrant, if there is no stop order. There was no stop order when the delivery was made, it had been removed; but the master's stop order was in full force when the bill of lading was given to Meyerstein.

When the goods first arrived in this country, the persons representing the Chartered Bank of India were the holders of all the three bills of lading, but they put upon the goods at the wharf a stop order for the money due to the bank. That showed that they did not deem the mere possession of the bills of lading to give them complete power over the goods which had been landed. While goods are at sea the bill of lading is, no doubt, the only symbol of property, but that is not so when they have been landed. It is merely evidence of the contract between the shipowner and the charterer, or the consignee, and when the shipowner has landed the goods he has done all that is necessary to entitle himself to payment, and his only right is to stop the removal of the goods until he is paid. The provisions of the Act, which [*322] requires * the wharfinger not to deliver as against a stop order of which he has notice, show that he is bound to deliver when that stop order has been removed. The wharfinger is only entitled to look to the bill of lading as a *primâ facie* voucher for ownership — he is not bound to inquire whether there are more bills of lading than one, or under what circumstances the bill of lading presented to him has been obtained. [The Lord Chancellor: The real question is between the bill of lading and the delivery warrants. You argue that a delivery warrant supersedes the bill of lading. They say that the two are but symbols of property, and that the bill of lading first assigned passes the property.] Here the Barbers took a bill of lading which was valid, and was completely effectual to pass the property in the goods, for it was given to them after the stop order was removed; they did not accept it until they were satisfied that the freight had been paid. Till that stop order was removed a bill of lading could not effectually pass the property. They took all possible precautions, and acted *bonâ fide*, and so ought to be protected. Having this valid bill of lading in their possession they applied for and obtained the delivery orders, which made their title to the goods complete.

The Judges in the Courts below assumed that the bill of lading was the only instrument which controlled the possession of the

goods. That is not so. To be so the bill of lading must, in the first place, be identified with the goods. But that is impossible in many cases, for, especially in the case of gums and other like cargoes from India, they may be repacked and marked differently, and that is often the case with cotton. In that way the identity would be destroyed.

It is an error to suppose that the mere handing over of one copy of the bill of lading passes the goods. All the copies here showed that no one was perfect in itself. It was distinctly stated that there were three, "one of which being accomplished the others shall stand void."

All three parts are of equal force, and here it is so not by any mere legal inference, but by the very words of the master. He, therefore, who, when no stop order exists, first presents the bill of lading to the wharfinger, first "accomplishes" the purpose for which it is given, and the other copies of the bill then stand void. * Blackburn on the Contract of Sale, pp. 297, [*323] 298, 302. It is perfectly clear that if bills of lading are in the hands of two different holders the wharfinger is not bound to examine the validity of their respective titles, all he has to do is to deliver the goods. To that effect is the case of *The Tigress*, 32 L. J. P. M. & A. 97, where it was held, that if bills of lading are presented to the master by two different holders, and he delivers to one, no right of action against him accrues thereby to the disappointed holder, as it is not for the master to inquire as to who has the better right. The judgment in the Court below is erroneous in declaring that "the person who holds the first bill of lading for value is entitled to the goods." All the three parts are of equal force, and the first that is "accomplished" alone has superiority over the rest. It is to be accomplished by other acts than the mere holding of it, and those other acts were, in this case, first performed by the Barbers.

Meyerstein was never entitled to the possession of the goods; he had not paid the dock fees, and so had not obtained the dock warrant. The mere possession of one copy of the bill of lading was not sufficient to vest the property of the goods in the holder of it: *Short* v. *Simpson*, L. R., 1 C. P. 248; 35 L. J. C. P. 147, where Mr. Justice WILLES says on that point, L. R., 1 C. P. 253: "It may be that the bill of lading would be exhausted by delivery of the goods at the dock as the warehouse of the consignee." It was so here.

No. 11. — Barber v. Meyerstein, L. R., 4 H. L. 323, 324.

The delivery under the bill of lading was complete when the master ceased to be liable for the custody of the goods. Indorsement of the bill of lading after the delivery of the goods, which the landing was in this case, does not operate more than an indorsement of it after a loss. Something more is necessary to pass the property in the goods. A sale would override all bills of lading, but a mere conditional transfer like this will not do so. *Pease* v. *Gloahec*, L. R., 1 P. C. 219. The Barbers did not advance money on the bill of lading but on the goods themselves; they took all the usual and proper precautions, while Meyerstein contented himself with the mere holding of the two copies of the bill of lading. As between two such parties he is the better entitled who takes [*324] every care to make good his title to the *property. As in the case of a man with a certain sum of money at his bankers drawing two cheques, he who first presents the cheque given to him is the person entitled to receive and to hold the money. The dock warrant was equivalent to an accepted delivery order, and vested the property at once in the Barbers, whose title to it then became complete.

Sir G. Honyman, Q. C., and Mr. Bridge (Mr. Watkin Williams with them), for the respondent Meyerstein were not called on.

The Lord Chancellor (Lord Hatherley): —

In this case the House is called upon to reverse unanimous judgments of the Court of Common Pleas and of the Court of Exchequer Chamber. The effect of these judgments is this, — to determine that, as to the plaintiff, the indorsee for value of a bill of lading of goods which, at the time of its being indorsed to him, were landed at a sufferance wharf on the Thames, and were there subject to two stops put upon them (the one by the shipowner for freight, the other by certain mortgagees), the security so indorsed is available in preference to the claim of the defendants, who, subsequently to such indorsement, obtained possession of the goods under the circumstances I am about to mention. A bill of lading was drawn up in a set of three, and after the indorsement of the first two of the three to the plaintiff had taken place, the consignee of the goods fraudulently retained the third, and obtained advances from the defendants on the security, in the first place, of this third, and proceeded afterwards to the wharf where the goods had been deposited, and after the production of this third bill of lading obtained the removal of a stop which had been put upon the goods

No. 11. — Barber v. Meyerstein, L. R., 4 H. L. 324, 325.

for freight. I should have before mentioned the previous removal on the part of the mortgagees (the directors of the Chartered Bank of India) of their stop in respect of their mortgage. Possession of the goods was, under those circumstances, obtained by the defendants, the persons who, on receiving this third bill of lading thus fraudulently retained by the consignee, made to him an advance on the goods represented by this bill of lading.

The question has really turned upon one point, and I may almost say upon one point alone, namely, whether or not the bills of lading had fully performed their office, and were discharged and *spent at the time that the plaintiff took his security. [*325] Whether, in other words, the landing of those goods at the sufferance wharf in the name of the consignee, but subject to the stop which was put upon them by the shipowner, and the stop put upon them by the mortgagees, was or was not, a delivery which had exhausted the whole effect of the bill of lading. That, I think, is the single point to which the case becomes reduced.

It appears to me, my Lords, that there are one or two points of law which must be taken to be clearly established, although very able efforts, employed with considerable ingenuity and resource, have been directed to the shaking of those well-established points of law. I refer particularly to the very able argument we have heard from Mr. Grantham in this case with reference to the first step, if I may so call it, in the proceeding, namely, the fact of the first assignment for value of a bill of lading when the goods are not landed, but are still at sea. Now, if anything could be supposed to be settled in mercantile law, I apprehend it would be this, that when goods are at sea the parting with the bill of lading, be it one bill out of a set of three, or be it one bill alone, is parting with the ownership of the goods.

Mr Grantham has raised this argument upon the frame of the bill of lading itself, which I apprehend is in the common form where three bills are given. The form of the bill of lading to which he specially referred, and upon which he founded the argument I now advert to, is this, that the shipper undertakes to deliver these goods, the cotton, to the Souzas or order, or to their assigns, he or they paying the freight for the goods at the rate there mentioned; and then, at the end of the document we have these words, "In witness whereof I, the master of the ship, have affirmed to three bills of lading, all of this tenor and date,

one of which being accomplished the others to stand void." The argument has been this, that the bill of lading has not accomplished its office until not only the goods are landed but the freight is paid, and the whole matter which is the subject of the contract of the shipowner has been achieved; and that, accordingly, if that be law, it follows that if one bill of lading be assigned while the ship is at sea, and a second bill of lading be assigned to a second person, fraudulently, of course, and [* 326] a third bill of lading be assigned to a * third person, also fraudulently, of course, it becomes simply a matter of expedition and race between the several parties who have taken those different assignments of the bills of lading; because until the goods have actually been landed and fully delivered, each bill of lading, according to the argument, is to be considered as of equal force until one of the bills has been, according to the argument, accomplished.

Now, I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases (which the learned counsel admitted to have been decided, and never yet to have been altered or reversed), if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would result from that state of facts. I apprehend that no decision can be found to the effect that any person taking an assignment of a bill of lading, knowing that others existed, is to be held to have been guilty of fraud simply from the fact of his so acting. No authority, at all events, has been cited for that proposition. And no authority has been cited at the bar to show that the transaction is not entire and complete when once the bill of lading has been assigned, as respects, at all events, goods *in transitu*, whether the assignment be by mortgage or by sale. If it were by sale other considerations would intervene which would give still greater efficacy to the assignment of the goods without delivery or possession. But when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself. It appears to me that to

shake any conclusion of that kind would be entirely to annihilate the course of mercantile procedure which has existed for a long period of time, — far longer, probably, than I can at this moment accurately state.

That being so, the Judges have reasonably assumed that proposition as a point of undeniable law. Then, if the property so passes when the goods are at sea, the whole question resolves itself into this: What is the effect of the assignment of the bill of lading * under the circumstances of this case, [* 327] when the goods were not at sea at the time when the interest was passed, but were at a sufferance wharf in the name and by the order of the consignee, Abraham, who represented the original consignees, the Souzas, subject to the stop order in respect of freight, and subject to the stop order given to the chartered bank.

Now the circumstances are briefly these as to the dates: On the 4th of March, the goods being in the situation I have described, Abraham, the person who has been guilty of this fraud, not being then in possession of the bills of lading himself, inasmuch as all three were at that time in possession of the bankers, applies to the plaintiff Meyerstein for a loan; he obtains money from Meyerstein; he first draws a cheque to meet the claim at the bank, a cheque provided for by the moneys advanced to him by Meyerstein, and then he obtains the three bills of lading from the bank. And on the same 4th of March, having these three bills of lading for a few minutes or a few hours in his possession, he does nothing with them in the way of claiming possession of the goods; he makes no use of them for that purpose, but he at once pledges two of these bills for value to Meyerstein. And that pledge being so completed, Meyerstein is in possession of these two bills with no other charge or claim whatever upon the goods they represented except the claim for freight, the freight being still unsatisfied. The mortgage had been cleared off, and he had become the owner of the property by this transaction, and he remained the owner subject to the payment of the freight. Then afterwards, fraudulently, Abraham enters into farther dealings with his brokers. His brokers are aware that the goods have arrived. They obtain a partial order from Abraham, by which they are enabled to obtain a sample of the cotton in question; but they decline in the first instance to make him any advance.

He proposes to obtain an advance on the bill of lading *simpliciter*, which they decline to make. But they were afterwards induced to make the advances when they had seen the goods themselves at the wharf, and when steps had been taken by Abraham for procuring money to enable him to discharge the stop which existed upon the goods for the freight. The stop which existed in respect of the mortgage had been already discharged, and [* 328] the property, therefore, became apparently at his * disposal. The defendants, being ignorant of the transaction with Meyerstein, on the 11th of March obtained possession of the goods, and on the same 11th of March Meyerstein, for the first time, discovers the fraud which has been perpetrated upon himself. When he wishes to obtain possession of the goods he finds that they have been removed. And hence, of course, a contest arises between the two parties.

Then in that state of things the question that arises is this: The goods, it is urged, were at home when Abraham was empowered by the Act of Parliament to give directions that the goods should be placed on the wharf as the goods of him, the consignee. But, however, the question arises whether these goods could in truth be said then to be at home. It is said that, at all events when for those few hours the three bills of lading were in possession of Abraham, and the goods were at home, as all the symbols of property were also in the hands of Abraham, therefore the symbol and the thing symbolized had become united, and that, in truth, the whole matter might be said to be disposed of. Now is it so? Can it be said that when for those few hours those documents were in the hands of Abraham, he had the control and proprietorship of the goods? Certainly when he first gave directions for their being warehoused in his name he was in no sense proprietor. He had neither the bills of lading, nor had he discharged the freight, nor had he in any other way put himself in a situation to entitle him to demand the goods. But now, having the bills of lading, supposing he had been minded to go down to the wharf to demand the goods, what would have happened? He would have found a stop placed upon the goods for the freight. And what would have been his position? By virtue of the 5th clause of the particular local Act (11 & 12 Vict. c. xviii.) referring to this subject, he would have found that he could not obtain any obedience to any delivery

No. 11. — Barber v. Meyerstein, L. R., 4 H. L. 328, 329.

order which he might think proper to give, and that he could not obtain any warrant of delivery, because there had been placed upon the goods this stop for the freight. The Act expressly enacts that when a stoppage has been put at the right time, namely, before the issue of any warrant for delivery, or the acceptance of any order, then no wharfinger shall be authorized to issue any warrant, or to accept any order, for the delivery of any *goods thus subject to a lien for freight. Accordingly, [* 329] therefore, the goods would not have been delivered to him had he made use of those bills of lading instead of delivering them over to Meyerstein, and in that sense, undoubtedly, the goods were not at home as far as he was concerned.

Then, the first proposition of law being clear, — that an indorsement of the bill of lading carries with it the property in the goods when the goods are at sea, the next proposition of law that we have to consider is this, laid down by all the Judges who have delivered their opinions in this case, and, as it appears to me, correctly laid down by them. It is stated by Mr. Justice Willes in his very elaborate judgment, in which he says: "I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it." Mr. Justice Keating says, in the same way, that he considers that "there can be no complete delivery of goods under a bill of lading until they have come to the hands of some person who has a right to the possession under it." And afterwards, in the Exchequer Chamber, Mr. Baron Martin, putting the case on somewhat different grounds, says: "For many years past there have been two symbols of property in goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger the former remains the only symbol of property in the goods. When, therefore, Abraham delivered the bill of lading to the plaintiff on the 4th of March, 1865, as a security for the advance then made to him, such delivery amounted to a valid pledge of the goods, and the plaintiff thereby acquired a right to hold them as against Abraham and all persons claiming title thereto under him." The principle seems to be the same, according to the view which Mr. Baron Martin takes, which is this: There has been adopted, for the convenience of mankind, a mode of dealing with property the possession

No. 11. — Barber v. Meyerstein, L. R , 4 H. L. 329, 330.

of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods and its [* 330] delivery to be a delivery of * them. When they have arrived at the dock, until they are delivered to some person who has the right to hold them the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it.

It appears to me that that is the legal sense of the transaction. The shipowner contracts that he will deliver the goods on the payment of freight. He discharges his contract when he delivers the goods. But, unless he chooses to waive his rights, he is not bound so to deliver the goods, or to hand them over to the person who is the original consignee to whom he has contracted to make the delivery, until all the conditions on which he contracted to deliver them are fulfilled. One of those conditions is, that the freight should be paid; and until the freight has been paid he is not bound to make the delivery.

Mr. Justice WILLES explains what is the effect of these various Acts of Parliament. These Acts of Parliament are not intended to deprive the shipowner of the right which he has to say that he will not part with the possession of the goods until freight is paid. Accordingly, the local Act first enacted that there should be a power on the part of the shipowner to relieve himself from the responsibility, which might be extremely inconvenient to all parties, of keeping the goods on board, when either the consignee was not ascertained, or when, if ascertained, there were some laches on his part in demanding the delivery of the goods. In such a case the shipowner, by depositing them in a warehouse, placed them in such a condition that if their owner could not be ascertained the goods should be considered as if they were still

at sea, in the absolute possession of the master to all intents and purposes. But if the owner of the goods could be ascertained, and the only question was the question of freight, still the Act of * Parliament provided that the shipowner [* 331] should be protected, that he should not be bound to hand over the goods absolutely, but that he should hand them over *sub modo*, with the full right of retaining his lien on the goods themselves, and with the right of preventing them being dealt with or removed until that lien should be satisfied. The legal effect of the proceeding is this, that the proprietor or consignee may require the goods to be landed at a wharf, and to be warehoused in his name, but subject to this condition, that the shipowner still retains his interest in the cargo until his charge for freight has been defrayed. If he gives notice of that charge prior to any act being done by which the ownership of the goods is changed, prior to the acceptance of an order for delivery, and prior to the issue of a warrant for delivery, then the shipowner's lien holds and attaches itself to those goods, and the goods cannot be removed; the bills of lading cannot be considered as having been fully spent or exhausted, because there remains an important part of the contract unfulfilled on the part of the consignee, namely, payment of the freight in respect of which the contract was entered into.

That seems to me to be the whole basis of the judgment at which the learned Judges arrived in the Courts below, and which, as I before stated, was their unanimous conclusion. But against it several objections have been urged. It is said that a frightful amount of fraud may be perpetrated if persons are allowed to deal in this way with bills of lading drawn in sets, if you allow efficacy be given to the first assignment of one of those bills, to the detriment of persons who may take, for value, subsequent assignments of the others. All that we can say is, that such has been the law hitherto, and that the consequences of the supposed evil, whatever they may be, have not been considered to be such as to counterbalance the great advantages and facilities afforded by the transfer of bills of lading. There is no authority or reason for holding that the person who first obtains the assignment of a bill of lading, and has given value for it, shall not acquire the legal ownership of the goods it represents. It seems to be required by the exigencies of mankind. It may be a satisfaction

to be told by Mr. Justice Willes (though it is a matter upon which I put no reliance), that other nations concur with
[* 332] us in holding that (whatever * inconveniences there may be attending it), the person who gets the first assignment for value is the person to be preferred.

The reasoning of the learned Judges in this case establishes clearly these two propositions: First, that the holder of the first assignment for value obtains a priority over those who obtain possession of the other bills. And, secondly (following the reasoning of Mr. Justice Willes), "The wharfinger under these circumstances was, at the lowest, the common agent for the shipowner and for the consignee or holder of the bill of lading, — agent for the consignee or holder, upon his producing the bill of lading showing that he was entitled to the goods, and upon his paying the freight, to transfer the goods into his name, and to deliver them to him, or give him a warrant for them, — and agent for the shipowner to retain possession of the goods and to permit no one to exercise any control over them until the claim for freight had been satisfied. During this period, therefore, the bill of lading would not only, according to the usage, and for the satisfaction of the wharfinger that he was delivering to the right person, be a symbol of possession, and practically the key of the warehouse, but it would, so far at least as the shipowner was concerned, retain its full and complete operation as a bill of lading, there having been no complete delivery of possession of the goods." The other learned Judges take the same view; and I apprehend that the correct view in substance is this, — that this being the possession of the wharfinger, the bill of lading remains in force so long as complete delivery and possession has not been given to some person having the right to claim such delivery and possession.

As to the argument founded on the possibility of fraud, I agree very much with one of the learned Judges, Mr. Justice Willes, who says, that as to any argument upon that subject, "all arguments founded upon the notion that the Court is to pronounce a judgment in this case which will protect those who deal with fraudulent people, are altogether beside the facts of this case, and foreign from transactions of this nature." I am afraid that the protection of parties against fraud is a matter of difficulty with which the Legislature must cope, as far as it can possibly do so

from time to time, when frauds of a serious character are practised; but the Courts of Law, which have to administer the law * as it exists, cannot alter their course of proceed- [* 333] ing because those who ought to do that which is right and just to their neighbours find means of defrauding them in spite of all the protection which the law may have thrown around the innocent holders of property. Judicature has no power to interfere with the course of proceeding in such cases. It must be left to the Legislature alone. But, on the other hand, we should consider that our mercantile laws, which are founded on long usage, have been found to work well for the general convenience of those engaged in those large adventures which are familiar to the enterprise of this country, and that although occasional inconvenience may have been caused by the fraudulent behaviour of some parties, yet these laws have, upon the whole, been felt to operate beneficially.

The principles which, as I have stated, form the foundation of the judgment in the present case are, that the parting with the symbol of property the possession of which cannot be delivered is the parting with the property itself; and that persons who have not a complete ownership and possession of the property cannot be said to have such a title to that property as to divest the operation of the symbol to give a title to it, until something occurs which brings the symbol and the property itself into contact, — and that for the purpose of so bringing the property and the symbol into contact, there must be a complete concurrence of title in the person who holds the symbol and the person who has the right to demand the property; and until that happens the symbol, as in the present case, has not exhausted its office.

I am, therefore, of opinion that the learned Judges have come to the right conclusion, and I have to move your Lordships to affirm the two decisions which are complained of in this appeal.

Lord CHELMSFORD: —

My Lords, I entirely agree with my noble and learned friend on the woolsack, and I do not feel justified in trespassing on your Lordships, except for a very few minutes. My noble and learned friend has stated very truly that the only question in this case is this: Where goods are shipped under bills of lading deliverable * to the consignee or his assignees, [* 334] and upon the arrival of these goods they are deposited by

the orders of the consignee at a sufferance wharf, or other wharf, and there warehoused, and a stop is put for the payment of freight upon the goods in the warehouse, whether, under these circumstances, the bill of lading has performed its duty, and whether it has (to use the expression which the learned Judges have used) become exhausted, and has ceased to be the symbol and representative of the goods. If the bill of lading continued operative, then, of course, the pledge of these goods to Meyerstein gave him constructive possession of them.

Now, upon this point we have the opinion of no less than nine Judges unanimously determining that the bill of lading was not exhausted, but that at the time of the transaction with Meyerstein it continued a living document. Mr. Justice WILLES in his very able judgment, puts the case shortly and clearly. He says: "There can be no complete delivery of goods until they are placed under the dominion and control of the person who is to receive them. Here Abraham could not have the complete dominion and control of the cotton until he had discharged the liability incurred by the shippers for the freight stipulated for in the bill of lading."

Now, my Lords, it must be remembered that at the time of this transaction the goods in the warehouse were under a double stop. They were under the stop of the Chartered Bank of India for advances made by the bankers, and they were also under the stop for freight. At that time, therefore, on the 4th of March, Abraham could not have dominion and control over the goods, because there were many preliminary things to be done before he could entitle himself to obtain possession of them. It was on the 7th of March that the stop of the Chartered Bank was withdrawn, and from that time the goods remained in the warehouse only under the stop for freight. But at that time Abraham had not the dominion and control over the goods because he could not obtain possession of them without producing to the wharfinger a withdrawal of the stop for freight, which withdrawal he could only obtain upon either paying or tendering the amount of the freight.

[* 335] * In the local Act which governs this transaction the 5th clause enacts as to the notice to be given to the wharfinger, and then it says expressly that "Nothing herein contained shall authorize any wharfinger to deliver or issue any

warrant, or accept any order, for the delivery of any goods which shall be subject to a lien for freight, and in respect of which such notice in writing as aforesaid to detain the same for freight shall have been given, until the importer, proprietor, or consignee of such goods shall have produced a withdrawal in writing of the order of stoppage for freight from the owner or master of the ship from or out of which such goods shall have been landed, or his broker or agent, and which order of withdrawal the said master or owner is hereby required to give on payment or tender of the freight to which the goods shall be liable."

Therefore it seems to me perfectly clear that at the time of the transaction, on the 4th of March, Abraham had not complete dominion or control of the goods, because, as Mr. Justice WILLES has said, it is only when he is entitled to immediate possession of the goods, without anything more being done, that the bill of lading will have become exhausted, and will not operate at all to transfer the goods to any person who either has advanced money or has purchased the bill of lading.

Under these circumstances, I am of opinion that the nine Judges who were unanimous in their judgment (three of the Court of Common Pleas, and six of the Court of Exchequer Chamber) were perfectly right in the conclusion at which they arrived, and I think their judgment ought to be affirmed.

Lord WESTBURY: —

My Lords, I hardly feel that I am justified in adding any observation to what has fallen from my noble and learned friends, but as it is extremely desirable that there should be no doubt in the mercantile world with regard to legal principles that have long been recognised, I will say a very few words. Unquestionably the bill of lading, as long as the engagement to the shipowner has not been fulfilled, is a living current instrument, and no doubt the transfer of it for value passes the absolute property in the goods. * It is unquestionable (as has been said here [* 336] by one of the Judges). that the handing over the bill of lading for any advance, under ordinary circumstances, as completely vests the property in the pledgee as if the goods had been put into his own warehouse. There can be no doubt, therefore, that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills

must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods, for the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property.

Now, this case depends upon one simple inquiry, — whether, on the 4th of March, when the bill of lading was given to Meyerstein for the sum of money then advanced and paid by him, that bill of lading was a living, current, unexhausted contract? The contract (as I have said) by the shipowner remains in force until he delivers possession of the goods. The question, then, is simply this: Had the shipowner delivered possession of the goods on the 4th of March? That depends on the character of the wharfinger's possession.

I cannot but notice the very loose and apparently irregular mode of proceeding which appears to have been pursued here. In reality, the goods appear to have been transferred from the ship to the sufferance wharf by the interference of Abraham, who at that time was not the holder of any of the bills of lading. All Abraham's acts with regard to the goods whilst the bills of lading were in the hands of other holders for value were wholly unauthorized. They were in reality the acts of a stranger. The goods, however, got to the sufferance wharf, and there they were immediately stopped for freight due to the shipowner.

[* 337] The * shipowner's lien was asserted, and with the lien the shipowner's right of possession was equally asserted. The effect, therefore, was, that the wharfinger, at all events, held for the shipowner. The possession of the wharfinger was the possession of the shipowner, whose freight remained unpaid. The answer to one question, therefore, is, that on the 4th of March, when the first bill of lading was transferred for value to Meyerstein, the bill of lading was a living, unexhausted instrument, because the contract to deliver possession by the shipowner had not been completed, because he had a lien on the goods for freight. There can be no doubt, therefore, that the bill of lading

at that time was a negotiable instrument; and if it was so, then Meyerstein had obtained the actual property in the goods by the transfer to him of the bill of lading. Having that actual property in the goods, there was no obligation on him to do more.

It was contended at the bar that he had been guilty of laches because he did not follow up the title he had acquired by giving notice of it to the wharfinger. But this is quite immaterial when a man has got both the right of property and the right of possession, passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession. When his title is thus complete, there is no obligation on him to give notice to any one. There was, therefore, no laches on his part, nor was there any ground of complaint that he failed in ordinary prudence, or that he did not in law and equity complete his security.

That being the state of the case, Meyerstein had a perfect right to the property. He had a perfect right to possession, and the moment the freight was paid, the wharfinger became the agent of the person who was entitled in law to the property and to the possession as soon as the obstacle existing by non-payment of the freight had been removed. There can be no doubt, therefore, that the wharfinger held, first, for the shipowner, and subject to his right, and from and after payment of the freight he held on behalf of Meyerstein, the legal owner. It is unnecessary to repeat what has been so well said by my noble and learned friends who preceded me, but I was anxious to show by these few remarks * that I heartily concur in the principles [*338] which they have laid down.

Lord COLONSAY: —

My Lords, the grounds of the judgment, concurring with the judgments given in the Courts below, have been so fully stated, that I have only to add my concurrence in them.

Judgments of Court of Common Pleas and of Court of Exchequer Chamber affirmed and appeal dismissed with costs.

Lords' Journals, 22nd February, 1870.

Glyn Mills, Currie, & Co. v. The East and West India Dock Company.

7 App. Cas. 591–619 (s. c. 52 L. J. Q. B. 146; 47 L. T. 309; 31 W. R. 201)

Bill of Lading. — Bills in Set. — Delivery.

Action by the plaintiff bank against the Dock Company as warehousemen for conversion of goods.

The goods had been shipped under bill of lading in a set of three in ordinary form, and had been landed on captain's entry, pursuant to the Merchant Shipping Act 1862, s. 68, &c.

The plaintiff bank were indorsees for value of the first of the set.

The defendants, the dock company, having delivered to consignee's order upon production of the second of the set, the plaintiffs demanded delivery, and subsequently brought the action.

The House of Lords, affirming the judgment of the Court of Appeal, and reversing that of Field, J., gave judgment in favour of the defendants.

[592] Appeal from the judgment of the Court of Appeal, 6 Q. B. D. 475; 50 L. J. Q. B. 62, reversing a judgment of Field, J. (who tried the case without a jury), in favour of the appellants. 5 Q. B. D. 129; 49 L. J. Q. B. 303. The facts (which are set out in the judgments of Field, J., and Brett, L. J.) are shortly as follows:

Sugar was shipped in Jamaica and consigned to Cottam, Mortan, & Co., merchants in London. On April 16, 1878, the master signed a set of three bills of lading marked respectively "First," "Second," and "Third," making the sugar deliverable to Cottam & Co., or their assigns, freight payable in London. Each bill contained the clause, "In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." During the voyage Cottam & Co., on the 15th of May, 1878, indorsed in blank the bill marked "First" to the appellants, London bankers, in consideration of a loan. The ship arrived at London on the 27th of May, and on the 28th the master landed the sugar and deposited it with the respondents in their docks, lodging with them a copy of his manifest in a printed form supplied by the respondents. In the manifest the names of Cottam & Co. appeared as consignees and as entering the goods. At the foot was a printed clause: "I declare the above to be a true copy of the manifest of the cargo of the above ship, and hereby authorize the East and West India Dock Company to deliver the same to the consignees as above, or to the holders of the bills of lading." This was signed by the master, the

words "the consignees as above or to" being first struck out. On the 29th the master lodged with the respondents a written notice "pursuant to 25 & 26 Vict. c. 63, s. 68, &c.," to detain the sugar till payment of the freight. On the 31st Cottam & Co. brought the bill marked "Second," not indorsed, to the [*593] respondents, who entered Cottam & Co. in their books as proprietors of the sugar. On the 7th of June, the freight having been paid by Cottam & Co., the stop for freight was removed. In July the respondents, *bonâ fide* and without notice or knowledge of any claim by the appellants, delivered the sugar to Williams & Co., who held delivery orders signed by Cottam & Co. Cottam & Co. having gone into liquidation in August, the appellants demanded the sugar from the respondents, producing the bill of lading marked "First." The respondents not being able to deliver, the appellants brought this action against them, claiming damages for the value of the sugar.

July 3, 4, 6. Sir F. Herschell, S. G., and Benjamin, Q. C. (Barnes with them), for the appellants: —

The indorsement of the "first" bill of lading gave the appellants a legal title to the goods: made them "holders of the bills of lading," and prevented any other persons being holders by any dealings with the "second" or "third" bill. The unloading and delivery to the dock company were strictly under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63). The shipowner would not have been discharged unless he delivered to the true owners, the appellants; but even if he would, the respondents would not. By 18 & 19 Vict. c. 111, ss. 1, 2, the appellants could sue on the contract and could be sued by the shipowner for freight. *Fearon* v. *Bowers*, 1 H. Bl. 364 n., so far as it affects the present question, was not approved or disapproved by Lord LOUGHBOROUGH in *Lickbarrow* v. *Mason*, 1 Sm. L. C. 8th ed. p. 782, *ante*, p. 756, but was approved by Dr. LUSHINGTON in *The Tigress*, 32 L. J. P. & A. 97. If it proves anything, it proves too much, viz., that delivery to a holder of any one of the set *with notice* of the holders of the others by the master will discharge him. The only other authority on the question whether delivery to the holder of one of several bills of lading discharges the shipowner is the *dictum* of Lord WESTBURY in *Barber* v. *Meyerstein*, L. R., 4 H. L. 336; 39 L. J. C. P. 187; p. 798, *ante*; and see Abbott on Shipping, 6th ed. p. 286, pt. 4, c. 3, s. 5. The clause "one of which being accomplished the others to stand void"

means "rightfully accomplished." It cannot mean accomplished by delivery to a person without title. There can be only [* 594] one "assign" in law, and delivery * to any person wrongfully pretending to be an assign is not delivery to an assign. A warehouseman holds not by contract, but by force of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63, ss. 66–77), and holds for the true owner. As soon as the stop for freight was removed, the contract of affreightment was gone. The warehouseman has more power than the shipowner; he can sell after ninety days. The striking out the words "to the consignees as above or to" out of the manifest was notice not to deliver to consignees, except in their character as holders of the bills of lading. There was no authority to deliver except as above. The respondents were not bailees within any of the classes in *Fowler* v. *Hollins*, L. R., 7 H. L. pp. 766–768; 44 L. J. Q. B. 169; 2 R. C. 410. The only case where ostensible ownership is recognized is a sale in market overt.

Sir H. Giffard, Q. C., and Cohen, Q. C. (Pollard with them), for the respondents: —

The appellants having recognised Cottam & Co. as entitled to deal with the goods, and as consignees and as their agents, cannot repudiate their own acts. If indeed the master had had notice, he might be liable in trover. The practice, as was said by BRAMWELL, L. J., 6 Q. B. D. 492; 50 L. J. Q. B. 79, is for the master to deliver to the person who first presents a bill of lading. The holder of a bill of lading ought to watch the ship and upon arrival present it, in view of possible claims for demurrage. For those claims the shipper would be primarily liable; and, secondarily, the indorsee of bills of lading to whom the contract is transferred by indorsement. If the holder of bills of lading is not there to receive the goods, the master has no reason to suspect, or to ask questions. As to reasonable grounds for suspicion, see *Jones* v. *Smith*, 1 Hare, 43; 11 L. J. Ch. 83. If such questions must always be asked, it would much impair the value of negotiable securities. The master had here no right or reason to suspect. The course of business between Cottam & Co. and the dock company was to show only one bill of lading. The Merchant Shipping Act 1862 does not provide for delivery of goods by a dock company. If the master would not be liable, neither would the dock company be. If the respondents fairly believed Cottam & Co. to be owners, they are not [* 595] liable in trover; nor if * they delivered to the ostensible

No. 12. — Glyn, &c. Co. v. East and West India Dock Co., 7 App. Cas. 595, 596.

owners which Cottam & Co. were, having a bill of lading and having been allowed to interfere with the goods.

Sir F. Herschell, S. G., in reply: —

There was no relation between Cottam & Co. and the dock company except as arising from statute and from the bill of lading. At the trial it was never suggested that the dock company were bailees of Cottam & Co. The goods were deposited by ship, and the dock company are in no better position than the shipowner. The appellants were not negligent. It is not the business of bankers to watch ships and stop delivery. If it were so held, it would impair the negotiability of bills of lading. No usage or custom was proved to deliver to whoever presents one of a set of bills of lading, though there may be a practice. But people often do things subject to risk of loss if there be fraud. Such usage could not be proved unless it were shown that the master delivered to a wrong person, and yet was held not liable. The clause "the one of which bills," &c., means only that the master shall not be liable to hand over the goods three times; and was not inserted with a view to such a case as the present. "Accomplished" means delivery in pursuance of the contract. Till the freight is paid the dock company hold for the shipowner to preserve his lien: when the stop for freight is removed the shipowner is out of the question, for he has discharged himself by delivery to the dock company, and they hold for the true owner, and have a lien against him for warehouse charges. When they sell they must hand the proceeds to the true owner. When the stop for freight is removed the bill of lading ceases to be "a living instrument" (*Barber* v. *Meyerstein*), and the dock company hold only for the true owner.

The House took time for consideration.

Aug. 1. Lord SELBORNE, L. C.: —

My Lords, having had the advantage of seeing in print the opinion of my noble and learned friend, Lord BLACKBURN, in this *case, with which I agree, I shall content myself [*596] with making a very few observations.

Every one claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the ship-

owner. It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that "the one of these bills being accomplished, the others are to stand void." It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a *bonâ fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice indeed that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to inquire whether there has in fact been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry. This conclusion is in accordance with the authorities which will be referred to by my noble and learned friend, and also with the principle of such decisions as those of your Lordship's House in *Shaw* v. *Foster*, L. R., 5 H. L. 321; 42 L. J. Ch. 49, and *London and County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722, 729; 51 L. J. Ch. 28.

[* 597] It was admitted, in the argument at the bar, that the right of * the shipowner to deliver to the first person who claimed it, by virtue of an indorsed bill of lading (the shipowner having no notice of any better title), could not be denied, although such person might not, in fact (if there had been a prior indorsement of another part of the bill of lading to another person for valuable consideration), have the legal title to the goods. It is clear, therefore, that the shipowner may be discharged by a *bonâ fide* delivery, under the terms of his contract with the shipper, to a person who is not the true owner; and I think there is no sufficient reason for refusing him the benefit of that contract, when

the part of the bill of lading on which he makes a like *bonâ fide* delivery is not indorsed.

I have spoken of the "shipowner" throughout, because, in my opinion, the position of the dock company for the purposes of the present question is not in any respect different from that of the shipowner.

The appeal, therefore, ought, in my opinion, to be dismissed with costs.

Earl CAIRNS: —

My Lords, I also am of opinion that this appeal must fail. There is no necessity for going at length into any of the facts of the case, for on the facts there has really been no dispute; but I think it is desirable to state at the outset that the opinion which I have formed is that the respondents, the dock company, are under no higher liability than the shipowner himself would have been, and on the other hand that they are not under any lower or less liability, and that the case may be looked upon, in a general point of view, as if the delivery had been, not by the dock company, but by the shipowner himself. I think that that is satisfactory, because the opinion which your Lordships will express will be an opinion applicable generally to the case of shipowners, and will not be founded upon any special circumstances connected with the present case.

So also it appears to me that neither the appellants nor the respondents can be said to be guilty of any laches whatever, much less of any want of good faith. It is quite clear that Cottam & Co. produced to the dock company, whom I will suppose to be * the shipowner, one part of the bill [* 598] of lading, and on the production of that part the delivery of the goods took place.

That leads me to consider what is the position, with regard to a bill of lading of this kind, of a shipowner at an out-port? A shipowner, or his agent at a distant port, undertakes to carry certain goods; he receives the goods upon a contract of affreightment; he or his servant, the master of the ship, gives a bill of lading. I will suppose, in the first place, that he gives a bill of lading consisting of only one part. Now the contract in a bill of lading of that kind is, that the shipowner will deliver to the consignee or to his order or to his assigns the goods which are undertaken to be carried. Of course in a contract of that kind it

is obvious that questions of some difficulty and some embarrassment may arise. The assumption is that the person who ships the goods, or the consignee, will not necessarily be the person to whom the delivery is to be made. The delivery is to be made to him or, in the alternative, to his order or to his assigns. Questions, it is obvious therefore, may arise. Has the consignee ordered the delivery to be made to any other person? Has he assigned the contract or the property in the goods? If he has, to whom has he assigned it? Are there more assigns than one, and if so, in what order of assignment do they stand?

Now if there were only one part of the bill of lading, the process, as it appears to me, would be an extremely simple one. The bill of lading would be the title deed, and whoever came to the shipowner or to the master of the ship and demanded delivery of the goods, in whatever right he claimed, — whether as the original consignee or as a person coming by order of the consignee, or as the assign of the contract or of the property, — in any of those cases all that the master of the ship (who is not a lawyer and has not, perhaps, a lawyer at his side) would have to say is, "Where is your title deed? Produce it." If he had not a title deed the master would be entitled to say, "I will not deliver these goods to you." If, on the other hand, he had the bill of lading, and if there was no fraud and no notice of any different title brought home to the master, all that the master would have to do would be to deliver to the person having that title deed, and then the master would be free from any responsibility.

[* 599] * But the confusion, the difficulty, and embarrassment have arisen from there not being what I have supposed, one title deed, but there being more than one, in this case three parts of the title deed, that is to say, of the bill of lading. I asked the question, For whose benefit is it that there are those three parts? Certainly not for the benefit of the shipowner, or for the benefit of the master. To them the presence of three parts of the bill of lading is simply an embarrassment. It is for the benefit of the shipper or of the consignee. I do not stop to inquire whether to them it is really a benefit, or whether at this time of day (many if not all of the reasons for having bills of lading in parts being very much modified) it would not be better for every one that there should be only one part: that is a question for the mercantile world to consider. It is quite sufficient

for me to say that it is certainly not for the benefit or for the convenience of the shipowner or of the master that there are three parts of the bill of lading.

Then what has the shipowner to do? The shipowner has to protect himself from that which is liable to cause difficulty or embarrassment to him, and the way in which as it appears to me he does protect himself is by stating that although "the master or purser hath affirmed to three bills of lading," — that is to say, has signed three bills of lading "all of the same tenor and date," — yet notwithstanding that fact "one of these bills of lading being accomplished the others shall stand void," which I understand to mean that if upon one of them the shipowner acts in good faith he will have "accomplished" his contract, will have fulfilled it, and will not be liable or answerable upon any of the others. If one is produced to him in good faith he is to act upon that, and not to embarrass himself by considering what has become of the other bills of lading. That appears to me to be the plain and natural interpretation of these words, having regard to the purpose for which they are introduced. I put it to the learned counsel who argued the case whether he could suggest any other explanation of these words which would give them a rational meaning, but I could not learn from the bar that there was any other explanation that could be suggested.

That being the case, there has occurred exactly one of those instances in which the shipowner requires protection. I use the * term "shipowner" because for this purpose I [*600] assume that the dock company is in the position of the shipowner. He has had, in good faith, one of the parts of the bill of lading presented to him - he has had no notice of any title at variance with that — he has acted upon the bill of lading so produced, and it appears to me that if he or those who stand in his place are not to be protected, the final clause might as well be struck out of the bill of lading.

It is said that this will cause inconvenience to those who advance money upon bills of lading. I do not think that it need do so in the least. There are, at all events, three courses open to them, either of which they may take. The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. That would be one course which might be taken. But even supposing that the bill of lading is

in more parts than one, all that any person who advances money upon a bill of lading will have to do, if he sees, as he will see, on the face of the bill of lading, that it has been signed in more parts than one, will be to require that all the parts are brought in, that is to say, that all the title deeds are brought in. I know that that is the practice with regard to other title deeds, and it strikes me with some surprise that any one would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts. If the person advancing the money does not choose to do that, another course which he may take is, to be vigilant and on the alert and to take care that he is on the spot at the first arrival of the ship in the dock. If those who advance money on bills of lading do not adopt one or other of those courses, it appears to me that if they suffer, they suffer in consequence of their own act.

Whether that be so or not, it seems to me that the dock company, standing in the position of the shipowner, require to be protected, — that they have done that which it was their positive duty to do, and that the judgment of the Court below ought to be affirmed.

Lord O'HAGAN: —

My Lords, I also have had the advantage of reading the opinion of my noble and learned friend (Lord BLACKBURN), and I [* 601] feel that * I cannot do better than follow the example of my noble and learned friend on the woolsack, by accepting its conclusions, and the reasons on which they have been based. Its statement of the facts is lucid, accurate, and exhaustive, and its exposition of the law presents with remarkable precision and succinctness the view which after serious consideration I have adopted in common, I believe, with all your Lordships.

I cannot say that I have not had some hesitation in the adoption of it. The conflict of decision between able Judges of equal authority and equally divided, the diversities of reasoning even between those who in the result have agreed, the want of any recent evidence as to the usages of commercial men in these countries with reference to bills of lading, and especially such dealings with them as are the subject of our consideration, made me doubtful for a time; but I am satisfied upon the whole that the ruling of the Appellate Court was right and ought to be upheld.

No. 12. — Glyn, &c. Co. v. East and West India Dock Co., 7 App. Cas. 601, 602.

The defendants got possession of the goods from the captain, not by virtue of any contract or bailment, as has been contended at the bar, but under the provisions of the statute and subject to the liabilities created, and the duties imposed, by it. And amongst them was the obligation to deliver them to such person or persons, and on such conditions, as the statute should be held to have indicated and required, to warrant delivery by the ship-owner or the master. On the payment of the freight and the removal of the stop order it seems to me that they were bound, as he would have been, to deliver them to the person making presentment of the bill of lading. I think, in the absence of express decision, the weight of authority having relation to it sustains the judgment of the Court below. I think that usage, so far as we have any means of ascertaining it, is inconsistent with the plaintiff's claim, — and, I think, finally, that principle and policy, and the necessities of mercantile affairs, are quite in favour of the action of the defendants.

As to authority, there is none which deals with the precise state of facts before us. The case of *Fearon* v. *Bowers* was different from this, as there the person yielding up the goods was the captain of the vessel, and not the warehouseman, and he had to * choose between two claimants; whereas in the [*602] present case there was only one claimant known to the defendants, and they had no notice of any other. I concur in the view of Lord TENTERDEN that the law should not commit a discretion to the captain of a ship so unreasonably large and so capable of being put to evil uses. But that case could scarcely have been entertained at all, if the lesser power to hand goods to the holder of a bill of lading, *bonâ fide* and without knowledge of any adverse title, had not been assumed to be warranted by usage and by law. I do not think the approval of that case in *Lickbarrow* v. *Mason*, by Lord LOUGHBOROUGH and Mr. Justice BULLER, can be held to have established it in all its dangerous extent. The circumstances they were considering did not necessitate the minute examination or the complete rejection or adoption of its doctrine. But this, at least, may be said, that unless the holder of a bill of lading was then understood to be entitled to receive the goods, of which it guaranteed the delivery, we can scarcely conceive that the larger proposition would not have been at once repudiated. And in the case of *The Tigress*, before Dr.

No. 12. — Glyn, &c. Co. v. East and West India Dock Co., 7 App. Cas. 602 603.

Lushington, when he refers to the case of *Evaron* v. *Bowers*, he does not expressly adopt it, in its fulness, as he did not need to do for the purpose of his judgment: but confines himself to approval of it, so far as it may be applied in the conditions of the case before him. He says of *Evaron* v. *Bowers*: "This case is a stronger one than the present, for here it appears that there had been no presentment at all by the vendee of his bill of lading. It is clear, therefore, that the master would at least have been justified in delivering to the plaintiffs as holders of the first bill of lading presented; and it must be remembered that the bills of lading contain a proviso that the first being accomplished the others shall stand void." Plainly Dr. Lushington considered the first presentment sufficient to entitle the holder to the delivery of the goods, and held that the delivery on such presentment was the "accomplishment," within the proper meaning of the instrument, on which the others should "stand void."

And accordingly the case is simply headed "A master is [* 603] justified in delivering the goods to the holder of the * first bill of lading presented," which is the case of the defendants who stand in the master's place. It seems to me that taking these cases together, they constitute a reasonable body of authority in support of the judgment of the Court below.

Then, as to the practice in such matters, we have no parol testimony about it, nor any proof at the particular trial of this case: but we have the statement of the Chief Justice (Lee) a long time ago that a usage existed then which would have fully warranted the course of the defendants: we have his direction of a verdict founded on the proof of it: we have Lord Tenterden suggesting the limitation of the rule so acted on by the Chief Justice, but not denying its existence or disapproving of it save as to its excessive operation: and we have the uncontradicted assertion of a living Judge of great experience in mercantile cases, that it is still the "undoubted practice" to deliver "without inquiry" to the holder of a bill of lading. *Per* Bramwell, L. J., 6 Q. B. D. 492.

And, lastly, that principle and policy are in favour of such a practice appears to me reasonably plain, when we consider how impossible it would be for a master in a multitude of cases to institute satisfactory inquiry as to the transactions dehors the part produced to him, which might qualify or destroy the right

to the possession of the goods. The fact that so very few complaints of misdelivery are recorded during a century and more, either on the score of error or of fraud, demonstrates how little practical evil has come of the usage; whilst, if it had not prevailed, the prompt and unfettered action required by the needs of commerce might have been much restrained in very many instances.

It is always painful to decide when the decision must necessarily injure one of two blameless parties; but in this case the plaintiffs who had the property which secured the advance undoubtedly vested in them by the indorsement of the bill of lading, have never lost their title to that property or the right to recover it, if wrongfully taken from them. If they had acted as the bank did in *Barber* v. *Meyerstein*, they would have run no risk of loss. They might have taken other precautions (such as getting all the three parts of the bill of lading) with a like result, and they are not now precluded from seeking redress from any one who may * illegally have obtained [* 604] possession of their goods. But the defendants, who have done nothing *malâ fide*, who have acted, as I conceive, according to usage and within their right, should not be made answerable for an error for the consequences of which they are not, in my opinion, legally or morally responsible.

I think that the appeal should be dismissed with costs.

Lord BLACKBURN: —

My Lords, this is one of the cases in which difficulty arises from the mercantile usage of making out a bill of lading in parts.

There is since the decision of *Lickbarrow* v. *Mason*, now nearly one hundred years ago, no doubt that, before there was any statute affecting the matter, the bill of lading was a transferable document of title, at least to the extent, as was said by Lord HATHERLEY in *Barber* v. *Meyerstein*, p. 798, *ante*, that, "when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself." And the very object of making the bill of lading in parts would be baffled unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts

would have had. And the consequence of making a document of title in parts is, that it is possible that one part may come into the hands of one person who *bonâ fidè* gave value for it under the belief that he thereby acquired an interest in the goods, either as purchaser, mortgagee, or pawnee, and another part may come into the hands of another person who, with equal *bona fides*, gave value for it under the belief that he thereby acquired a similar interest. This cannot well happen, unless there is a fraud on the part of those who pass the two parts to different persons such as would in most cases bring them within the grasp of the criminal law, and from the nature of the transaction such a fraud must speedily be detected; the cases, therefore, in which it occurs are not very frequent. Nevertheless, it does at times occur, and there are cases in our Courts, where the rights [* 605] of the two holders have had to be considered. The * last of those was *Barber* v. *Meyerstein*, in this House; and so far as that decision extends, the law must be taken to be settled.

I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the Master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out. So long as this practice continues, it is of vast importance not to unsettle the principles which have been already settled; and when a new case has to be decided it is desirable to be very cautious as to what principles are applied.

The facts in the present case bear in many respects a close resemblance to those in *Barber* v. *Meyerstein*, but they are not

quite the same; and the question, on the solution of which in my opinion the decision in the present case ought to depend, did not arise in *Barber* v. *Meyerstein*, though Lord WESTBURY did in that case mention it when he says, L. R., 4 H. L. p. 336: "There can be no doubt therefore that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party; but * although that may be a discharge to [* 606] the shipowner, it will in no respect affect the legal ownership of the goods." That point did not arise, and Lord WESTBURY did not express any opinion on it. He only mentions it so as to show that it was not decided either way.

In the present case Cottam & Co., on the 15th of May, 1878, applied in writing to Glyn & Co., bankers in London, for an advance, on the security of certain bills of lading. From the terms of the application it is plain that the bankers were to have the property, with a power of sale, in the goods represented by the bills of lading, so far as was necessary to secure their advance, and that, subject thereto, Cottam & Co. were to remain owners of all the rest of the interest in the goods, and might do, as owners everything consistent with the property thus given to the bankers. I do not think it necessary to express any opinion on a question much discussed by BRETT, L. J., I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowner's lien, and were entitled to maintain an action against any one who, without justification or legal excuse, deprived them of that right.

Cottam & Co. delivered to the bankers, as part of their security, a bill of lading for twenty hogsheads of sugar by the *Mary Jones*, shipped by Elliot in Jamaica, deliverable to Cottam & Co. or to

No. 12. – Glyn, &c. Co v. East and West India Dock Co., 7 App. Cas. 606, 607.

their assigns, indorsed in blank by Cottam & Co. This bill of lading bore on the face of it, distinctly printed, the word "first," and at the end had the usual clause, "In witness whereof the master of the ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." There could be no doubt therefore that the bankers had distinct notice that there were two other parts of the bill of lading. It appears, in *Barber* v. *Meyerstein*, that in a similar transaction the Chartered Mercantile Bank, before making a similar advance to Abraham, had in-
[*607] sisted on having all three parts of the bill of *lading delivered to them, and so no doubt might Glyn & Co. have done here; but I infer that Abraham, who soon after was guilty of a very gross fraud, was not a person who could ask any reliance to be placed on his honesty; and that where the person depositing the bill of lading is of good repute, a banker would rather run the risk, in most such cases nominal, of the depositor having committed a fraud, than the risk of offending a good customer by making inquiries which might be construed as implying that they thought him capable of committing a gross fraud. However this be, it appears that Glyn & Co. made no inquiry, and were content to take the one part. And as in fact neither of the other parts had been transferred, the security which Glyn & Co. had was not impeached by such a prior transfer. And as the *Mary Jones* was then at sea, the question mainly discussed in *Barber* v. *Meyerstein* does not arise in this case.

The *Mary Jones* arrived on the 27th of May, and the next day the master reported her at the Customs, and the goods were there, for Customs purposes, entered by Cottam & Co. as owners. All this was quite right, and did not require the production of any bill of lading: it could and ought to have been done as well if the other parts of the bill of lading had been delivered to Glyn & Co., or had remained locked up in the desk of the shipper Elliot in Jamaica.

The master appears to have been in a hurry to get his vessel empty, and to have resolved to avail himself of the provisions of the Merchant Shipping Act 1862, sects. 66 to 78. He had not, in strictness, any right to do so till default had been made in making entry, which never was the case at all, or till default had been made in taking delivery within seventy-two hours after

the report of the ship, which would not in this case be till the 31st of May. But the master, apparently being in a hurry, on the 28th of May, prepared and signed a notice to the East and West India Docks to "detain all the undermentioned goods which shall be landed in your docks, now on board the ship *Mary Jones* from Jamaica, whereof I am master, until the feight due thereon shall be duly paid or satisfied, in proof of which you will be pleased to * receive the directions of James Shepherd & [* 608] Co. The whole cargo as per bills of lading." This stop was lodged with the dock company on the 29th of May.

The dock company, it appears, were in the habit of requiring the master to sign an authority at the foot of a copy of the manifest. And in this case the copy manifest was signed and lodged on the 28th of May. It is not necessary to inquire what would have happened if, before the seventy-two hours had expired, a duly authorized person had tendered the freight and demanded delivery, for no such thing occurred. And I think, as soon as the seventy-two hours had elapsed, the dock company held the goods under the provisions of the Act, just as much as if they had not been landed till then. The counsel for the respondents wished your Lordships to draw the inference of fact that all this must have been done, not under the provisions of the Act, but by virtue of some agreement to which Cottam & Co. were a party. I do not see any evidence of this; and looking at the manner in which the admissions were made, so as to apply not only to the *Mary Jones* but to two other ships mentioned in the 6th and 11th paragraphs of the statement of defence, I should, if necessary, draw the inference that it was not the fact.

Then on the 31st of May, on which the seventy-two hours had expired, Cottam & Co. brought down and showed to the dock company a bill of lading with the word "second" distinctly printed on the face of it, and in every other respect precisely similar to the bill at that time in the hands of Glyn & Co. It was not indorsed. The clerk of the dock company entered in the books of the company that Cottam & Co. were the proprietors of the goods, and marked the bill of lading with his initials and the date, so as to show that he had seen it, and returned it to Cottam & Co. It was proved, what I think would have been inferred without proof, that after this the dock company would, according to their ordinary practice, have delivered the goods when the

stop for freight was removed to the order of Cottam & Co., unless, in the meantime they had got notice that another bill of lading was, as the witness says, out.

It appeared in *Barber* v. *Meyerstein*, that in the case of [* 609] * Abraham, whose honesty they seem to have distrusted, the Chartered Mercantile Bank had lodged a stop; and so might Glyn & Co. have done in the present case. They did not do so. And the stop for freight having been removed the dock company, though not till the month of July, delivered the goods to the order of Cottam & Co., not having then either notice or knowledge of the fact that one part of the bill of lading had been indorsed to Glyn & Co., but having from the form of the bill itself notice that there were two other bills of lading, either of which Cottam & Co., if dishonest enough, might have indorsed and delivered for value to some other party.

The real question, I think, is, whether the dock company were under such circumstances justified in or rather excused for delivering to Cottam & Co.'s order, though if they had had notice or knowledge of the previous transfer of the bill of lading to Glyn & Co., it would have been a misdelivery, for which they would have been responsible. I do not think the dock company held the goods by virtue of any contract. They held them under the statute subject to a duty imposed by the statute, to deliver them to the person to whom the shipowner was bound to deliver them. And, as I think, they were justified, or rather excused, by anything which would have justified or excused the master in so delivering them. So that, I think, the very point which has to be decided is that raised by Lord WESTBURY, namely, what will excuse or justify the master in delivering.

The case of *Barber* v. *Meyerstein* settles that the mere fact that there were parts of the bills in the hands of the mortgagor or pledgor does not form a justification or excuse for an innocent purchaser from the mortgagor or pledgor, whichever he was, taking the goods. If it could be proved that the other parts of the bills of lading were left in the hands of the mortgagor or pledgor, in order that he might seem to be the owner, though he was not, a purchaser from the person in whose hands they were thus left might either at common law or under the Factors' Acts have a good title; but there is not in this case, any more than there was in *Barber* v. *Meyerstein*, any evidence to raise such a question.

No. 12. — Glyn, &c. Co. v. East and West India Dock Co., 7 App. Cas. 610, 611.

* But the master is not in the position of a purchaser [* 610] from the holder, or person supposed to be the holder, of a bill of lading. He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading — in this case Cottam & Co. — or their assigns, that is, assigns of the bill of lading, not assigns of the goods. And I quite assent to what was said in the argument that this means to Cottam & Co., if they have not assigned the bill of lading, or to the assign if they have. If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear, he would fulfil the contract if he delivered to Cottam & Co. on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to any one producing the bill of lading with a genuine indorsement by Cottam & Co. He would not fulfil his contract if he delivered them to any one else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract. But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three bills of lading all of the same tenor and date, the one of which bills being accomplished, the others to stand void.

In *Fearon* v. *Bowers*, 1 Sm. L. C. 782, 8th ed. n. to *Lickbarrow* v. *Mason*, decided in 1753, LEE, C. J., is reported to have ruled "that it appeared by the evidence that according to the usage of trade the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury were therefore directed by the CHIEF JUSTICE to find a verdict for the defendant." Lord TENTERDEN says (I quote from the 5th edition of Abbott on Shipping, the last published in his lifetime, part 3, chap. ix., sect. 24), "But perhaps this rule might upon further consideration be held to put too much power into the master's hands." It is singular enough that one hundred and twenty-nine years should have elapsed without its having been necessary for any Court to say whether this rule was good law. It was suggested on the argument with great probability that, especially after the caution given immediately after the passage I have * read (part 3, chap. ix., [* 611]

sect. 25), masters have declined to incur the responsibility of deciding between two persons claiming under different parts of the bill of lading, so that the case has not arisen. If this rule were the law, it would follow *à fortiori* that if the master was entitled to choose between two conflicting claims, of both of which he had notice, and deliver to either holder, he must be justified in delivering to the only one of which he had notice. So that I think it is necessary to consider whether it is law, and I do not think it can be law, for the reason given by Lord Tenterden; it puts too much power in the master's hands. Where he has notice or probably even knowledge of the other indorsement I think he must deliver, at his peril, to the rightful holder or interplead.

But where the person who produces a bill of lading is one who — either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill — would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to some one else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.

It is not merely that, as Bramwell, L. J., says, 6 Q. B. D. 492; 50 L. J. Q. B. 78, "it is the undoubted practice to deliver without inquiry to any one who produces a bill of lading," *i.e.*, when no other is brought forward, and that the evidence given in *Fearon* v. *Bowers* must have proved that much, though it seems also to have proved more; but that, as it seems to me, unless this was the practice, the business of a shipowner could not be carried on, unless bills of lading were made in only one part. I cannot say on this anything in addition to what Baggallay, L. J., says, 6 Q. B. D. pp. 502, 503, and I quite assent to his reasoning there; I think also that the only reasonable construction to be put upon the clause at the end of the bill of lading is that the shipowner stipulates that he shall not be liable on this [* 612] contract if he *bonâ fide*, and without notice * or knowledge of anything to make it wrong, delivers to a person producing one part of the bill of lading, designating him — either as being the person named in the bill if it has not been indorsed, or

No. 12. — Glyn, &c. Co. v. East and West India Dock Co., 7 App. Cas. 612, 613.

if there be a genuine indorsement as being assign — as the person to whom the goods are to be delivered. In that case, as against the shipowner, the other bills are to stand void. Even without that clause I should say that the case falls within the principle laid down as long ago as the reign of James I. in *Watts* v. *Ognell*, Cro. Jac. 192. That depends, says WILLES, J., in *De Nicholls* v. *Saunders*, L. R. 5 C. P. 594; 39 L. J. C. P. 297, "upon a rule of general jurisprudence, not confined to *choses in action*, though it seems to have been lost sight of in some recent cases, viz., that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation." The equity of this is obvious. It was acted upon in *Townsend* v. *Inglis*, Holt, N. P. 278, 17 R. R. 636, where goods lodged in the docks by Reed & Co. were by them sold to Townsend, and a delivery order was given by Reed & Co. to Townsend. Townsend paid for the goods to Reed & Co.'s brokers, who misappropriated the money. Then Reed & Co. countermanded the order, and finally removed the goods from the docks before the dock company had any notice either of the sale to Townsend or of the delivery order given to him. Townsend brought trover against Reed & Co. and the dock company. GIBBS, C. J., a very great commercial lawyer, left to the jury the question as to whether Townsend was, on the evidence as to previous dealings, justified in paying the broker, which the jury found he was, and the plaintiff had a verdict against Reed & Co., but he directed a verdict for the dock company, saying, "Though the skins were the property of the plaintiffs from the completion of the bargain, the company had made no transfer, and had no notice of their possessory title when they delivered the skins to Reed & Co." And in *Knowles* v. *Horsfall*, 5 B. & Ald. 139, ABBOTT, C. J., treats this as indisputable. Goods, part of which were in a warehouse, had been sold by Dixon to the plaintiff. ABBOTT, C. J., says, as to the parcel in the warehouse, "If the plaintiff had given notice of the sale to the warehouse keeper, * the latter would not have [* 613] been justified in delivering them to any other order than that of the plaintiff, but not having received any such notice, the warehouse keeper would have been justified in delivering them to the order of Dixon, who placed them there." I know of no case in which this principle has been departed from intentionally, and

though it is very likely that it may have been sometimes lost sight of, I do not know to what cases WILLES, J., alludes.

The sum involved in this case is not large, but the amounts advanced by those who lend money on the security of bills of lading, and the value of the goods for which warehouse keepers and wharfingers become responsible, are enormous. Which is the more important trade of the two I do not know, but the decision of this case must have an effect on both, and it is therefore of great importance, and requires careful consideration. And that being so, I have felt some diffidence in differing from the two learned Judges who had below come to a different result. Mr. Justice FIELD seems, 5 Q. B. D. 135; 49 L. J. Q. B. 303, to have taken a view of the facts as to the way in which the goods came into the hands of the dock company different from that which I have taken, and consequently to have thought that the very important question suggested by Lord WESTBURY did not arise. Lord Justice BRETT thinks, 6 Q. B. D. 488; 50 L. J. Q. B. 64, that the master cannot be excused as against the first assignee of one part of the bill, who has the legal right to the property, for delivering under any circumstances to one who produces another bill of lading bearing a genuine indorsement, unless he would be excused in all circumstances; in other words, unless *Fearon* v. *Bowers* is good law to its full extent. In this I cannot agree. I think, as I have already said, that where the master has notice that there has been an assignment of another part of the bill of lading, the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong. And I think it probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it or as yet claimed under it. At all events, he would not [* 614] be safe, in such a case, in delivering without * further inquiry. But I think that when the master has not notice or knowledge of anything but that there are other parts of the bill of lading, one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him.

And I further think that a warehouseman taking the custody of the goods under the provisions of the Merchant Shipping Act 1862, s. 66, &c., is under an obligation cast upon him by the

No. 12. — Glyn, &c. Co. v. East and West India Dock Co., 7 App. Cas. 614, 615.

statute to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master. And I find, as a fact, that this was the position of the respondents here. And, on this *ratio decidendi*, I think that the appeal should be dismissed, with costs.

Lord WATSON: —

My Lords, I am of the same opinion; and I shall only say a word or two in explanation of my own views, because I have had the opportunity of considering the elaborate judgment of my noble and learned friend (Lord BLACKBURN) in which I entirely concur.

It appears to me that the goods in question were placed in the custody of the respondents, under the provisions of the Merchant Shipping Act of 1862, and I agree with your Lordships that, in the circumstances of this case, the duty of the dock company, in regard to their delivery, differed in no respect from that of the shipowner.

The nature and extent of the obligation, undertaken by the shipowner, to deliver the goods at the end of the voyage, must depend upon the terms of the bills of lading, which contain his contract with the shipper; and every assignee of a bill of lading has notice of, and must be bound by, those stipulations, which have been introduced into the contract, for his own protection, by the shipowner. In the present case the master, for the convenience of the shipper, subscribed to three bills of lading of the same tenor and date, by which he undertook to deliver the goods, at the port of London, to Cottam & Co. or their assigns; and each bill * of lading bore the usual affirmation by the [* 615] master that he had signed three in all, "the one of which bills being accomplished the others to stand void."

That is a stipulation between the shipper and the shipowner, and is plainly intended to give some measure of protection to the latter, after he has delivered the goods upon one of the bills of lading, against subsequent demands for delivery, at the instance of the holders of the other bills of the set. It is, in my opinion, inconsistent with any reasonable construction of the stipulation, that the shipowner should be held liable in all cases to deliver to the true owner of the goods, because in that case, it would give him no protection. The stipulation can have no intelligible

No. 12. — Glyn, &c. Co. v. East and West India Dock Co., 7 App. Cas. 615, 616.

meaning or effect, if it does not, under some circumstances, enable the shipowner to resist a claim for second delivery, preferred by the holder of a bill of lading, who has, by virtue of it, the right of property in the goods. On the other hand, it is obvious that the stipulation is meant exclusively for the protection of the shipowner, and is not intended to confer upon him the right to select the person to whom he shall deliver, or to affect the rights *inter se* of the holders of the bills of lading. That being so, I think that the natural and reasonable construction of the language of the contract is that the shipowner is to be exonerated by delivery upon one of the bills of lading, although it does not represent the property in the goods, — with this qualification that, *bonâ fides* being an implied term in every mercantile contract, the delivery must be made in good faith, and without knowledge or notice of any right or claim preferable to that of the person to whom he so delivers.

Lord FITZGERALD: —

My Lords, I also have had the advantage of reading the judgment of the noble and learned Lord (Lord BLACKBURN). I had previously arrived at the same result, though not entirely on the same grounds, and I concur in the decision which has now been announced.

At the close of the very able arguments at the bar, your Lordships reserved judgment, and you did so, probably, not from any doubt as to the decision which justice and reason required, [* 616] but * rather from the great importance of the case to the mercantile community, and from an anxiety that your Lordships' judgment should be so cautiously and accurately expressed as not to conflict with principles of mercantile law, settled long ago and recently affirmed by your Lordships' House.

We have reason to be grateful to the noble Lord for the care he has taken. He has succeeded in expressing your Lordships' decision in language so clear and so simple as not to leave it open hereafter to contend that your Lordships intended to modify or to depart from the decision of this House in *Barber* v. *Meyerstein*.

I entirely concur in the condemnation of the law laid down in *Fearon* v. *Bowers* (if it was so laid down there), that in case of presentation to the captain of two or more parts of the bill of lading, by parties claiming to be holders and adversely to each other, the captain was not bound to look into the merits of the particular

claims, but had a right to deliver to which of the claimants he thought proper. Such a rule would go far to enable the captain to violate his contract and his duty, and to "accomplish" his obligation by delivery to one whom he may have had reason to believe was not the real owner of the goods.

Before the close of the argument, the noble and learned Earl (Earl CAIRNS) suggested, for your Lordships' consideration, that the practice of having so many parts of the bill of lading all in the nature of originals was introduced for some purpose of convenience to the consignor or consignee, and that the concluding passage, "the one of which being accomplished the others to stand void," was probably intended for the protection of the shipowner. He further suggested that, in carrying into effect that object, the true interpretation should be that if the master, acting in entire good faith, delivered the cargo on one part of the bill of lading either to the consignee named in it as such, or to an indorsee of one part, he would have "accomplished" the bill of lading so far as it is a contract for carriage and delivery, and be protected even though another part of the bill of lading should prove to be outstanding in the hands of a prior indorsee for value, but of which the master had no notice.

*It is singular that on this point there seems to have [*617] been hitherto no direct decision, though the present form of bills of lading has been in use, and the practice of having several parts of the bill of lading has been followed, for considerably more than a century.

In *Fearon* v. *Bowers*, tried in 1753, there were three parts and the same form, and in *Wright* v. *Campbell*, 4 Burr. 2047, in 1767, there were two parts and the form the same. *Fearon* v. *Bowers* may be considered to bear on the question of construction, for LEE, C. J., is there represented to have said, "All the captain had to do was to deliver on one of the bills of lading."

In the absence of any authority to the contrary, I have come to the conclusion that, so far as the bill of lading is a contract for carriage and delivery, the noble and learned Earl suggested the true interpretation of "one of which being accomplished the others to stand void."

I should have had some difficulty in assenting to the proposition, either generally or as applicable to this particular case, that a delivery which, if made by the master, would justify or excuse

him, would equally justify or excuse the warehouseman. The position of the warehouseman, when the stop order had been removed, seems to me to be different, and possibly his liability more extensive. If we had to determine that question it would be necessary to consider carefully the position of the warehouseman, and to have regard to the Merchant Shipping Amendment Act, 25 & 26 Vict. c. 63, ss. 67, 75, and in this particular case to his obligation under the memorandum at foot of the manifest. I refrain from pursuing this topic further, as I do not consider it to be a necessary part of your Lordships' decision, nor does it, in my opinion, affect the result.

A loss has been sustained by the wrongful act of Cottam & Co., which must be ultimately borne by one of three parties. Williams & Co. are not before us, and I say nothing as to whether or not they may be ultimately subject to any liability; but as between the plaintiffs and the defendants in this suit, it seems to me that the plaintiffs, who, by their omissions and want of proper caution and by their misplaced confidence in Cottam & Co., have [*618] enabled *Cottam & Co. to commit that wrong, ought in reason and justice to bear the loss.

The plaintiffs omitted to get up from Cottam & Co. the second and third parts of the bill of lading, or to make any inquiry about them. They were not bound to do so, nor did that omission affect their legal title, but it left them open to a risk, from which they are now to suffer loss. The insecurity created by that omission might have been rectified by notice of their title to the master, or by notice to the defendants at any time before the actual delivery to Williams & Co. The plaintiffs used no proper caution, and took no action of any kind in relation to the goods until after the misdelivery to Williams & Co., and the discovery of the insolvency of Cottam & Co.; and if we could put the question to them, "Why did you pursue so incautious a course?" their reply probably would be, "We trusted to the integrity of Cottam & Co., and we left the entry and warehousing of the goods, the payment of freight, and all matters of detail to Cottam & Co." It cannot be truly said that, as between the plaintiffs and defendants, the plaintiffs are innocent sufferers by the act of a third party.

The result has been the misdelivery of the goods, which the plaintiffs charge as an act of wrong by the defendants rendering them liable in this suit. Having regard to the plaintiffs' legal title,

it was no doubt a misdelivery; but the defendants are excused by law from the consequences of an error into which they have been led by the plaintiffs.

In *Lickbarrow* v. *Mason*, 1 Sm. L. C. 8th ed. 806, 807, BULLER, J., in delivering his opinion in this House, observes, "that in all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible;" and I may amplify his language by interpolating after "property" the words "and the advance and security of capital."

It will be observed that, in this present decision of your Lordships, nothing has been expressed adverse to that proposition. We give full effect to the bill of lading as a symbol of title to the property comprised in it, and to its indorsement as a transfer of that title as full and effectual as if accompanied by a delivery of actual possession.

* We do no more than lay down a rule of construction, [* 619] and apply a well-established principle of law to this particular case, and we hope it may serve as a landmark for the future.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 1 August, 1882.

ENGLISH NOTES.

It is to be observed that some of the expressions used in the judgments of Lord HATHERLEY and Lord WESTBURY as to the effect of the indorsement and delivery of a bill of lading transferring the ownership, or absolute property, in the goods, might be misleading if not understood merely as unguarded expressions correctly enough applied in a case involving no important question as to the intention with which the bill of lading was indorsed and handed over. See *Sewell* v. *Burdick*, No. 9, and judgment of Lord SELBORNE, p. 764, *ante* (10 App. Cas. 81, 54 L. J. Q. B. 160).

The case of *Fearon* v. *Bowers* (1753), 1 H. Bl. 364 n., 1 Sm. L. C. 8th ed. 782, referred to in the judgments of the latter of the principal cases, was an early case in which the master was held exonerated by delivery of the goods to the holder of one of the set of bills of lading, independently of any question as to who had the best right to the goods. The case is reported in a note to the report of the judgment of the Exchequer Chamber in *Lickbarrow* v. *Mason*, 1 H. Bl. 364, 1 Sm.

L. C. 8th ed. p. 782. The action was for detinue against the master. The case was that A. & Co. of Malaga had shipped goods purchased by one Hall of Salisbury. They sent one of the set of bills of lading to Hall, accompanied by an invoice. They sent another of the set to their own agent, Jones, with a bill of exchange, to be presented to Hall. Hall refused to accept the bill of exchange, which was accordingly protested for non-acceptance. Jones accordingly demanded the goods from the master upon his bill of lading; and the master, notwithstanding a previous demand for them by the plaintiff, who was an indorsee for value of Hall's bill of lading, delivered them to Jones. Lee, C. J., in summing up the evidence, said that, to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement; that the invoice strengthens that right by showing a further intention to transfer the property. But it appeared in this case that Jones had the other bill of lading to be as a curb on Hall, who in fact had never paid for the goods. And it appeared by the evidence that, according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury were therefore directed by the Chief Justice to find a verdict for the defendant, which they accordingly did.

In the case of *Sanders* v. *Maclean* (C. A. 1883), 11 Q. B. D. 327, 52 L. J. Q. B. 481, 49 L. T. 462, there was a contract for sale by plaintiffs to defendants of iron rails to be shipped from Russia to Philadelphia, "payment to be made in net cash in London in exchange for bills of lading and policy of insurance of each cargo or shipment." The goods having been shipped according to contract, the plaintiffs tendered to defendants two of a tripartite set of bills of lading duly indorsed, the third of the set having been detained in Russia, but not dealt with. The defendants declined to take the two of the set of bills and to pay for the iron, on the ground that the third of the set was outstanding. Subsequently the plaintiffs procured the third of the set, and tendered the whole set, which the defendants declined on the ground that they came too late to be forwarded to Philadelphia in time for the arrival of the ship. The action was for damages for not accepting the iron. The Court of Appeal, reversing the judgment of Pollock, B., gave judgment in favour of the plaintiffs, on the ground that the former tender was sufficient.

No. 13. — In re WESTZINTHUS.

(1833.)

No. 14. — Ex parte GOLDING DAVIS & CO. In re KNIGHT

(C. A. 1880.)

RULE.

WHERE a bill of lading is indorsed for valuable consideration with the intention of conferring upon the indorsee a right of property in security of a debt, a stoppage (or attempted stoppage) *in transitu* by the unpaid vendor is effectual in equity to revest in the vendor the purchaser's right in the goods subject to the indorsee's legal right.

And conversely, if the general property in goods consigned by A. to B. has passed by a sub-sale to an indorsee (C.) of the bill of lading, subject, as between B. and C. to the right of B. as vendor; the original vendor (A.) by stopping the goods *in transitu* attaches this sub-vendor's right, and so, in effect, attaches the purchase-money in the hands of the sub-purchaser (C.).

In re Westzinthus.

5 Barn. & Ad. 817–835.

Bill of Lading. — Stoppage in Transitu. — Right in Security.

Arbitration. W., at Leghorn, shipped oil to L. at Liverpool. L. accepted a bill for the price, got the bill of lading and indorsed it to H. as security (along with other property of L.) for a loan. L.'s acceptance having been dishonoured, W., on arrival of the vessel, gave notice to the captain to stop delivery of the goods; and also gave notice of his claim to H., who had got delivery upon an indemnity. H. sold the oil and deposited the purchase-money to abide the event of the award.

Held, that W., by virtue of his attempted stoppage, had an equitable right to the oil, preferable to the general creditors of L., but subject to H.'s right in security.

Held, also, that W. was entitled to claim that H. should satisfy his own claim out of any other property he held of L.'s before resorting to the goods in question.

By rule of this Court, certain matters in dispute between [817] Westzinthus and the assignees of Lapage & Co., and between

Rogers & Co., and the same assignees, were referred to an arbitrator, who stated the following facts upon his award: —

In February, 1831, Westzinthus shipped, at Leghorn, twenty-three casks of oil, by the ship *Sarah*, to John and Frederick Lapage, who then carried on business as merchants in Liverpool under the firm of Lapage & Co., in execution of an order transmitted by them to him, and at the same time drew a bill of exchange on them for the amount of the invoice of the oil. This bill, together with the bill of lading for the oil, was transmitted to certain agents of Westzinthus, with instructions to deliver the bill of lading to

[* 818] Lapage & Co., * upon their accepting the bill of exchange so drawn on them; and accordingly Lapage & Co. accepted the bill of exchange, and the bill of lading was delivered to them.

Messrs. Hardman & Co., brokers in Liverpool, were in the habit of making advances in cash, and by acceptances, to Lapage & Co., upon goods placed by them in the hands of Hardman & Co., for sale. Under this course of dealing, the transactions hereinafter mentioned took place. On the 14th of March, 1831, Hardman & Co. were under cash advances, and had accepted for Lapage & Co., to the amount of about £6700 upon various goods, all of which were in the possession of Hardman & Co. On the 14th of March, 1831, Hardman & Co., at the request of Lapage & Co., accepted their draft for £1500, falling due the 15th of July (which was duly paid at maturity), as a further advance upon the goods already in the hands of Hardman & Co., and also on the said twenty-three casks of oil by the *Sarah*, which had not then arrived; the bill of lading of the oil by the *Sarah* was, on the same 14th of March, duly indorsed and delivered by Lapage & Co., to H. & Co. According to the agreement, and the course of business between Lapage & Co. and H. & Co., the latter were entitled to hold all the goods and bills of lading as a security for their advances. On the 16th of March, 1831, a similar advance was made by H. & Co., of £1000, on which occasion a bill of lading of certain oil, then expected by the ship *Frederick*, was handed and indorsed to H. & Co., by Lapage & Co. The facts and questions as to this oil were the same as those relating to that by the *Sarah*, and it was to abide the event of the award as to the oil by the *Sarah*.

[* 819] * On the 19th of March, 1831, Lapage & Co. committed acts of bankruptcy; and their acceptance of Westzinthus's bill was dishonoured at maturity. On the 26th of March, a com-

mission of bankrupt was issued against them. On the 24th of March, the *Sarah* arrived at Liverpool; and on the same day, the agents for Westzinthus, who held an indorsed part of the bill of lading, gave notice to the captain, in consequence of the failure of Lapage & Co., not to deliver the oil to them; and they also demanded the delivery of the oil to be made to them as agents of M. Westzinthus under the bill of lading held by them, and tendered the captain the amount of the freight; but no tender or offer was made to Hardman & Co. to repay any part of the money advanced as hereinbefore mentioned. On the 7th of April, 1831, the solicitors of Westzinthus wrote the following letter to Hardman & Co.: "GENTLEMEN, as solicitors of M. Westzinthus of Leghorn, we address you upon the subject of twenty-three casks of oil, marked T., consigned by him per the *Sarah* to Messrs. Lapage & Co. of your town; and of which you have illegally obtained possession, after the same had been stopped *in transitu* on behalf of the consignor, in consequence of the failure of Lapage & Co. We are informed that Lapage & Co. transferred to you the bill of lading of this oil, together with indigo and other property belonging to them, as a security for £1500 advanced by you to them. We are also informed that you hold other property belonging to Lapage & Co. which you are also entitled to retain as a security for the £1500. Without entering, at present, into any question as to the validity of the transfer of this bill of lading, we think it right to give you notice that, in any event, you will be required to apply the indigo * and other property, really belonging to Lapage [* 820] & Co. now in your possession, in payment, in the first instance, of your advances, without having recourse to the oil in question, except for any deficiency after you have realised the other securities; and should the oil be more than sufficient to cover such deficiency, M. Westzinthus will claim the benefit of his stoppage *in transitu*, at least, to the extent of the surplus. If you should think it right, after this notice, to sell the oil before realising your other securities, M. Westzinthus will hold you responsible; and in that case he will claim any balance which may arise in your hands due to Lapage & Co. not exceeding the proceeds of the oil; and we give you notice not to pay such balance to Lapage & Co., or their assignees or creditors." After the delivery of the oil had been stopped, the captain, on the 27th of March, delivered the oil to Hardman & Co. under an indemnity. At the time of the bankruptcy of Lapage

& Co., they were indebted to Hardman & Co. in the sum of £9271, advanced in the manner before described; and as security for this sum, they held goods of Lapage & Co. which had actually arrived, of which the net proceeds, when sold as after mentioned, were £9961 1*s.* 7*d.*; they also held the bill of lading of the oil by the *Sarah*, of which the net proceeds, when sold as hereinafter mentioned, were £331 7*s.* 7*d.*; and the bill of lading of the oil by the *Frederick*, of which the net proceeds, when sold as hereinafter mentioned, were £1106 10*s.* 10*d.* After the arrival of the oil by the *Sarah* and by the *Frederick*, H. & Co. sold all such oil and other goods; the net proceeds of which amounted respectively to the before-mentioned sums, making a total of £11,399.

[* 821] "Out of this sum, H. & Co. have paid themselves * £9271, due to them as aforesaid; they have deposited £1437 18*s.* 5*d.* (the amount of the two parcels of oil in dispute) to abide the event of this award, and have paid over the residue to the assignees of Lapage & Co. The goods, other than those by the *Sarah* and *Frederick*, which H. & Co. had sold as aforesaid, had been sold by different persons to Lapage & Co., and not paid for; and such vendors, at the time of the bankruptcy, were creditors of Lapage & Co. for the amount. The bills drawn by Westzinthus and by Rogers & Co. for the amounts of the oil by the *Sarah* and the *Frederick*, have not been paid or negotiated; but are still in the hands of the drawers or their agents."

The arbitrator was of opinion that Westzinthus and Rogers & Co. were respectively entitled to £18 13*s.* 4½*d.* per cent. on the respective proceeds of the goods per the *Sarah* and the *Frederick* (being such part of the said proceeds as bore to the whole the same proportion which the excess of the whole proceeds of the goods sold by H. & Co. over the debt to them from Lapage & Co. bore to such whole proceeds), and ought to stand in the situation of creditors of Lapage & Co. for the residue of such proceeds of the goods by the *Sarah* and the *Frederick* respectively; he then awarded and directed that the sums of £61 17*s.* 3*d.* and £206 11*s.* 7*d.* (being such per centage as aforesaid), together with such sums as any dividends already declared under the bankruptcy of Lapage & Co. on the residue of such amounts of the said goods respectively (that is to say, on the sums of £296 10*s.* 4*d.* and £899 19*s.* 3*d.*) would amount to, should be paid to Westzinthus and Rogers & Co. respectively; and that the residue of such disputed sums should be paid

to the assignees of Lapage & Co.; and * that Westzinthus [* 822] and Rogers & Co. should be respectively paid such dividends as should thereafter be declared under the bankruptcy on such last-mentioned part of the sums in dispute; and that the said bills of exchange should be delivered to the assignees. But if this Court should be of opinion that Westzinthus and Rogers & Co. were entitled to the whole proceeds of the said goods respectively, then the arbitrator awarded that such proceeds should be respectively paid to them, and the said bills of exchange delivered to the said assignees; or if the Court should be of opinion that Westzinthus and Rogers & Co. were not entitled, under their stoppage *in transitu*, to any part of the proceeds of such goods respectively, then he awarded, that so much of the said proceeds as the dividends already declared on the whole sums for which the said goods were sold by Westzinthus and Rogers & Co. respectively to Lapage & Co., amounted to, should be paid to Westzinthus and Rogers & Co. respectively; and the residue thereof to the said assignees, who were to pay to Westzinthus and to Rogers & Co. such dividends as should thereafter be declared upon such whole sums respectively.

F. Pollock had obtained a rule *nisi* for setting aside so much of the award as gave to Westzinthus and Rogers & Co. respectively £18 13*s.* 4½*d.* per cent. on the amount for which the goods were sold, and as directed that they should stand in the situation of creditors to Lapage & Co. for the residue: and the rule proposed that, instead thereof, it should be declared that Westzinthus and Rogers & Co. were entitled only to so much as the dividends already declared amounted to.

* J. H. Lloyd, for Westzinthus and Rogers & Co., ob- [* 823] tained a rule for setting aside the same part of the award, and that Westzinthus and Rogers & Co. should be declared to be entitled to the whole proceeds of the goods. The Court ordered that the case should be set down in the special paper for argument.

The case having been argued, the Court took time for consideration.

Denman, C. J., in this term (November 25th) delivered the [832] judgment of the Court: —

In this case Westzinthus, who was the unpaid vendor at the time when his agents made the demand on the master of the vessel on board which the oil was, had no right to take possession, on

the insolvency of the vendee, Lapage, because the property in, and also the right to the possession of, the goods was unquestionably vested at that time in Hardman the indorsee of the bill [*833] *of lading, for a valuable consideration. The demand, therefore, of Westzinthus gave him no legal right to the property or possession of the goods; and it appears to us that he can have no claim at law, except as arising out of the right of retaking the possession of the goods themselves, which right was determined by the indorsement of the bill of lading. It is not necessary to determine what would have been his situation if either Lapage or himself had paid off Hardman's demand, prior to the notice given to the master, or to the actual receipt of the goods by the vendee.

But it is very properly urged, in the able argument in support of Westzinthus's claim that every question of equity, as well as of law, was referred to the arbitrator, and that the unpaid vendor had, under the circumstances, an equitable title to the goods, by virtue of the attempted stoppage, subject to Hardman's right thereto; and also an equitable right to compel Hardman, the creditor, to pay himself out of Lapage's own property, which all the other goods (except those of Messrs. Rogers and Co., whose claim abides the decision of this Court) certainly were. The learned arbitrator appears to have decided in favour of Westzinthus to this extent,— that he had by virtue of the demand or attempted stoppage *in transitu*, a preferable right, either at law or in equity, to the general creditors of Lapage; but he has allowed him only a proportion of the proceeds of his goods, thinking that all the goods deposited by Lapage with Hardman should be proportionably charged with the payment of the debt due to him. He has, therefore, deducted £81 6*s*. 7½*d*. per cent. of the proceeds of Westzinthus's goods, being the proportion which the debt due to Hardman bears to all [*834] the proceeds, and *directed the remainder to be paid over to him; and has, therefore, disallowed the equity claimed by Westzinthus to oblige Hardman to pay himself out of Lapage's own goods.

We think that the arbitrator was right in allowing Westzinthus to be in a better condition than the other creditors, but wrong in disallowing his claim to have all the proceeds paid over to him.

As Westzinthus would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession by

the indorsement of the bill of lading for a valuable consideration, to Hardman, it appears to us that, in a court of equity, such transfer would be treated as a pledge, or mortgage, only, and Westzinthus would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage; in analogy to the common case of a mortgage of a real estate, which is considered as a mere security, and the mortgagor as the owner of the land. We therefore think that Westzinthus, by his attempted stoppage *in transitu*, acquired a right to the goods in equity (subject to Hardman's lien thereon) as against Lapage, and his assignees, who are bound by the same equities that Lapage himself was. And this view of the case agrees with the opinion of Mr. Justice BULLER, in his comment on the case of *Snee* v. *Prescot* in *Lickbarrow* v. *Mason*, 6 East, 29 n.

If, then, Westzinthus had an equitable right to the oil, subject to Hardman's lien thereon for his debt, he would by means of his goods have become a surety * to Hardman for Lapage's [*835] debt, and would then have a clear equity to oblige Hardman to have recourse against Lapage's own goods, deposited with him, to pay his debt in case of the surety; and all the goods, both of Lapage and Westzinthus, having been sold, he would have a right to insist upon the proceeds of Lapage's goods being appropriated, in the first instance, to the payment of the debt.

The result is, that Mr. Lloyd's rule must be made absolute, and Mr. Pollock's discharged.

Rules accordingly.

Ex parte Golding Davis & Co. In re Knight.

13 Ch. D. 628–638 (s. c. 42 L. T. 270; 28 W. R. 481).

Bill of Lading. — Stoppage in Transitu. — End of Transitus.

Appeal in bankruptcy.

G. sold to K. (the bankrupt) certain quantities of alkali to be shipped f. o. b. Liverpool. K. made a similar contract with T. to sell the same at a somewhat higher price. K., by T.'s instructions, directed G. to ship a certain quantity of the goods on board the *Larnaca*, a general ship then lying at Liverpool, for New York. The shipment was made accordingly, and the bill of lading made out to order of T. K. having suspended payment, G. gave notice to the master of the *Larnaca*, which had not left Liverpool, to stop the goods *in transitu*, and they also sent T. a notice of their claim. The purchase-money payable by T. on the sub-contract was paid to a deposit account pending decision

upon the validity and effect of the notice. The Registrar held that the notice was of no effect, *the transitus* being at an end.

The Lords Justices held (1) That *the transitus* was not ended until arrival at New York; (2) That, although the bill of lading had been made out to T.'s order, the stoppage by G. was effectual to attach the unpaid purchase-money due from T. to K., so far as to satisfy G. for the original price.

[628] This was an appeal from a decision of Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy.

Knight & Son were merchants in London and at Liverpool. Golding Davis & Co., Limited, carried on business as manufacturers of alkali at Widnes.

On the 15th of November, 1877, Knight & Son entered into the following contract with the company: —

"Messrs. Golding Davis & Co.

"We have this day bought of you the following goods of good merchantable quality:

"Twelve hundred (1200) drums 5/6 cwt. each, white 70% caustic soda, your own make, per Huson's sampling and test note.

"Delivery, 100 drums per month, January and December, 1878.

"Shipment, f. o. b. Liverpool.

"Price, £14 per ton.

"Discount 2½% and com. 1%.

"Prompt 14 days after each delivery, or before delivery if required.

(Signed) "Knight & Son."

On the same day Knight & Son entered into the following contract with D. Taylor & Sons of London: —

[*629] "* Messrs. D. Taylor & Sons.

"We have this day sold to you the undermentioned goods of good merchantable quality:

"1200 drums, 5/6 cwt. each, white 70% caustic soda, Golding Davis & Co.'s make, Huson Bros. sampling and test.

"Mode of delivery, f. o. b. Liverpool.

"Time of delivery, 100 drums per month, January and December, 1878, each month's delivery a separate contract.

"Price, £14 per ton.

"Discount, 2½%.

"Prompt 14 days after each delivery

(Signed) "Knight & Son."

No. 14. — Ex parte Golding Davis & Co. In re Knight, 13 Ch. D. 629, 630.

The question in dispute on the present appeal related to the October delivery of 100 tons.

On the 28th of October, 1878, Knight & Son's London house wrote to their Liverpool branch, in pursuance of instructions which they had received from D. Taylor & Sons, as follows: —

"We inclose bills of lading for Taylor's 100 drums, Golding's. Please get them shipped at once, as Taylor wants bills of lading dated October. They are to go by sail to New York."

On the 4th of November Knight & Son's Liverpool branch sent instructions to the company to ship the 100 drums at once on board the ship *Larnaca*, for New York, then lying at Liverpool. The *Larnaca* was a general ship. The goods were accordingly shipped by the company on the 7th of November. The wharfinger's receipt for the goods stated that they were received for shipment on board the *Larnaca* on account of Knight & Son, Liverpool. This receipt was handed to the shipping brokers of the ship, who then procured the signature of the master of the ship to the bill of lading.

The bill of lading stated that the goods were shipped by David Taylor & Sons, to be delivered at New York unto order or to assigns, he or they paying freight.

The sum payable by Taylor & Sons to Knight & Son for the goods was £370 10*s.* 3*d.*, and the sum payable by Knight & Son to the company was £366 14*s.* 3*d.* The bill of lading was handed * by the shipping brokers to Knight & Son's Liver- [*630] pool branch on the afternoon of the 7th of November, and was sent by them the same evening by post to Knight & Son in London, by whom it was received on the morning of the 8th of November. Meanwhile, on the 7th of November, Knight & Son (the partners in the firm all residing in London) had suspended payment, but this fact was not known to their Liverpool branch until the morning of the 8th of November. On the same morning the company received a circular informing them of the suspension. The *Larnaca* was still in dock at Liverpool, and the goods had not been paid for either by Knight & Son or by Taylor & Sons. The company at once telegraphed to Knight & Son in London not to part with the bill of lading, and they also served a notice of stoppage *in transitu* on the master of the ship, the ship's agents, and the brokers for the ship. Knight & Son had placed their affairs in the hands of Mr. F. Cooper, an accountant in London, to whom

the bill of lading was handed on the 8th of November. On the 13th of November Knight & Son filed a liquidation petition, and on the 14th of November Cooper was appointed receiver under the petition. On the 4th of December the creditors resolved upon a liquidation by arrangement, and appointed Cooper trustee. The price of caustic soda had fallen £3 per ton since November, 1877, and it was arranged between Cooper and the company that the contract with Taylor & Sons should be carried out, and that their purchase-money should be paid into a bank in the joint names of Cooper and the manager of the company, pending the decision of the Court as to the validity of the notice to stop *in transitu*. This was done, and the goods were accordingly delivered in New York.

The Registrar held that the notice was of no effect, on the ground that, the bill of lading being in the name of Taylor & Sons, the property in the goods was transferred to them, and the *transitus* was at an end as between the company, the vendors, and Knight & Son, the purchasers, when the goods were placed on board the ship and the bill of lading was made out in the name of Taylor & Sons.

The company appealed.

[* 631] * De Gex, Q. C., and E. Cooper Willis, for the appellants.

The case is very like *Ex parte Rosevear China Clay Company*, 11 Ch. D. 560; 48 L. J. Bk. 100; except that there has been a sub-sale of the goods. The transit originally contemplated was not at an end when the notice to stop was given. The goods had not come into the actual or the constructive possession of either Knight & Co. or Taylor & Co. The mere fact that there had been a sub-sale did not destroy the original vendor's right to stop *in transitu*. Till the bill of lading had been handed over to Taylor & Sons, or the goods had been delivered to them, the property in the goods did not pass to them irrevocably. *Mitchel* v. *Ede*, 11 A. & E. 888. The contract between Knight & Son and Taylor & Sons had not been completed: there had been no irrevocable appropriation of the goods. An unpaid vendor's right to stop *in transitu* can be defeated only by a *bonâ fide* transfer of the bill of lading for value. Benjamin on Sales, 2nd ed. pp. 719 *et seq.*; Smith's Leading Cases, 8th ed. vol i. pp. 822 *et seq.* If the bill of lading had been made out to Knight & Son, and they had indorsed it to Taylor & Sons, and then kept it in their pocket, that would have been equiva-

lent to what has been done in the present case, and Taylor & Sons would have acquired no right which could defeat the company's right to stop *in transitu*.

[James, L. J.: In the present case a stoppage *in transitu* by the company would really have been a benefit to Taylor & Sons, for it would have relieved them from the necessity of paying for the goods, which had fallen in price.]

The original destination of the goods was not altered by Taylor & Sons, but the Registrar's *ratio decidendi* was that by reason of the sub-sale the master of the ship received the goods as the agent of Taylor & Sons, and that thus the original *transitus* had come to an end. But the real question is whether the destination originally prescribed is continuing, not whether it is continuing as between the original vendor and the original purchaser. The right of the vendor to stop continues until the goods arrive at the place of destination named by the purchaser. *Coates* v. *Railton*, 6 B. & C. 422, 425; *Whitehead* v. *Anderson*, 9 M. & W. 518, 534; 11 L. J. Ex. 157.

*[James, L. J., referred to *Ex parte Cooper*, 11 Ch. [*632] D. 68.]

It has been held in many cases that the vendor's right to stop *in transitu* will not be interfered with further than is necessary to give effect to the rights which have been acquired by third parties for value. It has been decided in cases where the bill of lading has been mortgaged or pledged, that the unpaid vendor, who has given notice to stop *in transitu*, is entitled to the proceeds of the goods *ultra* the amount for which they have been mortgaged or pledged. *In re Westzinthus*, 5 B. & Ad. 817, p. 845 *ante*; *Spalding* v. *Ruding*, 6 Beav. 376; 12 L. J. Ch. 503; *Berndtson* v. *Strang*, L. R., 4 Eq. 481; L. R., 3 Ch. 588; 37 L. J. Ch. 665; *Coventry* v. *Gladstone*, L. R. 6 Eq. 44; 37 L. J. Ch. 492. The principle of those cases applies to the present, for Taylor & Sons' purchase-money was outstanding, and they have had the goods. The purchase-money due to the company ought to be paid out of Taylor & Sons' purchase-money, the difference only going to Knight & Son's trustee.

Winslow, Q. C., and F. W. Hollams, for the trustee: —

The contract between the company and Knight & Son vested the property in the goods in the latter, and their contract with Taylor & Sons passed the property to them. That is a question of

intention, and the property was clearly intended to pass. A purchaser has a right to terminate the *transitus* and to get possession of the goods at any point of the voyage; if he obtains possession in fact, there is an end of the *transitus* and of the vendor's right to stop *in transitu*. *Whitehead* v. *Anderson*, 9 M. & W. 518, 11 L. J. Ex. 157; *Valpy* v. *Gibson*, 4 C. B. 837. That which took place in the present case was equivalent to a delivery of the goods to Knight & Son at Liverpool, and a sending of the goods on a new *transitus*. The signing of the bill of lading by the ship's master in favour of Taylor & Sons was a complete attornment. If the master attorns to a new purchaser, how can it be said that the goods are still in transit between the vendor and the original purchaser? It is equivalent to the case of a carrier agreeing to hold goods for the purchaser, not as carrier but in another
[* 633] capacity. In *Lickbarrow* * v. *Mason*, Sm. L. C. 8th ed. vol. i. p. 802, Mr. Justice BULLER says distinctly that the right of stopping goods *in transitu* exists only as between vendor and vendee, *i. e.*, as he explains it, between the two parties to a particular contract. *Hawes* v. *Watson*, 2 B. & C. 540, illustrates this distinction. There a wharfinger had acknowledged that he held goods as agent for a sub-purchaser, and it was held that this defeated the vendor's right to stop *in transitu*. That applies to the present case: possession was in effect taken by Knight & Son, and they in effect delivered the goods to Taylor & Sons.

At any rate, that which is now claimed would be a great extension of the doctrine of *Spalding* v. *Ruding*. The rights of a sub-purchaser are much more extensive than those of a mere mortgagee or pledgee. Taylor & Sons might have entered into contracts for the resale of the goods.

JAMES, L. J.: —

It appears to me that the principle upon which this case can be decided may be expressed in a very few words. I confess that I differ from the judgment of the Registrar. There is no doubt that the right of a vendor to stop *in transitu* exists so long as the *transitus* is not at an end, and as a general rule the mere sale of goods while they are *in transitu* does not determine the *transitus*. That seems to me to be quite settled by the cases. A mere transfer of a bill of lading, or any other sale of the goods, though it transfers the whole property in the goods, does not determine the *transitus*. And it seems to me that the goods now in question were clearly

No. 14. — Ex parte Golding Davis & Co. In re Knight. 16 Ch. D. 633, 634.

in transitu at the time when the transaction took place between Knight & Son and Taylor & Sons. They left the vendors' warehouse for the purpose of their being put on board a ship which was to deliver them in New York. That *transitus* was never altered and never ceased, because the goods have since been delivered in New York accordingly. There was a *transitus* continuing from the vendors' warehouse to New York. No doubt in the meantime there was a transaction between Knight & Son and Taylor & Sons, by which there was an * actual transfer [*634] of the property to Taylor & Sons. Assuming that there was a complete transfer to Taylor & Sons of that same right of property and right of possession which Knight & Son had, and no new possession was taken either by Knight & Son or Taylor & Sons (that is, no actual possession by reason of the transfer), it was a mere transfer of the property and the right of possession. The point has been the subject of decision over and over again and the rule seems to me to have been most accurately expressed by Mr. Justice BEST in *Hawes* v. *Watson*. He says, 2 B & C. 545, "It appears to me too that if we consider the principle upon which the right of stoppage *in transitu* is founded, it cannot extend to such a case as the present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them *in transitu*, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons." The fact that in that case the third person had not only bought the goods, but had paid the price, was taken into consideration by the Judges, though I do not think Mr. Justice HOLROYD referred to it in his judgment, but it was considered a material part of the facts which gave the equity to the third person. It has been decided on the same principle that if the transaction with the third party amounted only to a mortgage, and you can give effect to the equitable right of the mortgagee, you do so, and effect is given to the equitable right of the vendor to stop *in transitu*, subject to the intermediate equitable right of the mortgagee. It appears to me impossible to distinguish the case of a mortgagee from that of an actual purchaser of goods; each of them is equally entitled to have his rights respected in the transaction. In my opinion, on the facts of the present case, full effect can be given to the right of the vendors to

No. 14. — Ex parte Golding Davis & Co. In re Knight, 16 Ch. D. 634, 635.

stop *in transitu*, without in the slightest degree affecting any right or equity of Taylor & Sons, because it does not prevent Taylor & Sons from getting the goods in performance of the contract into which they had entered, upon their paying their purchase-money, and the only question is whether the money which they gave [* 635] for the goods is to be subject to the stoppage *in* * *transitu*. I cannot distinguish the case from that of a mortgagee. If surplus moneys remain in the hands of a mortgagee, all he gets is satisfaction of his mortgage. If he sells the goods and pays himself, and there is a balance in his hands, he must account for it. In the one case the balance will be held subject to the right of the vendor to stop *in transitu*; in the other case the whole purchase-money will be equally subject to that right to the extent of the purchase-money due to the vendor. There might be a great difference between the purchase-money payable by the vendee and that which is payable by the sub-vendee, though in the present case there is not much difference. But to the extent of the difference the surplus money will go to Knight & Son's trustee and the rest of the money will go to the vendors, to give effect to their equitable right of resuming possession of the goods by means of a stoppage *in transitu*. I think that the appeal ought to be allowed.

Baggallay, L. J.: —

I am of the same opinion. I entertained some doubts during the progress of the argument, but they were removed when I came more fully to appreciate all the facts of the case. I am satisfied now that the facts are clearly before us, that it is a case in which the right of stoppage *in transitu* remained. I may say that at one time I was pressed with the consideration that the form in which the bill of lading was made out was equivalent to there having been a delivery of the goods to Knight & Son, and then an indorsement of the bill of lading by them to Taylor & Sons, and that that would have determined the *transitus*, but I am satisfied upon further consideration that that is not the true view of the case.

Cotton, L. J.: —

We have to consider a case which is perhaps, to some extent, new as regards the right of stoppage *in transitu*. Now of course that right only exists during the transit. If it can be shown by any means that the transit is at an end, then that right is gone, and there would be no occasion to consider how far the right is

interfered with or defeated by the claims or rights of third persons. I will first deal with the point whether, in this case, the transit was at an end when the notice was given. [* 636]

As I understand it, the transit in such cases is while the goods are in the hands of a carrier for the purposes of the journey indicated under or by the contract between the original vendor and purchaser. That, I take it, is the meaning of the transit. When we look into the facts what we find is this, that as between the original vendors, Golding Davis & Co., Limited, and the original purchasers, Knight & Son, Knight & Son gave directions, as they had a right to do, that the goods should be sent to Liverpool to be shipped on board a ship, which they named, for New York. The voyage, therefore, from the warehouse or works of Golding Davis & Co., to New York was the journey or transit agreed upon or pointed out by the contract between the original vendors and the original purchasers. What we have to consider is whether, at the time when the right of stoppage was attempted to be exercised, the goods were on that transit.

It is undoubted that the transit might be put an end to by the purchaser who has the property in and the right to claim possession of the goods. But in the present case the goods were in the ship, where the shipowner and the captain were acting simply (subject to what I shall presently consider) as carriers for the purpose of completing the journey which had been indicated as between the vendors and the purchasers. But it is said (and that seems to have been the view of the Registrar) that the transit as between the original vendors and purchasers was ended. Now, that must mean that there had been either a taking possession of the goods by the purchasers, or a sending of the goods on a new and different voyage, because, if it only means that when the goods should arrive at their destination they would, under the circumstances existing at the time when the attempt was made to exercise the right to stop, go, not to the original purchaser, but to somebody else, that is the case whenever the original purchaser has handed over the right to receive the goods at the end of the voyage to somebody else. That would include every case of a transfer of a bill of lading. But it is clear that the transfer of a bill of lading, except for value, will never defeat the right of stoppage *in transitu*, and will never put an end to the transit

No. 14 — Ex parte Golding Davis & Co. In re Knight 16 Ch. D. 637, 638.

[*637] by *making the journey not a journey as between the vendor and the original purchaser, but a journey as between the vendor and somebody else. The real fact in the present case was that the original purchasers, Knight & Son, had entered into another contract, not to sell these particular goods, but a contract which they intended to supplement and make good by means of the goods which they would acquire under their contract with Golding Davis & Co. No doubt New York was the end of the journey indicated in the contract between Knight & Son and Taylor & Sons, but it did not on that account cease to be, and it was not on that account a bit the less the end of the journey contemplated as between Golding, Davis & Co. and Knight & Son. The view which the Registrar took cannot, in my opinion, be maintained. The journey indicated by the contract between the original vendors and purchasers was still continuing, there had been no new or different journey indicated, and that entirely distinguishes the case from that which possibly was in the mind of the Registrar, where on the original purchase one journey had been contemplated, but in consequence of a contract between the original purchaser and the sub-purchaser, he directs that the goods shall go to a different terminus. In such a case, of course the right of stoppage *in transitu* is at an end because what is done is equivalent to the original purchaser taking possession of the goods and dealing with them by means of that possession. It was urged by Mr. Winslow that what occurred in the present case was equivalent to that; but, in my opinion, that view cannot be sustained. I think that what was done had just the same legal effect as if the bill of lading had been made out in the name of the original purchasers and had then been assigned by them to their sub-purchasers. There was nothing done by the purchasers to alter the destination agreed upon between them and the original vendors, no actual taking possession of the goods, and, in my opinion, there was nothing which can be considered as equivalent to their doing that, and then starting the goods as from their possession on a different and new voyage.

Then, the *transitus* being still existing, and there being a right in the vendors to stop, unless something had interfered with that right, can it be said that the sub-sale has interfered with it?

Now, I take it the principle is this, that the vendor [*638] cannot *exercise his right to stop during the transit, if

the interests or rights of any other persons which they have acquired for value will be defeated by his so doing. Except so far as it is necessary to give effect to interests which other persons have acquired for value, the vendor can exercise his right to stop *in transitu*. It has been decided that he can do so when the original purchaser has dealt with the goods by way of pledge. Here we have rather the converse of that case. There has been an absolute sale of the goods by the original purchaser, but the purchase money has not been paid. Can the vendor make effectual his right of stoppage *in transitu* without defeating in any way the interest of the sub-purchaser? In my opinion he can. He can say, I claim a right to retain my vendor's lien. I will not defeat the right of the sub-purchaser, but what I claim is to defeat the right of the purchaser from me, that is, to intercept the purchase-money which he will get, so far as is necessary to pay me. That, in my opinion, he is entitled to do, not in any way thereby interfering with the rights of the sub-purchaser, but only, as against his own vendee, asserting his right to resume his vendor's lien and to obtain payment by means of an exercise of that right; interfering only with what would have been a benefit to the vendee, who would otherwise have got his purchase-money without paying for the goods, but in no way interfering with any right acquired by the sub-purchaser of the goods.

Appeal allowed. Appellants to receive the whole of the purchase-money due under their contract with Knight & Son out of the fund in the joint names.

ENGLISH NOTES.

The former branch of the rule established by the case of *In re Westzinthus* is adopted and confirmed by the House of Lords in *Kemp* v. *Falk* (1882), 7 App. Cas. 574, 52 L. J. Ch. 167, 47 L. T. 454. In this case Falk was the vendor of a cargo of salt to be shipped from Liverpool to Calcutta. Kiell, the purchaser, had accepted bills for the price, and had got the bill of lading and indorsed it to a bank for an advance. Kiell, by agents in Calcutta, who also acted for the bank, sold the salt, to arrive, to various sub-purchasers. On its arrival, the agents, acting for the bank, presented the bills of lading and arranged for the delivery of the cargo to the sub-purchasers, on the latter producing their receipts for the amounts which they had paid to the agents, and which the agents received for the bank. Falk, the original

vendor, having given notice to stop the goods *in transitu*, it was held by the House of Lords, as well as by the Court of Appeal, that this stoppage was, notwithstanding the paramount legal right of the Bank, good as between the original vendor and the trustee in bankruptcy of Kiell, and was effectual to revest in the vendor the right to the balance of the purchase moneys in the hands of the bank after satisfying their own claim, — that balance being less than the amount of the original purchase-money.

AMERICAN NOTES.

The principal case is cited, Note, 29 Am. Dec. 393.

END OF VOL. IV.

NOTES

ON

ENGLISH RULING CASES

CASES IN 4 E. R. C.

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4 E. R. C. 1, EX PARTE BLAIN, L. R. 12 Ch. Div. 522, 41 L. T. N. S. 46, 28 Week. Rep. 334.

Intra territoriality of statutes.

Cited in American Banana Co. v. United Fruit Co. 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047, holding that domestic corporation is not liable under Sherman anti-trust act for acts done in foreign territory in co-operation with de facto government of such country; Beardsley v. New York, L. E. & W. R. Co. 17 Misc. 256, 40 N. Y. Supp. 1077, holding that unless otherwise provided a law is presumed to have only a territorial application; Conrad v. Alberta Min. Co. 4 Terr. L. Rep. 412, on the extra-territorial application of a law; R. v. Smiley, 22 Ont. Rep. 686, holding that a statute making it a misdemeanor to be a stackholder in a wager had no application to a wager conducted outside of Canada.

— Bankruptcy laws as affecting foreigners.

Cited in Nicholson v. Baird, N. B. Eq. Cas. 195, holding that English bankruptcy act does not apply to Canada so as to vest in trustee appointed in England in Canada or personalty of person domiciled here; Re Steel Co. 17 N. S. 141 (dissenting opinion), on application of bankruptcy act to companies incorporated under foreign law; Re Clark [1896] 2 Q. B. 476, 65 L. J. Q. B. N. S. 684, 75 L. T. N. S. 304, 45 Week. Rep. 118, holding that a foreigner resident abroad could not commit an act of bankruptcy under the English law, as he was not subject to it; Dulaney v. Merry & Son [1901] 1 K. B. 536, 70 L. J. K. B. N. S. 377, 84 L. T. N. S. 156, 49 Week. Rep. 331, 8 Manson, 152, 17 Times L. R. 253, holding that an assignee in bankruptcy of a foreign debtor, in the country of his domicil, can establish a title in England good as against creditors even though the deed of assignment was not registered according to English law.

Jurisdiction of bankruptcy courts.

Cited in Nicholson v. Baird, N. B. Eq. Cas. 195, holding that an English bankruptcy court has not jurisdiction over the real estate or personal property of a person residing in Canada, though he is a member of a firm dealing in England; Re Pearson [1892] 2 Q. B. 263, 61 L. J. Q. B. N. S. 585, 67 L. T. N. S. 367, 40 Week. Rep. 532, 9 Morrell, 185, holding that the court of bankruptcy had no jurisdiction under the bankruptcy act to allow the service of a bank-

ruptcy notice upon a foreigner out of the jurisdiction; Cooke v. Charles A. Vogeler Co. [1901] A. C. 102, 70 L. J. Q. B. N. S. 181, 84 L. T. N. S. 10, 8 Manson, 113, 17 Times L. R. 153 (affirming [1900] 1 Q. B. 541, 69 L. J. Q. B. N. S. 375, 82 L. T. N. S. 169, 48 Week. Rep. 424, 7 Manson, 134, 16 Times L. R. 238), holding that a court of bankruptcy had no jurisdiction to make a receiving order against a foreigner, who has without coming to the country contracted debts and acquired assets, and has executed abroad an assignment for the benefit of creditors.

Act of firm as act of "persons" constituting it.

Cited in Re Wah Yun, 11 B. C. 154, holding that the word person does not include a firm.

4 E. R. C. 16, ROBERTSON v. LIDDELL, 9 East, 487, 9 Revised Rep. 596.

Act of bankruptcy.

Cited in Globe Ins. Co. v. Cleveland Ins. Co. 14 Nat. Bankr. Reg. 311, Fed. Cas. No. 5,486, holding that an act was an act of bankruptcy if it defeated the operation of the bankruptcy statute, though no creditor was defrauded or delayed.

Cited in notes in 4 E. R. C. 24; 5 E. R. C. 31,—on what are acts in bankruptcy.

Purpose and intent as words of similar meaning.

Cited in Olmsted v. Buss, 122 Cal. 224, 54 Pac. 745, holding that a finding that a will was destroyed for the purpose of revocation was good though it did not state that it was for the intent and purpose, as these two words were of similar meaning.

4 E. R. C. 26, EX PARTE KING, 45 L. J. Bankr. N. S. 109, L. R. 2 Ch. Div. 256, 34 L. T. N. S. 466, 25 Week. Rep. 559.

Transfer by debtor of whole of his property to secure present advance and existing debt as an act of bankruptcy.

Cited in Smith v. McLean, 25 Grant, Ch. (U. C.) 567, holding that an arrangement between a creditor and debtor to secure the former for a past and present advance is not an act of bankruptcy if made bona fidely to enable him to continue in business; Smith v. Harrington, 29 Grant, Ch. (U. C.) 502, holding that a mortgage given as security for a contemporaneous advance, as well as for past and future ones is not valid as to the past ones where he was only a surety for them; Kalus v. Hergert, 1 Ont. App. Rep. 75, holding an assignment of the whole of a debtor's estate to secure a pre-existing debt is valid where a further advance is made and there is a bona fide intention that the business will be carried on; Brayley v. Ellis, 9 Ont. App. Rep. 565 (dissenting opinion), on an act which would otherwise have been an act of bankruptcy, not being such because made pursuant to an agreement entered into before insolvency; Jamaica v. Lascelles, [1894] A. C. 135, 70 L. T. N. S. 179, 63 L. J. P. C. N. S. 70, 42 Week. Rep. 416, 1 Manson, 163, 6 Reports, 445, holding that an assignment of the whole of the debtor's property in consideration of a contemporaneous advance, and promise of further assistance in order to enable the debtor to carry on his business and with reasonable belief that he could thereby do so, was not an act of bankruptcy; Ex parte Hauxwell, L. R. 23 Ch. Div. 626, 52 L. J. Ch. N. S. 737, 48 L. T. N. S. 742, 31 Week. Rep. 711, holding same under same facts where a bill of sale was given to secure a present advance and an existing debt; Ex parte Threlfall, 46 L. J. Bankr. N. S. 8, 35 L. T. N. S. 675, 25 Week. Rep. 127,

holding same where the bill of sale was given to secure an existing debt and present advancements in goods to carry on the business.

Distinguished in Clarkson v. Sterling, 15 Ont. App. Rep. 234, holding that where notice was given in July to pay a claim or give securities and six months was allowed by the agreement and the securities were given in December though in the meantime the company had become insolvent it was not an act of bankruptcy; Ex parte Kilmer, L. R. 13 Ch. Div. 245, 41 L. T. N. S. 520, 28 Week. Rep. 269, holding that where the bill of sale was given on the eve of bankruptcy, pursuant to an agreement to give it at any time, and it was not given in good faith it is invalid.

4 E. R. C. 34, SELKRIG v. DAVIS, 2 Dow, 230, 2 Rose, 97, 2 Rose, 291, 14 Revised Rep. 146.

Foreign assignment in bankruptcy as passing title to local property.

Cited in Betton v. Valentine, 1 Curt. C. C. 168, Fed. Cas. No. 1,370, on the effect of a foreign assignment in bankruptcy to pass title to property in another country; Blake v. Williams, 6 Pick. 285, 17 Am. Dec. 372, holding that an assignment by commissioners of bankruptcy in a foreign country does not operate a legal transfer of the bankrupt's property in another state, as against a creditor; Holmes v. Remsen, 20 Johns. 229, 11 Am. Dec. 269, on the power of each sovereignty to fix the laws governing the disposition of personal property found within it; Abraham v. Plestoro, 3 Wend. 538, 20 Am. Dec. 738, holding that assignment under English bankrupt law does not operate legal transfer of personal property of bankrupt in this country; Holmes v. Remsen, 4 Johns. Ch. 460, 8 Am. Dec. 581, holding that assignment by commissioners of bankrupts in England, of all estate and choses in action of bankrupt, passes debt due by citizen of this state to English bankrupt; Williams v. Maus, 6 Watts, 228, 31 Am. Dec. 465, holding that appointment of trustee by court of another state, in place of deceased trustee, to whom land in this state had been conveyed, vests no title to land in trustee thus appointed, so as to enable him to maintain ejectment; Rogers v. Allen, 3 Ohio, 488, holding that an assignment by an insolvent debtor under the laws of Pennsylvania does not pass legal title to land situate in Ohio; Re Merrick, 2 Ashm. (Pa.) 485, on the laws governing the passage of property from a bankrupt to his assignee; Williams v. Rogerson, N. F. (1854–64) 21, holding that effect of English bankruptcy laws extends to colonies only so far as to vest in assigned bankrupt's personal property which may be in colony; Nicholson v. Baird, N. B. Eq. Cas. 195, holding that English bankruptcy act does not apply to Canada so as to vest in trustee appointed in England personalty of person domiciled here; Macdonald v. Georgian Bay Lumber Co. 2 Can. S. C. 364 (affirming decision of Court of Appeals of Ontario, reversing 24 Grant Ch. (U. C.) 356), holding that a bankrupt deed of assignment under the provisions of the laws of the United States will not transfer immovable property in Canada; Nicholson v. Baird, N. B. Eq. Cas. 195, holding that a trustee appointed by an English Bankruptcy court does not receive title to either real estate or personal property of the insolvent situate in Canada of a person domiciled there, though he belongs to an English firm; Re Steel Co. 17 N. S. 17, on the effect of bankruptcy proceedings in foreign countries; Ewing v. Orr Ewing, L. R. 10 App. Cas. 453, 53 L. T. N. S. 826, as to what court has jurisdiction where the bankrupt has two trading domicils, and in whom the property becomes vested by the assignment.

Adjustment of rights of partly satisfied creditors in domestic property.

Cited in Re Pollmann, 156 Fed. 221, holding that foreign creditor of bankrupt who realizes part of claim out of lien obtained within four months prior to bankruptcy, cannot prove balance of claim, unless he surrenders amount received; Re Bugbee, 9 Nat. Bankr. Reg. 258, Fed. Cas. No. 2,115, holding that a foreigner must account for moneys received from the debtor before he will be allowed to share in the debtor's estate in this country with domestic creditors; Chipman v. Manufacturers' Nat. Bank, 156 Mass. 147, 30 N. E. 610, holding that court had no jurisdiction, in action brought by assignee for creditors here, to compel domestic creditor who had obtained attachment against insolvent's property in other states to carry on suits or to permit assignee to do so; Batcheller v. National Bank, 157 Mass. 33, 31 N. E. 481, holding that domestic creditor who has received part of his claim out of debtor's property in another state for which he would not be accountable to debtor's assignee, may prove balance of claim here without accounting for part so received; Ex parte Wilson, L. R. 7 Ch. 490, 41 L. J. Bankr. N. S. 46, 26 L. T. N. S. 489, 20 Week. Rep. 564, holding that if a foreign debtor received assets of the creditor abroad, that he could not share with domestic creditors until they had received an amount equal to what he has received, and then to share equally in the remainder; Banco de Portugal v. Waddell, L. R. 5 App. Cas. 161, 49 L. J. Bankr. N. S. 33, 42 L. T. N. S. 698, 28 Week. Rep. 477, holding that where a foreign creditor has received a part of his claim under a foreign bankruptcy proceedings, before he can share with domestic creditors in the domestic property, he must account for what he received in the foreign proceedings.

Collection of bankrupt's debts in foreign country.

Cited in Re Steel Co. 17 N. S. 49 (dissenting opinion), on right to enforce collection of bankrupt's debts in foreign country.

Discharge in bankruptcy as discharging secured debt.

Cited in Beaty v. Samuel, 29 Grant. Ch. (U. C.) 105, holding that by a discharge in bankruptcy, the holder of a chattel mortgage with a covenant of payment, was not barred from enforcing his mortgage, though he had notice of the proceedings and did not list his mortgage.

Rights of trustee in bankruptcy.

Cited in note in 11 E. R. C. 626, on rights of trustee in bankruptcy.

Assignee in bankruptcy as the successor of insolvent.

Cited in Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567, holding that the assignee in bankruptcy is not a universal successor of the bankrupt.

Law governing succession and administration of estate.

Cited in Olyphant v. Atwood, 4 Bosw. 459 (dissenting opinion), on law of domicil as governing in regard to assignment of personal property.

Cited in note in 2 E. R. C. 88, on law governing succession and administration of estates.

Nature of partnership real estate.

Cited in Sigourney v. Munn, 7 Conn. 11; Divine v. Mitchum, 4 B. Mon. 488, 41 Am. Dec. 241; Buffum v. Buffum, 49 Me. 108, 77 Am. Dec. 249; Duryea v. Burt, 28 Cal. 569, 11 Mor. Min. Rep. 395,—holding that in equity land purchased by partners with firm funds, is deemed as held in trust as part of firm property applicable to pay firm debts; Buckley v. Buckley, 11 Barb. 43; Buchan v. Sumner, 2 Barb. Ch. 165,—holding that partnership real estate, after pay-

ment of firm debts, is to be considered and treated as real estate; Smith v. Wood, 1 N. J. Eq. 74, on question as to whether land purchased with partnership funds is to be considered personalty as between partners and creditors; Yeatman v. Woods, 6 Yerg. 20, 27 Am. Dec. 452, holding that real estate held by partners, for partnership purposes, descends and vests in heirs at law of deceased partner, as real estate; M'Dermot v. Laurence, 7 Serg. & R. 438, 10 Am. Dec. 468, holding that all partnership property is personal property.

Cited in Browne Stat. Frauds, 5th ed. 341, on nature of real estate used for partnership purposes within rule as to statute of frauds.

4 E. R. C. 58, MACE v. CADELL, Cowp. pt. 1, p. 232.

Conveyances in fraud of creditors.

Cited in Sands v. Codwise, 4 Johns. 536, 4 Am. Dec. 305, holding that a conveyance made to defraud creditors is void by the common law as well as by the statute of frauds.

Estoppel by acts or failure to assert rights when bound to do so.

Cited in Tufts v. Hayes, 5 N. H. 452, holding that a party is bound by representations which he has made to another with a view to gain credit or advantage, unless there is no bad faith in receding from them.

— To deny property.

Cited in Barham v. Turbeville, 1 Swan, 437, 57 Am. Dec. 782, on estoppel to assert ownership as defeating parties' right to retain same.

— To deny marriage.

Cited in Johnston v. Allen, 39 How. Pr. 506, 6 Abb. Pr. N. S. 306, 3 Daly, 43, holding that a man who is married to a woman by legal formula, and cohabits with her and introduces her as his wife is estopped to deny as against tradesmen dealing with her that she is his wife.

Right of court to inquire into validity of disputed marriage.

Cited in Fornshill v. Murray, 1 Bland, Ch. 479, 18 Am. Dec. 344, on the right of the court to inquire into the validity of a marriage.

— Testimony of husband or wife to prove marriage.

Cited in Rose v. Niles, Abb. Adm. 411, Fed. Cas. No. 12,050, holding that a female offered as a witness and objected to upon the ground that she is the wife of the party calling her, cannot be examined to disprove the marriage where there is evidence already to raise a presumption of marriage; Allen v. Hall, 2 Nott. & M'C. 114, 10 Am. Dec. 578, holding that the declarations of the husband or wife are admissible to prove marriage.

Clauses of statute as limited by preamble or title.

Cited in Dawson v. Corbett, 10 Rich. L. 505; Holbrook v. Holbrook, 1 Pick. 248,—holding that where words of enacting part of statute are plain and express, they should not be restrained by preamble; Miller v. Leonhard, 1 Yeates, 570, holding that a general clause in a statute cannot be narrowed down by the title, where they are not uncertain; Reg. v. Fredericton, 19 N. B. 139, holding that if doubts arise in construction of statute, preamble may properly be resorted to; Doe ex dem. Presbyterian Church v. Bain, 3 U. C. Q. B. 198, holding that remedial act is to be construed liberally, independent of general language of enacting part of act, beyond recital or preamble; Huskinson v. Lawrence, 25 U. C. Q. B. 496, on the construction of statutes to apply to matters not mentioned in preamble or enacting clause; Colehan v. Cooke, 4 E. R. C. 184, Willes, 393-399, holding enacting part of statute not restricted by preamble.

Goods within reputed ownership clause of bankruptcy act.

Cited in note in 21 E. R. C. 183, on what are goods and chattels within reputed ownership clause of bankruptcy act.

4 E. R. C. 64, EX PARTE WATKINS, 42 L. J. Bankr. N. S. 50, L. R. 8 Ch. 520, 28 L. T. N. S. 793, 21 Week. Rep. 530.

Force of trade customs.

Cited in Bank of New Hanover v. Williams, 79 N. C. 129, holding that bankers discounting bills of persons in particular trades are presumed to know and make their contracts in reference to custom of trade.

— As overcoming the presumption of reputed ownership.

Cited in Ex parte Vaux, L. R. 9 Ch. 602, 43 L. J. Bankr. N. S. 113, 30 L. T. N. S. 739, 22 Week. Rep. 811, holding that where it was the custom of the trade to allow property purchased in the course of that business to remain with the vendor, the presumption of reputed ownership was overcome and did not apply; Ex parte Powell, L. R. 1 Ch. Div. 501, 45 L. J. Bankr. N. S. 100, 34 L. T. N. S. 224, 24 Week. Rep. 378, holding that where a custom of holding certain goods on hire is relied on to take the goods out of the order and disposition of a bankrupt, the custom must be one which the ordinary creditors may reasonably be presumed to have known; Harris v. Truman, L. R. 7 Q. B. Div. 340, 50 L. J. Bankr. N. S. 641, 45 L. T. N. S. 255, holding that a malting agent not usually being the owner of the barley and malt on their maltings, they are not the reputed owners thereof; Colonial Bank v. Whinney, L. R. 11 App. Cas. 426, 56 L. J. Ch. N. S. 43, 55 L. T. N. S. 362, 34 Week. Rep. 705, 21 Eng. Rul. Cas. 162, holding that where a shareholder deposited his shares of stock with his bank a security, and a note on the shares stated that they could not be transferred except by deed, and notice to the company, the shareholder was not the reputed possessor of the shares.

Distinguished in Ex parte Cohen, 38 L. T. N. S. 884, holding that where the property was left in the possession of the vendor with the consent of the vendee, though marked with the latter's mark, it passed to the trustee of the former, upon his becoming bankrupt; Re Goetz, J. & Co. [1898] 1 Q. B. 787, 67 L. J. Q. B. N. S. 577, 78 L. T. N. S. 399, 46 Week. Rep. 469, 5 Manson, 76, 14 Times L. R. 327, holding that a custom of trade by which goods are left in the possession of persons to whom they do not belong, in order to exclude the doctrine of reputed ownership, must be a custom known to the business generally, and not in one market only; Sharman v. Mason [1899] 2 Q. B. 679, 69 L. J. Q. B. N. S. 3, 81 L. T. N. S. 485, 48 Week. Rep. 142, 16 Times L. R. 11, holding that where there was no custom, goods left with a shop-keeper to enable him to show off his wares, came under the rule of reputed ownership and passed to the trustee; Ex parte Lovering, L. R. 9 Ch. 621, 43 L. J. Bankr. N. S. 116, 30 L. T. N. S. 622, 22 Week. Rep. 853, holding same as to property the title of which was transferred as security for debt.

Reputed ownership of bankrupt's property.

Cited in notes in 4 E. R. C. 64, 72; 5 E. R. C. 70,—on reputed ownership of bankrupt's property.

4 E. R. C. 73, BROWN v. KEMPTON, 19 L. J. C. P. N. S. 169.

Validity of preferential transfer or security given by insolvent debtor under pressure.

Cited in Adams v. Bank of Montreal, 8 B. C. 314, holding that a mortgage on

the whole of the debtor's property will not be set aside though it amounts to a preference, and made with knowledge of insolvency, if there was pressure: Colquhown v. Seagram, 11 Manitoba L. Rep. 339, on pressure as saving an assignment from being void as a preference; Campbell v. Barrie, 31 U. C. Q. B. 279, holding that a mortgage made under pressure was not ipso facto void under the insolvent law declaring all transfers made in contemplation of insolvency void; Re Hurst, 6 Ont. Pr. Rep. 329, holding that if there is bona fide application of pressure on part of one having right to apply and conveyance in any degree proceeds from such application or pressure, conveyance is not entirely voluntary, and not act of bankruptcy; Martin v. McAlpin, 8 Ont. App. Rep. 675, holding that a preference made under threats of suits and enforcement of claims, was void as to other creditors who were not preferred; Ex parte Tempest, L. R. 6 Ch. 70, 40 L. J. Bankr. N. S. 22, 23 L. T. N. S. 650, 19 Week. Rep. 137; Smith v. Pilgrim, L. R. 2 Ch. Div. 127, 34 L. T. N. S. 408,—on pressure as rebutting the presumption of fraudulent preference, and sustaining the deeds.

Cited in note in 12 E. R. C. 347, on sufficiency of consideration to support settlement as against subsequent purchasers.

Distinguished in Schwartz v. Winkler, 13 Manitoba, L. R. 493, holding that a mortgage given under pressure which amounts to a preference is void as such where the debtor knew or should have known that such would be the result, under the bankruptcy law of that province; Davies v. Gillard, 21 Ont. Rep. 431, holding that the doctrine of pressure did not apply where the debtor transferred all of his property.

What constitutes "pressure."

Cited in M'Whirter v. Thorne, 19 U. C. C. P. 302, holding that a mere demand or request without suit is sufficient to constitute pressure, unless there is alone an intention to defeat the insolvent act.

4 E. R. C. 76, EX PARTE BLACKBURN, 40 L. J. Bankr. N. S. 79, L. R. 12 Eq. 358, 25 L. T. N. S. 76, 19 Week. Rep. 973.

What constitutes fraudulent preference.

Cited in Smith v. Hutchinson, 2 Ont. App. 405, holding that payment within thirty days before assignment is not void unless payee knew of insolvent's inability to meet liabilities in full, or had probable cause for believing same to exist; Harvie v. Wylde, Russell Eq. 515, holding that transfer of property when debtor believed he was insolvent constituted unlawful preference under insolvent act of 1869; Churcher v. Johnston, 34 U. C. Q. B. 528, holding that person holding equitable lien on bankrupt's goods, must be restored to him before he can be required to return money paid to him immediately before bankruptcy; McLeod v. Wright, 17 N. B. 68, holding that man must be held to have contemplated bankruptcy, if payment is made when he knew it was impossible for him to satisfy his creditors; Davidson v. McInnes, 22 Grant, Ch. (U. C.) 217, holding that conveyance to one creditor proceeds of stock in trade, leaving only book accounts for balance of creditors, was invalid preference, where total debts were $8,000 and stock was worth $6,000; Hunt v. Hearn, N. F. (1884–96) 615, holding that unless it is clearly apparent that debtor's sole motive was to prefer creditors paid payment cannot be impeached; Colquhoun v. Seagram, 11 Manitoba L. Rep. 339, holding that in determining whether a conveyance was void as a preference, it must be considered whether he was actuated by a desire to prefer or whether a request was the moving cause; Long v. Hancock, 12 Ont. App. Rep. 132, holding that a transfer made with the intent to prefer and with

knowledge on the part of both parties to that effect, was void, though made upon consideration of a new loan; Ex parte Topham, L. R. 8 Ch. 614, 42 L. J. Bankr. N. S. 57, 28 L. T. N. S. 716, 21 Week. Rep. 655, holding that where a vendor pressed the debtor for payment for goods and the latter turned back some of them in payment, it was not a preference, and was therefore valid; Ex parte Butcher, L. R. 9 Ch. 595, 43 L. J. Bankr. N. S. 98, 30 L. T. N. S. 482, 22 Week. Rep. 721, holding that if a creditor for a valuable consideration has no notice or suspicion that the debtor is insolvent, he is protected; Ex parte Hill, L. R. 23 Ch. Div. 695, 52 L. J. Ch. N. S. 903, 49 L. T. N. S. 278, 32 Week. Rep. 177, holding that it is sufficient to avoid a payment of money or a transfer of property as to preference, that the substantial and dominant intent of the party was to make a preference, though it was not his sole view.

When conveyance voluntary.

Cited in Long v. Hancock, 12 Ont. App. Rep. 137, holding that if there is bona fide application or pressure on part of one having right, and conveyance in any degree, proceeds from such application or pressures, conveyance not entirely voluntary and is not act of bankruptcy; Colquhoun v. Seagram, 11 Manitoba L. Rep. 339, on necessity that creditor should threaten to take proceedings against debtor, in order to constitute sufficient pressure.

4 E. R. C. 86, TOMKINS v. SAFFERY, L. R. 3 App. Cas. 213, 47 L. J. Bankr. N. S. 11, 37 L. T. N. S. 758, 26 Week. Rep. 62.

Effect of assignment for benefit of creditors under rules of the stock exchange.

Cited in Re Gregory, 27 L.R.A.(N.S.) 613, 98 C. C. A. 383, 174 Fed. 629, holding that funds arising from closing out of transaction upon its floors of bankrupt member of stock exchange pass to trustee in bankruptcy, subject to rules of exchange, which give its members priority; McIver v. Montreal Stock Exchange, 4 Montreal L. Rep. 117, holding that by-laws which give governing committee of stock exchange right to sell member's seat at board, for cause of insolvency, are reasonable and intra vires; Richardson v. Stormont, T. & Co. [1900] 1 Q. B. 701, 69 L. J. Q. B. N. S. 369, 82 L. T. N. S. 316, 48 Week. Rep. 451, 5 Com. Cas. 134, 16 Times L. R. 224, holding that an assignment under the rules of the stock exchange passes title to all the assets of the defaulter: Ratcliffe v. Mendelssohn [1902] 2 K. B. 653, 71 L. J. K. B. N. S. 984, 51 Week. Rep. 3, 87 L. T. N. S. 422, 18 Times L. R. 759, 7 Com. Cas. 247, on the effect of the transfer of property for the benefit of stock exchange creditors.

Cited in note in 27 L.R.A.(N.S.) 617, on seat, or funds derived from transactions on exchange, as assets in bankruptcy.

Distinguished in Ex parte Grant, L. R. 13 Ch. Div. 667, 42 L. T. N. S. 387, 28 Week. Rep. 755, holding that a fund created by the special rules of the stock exchange in the hands of the official assignee was not assets of the defaulter and the assignee in bankruptcy could not recover them; Lomas v. Graves & Co. [1904] 2 K. B. 557, 73 L. J. K. B. N. S. 803, 20 Times L. R. 657, 91 L. T. N. S. 616, holding that an assignment under the rules of the stock exchange by a member thereof was valid as against the other members, unless invalidated by bankruptcy proceedings, and also as against outsiders.

Application of rules of stock exchange.

Cited in Pearson v. Scott, L. R. 9 Ch. Div. 198, 38 L. T. N. S. 747, 26 Week. Rep. 796, holding that the rules of the stock exchange apply only to sales on the exchange.

Bona fide transfers of property as fraudulent preferences.

Cited in Slater v. Oliver, 7 Ont. Rep. 158, holding that security given in response to bona fide pressure on the part of the creditor was not void as a fraudulent preference.

Distinguished in Davies v. Gillard, 21 Ont. Rep. 431, holding that a transfer of all of a debtor's property was void, where the creditor knew of the insolvent condition and demanded security; Campbell v. Roche, 18 Ont. App. Rep. 646, holding a mortgage void as to a part of the consideration which was fraudulent, whether the mortgagee was a bona fide creditor or not.

Right to inquire as to consideration for debts claimed against bankrupt.

Cited in Ex parte Pottinger, L. R. 8 Ch. Div. 621, 47 L. J. Bankr. N. S. 43, 38 L. T. N. S. 432, 26 Week. Rep. 648, on the right in bankruptcy proceedings to inquire into the consideration for the debts claimed.

Possession as prima facie evidence of title.

Cited in Stewart v. Gates, 2 Has. & W. (Pr. Edw. Isl.) 432, on possession as prima facie evidence of title.

4 E. R. C. 110, EX PARTE COOK, Mosely, 80, 2 P. Wms. 500.

Administration of joint and separate estates of insolvent partners and partnership.

Cited in Thornton v. Bussey, 27 Ga. 302, holding that where a member of two partnerships dies, and is insolvent the creditors of each firm must look to the assets of each firm for payment, and the separate creditors to the separate estate; Jacques v. Greenwood, 12 Abb. Pr. 232, explaining the equities of partnership creditors to be first satisfied out of firm property; Smith v. Mallory, 24 Ala. 628; Bowen v. Billings, 13 Neb. 439, 14 N. W. 152; Smith v. Jones, 18 Neb. 481, 25 N. W. 624,—holding that property of an insolvent partnership will be applied in the first instant to the payment of partnership debts; Bartlett v. Meyer-Schmidt Grocer Co. 65 Ark. 290, 45 S. W. 1065; M'Culloh v. Dashiell, 1 Harr. & G. 96, 18 Am. Dec. 271; Black's Appeal, 44 Pa. 503, 20 Phila. Leg. Int. 340,—holding that where there are partnership and separate creditors and partnership and firm property, each class has priority upon its respective estate and must resort to it first for payment; Jarvis v. Brooks, 23 N. H. 136; Crockett v. Crain, 33 N. H. 542; Sniffer v. Sass, 14 Rich. L. 210,—holding that the separate creditors of the partners were to be paid out of the separate estate and that if any remained afterward to be paid the partnership creditors; Re Blanchard, 161 Fed. 793; Talcott v. Dudley, 5 Ill. 427; Carlisle v. McAlester, 3 Ind. Terr. 164, 53 S. W. 531; Morris v. Morris, 4 Gratt. 293; Gordon v. Matthews, 18 Ont. L. Rep. 340,—on the right to apply partnership property to the payment of individual debts before the payment of partnership debts; Murrill v. Neill, 8 How. 414, 12 L. ed. 1135, holding that partnership debts should be paid out of partnership property and separate debts out of the separate estate of the partners, before either can share in the other estate.

Cited in notes in 28 L.R.A. 164, on rights and position of creditors, purchasers, and other third parties in partnership realty; 4 Eng. Rul. Cas. 73, on reputed ownership of bankrupt's property in case of partnership.

Cited in Parsons Partn. 4th ed. 329, on respective rights of creditors of firm and partners; Parsons Partn. 4th ed. 479, on effect of insolvency of firm on separate property of partners.

Distinguished in Re Sperry, 1 Ashm. (Pa.) 347, holding that where a party dies intestate, leaving joint and separate creditors, and there is no joint fund

or surviving partner the separate and joint creditors share equally in the separate estate; Harris v. Peabody, 73 Me. 262, holding same where there is no partnership estate and all the members thereof are insolvent; Rodgers v. Meranda, 7 Ohio St. 179, holding same where there is no joint estate or surviving partner and if there is both then it must go to pay, first the partnership debts; Re Budgett [1894] 2 Ch. 557, 63 L. J. Ch. N. S. 847, 8 Reports, 424, 71 L. T. N. S. 72, 42 Week. Rep. 551, holding that where there is no partnership estate, the partnership creditors can share with the personal creditors in the separate estate.

Separate or joint bankruptcy proceedings against firm and partners.

Cited in Re Wilcox, 94 Fed. 84, on necessity of separate commissions against firm and individuals thereof.

— Jurisdiction over partnership and separate property.

Cited in Ex parte Hall, Fed. Cas. No. 5,919, holding that either partner may be adjudged a bankrupt, but the first court acquiring jurisdiction has exclusive jurisdiction over all the partners and all their property joint and several.

4 E. R. C. 112, DUTTON v. MORRISON, 1 Rose, 213, 11 Revised Rep. 56, 17 Ves. Jr. 193.

Assignment for benefit of creditors of all debtor's property as an act of bankruptcy.

Cited in Jones v. Sleeper, 2 N. Y. Leg. Obs. 131, Fed. Cas. No. 7,496, holding that a conveyance of all his property by a trader is in itself an act of bankruptcy, though it contained no preference but was for the benefit of all creditors; Barnes v. Rettew, 8 Phila. 133, 28 Phila. Leg. Int. 124, Fed. Cas. No. 1019, holding that an execution of a deed of trust for the benefit of creditors was an act of bankruptcy, where it conveyed all his estate.

Distinguished in Ex parte Ames, 1 Low. Dec. 561, Fed. Cas. No. 323, holding that a mortgage by an insolvent trader on his stock and tools for present and future advances is not fraudulent nor an act of bankruptcy, if made with an honest intent to enable him to continue business.

— Assignment by one or more partners.

Cited in Davidson v. Papps, 28 Grant, Ch. (U. C.) 91, on an assignment by a deed of trust for the benefit of creditors by the surviving partners at the request of the executrix of the deceased partner as an act of bankruptcy.

Distinguished in Ex parte Egyptian Commercial & Trading Co. L. R. 4 Ch. 125, holding that an inspectorship deed was not an act of bankruptcy, where it contained no assignment of the assets of the firm, though it provided for their distribution by the inspector among the creditors.

Disapproved in Bowker v. Burdekin, 8 E. R. C. 599, 12 L. J. Exch. N. S. 329, 11 Mees. & W. 128, holding it undoubted that a present deed by one partner is a present act of bankruptcy though other partners did not join as intended.

Interest of partner in partnership property.

Cited in Canfield v. Hard, 6 Conn. 180, holding that a partner has no exclusive right to any part of the partnership funds, until the partnership account has been adjusted and his balance ascertained: Tappan v. Blaisdell, 5 N. H. 190, holding that each partner has a lien on the partnership property, in respect to the balance due him and the liabilities he may have accrued in its behalf; Nicoll v. Mumford, 4 Johns. Ch. 522, holding that assignee, or separate creditor, of one partner, is entitled only to share of such partner, after settlement of accounts, and after all claims of other partner are satisfied: Murray v. Murray, 5

Johns. Ch. 60, holding that a solvent partner is only entitled to his share of the surplus after the partnership debts have been paid.

Liability of partnership property for the debts of the partner.

Cited in Macy v. DeWolf, 3 Woodb. & M. 193, Fed. Cas. No. 8,933, holding that the firm debts must be paid before a mortgage given by one of the partners on the partnership property can be foreclosed: Re Marwick, 2 Ware, 233, Fed. Cas. No. 9,181; Smith v. Mallory, 24 Ala. 628: M'Culloh v. Dashiell, 1 Harr. & G. 96, 18 Am. Dec. 271,—on the rule governing the distribution of partnership property to partnership and individual creditors: Meech v. Allen, 17 N. Y. 300, 72 Am. Dec. 465, holding that the creditor of the partner must wait until all the partnership debts are paid before he can share in the partnership property: Mumford v. Nicoll, 20 Johns. 611 (reversing 4 Johns. Ch. 522), on the liability of the partnership property for the separate debt of the partner: Rodgers v. Meranda, 7 Ohio St. 179, holding that partnership property is liable only for partnership debts and the separate creditors will be allowed to share in it after the partnership debts have been paid, and the same as to separate property and separate debts.

Cited in note in 46 L.R.A. 499, 501, on levy on partnership property for debt of partner.

— Liability to seizure on execution for individual debt.

Cited in Church v. Knox, 2 Conn. 514; Brewster v. Hammet, 4 Conn. 540,—holding that a creditor of a partner can attach only that partner's interest in the partnership, which is the share left after partnership debts have been paid; Hubbard v. Curtis, 8 Iowa, 1, 74 Am. Dec. 283, holding that the purchaser at an execution sale of the partnership property for a separate debt of the partner, takes only an interest in the partnership subject to the payment of the debts of the firm; Leonard v. Scarborough, 2 Ga. 73: Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653,—on the right to levy upon the property of the partnership for the debt of one of the partners; Jarvis v. Brooks, 23 N. H. 136: Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189,—on the right of a creditor of either partnership or partner to seize the partnership property: Burtus v. Tisdall, 4 Barb. 571: Sniffer v. Sass, 14 Rich. L. 20,—on the right to seize partnership property for separate debt of the partner: Reed v. Johnson, 24 Me. 322: Washburn v. Bank of Bellows Falls, 19 Vt. 278: Bank of Toronto v. Hall, 6 Ont. Rep. 644,—holding that only the partner's interest in the partnership property after the firm debts had been paid could be sold on execution: Maddock v. Skinker, 93 Va. 479, 25 S. E. 535: Flintoff v. Dickson, 10 U. C. Q. B. 428,—holding that a creditor can seize only the partner's interest in the firm property after the firm debts have been paid: O'Neil v. Hamilton, 4 U. C. Q. B. 294, to the point execution under judgment transfers no part of joint property, but merely right to account; Dibb v. Brooke [1894] 2 Q. B. 338, 63 L. J. Q. B. N. S. 665, 10 Reports, 352, 71 L. T. N. S. 234, 42 Week. Rep. 495, 1 Manson, 245, on the right to seize partnership property for personal debt of partner.

Distinguished in Gillaspy v. Peck, 46 Iowa, 461, holding that under the statute a judgment later in point of time, against a partner for an individual debt does not take priority over one previously rendered against him for a partnership debt; Allen v. Wells, 22 Pick. 450, 33 Am. Dec. 757, holding that the separate property of each member of a partnership is liable to be attached for debts due the partnership.

What constitutes a partnership.

Cited in Buckner v. Lee, 8 Ga. 285, holding that where two persons entered

into an agreement whereby one should take another's negroes and work them in a blacksmith shop, paying all the expenses, and then to divide the proceeds they were partners; Hugnley v. Morris, 65 Ga. 666, on what constitutes a legal partnership.

Validity of an assignment not according to the insolvency law.

Cited in Globe Ins. Co. v. Cleveland Ins. Co. 14 Nat. Bankr. Reg. 311, Fed. Cas No. 5,486, holding that a general assignment for the benefit of creditors is void, as against a trustee in bankruptcy; Wilson v. Camp, 11 Grant, Ch. (U. C.) 446, holding that a voluntary assignment for the benefit of creditors, not executed in pursuance of the provisions of the insolvency act is void as against assignees appointed under such act.

Disapproved in Anonymous, 1 Clark (Pa.) 121, holding a general assignment without preferences is valid under the Bankrupt Law.

Insolvency of partner as dissolving partnership.

Cited in Wilkins v. Davis, 2 Law. Dec. 511, Fed. Cas. No. 17,664, holding that the insolvency of one partner dissolves the partnership except for the purpose of closing the joint estate; Arnold v. Brown, 24 Pick. 89, 35 Am. Dec. 296, on the insolvency of one of the partners as dissolving the partnership per se.

Giving effect to one of several connected instruments not all are completed.

Cited in Southern L. Ins. & T. Co. v. Cole, 4 Fla. 359, holding that where there is a variety of instruments forming one transaction the law will not give effect to any one, unless the whole are completed.

Remedies in equity.

Cited in Veazie v. Williams, 8 How. 134, 12 L. ed. 1018, holding, except under peculiar circumstances damages cannot be recovered in a court of equity, but only in a law court.

4 E. R. C. 126, EX PARTE WARING, 2 Glenn. & J. 404, 2 Rose, 182, 13 Revised Rep. 217, 19 Ves. 345.

Relative equities of separate and joint creditors of two estates.

Cited in Re Childs, L. R. 9 Ch. 508, 43 L. J. Bankr. N. S. 89, 30 L. T. N. S. 447, on the relative equities of the creditors of two estates, where there are joint and separate creditors.

Right of creditor of principal party to proceed against securities held by the surety or secondary obligor.

Cited in Platt v. Mead, 9 Fed. 91, on the right to proceed against property held by another party with the intent to defraud creditors, where both parties are insolvent; Re Baldwin, 19 Nat. Bankr. Reg. 52, Fed. Cas. No. 796, 8 Cent. L. J. 186, holding that when the principal is insolvent, the solvent surety who holds collateral security for his indemnity is the trustee of the security for the creditor; Curtis v. Tyler, 9 Paige, 432, holding that the creditors of the principal have a right in equity to have securities held by the surety applied to their demands; Watts v. Shipman, 21 Hun, 598, holding same and that they had a preference over creditors claiming under the general assignee; Crow & Co. v. Vance, 4 Iowa, 434; Pratt v. Adams, 7 Paige, 615; Scheidt v. Sturgis, 10 Bosw. 606,—on the right of a creditor of the principal to proceed against securities placed in the hands of the surety; Allchin v. Buffalo, 23 Grant, Ch. (U. C.) 411, holding the securities were chargeable in favor of holders of part paid paper only as to so much as remained after indemnifying the person

secured; Smith v. Fralick, 5 Grant, Ch. (U. C.) 612, holding that second indorser is not entitled to benefit of trust deed given to first indorser to indemnify him against loss; Molson's v. Blakeney, 25 Grant, Ch. (U. C.) 513, holding that mortgage given to indemnify accommodation indorsers covers notes so indorsed and bank discounting such notes are entitled to benefit of mortgage; Re Manning, 4 Deacon & C. 579, 4 L. J. Bankr. N. S. 14, holding that the assignee of a debt is entitled to have the security for it applied to the debt; Ex parte Manchester Bank, L. R. 12 Ch. Div. 917, 48 L. J. Bankr. N. S. 94, 40 L. T. N. S. 723, holding that machinery used by a successor of an old firm which formerly belonged to the old firm, was to be held to pay a debt due from the old firm to a third party, and debited to the new firm; Re Walker [1892] 1 Ch. 621, 61 L. J. Ch. N. S. 234, 66 L. T. N. S. 315, 40 Week. Rep. 327, holding that the solvent surety is not a trustee of the security given him to indemnify himself, by the principal who is insolvent.

Distinguished in Rindge v. Sandford, 117 Mass. 460, holding that where one furnished large amounts of goods to another to be manufactured, and was to issue his notes for the use of the other, the latter becoming insolvent, the holders of the note were not entitled to be paid out of the goods held for manufacture; Smith v. Fralick, 5 Grant, Ch. (U. C.) 612, holding that where an accommodation indorser had received security from the drawer, but the bills were paid by a subsequent indorser, the latter had no equity against the securities in the former's hands.

— Where principal and surety are insolvent.

Cited in Re Jaycox, 8 Nat. Bankr. Reg. 241, Fed. Cas. No. 7,242; Mathews v. Abbott, 2 Haskell, 289, Fed. Cas. No. 9,275; Ex parte Morris, 2 Low. Dec. 424, Fed. Cas. No. 9,823,—holding that where the maker of a note gives the surety a mortgage to secure him, the holder of the note is entitled to have the same applied to his note if both the surety and maker becomes insolvent; Keene Five Cents Sav. Bank v. Herrick, 62 N. H. 174, holding that the payee of a note is entitled to have a mortgage given by the maker to the surety, assigned to him after their insolvency, though given to secure the surety; Miles' Claim, L. R. 9 Ch. 637, note; Hart v. Maguire, 29 N. S. 181 (dissenting opinion); Trerice v. Burkett, 1 Ont. 80,—on the right of a bill holder to proceed against securities held by a surety, where surety and principal are insolvent; Crathern v. Bell, 45 U. C. Q. B. 473, on the right to enforce a contract of guaranty on a non-negotiable paper where both guarantor and maker were insolvent.

Distinguished in Re Morton, 3 Ont. App. Rep. 202, holding that where one gave a note and mortgage to another, which note was discounted at a bank and was renewed but no assignment of the mortgage ever made, the bank was not entitled to the benefit of the mortgage, when both maker and payee became insolvent.

— As between creditor of drawer and acceptor of bill of exchange.

Cited in Ex parte Harris, 2 Low. Dec. 568, Fed. Cas. No. 6,109, on the right to proceed against property held by the acceptor of a bill of exchange where both acceptor and drawer are insolvent; Ex parte Flannagans, 2 Hughes, 264, Fed. Cas. No. 4,855, 12 Nat. Bank. Reg. 230, on the right to bind goods for bills drawn by a consignor upon the consignee after a subsequent sale by the latter; Molson's Bank v. Blakeney, 25 Grant, Ch. (U. C.) 513, holding that where one party became an accommodation indorser for another, and received as security a mortgage, the holder of the paper was entitled to the benefit of the mortgage, where both of the parties were insolvent; Commercial Bank v. Poor, 6 Grant, Ch.

(U. C.) 514, holding same, but that the holder of the security had a right to transfer it, if he was solvent, and such transfer was valid as against creditors of the drawer and acceptor; Powles v. Hargreaves, 3 DeG. M. & G. 430, 2 Eq. R. 162, 23 L. J. Ch. N. S. 1, 17 Jur. 1083, 2 Week. Rep. 21, holding that the bill holders were not limited to cases of judicial insolvency, but the rights may be enforced in equity; City Bank v. Luckie, L. R. 5 Ch. 773, 23 L. T. N. S. 376, 18 Week. Rep. 1181, holding that the holders of bills were entitled to have the mortgage executed in favor of the acceptor applied to the bills where both acceptor and drawer became insolvent; Bank of Ireland v. Perry, L. R. 7 Exch. 14, 41 L. J. Exch. N. S. 9, 25 L. T. N. S. 845, 20 Week. Rep. 300, holding that the holder of a bill of exchange drawn on a particular cargo was entitled to have the proceeds of the cargo applied pro tanto to the payment of the bill where both drawer and acceptor were insolvent; Ex parte Ackroyd, 3 DeG. F. & J. 726, holding same where wool was deposited against which the bills were drawn; Trimingham v. Maud, L. R. 7 Eq. 201, 38 L. J. Ch. N. S. 207, 19 L. T. N. S. 554, 17 Week. Rep. 313; Ex parte Smart, L. R. 8 Ch. 220, 42 L. J. Bankr. N. S. 22, 28 L. T. N. S. 146, 21 Week. Rep. 237,—holding that short bills held by the acceptor, must be applied on the bills accepted, where both acceptor and drawer are insolvent; Ex parte Dewhurst, L. R. 8 Ch. 965, 42 L. J. Bankr. N. S. 87, 29 L. T. N. S. 125, 21 Week. Rep. 874, holding that where both firms were insolvent the holders of bills of exchange drawn by one and accepted by the other to pay for goods shipped from one to the other, were entitled to have the goods applied on the bills of exchange; Loder's Case, L. R. 6 Eq. 491, 16 Week. Rep. 1076; Ex parte Stephens, L. R. 3 Ch. 753, 19 L. T. N. S. 198, 16 Week. Rep. 1152; Banner v. Johnston, L. R. 5 H. L. 157, 40 L. J. Ch. N. S. 730, 24 L. T. N. S. 542; Engelbach v. Nixon, L. R. 10 C. P. 645, 44 L. J. C. P. N. S. 396,—on the right of a creditor of the drawer to proceed against securities held by the acceptors; Ex parte Dever, L. R. 14 Q. B. Div. 611, 54 L. J. Q. B. N. S. 390, 53 L. T. N. S. 131, 33 Week. Rep. 625, holding that where the estates of both the drawer and acceptor of a bill of exchange are insolvent, the holder of the bill of exchange may have applied on his bill any security appropriated to its payment in the hands of the acceptor.

Cited in note in 4 E. R. C. 130, 132, on rights arising on bankruptcy of drawer and acceptor of bill.

Distinguished in Cabot's Estate, 7 Phila. 437, 27 Phila. Leg. Int. 356, holding that the holder of a bill of exchange has no interest in securities transmitted by the drawer to the drawee where neither is insolvent; Laycock v. Johnson, 6 Hare, 199, 16 L. J. Ch. N. S. 350, 11 Jur. 688, holding that the rule as to the right of creditors to proceed against securities held by an acceptor or surety, did not apply to the administration of a trust in equity; Hickie's Case, L. R. 4 Eq. 226, 36 L. J. Ch. N. S. 809, 16 L. T. N. S. 654, 15 Week. Rep. 954, holding that where the acceptor is a stock company which has been ordered wound up, the creditors are not entitled to have the securities applied unless the acceptor is insolvent, and also it does not apply where the acceptor owes the drawer an amount exceeding the bill; Ex parte Alliance Bank, L. R. 4 Ch. 423, 38 L. J. Ch. N. S. 714, 20 L. T. N. S. 685, 17 Week. Rep. 631, holding that the holders of the bills of exchange were not entitled to have the securities applied, where other bills had been drawn against the same securities to take the place of these bills in question; Re Levi, L. R. 7 Eq. 449, 20 L. T. N. S. 296, 17 Week. Rep. 565, holding that where the securities were deposited to provide for the payment of certain other bills and not on general account or these bills the holders of the

ones in question could not reach the securities; Vaughan v. Halliday, L. R. 9 Ch. 561, 30 L. T. N. S. 741, 22 Week. Rep. 886, holding that where the bill of exchange has not been accepted, securities held by the acceptor cannot be reached by the holder; Ex parte Lambton, L. R. 10 Ch. 405, 44 L. J. Bankr. N. S. 81, 32 L. T. N. S. 380, 23 Week. Rep. 662, holding that where a ship was built under a contract and paid for by means of bills of exchanges drawn on the purchaser, who became insolvent before the ship was completed, the ship was not security for the bills and could not be applied to their payment; Ex parte General South American Co. L. R. 10 Ch. 635, 45 L. J. Bankr. N. S. 54, 33 L. T. N. S. 112, 23 Week. Rep. 843, holding under same conditions where one party was not subject to any insolvency court or court of bankruptcy, that the holder of an accepted bill could not recover out of any remittance to cover acceptance; Ex parte Gomez, L. R. 10 Ch. 639, 32 L. T. N. S. 667, 23 Week. Rep. 780, holding that where bills were drawn on one party by another and paid by other bills forwarded, and both parties had become insolvent but after the acceptor had been paid all he had accepted, the property belonged to the drawer; Ex parte Banner, L. R. 2 Ch. Div. 278, 45 L. J. Bankr. N. S. 73, 34 L. T. N. S. 199, 24 Week. Rep. 476, holding where one company was acting as the agent of another in buying goods and forwarding them, and in turn drawing upon the latter to pay therefor, both companies having become insolvent, the holders of the bills drawn and accepted were not entitled to have goods in transit applied to their bills; Royal Bank v. Commercial Bank, L. R. 7 App. Cas. 366, 47 L. T. N. S. 360, 31 Week. Rep. 49, holding that the rule of ex parte warring does not exist in Scotland and the holders of the bills of exchange could not proceed against the securities held by the acceptor.

Necessity of acceptance of bill of exchange to charge acceptor.

Cited in Cabada v. Delongh, 1 W. N. C. 342, holding that a bill of exchange is an assignment to the payee of funds of the drawer in the hands of the drawee only after acceptance.

Reduction of proof and claim of debt after receiving part payment.

Cited in Re Baxter, 12 Fed. 72, on the right of a debtor to amend his proofs of debt after receiving dividends; Ex parte Joint Stock Discount Co. L. R. 19 Eq. 1, 44 L. J. Ch. N. S. 194, 31 L. T. N. S. 802, 23 Week. Rep. 281, L. R. 10 Ch. 198, holding that where the creditors had been paid the proceeds of the securities, they must reduce their proof of loss by that amount.

Enforcing of rights through another's equities to prevent a wrong.

Cited in Pearsen v. Bailey, 177 Mass. 318, 58 N. E. 1028, on the working out of rights through another's equities to prevent a wrong.

Jurisdiction of bankruptcy court.

Cited in Ex parte Dicken, L. R. 8 Ch. Div. 377, 38 L. T. N. S. 860, 26 Week. Rep. 731, holding that a court of bankruptcy had not jurisdiction to try a mere demand of a trustee against the agent due the principal's estate; Ex parte Musgrave, L. R. 10 Ch. Div. 94, 48 L. J. Bankr. N. S. 39, 39 L. T. N. S. 647, 27 Week. Rep. 372, on the power of a court of bankruptcy to adjust differences between agent and principal.

4 E. R. C. 180, CARLOS v. FANCOURT, 2 Revised Rep. 647, 5 T. R. 482.

Elements essential to negotiability of commercial paper.

Cited in Augusta Bank v. Augusta, 49 Me. 507, holding a coupon not payable to order or bearer nor containing no equivalent words is not negotiable; Fitzharris v. Leggatt, 10 Mo. App. 527, holding a bill of exchange drawn at St.

Louis "with exchange on New York" is not negotiable; Drown v. Smith, 3 N. H. 299, holding a note given for specific articles could not be declared on as a bill; People v. Shale, 9 Cow. 778, holding an unsealed promise to pay a certain amount of money in labor and expressing no consideration was not negotiable; Lindsay v. Price, 33 Tex. 280, holding an order to pay money out of the proceeds of a certain note to be collected was not such a bill of exchange as to bind persons accepting the order; Averett v. Booker, 15 Gratt. 163, 76 Am. Dec. 203, holding a paper representing that the trustee of certain persons would pay a specific sum out of moneys belonging to promisor was not a bill of exchange; Schlesinger v. Arline, 31 Fed. 648, holding a stipulation for costs and attorneys fees therein does not affect the negotiability of a promissory note; Hall v. Merrick, 40 U. C. Q. B. 566, holding a provision in a note to the effect that it was to be held as collateral security rendered such rate non-negotiable; Hegeler v. Comstock, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 351, on what essential to the negotiability of commercial paper; LaBanque Nationale v. Lemaire, Rap. Jud. Quebec 41 C. S. 37, holding that note indicating on its face that it was signed as a guaranty of other notes is not negotiable.

Distinguished in Riker v. Sprague Mfg. Co. 14 R. I. 402, 51 Am. Rep. 413, holding a reservation in a note of the right to pay before maturity in instalments of the principal when the semiannual interest fell due, did not render it so uncertain as to prevent its being negotiable.

— Paper payable on contingency.

Cited in Blackman v. Lehman, 63 Ala. 547, 35 Am. Rep. 57, holding municipal bonds issued in aid of a railroad were not negotiable where made payable on the contingency that the road be completed to that particular municipality; Hamilton v. Myrick, 3 Ark. 511, holding an order to pay a specific sum out of money received on the account of order or when collected was not negotiable; Fralick v. Norton, 2 Mich. 130, 55 Am. Dec. 56, holding an instrument was not a promissory note where it provided that if a certain amount be paid on a day prior to when it is due, the note should be canceled; Loftus v. Clark, 1 Hilt. 370, holding promise to pay sum to seaman "provided" he shipped, was not negotiable; Wiggens v. Vaught, Cheves, L. 91, holding a promise to pay as soon as the promisor was in the possession of funds to do so from a particular estate was not a promissory note; Kennedy v. Murdick, 5 Harr. (Del.) 263; Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946; Jenkins v. Bossom, 13 N. S. 540; Protection Ins. Co. v. Bill, 31 Conn. 534.—on paper paper payable on a contingency as not being negotiable; Colehan v. Cooke, Willes, 393-399, 4 E. R. C. 184, on non-negotiability of bills or notes payable on a contingency.

Distinguished in Elliott v. Beech, 3 Manitoba L. R. 213, holding a note payable at a specific date providing that it should be payable on demand if promisor should sell land described in a memorandum to the note was a good promissory note.

Transferability of notes at common law.

Cited in Bradley v. Trammel, Fed. Cas. No. 1,788a, on nonassignability of promissory notes prior to the Statute of Anne.

Promissory rates as being on same footing with bills of exchange.

Cited in Howard v. Central Bank, 3 Ga. 375, holding a protested negotiable note was on the same footing as a protested bill of exchange with reference to the right of damages as against indorser.

Nature of indorsement of bill or note.

Cited in Ellis v. Brown, 6 Barb. 282 (dissenting opinion), on the indorsement of a bill or note as being in itself a bill of exchange.

Consideration for written agreement when must be shown.

Cited in Douglass v. Davie, 2 M'Cord, L. 218, holding in an action for the delivery of property, a consideration therefor must be averred and proved.

— Effect of recital of "value received."

Cited in Lansing v. M'Killip, 3 Caines, 286, holding the consideration for a special agreement reduced to writing must be proved as laid although the instrument says for value received; Waddel v. M'Cabe, 3 U. C. Q. B. O. S. 502, on the "value received" in an instrument as importing a consideration.

Liability of acceptor of non-negotiable bill.

Cited in Atkinson v. Manks, 1 Cow. 691, holding the acceptor of a non negotiable order was liable only to the extent of his special agreement.

Right of action on bill or note.

Cited in Jarvis v. McMain, 10 N. C. (3 Hawks) 10 (dissenting opinion), on what is essential to maintain an action on a note.

4 E. R. C. 184, COLEMAN v. COOKE, Willes, Rep. 393, affirmed in 2 Strange, 1217.

Negotiability of commercial paper to mature at future unfixed time.

Cited in Protection Ins. Co. v. Bill, 31 Conn. 534, holding a promise to pay an instalment on stock which has already been determined when required and in whatever proportions desired was negotiable; Curtis v. Horn, 58 N. H. 501, holding a promissory note payable "on or before the first day of May next" was negotiable; Riker v. Sprague Mfg. Co. 14 R. I. 402, 51 Am. Rep. 413, holding a note not rendered non-negotiable by a reservation of the right to pay before maturity in instalments of a certain time, at any time the semiannual interest became payable; Chicago R. & Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999, holding the negotiability of a note was not affected by the fact that it might at the option of the holder and by reason of the default of the maker become due at an earlier date; Re Central Bank, 17 Ont. Rep. 574, holding a deposit receipt issued by a bank, payable to order, was negotiable; Henschel v. Mahler, 3 Denio, 428, on what essential to the negotiability of a bill or note; Elliott v. Beech, 3 Manitoba L. R. 213, holding the negotiability of a note payable on a specific date was not affected by a provision that it should be payable on demand if the maker should dispose of land described in memorandum attached to the note.

— When payable at death or at attained age.

Cited in Kelley v. Hemmingway, 13 Ill. 604, 56 Am. Dec. 474, holding a note made payable to a person when he is "twenty-one years old" is not a promissory note and negotiable; Carter v. King, 11 Rich. L. 125, holding the validity of a promissory note was not affected by a reservation making it not collectable until the death of the promisor, Mumma's Appeal, 127 Pa. 474, 18 Atl. 6, on right to make a good promissory note not maturing until after the payee's death; Hinguley v. Lanier, 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. 922, on promissory note made payable after death of maker as being valid.

Cited in note in 27 L.R.A. (N.S.) 1017, on negotiability of note, payment of which depends on termination of life.

Other contingencies affecting negotiability.

Cited in Hamilton v. Myrick, 3 Ark. 541, holding an order requesting a person to pay a specific sum of money to another out of money received on drawer's account when collected is not such a bill of exchange that an indorsee can maintain an action on; Rice v. Porter, 16 N. J. L. 440, holding an order to pay a specific sum on account of drawer's share of rent of fishery when due is not a bill of exchange; Hogg v. Marsh, 5 U. C. Q. B. 319, holding an instrument made payable on the alternative as to time and interest was a valid promissory note.

What constitutes negotiable bill or note.

Cited in R. v. Cormack, 21 Ont. Rep. 213, holding an instrument in the form of a promissory note with a blank left for the payee's name is not a completed note so as to support a conviction for forgery; McArthur v. Winslow, 6 U. C. Q. B. 144; Trimble v. Miller, 22 Ont. Rep. 500, on the definition of what constitutes a promissory note; La Banque Nationale v. Lemaire, Rap. Jud. Quebec 41 C. S. 37, holding that note indicating on its face that it was signed as a guaranty of other notes is not negotiable.

Nature of indorsement of bill or note.

Cited in Ellis v. Brown, 6 Barb. 282, on the indorsement of a bill or note being in itself a bill of exchange; Ockerman v. Blacklock, 12 U. C. C. P. 362, holding an instrument not a negotiable bill when drawn could not be made so by an acceptance.

Construction of statutes.

Cited in Ezekiel v. Dixon, 3 Ga. 146; New York v. Lord, 18 Wend. 126 (dissenting opinion); Heron v. United States Bank, 5 Rand. (Va.) 426; Farrel Foundry v. Dart, 26 Conn. 376,—on how doubtful and uncertain terms of a legislative act are to be construed; Holbrook v. Holbrook, 1 Pick. 248, on right to resort to the preamble in interpreting the meaning of a statute; Roberts v. Jackson, 4 Yerg. 308; Den ex dem. Mickle v. Matlack, 17 N. J. L. 86,—on words as to be taken in their plain sense in the construction of a statute where no ambiguity.

4 E. R. C. 195, ABREY v. CRUX, 39 L. J. C. P. N. S. 9, L. R. 5 C. P. 37, 21 L. T. N. S. 327, 18 Week. Rep. 63.

Inadmissibility of parol evidence to vary or contradict terms of a bill or note.

Cited in Metzerott v. Ward, 10 App. D. C. 514, holding one of the makers of a promissory note could not show by parol evidence that he was to be bound as indorser only; Martin v. Cole, 104 U. S. 30, 26 L. ed. 647; Randle v. Davis Coal & Coke Co. 15 App. D. C. 357,—holding parol evidence of a contemporaneous agreement that an indorsement of a note was without recourse is inadmissible; Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870, 29 N. W. 46, holding that parol testimony is admissible to show relation of parties to note, where their names are so placed as to leave real intention in doubt; Knox v. Gerhauser, 3 Mont. 267, holding that parol agreement, made contemporaneously with note, is not admissible, to make payment depend upon condition; Cummings v. Kent, 44 Ohio St. 92, 58 Am. Rep. 796, 4 N. E. 710, holding same in case of agreement that the liability of the drawer of a bill was not to be enforced; Earle v. Enos, 130 Fed. 467, holding same as to agreement that maker of accommodation note would not be looked to for payment; Imperial Bank v. Brydon, 2 Manitoba L. R. 117, holding same in case of agreement that note should not be paid at maturity; Bank of Nova Scotia v. Fish, 32 N. B. 434; Smith v. Squires, 13 Manitoba

L. R. 360,—holding same in case of agreement that indorser of note was not to be liable on it; Moore v. Grosvenor, 30 N. B. 221, holding same in case of agreement that indorser would be relieved from liability if he paid the taxes; Hall v. First Nat. Bank, 173 Mass. 16, 44 L.R.A. 319, 73 Am. St. Rep. 255, 53 N. E. 154, holding a bill in equity alleging a contemporaneous agreement to renew notes, cannot be maintained to enjoin the enforcement of the notes, the agreement not having been alleged to be in writing; Porteous v. Muir, 8 Ont. Rep. 127, holding evidence of a parol agreement to extend the time of payment of a note payable on demand was not admissible; Lancey v. Brake, 10 Ont. Rep. 428, holding evidence was not admissible to vary receipts for loans showing they were to be repaid in money, by a parol agreement that they might be repaid in petroleum oil; Graham v. Graham, 11 N. S. 265, holding evidence of parol agreement that a note was not to be recoverable until payee's wife went before a magistrate and relinquished her dower was inadmissible; Brown v. Spofford, 95 U. S. 474, 24 L. ed. 508; Chaddock v. Vanness, 35 N. J. L. 517, 10 Am. Rep. 256; Washington Sav. Bank v. Ferguson, 43 App. Div. 74, 59 N. Y. Supp. 295; Weaver v. Paul, 4 Dauphin Co. Rep. 305, 4 Pa. Dist. R. 492, 16 Pa. Co. Ct. 471; MacArthur v. MacDowall, 1 Terr. L. Rep. 345; Farwell v. Ensign, 66 Mich. 600, 33 N. W. 734,—on the inadmissibility of parol evidence to vary the terms of a bill or note; Stott v. Fairlamb, 52 L. J. Q. B. N. S. 420, 48 L. T. N. S. 574, holding evidence of a parol agreement admissible to show no consideration for note between original parties and that the moneys covered by the note were covered by the agreement.

Cited in 1 Beach Contr. 561, on verbal release of bills and notes.

Distinguished in McQuarrie v. Brand, 28 Ont. Rep. 69, holding in action on a note evidence of a parol agreement which had been performed and the effect of which was to discharge the obligation on the note was admissible.

Admissibility of parol evidence to affect writings.

Cited in Ontario Ladies' College v. Kendry, 10 Ont. L. Rep. 324, holding evidence of a contemporaneous oral agreement that a written contract was not to take effect until some other event happens was admissible; Tyson v. Abercrombie, 16 Ont. Rep. 98, holding parol evidence inadmissible to show that a chattel mortgage of timber was to become ineffective upon the delivery of certain pieces of timber sold by mortgagor's father to mortgagee; Mason v. Scott, 22 Grant, Ch. (U. C.) 592, holding evidence of a collateral parol agreement was not admissible to vary the terms of a lease; Byers v. McMillan, 15 Can. S. C. 194 (dissenting opinion), on the inadmissibility of parol evidence to vary the terms of a written instrument.

Cited in notes in 31 L.R.A.(N.S.) 236, on admissibility of parol evidence as to manner or means of paying written contract not within statute of frauds, purporting to be payable in money; 11 Eng. Rul. Cas. 220, on parol evidence to contradict written instrument.

Cited in 2 Page Contr. 1823, on merger of prior negotiations in written contract.

Liability assumed by drawing of bill of exchange.

Cited in Yager v. McCormack, 41 Fla. 204, 25 So. 883, on the liability assumed by the drawing of a bill of exchange.

4 E. R. C. 203, BELL v. INGESTRE, 19 L. J. Q. B. N. S. 71, 12 Q. B. 317.

Admissibility of parol evidence as to liability on bill or note.

Cited in Ricketts v. Pendleton, 14 Md. 320, holding that indorser can show by parol that note was delivered to holder to be held upon a condition to be per-

formed before interest of holder could attach; Cummings v. Kent, 44 Ohio St. 92, 58 Am. Rep. 796, 4 N. E. 710, holding parol evidence is inadmissible to show an agreement that the drawer of a bill was not to be liable on as such.

Cited in note in 4 E. R. C. 208, 210, on parol evidence as to note or bill of exchange.

Distinguished in Woodward, B. & Co. v. Foster, 18 Gratt. 200, holding in an action against an indorser on a protested bill parol evidence varying the liability of the endorser is not admissible.

—On contract generally.

Cited in Chaddock v. Vanness, 35 N. J. L. 517, 10 Am. Rep. 256; MacArthur v. MacDowall, 1 Terr. L. Rep. 345; Stuck v. Beach, 74 Ind. 571, 39 Am. Rep. 113,— on when parol evidence is admissible.

Cited in note in 11 E. R. C. 221, on parol evidence to contradict written instrument.

—To rebut delivery or execution.

Cited in Culbertson v. Cox, 30 Minn. 309, 43 Am. Rep. 204, 13 N. W. 177, holding parol evidence was admissible to show that a note delivered by the maker to the payee was not intended to be operative until the signature of a third person was procured thereto; Sweet v. Stevens, 7 R. I. 375, holding parol evidence was admissible to show the delivery of a note was made in escrow; Austin v. Farmer, 30 U. C. Q. B. 10, holding parol admissible to show an indorsement of the note was made upon condition that it should be signed by others as makers; Elastic Tip Co. v. Graham, 185 Mass. 597, 71 N. E. 117, on the existence of the right to show by parol that a completed instrument was delivered on a condition which has not been performed; Coleman v. Sherwood, 3 U. C. C. P. 359, on evidence admissible to show want of delivery of an instrument.

Distinguished in Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 14 L. ed. 157, holding evidence that there was an understanding that another person should sign an instrument before it would take effect was not admissible where it did refer to the time when the corporate seal was affixed.

Breach of condition as defence between indorser and indorsee.

Distinguished in Mechanics' Nat. Bank v. Robins, 134 Mass. 331, where the question was whether ownership of a bill passed on the discounting thereof pursuant to a conditional agreement.

Compliance with conditions precedent to validity of instrument.

Cited in Penn. Mut. L. Ins. Co. v. Crane, 134 Mass. 56, 45 Am. Rep. 282, on a negotiable instrument delivered upon a condition essential to its validity as being of no effect between the parties until such condition is performed.

Sufficiency of delivery of contract under seal.

Cited in Brackett v. Barney, 28 N. Y. 333, on an acceptance as essential to the validity of a delivery of an instrument; Wilder v. Butterfield, 50 How. Pr. 385, holding that question of delivery, involving acceptance, is always one of intention, depending on the circumstances.

Cited in 3 Washburn Real Prop. 6th ed. 265, on mere transfer of possession of deed as insufficient delivery.

Delivery in escrow.

Cited in Hurt v. Ford, 142 Mo. 283, 41 L.R.A. 823, 44 S. W. 228 (dissenting opinion); Daggett v. Simonds, 173 Mass. 340, 46 L.R.A. 332, 53 N. E. 907,— on right to make a delivery of promissory notes in escrow; Arthur v. Anderson, 9 S. C. 234, on right to make a conditional delivery of an instrument by placing it in escrow.

Defenses to actions on bills or notes.

Cited in Blackstone v. Chapman, 3 U. C. C. P. 221, on sufficiency of pleas in defense in action on a promissory note.

Defenses to bill or note.

Cited in Hall v. Francis, 4 U. C. C. P. 210, considering what may be pleaded as a defence to an action for a bill or note; Bank of Upper Canada v. Upton, 10 U. C. C. P. 455, on what put in issue by the denial of the indorsement of an instrument.

4 E. R. C. 210, FORSTER v. MACKRETH, 36 L. J. Exch. N. S. 94, L. R. 2 Exch. 163, 16 L. T. N. S. 23, 15 Week. Rep. 747.

Power of agent to draw post dated bills of exchange.

Cited in New York Iron Mine Co. v. Citizens' Bank, 44 Mich. 344, 6 N. W. 823, holding an agent's authority to draw bills of exchange payable on time or at sight does not include authority to draw post-dated bills.

Right of member of partnership of lawyers to bind the firm by his acts.

Cited in Worster v. Forbush, 171 Mass. 423, 50 N. E. 936, holding an attorney at law who is a member of a partnership of lawyers had no authority to indorse a negotiable promissory note in the name of the partnership.

Checks as bills of exchange.

Cited in People v. Kemp, 76 Mich. 410, 43 N. W. 439, on a check as being a bill of exchange.

Admissibility of post-dated check in evidence.

Distinguished in Bull v. O'Sullivan, L. R. 6 Q. B. 209, 40 L. J. Q. B. N. S. 141, 24 L. T. N. S. 130, holding a check payable to order and post dated is admissible in evidence with a penny stamp.

Power of partner to draw checks.

Cited in 2 Bolles Banking, 591, on power of partner to draw checks.

4 E. R. C. 216, MUTFORD v. WALCOT, 1 Ld. Raym. 574, 1 Salk. 129.

Negotiability of an indorsement of a bill or note.

Cited in Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322, holding the indorsement of a negotiable note made very shortly after its maturity is negotiable although containing no words of negotiability; Mead v. Small, 2 Me. 207, 11 Am. Dec. 62, holding that nothing but payment will destroy negotiability of note.

Notice of nonpayment of bill or note when unnecessary.

Cited in Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622, holding that indorser of note, when over due is not liable thereon unless note be presented to maker for payment within reasonable time, and if not paid, notice of nonpayment given to indorser; Hall v. Francis, 4 U. C. C. P. 210, holding notice of nonpayment unnecessary to indorser where indorsement is made after the maturity of the note.

Rights and liabilities of purchaser of overdue bill or note.

Cited in Allen v. Bratton, 47 Miss. 119, holding that indorsee of note over due, takes it subject to all equities between original parties; Etheridge v. Gallagher, 55 Miss. 158, holding that person who buys note when over due acquires legal title to paper, and right to enforce it against maker; Wells v. Whitehead, 15 Wend. 527, holding that acceptor supra protest subjects himself to same obli-

gations as if bill had been directed to him; Johnson v. Bloodgood, 2 Car. Cas. 303, holding that when bill or note is purchased after due, every presumption is to be made against purchaser; Britton v. Bishop, 11 Vt. 70, holding that if note be negotiated when overdue, holder is liable to all defenses inherent in note, or arising out of any agreement in relation to note with payee.

Sufficiency of declaration.

Cited in Payne v. Rodden, 4 Bibb. (Ky.) 304, holding that declaration alleging failure of title although it contains no express promise of warranting title, is good as containing implied warranty.

4 E. R. C. 218, Steele v. M'KINLAY, L. R. 5 App. Cas. 754, 43 L. T. N. S. 358, 29 Week. Rep. 17.

What constitutes acceptance of bill.

Cited in Smith v. Commercial Bkg. Co. 11 C. L. R. (Austr.) 667, holding that bank's name impressed upon face of draft did not constitute acceptance by bank so as to comply with statute.

Liability of irregular indorser on bill or note.

Cited in Small v. Henderson, 27 Ont. App. Rep. 492, holding an insolvent endorsing before delivering notes executed by his wife for a loan for his benefit was not liable on such indorsement; Robertson v. Davis, 27 Can. S. C. 571, holding in an action on the note itself the payee could not maintain an action against an indorser thereof; Jenkins & Sons v. Coomber [1898] 2 Q. B. 168, 67 L. J. Q. B. N. S. 780, 78 L. T. N. S. 752, 14 Times L. R. 425, 47 Week. Rep. 48, holding a person indorsing a bill as surety was not liable thereon where it was delivered without the indorsement of the drawers and not indorsed by them until after its acceptance by the drawee; Miller v. Ridgely, 22 Fed. 889; Haddock, B. & Co. v. Haddock, 118 App. Div. 412, 103 N. Y. Supp. 584 (dissenting opinion),—on an irregular indorser of a bill or note as not being liable to payee thereon; Carrique v. Beaty, 24 Ont. App. Rep. 302; Ayr American Plough Co. v. Wallace, 21 Can. S. C. 256,—on the liability of an irregular indorser on a bill or note; Knechtel Furniture Co. v. Ideal House Furnishers, 19 Manitoba L. Rep. 652, holding that under Bills of Exchange Act, person who indorses note before it is indorsed by payee may be liable as indorser to payee; Canadian Bank v. Perram, 31 Ont. Rep. 116, holding that one who endorsed note before it was indorsed by payee was not liable to payee upon such indorsement; Merchants' Bank v. Whitfield, 2 Dorion Q. B. 157, holding that successive indorsers of note indorsed for accommodation of maker are liable to each other the same as if indorsements had been for value received, in absence of agreement to contrary, which can only be proved according to statutes.

Disapproved in Slater v. Laboree, 10 Ont. L. Rep. 648, holding pursuant to Canada decisions that a person endorsing promissory notes for a valuable consideration, where the payee thereof has not endorsed, is liable on such indorsements.

Estoppel of acceptor of bill.

Cited in note in 4 Eng. Rul. Cas. 635, on estoppel of acceptor to deny genuineness and validity of drawer's signature.

Parol evidence to vary note.

Cited in Re Boutin, Rap. Jud. Quebec 12 C. S. 186, on parol evidence to prove independent contract of guarantee.

4 E. R. C. 243, FANSHAWE v. PEET, 2 Hurlst. & N. 1, 26 L. J. Exch. N. S. 314, 5 Week. Rep. 489.

Construction of acceptance of bill.

Cited in note in 4 Eng. Rul. Cas. 259, on construction of acceptance of bill.

4 E. R. C. 246, SMITH v. VERTUE, 9 C. B. N. S. 214, 7 Jur. N. S. 395, 30 L. J. C. P. N. S. 56, 3 L. T. N. S. 583, 9 Week. Rep. 146.

Conditional acceptance of bill of exchange.

Cited in Decroix v. Meyer, L. R. 25 Q. B. Div. 343, 59 L. J. Q. B. N. S. 538, 63 L. T. N. S. 414, 39 Week. Rep. 2, 4 Eng. Rul. Cas. 249, holding an acceptance "in favor of drawer only" of a bill drawn to order, was a general acceptance; Shaver v. Western U. Teleg. Co. 57 N. Y. 459 (dissenting opinion), on the effect of a conditional acceptance of a bill of exchange.

Cited in notes in 38 L.R.A.(N.S.) 748, on reference to consideration for draft as making acceptance conditional; 4 Eng. Rul. Cas. 191, on conditional acceptance of bill of exchange; 4 Eng. Rul. Cas. 245, on construction of acceptance of bill.

Distinguished in Guaranty Trust Co. v. Grotrian, 57 L.R.A. 689, 52 C. C. A. 235, 114 Fed. 433, holding that money paid by drawee upon draft drawn against "indorsed bills of lading" which are in fact fictitious and accept "against" such bills in ignorance of fraud, may be recovered from payee.

Liability of acceptors of bills of exchange, when becomes fixed.

Cited in Ebsworth v. Alliance M. Ins. Co. L. R. 8 C. P. 596, 42 L. J. C. P. N. S. 305, 29 L. T. N. S. 479, 2 Asp. Mar. L. Cas. 125, 13 Eng. Rul. Cas. 215, holding acceptors of bills of exchange were liable thereon when the shipping documents were delivered to them.

Time for presentment of bill or note.

Cited in Merchants Bank v. Henderson, 28 Ont. Rep. 360, holding a promissory note payable at a particular place need not be presented there at maturity in order to charge the maker.

4 E. R. C. 249, MEYER v. DECROIX [1891] A. C. 520, 61 L. J. Q. B. N. S. 205, affirming the decision of the Court of Appeal, reported in L. R. 25 Q. B. Div. 343, 59 L. J. Q. B. N. S. 538.

Construction of acceptance of bill.

Cited in notes in 4 E. R. C. 245, on construction of acceptance of bill; 4 E. R. C. 444, on whether acceptance of bill can be qualified so as to render it not negotiable.

Immaterial alterations of bills or notes.

Cited in note in 2 Eng. Rul. Cas. 693, on invalidity of instrument materially altered.

4 E. R. C. 260, YORKSHIRE BKG. CO. v. BEATSON, L. R. 5 C. P. Div. 109, 49 L. J. C. P. N. S. 380, 42 L. T. N. S. 455, 28 Week. Rep. 879, affirming the decision of the Court of Common Pleas, reported in 48 L. J. C. P. N. S. 428, L. R. 4 C. P. Div. 204, 40 L. T. N. S. 654, 27 Week. Rep. 911.

Partnership liability on paper signed by name common to two firms.

Cited in Hastings Nat. Bank v. Hibbard, 48 Mich. 452, 12 N. W. 651, holding a member of one of two firms of the same name but having a distinct business but no separate bank account was not liable on a note in the firm name exe-

cuted by a person a member of both partnerships, it not being shown that the money was used for defendant's firm; Standard Bank v. Dunham, 14 Ont. Rep. 67, holding in an action on a note executed in a firm name of which there are two firms having common partners the burden was on plaintiff to prove which of the firms was liable; Danks v. Park, Cameron (Can.) 200, on partnership liability on paper where two firms of same name.

Evidence to determine liability on paper as between firms of the same name.

Cited in Fosdick v. Van Horn, 40 Ohio St. 459, holding in order to bond a dormant partner in a firm of which there are two of the same name, on a note bearing the common firm name, representations made by the partners at the time of the execution of the note are admissible.

Power of member of firm to bind.

Cited in Bank v. Northwood, 7 Ont. Rep. 389, holding other members of a firm were not liable on accommodation indorsement made in the firm name by one of the partners for the benefit of the maker of the note, the party discounting knowing it was an accommodation indorsement; Smith v. Commercial Bkg. Co. 11 C. L. R. (Austr.) 667, on name of bank's officer on draft as signature of bank.

Cited in Parsons, Partn. 4th ed. 114, on liability of other partners where business is done in name of a single partner.

The decision of the Court of Common Pleas was cited in Hovey v. Cassels, 30 U. C. C. P. 230, holding a firm was not liable by the acceptance by a member of the firm in his own name of an order drawn of them by a person having no funds in their hands.

Right of court to give final judgment on motion for judgment or a new trial.

Cited in Sheppard Pub. Co. v. Press. Pub. Co. 10 Ont. L. Rep. 243; Stewart v. Rounds, 7 Ont. App. Rep. 515,—holding court may upon motion for judgment or for a new trial, if satisfied that it has before it all materials necessary to a final determination, give judgment accordingly; dissenting opinions in Bate v. Canadian P. R. Co. 15 Ont. App. Rep. 388; Wills v. Carman, 14 Ont. App. Rep. 656,—on right of court to give judgment on motion for judgment or for a new trial.

4 E. R. C. 278, DUTTON v. MARSH, 40 L. J. Q. B. N. S. 176, L. R. 6 Q. B. 361, 24 L. T. N. S. 470, 19 Week. Rep. 754.

Liability of persons signing instruments in their representative or official capacity.

Cited in Vliet v. Simanton, 63 N. J. L. 458, 43 Atl. 738, holding trustees of a corporation were personally liable on a promissory note signed by them as trustees and in which they as trustees promised to pay; Madden v. Cox, 5 Ont. App. Rep. 473; Laing v. Taylor, 26 U. C. C. P. 416,—holding the acceptance by an officer of a corporation of a bill drawn on him personally, by signing it in his capacity as treasurer rendered such official personally liable; Hagarty v. Squier, 42 U. C. Q. B. 165, holding an officer drawing a bill of exchange which he signs with the addition of the name of his position is personally liable on such bill; Fairchild v. Ferguson, 21 Can. S. C. 484 (reversing 1 Terr. L. Rep. 329), holding a promissory note signed by the manager of the company alone with a description of his position annexed rendered him alone liable on the note.

Cited in notes in 19 L.R.A. 680, on personal liability of officers on note made for corporation; 21 L.R.A.(N.S.) 1047, 1048, 1058, 1060, 1065, on liability of

principal on negotiable paper executed by agent; 42 L.R.A.(N.S.) 25, 42, on liability of one signing contract in representative capacity; 26 L. ed. U. S. 1079, as to when promissory notes executed by an officer bind the corporation.

Cited in Reinhard, Ag. 178, on construction of contract of agency from recitals together with signatures, headings, marginal notes, etc.,

Distinguished in Atkins v. Wardle, 58 L. J. Q. B. N. S. 377, 61 L. T. N. S. 23, holding an acceptance by directors of a draft directed to the corporation as drawee, rendered them personally liable where they signed the acceptance with the description of their position as directors.

Disapproved in Crane v. Lavoie, 4 D. L. R. 175, holding that it may be shown by parol that person who signed note ostensibly as agent, was in fact not acting for any principal but for himself.

Right of agent to maintain action on contract signed in his representative capacity.

Cited in Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 30 L. ed. 982, 7 Sup. Ct. Rep. 958, holding an agent might maintain an action on a contract on his own name which was signed by himself as agent and entered into as agent for the principal without further reference to principal.

Effect of affixing corporate seal to instrument executed by agent.

Cited in Bridgewater Cheese Factory Co. v. Murphy, 23 Ont. App. Rep. 66, on the affixing of the corporate seal as not sufficient to show act that of corporation.

Distinguished in Guthrie v. Imbril, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664, holding defendants signing a promissory note as president and secretary without disclosing the name of the principal were not individually liable thereon where the seal affixed bore the name of the principal.

4 E. R. C. 287, ROUQUETTE v. OVERMANN, 44 L. J. Q. B. N. S. 221, L. R. 10 Q. B. 525, 33 L. T. N. S. 420.

Conclusiveness of rulings of court of another state.

Cited in Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518, holding the rights of parties to a check were to be determined according to the laws of the place of payment; Clough v. Holden, 115 Mo. 336, 37 Am. St. Rep. 393, 21 S. W. 107 (dissenting opinion), on the ruling of the court of last resort in state where note made payable the sufficiency of presentment as being conclusive of the question.

Distinguished in London & B. Bank v. Maguire, Rap. Jud. Quebec, 8 C. S. 358, holding the legal liability of the endorser of a bill of exchange is governed by the law of the place of endorsement and not by the law of the place of payment.

What law governs in construing rights under contract.

Cited in Guernsey v. Imperial Bank, 40 L.R.A.(N.S.) 377, 110 C. C. A. 278, 188 Fed. 300, holding that sufficiency of notice of dishonor, in case where commercial paper is indorsed in one jurisdiction and is payable in another, is governed by law of place where it is payable.

Cited in notes in 61 L.R.A. 214, 219, on conflict of laws as to negotiable paper: 5 Eng. Rul. Cas. 943, on law governing remedies.

Cited in 1 Beach, Contr. 727, on law governing promissory notes and bills of exchange.

Distinguished in Duerson v. Alsop, 27 Gratt. 229, holding the rights and obligations of parties to a promissory note were to be governed by the law existing where contract executed and not when the note made payable.

Constitutionality of statutes.

Cited in Beardmore v. Toronto, 21 Ont. L. Rep. 505, holding that where subject matter of legislation is within power of Legislative Assembly, court cannot declare it void.

4 E. R. C. 307, Re Whitaker, L. R. 42 Ch. Div. 119, 58 L. J. Ch. N. S. 487, 61 L. T. N. S. 102, 37 Week. Rep. 673.

Effect of voluntary note.

Cited in Trusts & G. Co. v. Hart, 31 Ont. Rep. 414, holding that notes given as settlement for children were incomplete gifts and not binding on estate of maker.

4 E. R. C. 317, CURRIE v. MISA, 44 L. J. Exch. N. S. 94, L. R. 10 Exch. 153, 23 Week. Rep. 450, affirmed on other grounds by the House of Lords in 1 L. R. App. Cas. 554, 45 L. J. Q. B. N. S. 852, 35 L. T. N. S. 414, 24 Week. Rep. 1049.

Protection afforded holder of negotiable security given for a pre-existing debt.

Cited in Goodwin v. Massachusetts Loan & T. Co. 152 Mass. 189, 25 N. E. 100, holding taking a negotiable instrument as security for a pre-existing debt, is a taking for value, if it is taken in good faith and without notice of equities; Rutland Provision Co. v. Hall, 71 Vt. 208, 44 Atl. 94, holding the giving of a negotiable security on account of a pre-existing debt makes of the creditor a bona fide holder for value; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61, holding the bona fide holder of negotiable paper, indorsed to a creditor before maturity as security for an antecedent debt is unaffected by equities between prior parties; Williams v. Leonard, 26 Can. S. C. 406, holding a purchaser from maker of chattel mortgage in consideration of discharge of pre-existing debt is a purchaser for value; Cross v. Currie, 5 Ont. App. Rep. 31, holding taker is as much a purchaser for value as a person purchasing it for a present advance; Ryan v. McKerral, 15 Ont. Rep. 460, holding taking a note on account of a debt is taking it in the ordinary course of business, and for valuable consideration; Canadian Bank v. Gurley, 30 U. C. C. P. 583, holding an antecedent debt will support a note transferred as collateral so as to protect the holder without notice from equities existing between maker and payee.

Cited in notes in 26 L.R.A. 568, on bona fide holder of post-dated check; 31 L.R.A.(N.S.) 291, on holder of bill or note as collateral as bona fide holder; 4 Eng. Rul. Cas. 328, 329, 331, on who are bona fide holders of bills or notes.

Distinguished in M'Lean v. Clydesdale Bkg. Co. L. R. 9 App. Cas. 95, 50 L. T. N. S. 457, holding a bank check endorsed and paid into the bank by the payee and applied on his account which was overdrawn, was accepted as cash, and bank's title was perfect.

Disapproved in Pitts v. Foglesong, 37 Ohio St. 676, 41 Am. Rep. 540, holding a negotiable instrument voluntarily transferred to secure a pre-existing debt does not make the creditor, where parties are left in statu quo, a holder of the security for value.

The decision of the House of Lords was cited in Danks v. Park, Cameron (Can.) 200, on what constitutes one a holder for value.

Payment by acceptance of cheque or note.

Cited in Davis v. Parsons, 157 Mass. 584, 32 N. E. 1117, holding a party's right to a lien for labor is not prejudiced by fact of negotiation of note taken

if note is retaken before maturity and surrendered in court: Canadian Bank v. Woodward, 8 Ont. App. Rep. 347, holding the giving of a renewal bill is merely prima facie evidence of payment or satisfaction and discharge of the first note; Sawyer v. Thomas, 18 Ont. App. Rep. 129, holding the cheque of a third person given on account of a pre-existing debt is prima facie as conditional payment only; Freeman v. Canadian Guardian Life Ins. Co. 17 Ont. L. Rep. 296, holding the acceptance of a note for a debt and failure to present same for payment does not extinguish the debt; Neill v. Union Mut. L. Ins. Co. 45 U. C. Q. B. 593, holding a cheque, if it be duly presented and dishonored, is no payment or satisfaction.

Cited in note in 4 E. R. C. 529, on payment of debt by bill of exchange.

Cited in Benjamin Sales, 5th ed. 782, on payment by bill or note as not necessarily a satisfaction or discharge of the debt: Benjamin Sales 5th ed. 783, on validity of payment by bill or note until defeasance; 2 Bolles Banking, 601, on check or note of third person for debt as payment.

Consideration necessary to support contract.

Cited in Droop v. Ridenour, 11 App. D. C. 224, holding the surrender of alimony due or to become due is a good consideration as against creditors of one bound to pay; Schloss v. Feltus, 103 Mich. 525, 36 L. R. A. 161, 61 N. W. 797, on a pre-existing debt as consideration for purchase as against bona fide purchaser; Frey v. Hubbell, 74 N. H. 358, 17 L.R.A.(N.S.) 1197, 68 Atl. 325, holding acceptance in payment of a sum less than due in discharge of a debt is consideration for release of balance; Baptist Female University v. Borden, 132 N. C. 476, 44 S. E. 47, holding that mutual promises of several subscribers to contribute to fund to be raised for specified object, are sufficient consideration to make subscription valid contract; St. Mark's Church v. Teed, 120 N. Y. 583, 24 N. E. 1014, holding the withdrawal of objections, by only heir at law, to probate of will, is a sufficient consideration to support promise of executor to pay a sum named in instrument executed by him; Babcock v. Chase, 92 Hun 264, 36 N. Y. Supp. 879, holding the changing of a child's christian name by parents in consideration of promise to give a sum of money to child is a valuable consideration; Irwin v. Lombard University (Irwin v. Webster) 56 Ohio St. 9, 36 L.R.A. 239, 60 Am. St. Rep. 727, 46 N. E. 63, holding a subscription to an incorporated college induced by other donations in money and executed obligations is supported by a valuable consideration; Stover v. Stover, 60 W. Va. 285, 54 S. E. 350, holding a valuable consideration imported by a contract of partition under seal in which the owners mutually bound themselves in a specified sum to make good any loss occurring any owner; Fitzpatrick v. Dryden, 30 N. B. 558, on the discharge of a pre-existing debt as a valuable consideration; Crossett v. Haycock, 7 Ont. L. Rep. 655, holding a son a purchaser for value of property conveyed by father in consideration of son's remaining and helping at the request and upon promise of father; Randall v. Dopp, 22 Ont. Rep. 422, on agreement of settlement by members of family as purporting a consideration from mutual promises; Fleming v. Bank of New Zealand [1900] A. C. 577, 69 L. J. P. C. N. S. 120, 83 L. T. N. S. 1, 16 Times L. R. 468, holding a consideration shown by deposit of store warrants, such deposit conferring some right, profit or interest.

Cited in notes in 6 E. R. C. 18, on what may constitute consideration for contract; 4 Eng. Rul. Cas. 796, on consideration necessary to entitle transferee of bill of lading to defeat right of stoppage in transitu.

Distinguished in Stack v. Dowd, 15 Ont. L. Rep. 331, holding where effect of party's signing a note after maturity was to release other parties, such release

is not a consideration for the promise, nothing showing it was intended to release other parties; Springstead v. Ness, 125 App. Div. 230, 109 N. Y. Supp. 148, holding a promise, made in consideration of party, having no color of right in property, not interfering in owner's enjoyment, is without consideration.

The decision of the House of Lords was cited in Bank of British North America v. E. D. Warren & Co. 19 Ont. L. Rep. 257, holding the giving of time in respect to an existing debt constituted a valuable consideration; Scanlon v. Wallach, 53 Misc. 104, 102 N. Y. Supp. 1090, holding waiver of a legal defense was consideration for interested person's check.

— Existing debt or promise as supporting promissory note.

Cited in Bray v. Comer, 82 Ala. 183, 1 So. 77, holding a subsisting debt a sufficient consideration to uphold notes and mortgage given; Clark's Appeal, 57 Conn. 565, 19 Atl. 332, holding a note given by one ill for services rendered where compensation was expected is supported by a valuable consideration; Furber v. Fogler, 97 Me. 585, 55 Atl. 514, holding an agreement to transfer and assign an interest in capital stock of a corporation was a consideration sufficient to support notes given; Samuel v. Fairgrieve, 21 Ont. App. Rep. 418, holding the existence of the pre-existing debt is all that need be proved as consideration for notes given in payment; Bank of British North America v. McComb, 21 Manitoba L. Rep. 58, holding that mere existence of liability of customer of bank on note not yet due, is not sufficient consideration for transfer of note of third party as collateral security so as to constitute bank holder in due course of such note; Stott v. Fairlamb, 53 L. J. Q. B. N. S. 47, 49 L. T. N. S. 525, 32 Week. Rep. 354, holding the giving of a note, where a state of things exists which entitled the debtor to pay his debt, without other consideration, is not open to attack for want of consideration.

Distinguished in Ryan v. McKerral, 15 Ont. Rep. 460, holding a third party's promise contained in his signature to notes already completed or after maturity where no consideration moves directly to him, is without consideration.

The decision of the House of Lords was cited in Canadian Bank v. Gurley, 30 U. C. C. P. 583, holding that antecedent debt is good consideration for note transferred as collateral security for debt, so as to enable bona fide holder, to enforce it.

Bankers' lien.

Cited in Tiffany Ag. 471, on ownership of principal as essential to lien of agent.

The decision of the House of Lords was cited in Falkland v. St. Nicholas Nat. Bank, 21 Hun, 450, holding bank might as a result of its lien charge firm liabilities to account carried by firm's employee ostensibly for its benefit; Rex v. Royal Bank, 2 D. L. R. 762, to the point that all moneys paid into bank are subject to lien as well as documents.

Observance of custom or usage by the courts.

The decision of the House of Lords was cited in Cross v. Currie, 5 Ont. App. Rep. 31, on the observance by the courts of custom of bankers.

Right to raise point of law for first time on appeal.

The decision of the House of Lords was cited in Stone v. Rossland Ice & Fuel Co. 12 B. C. 66, holding where the point is wholly one of law it may be raised for the first time in appeal.

Title of bona fide holder.

Cited in Walker v. Conant, 69 Mich. 321, 13 Am. St. Rep. 391, 37 N. W. 292,

holding that money received in good faith in ordinary course of business for valuable consideration, cannot be recovered back because it was fraudulently obtained of some person by payor.

4 E. R. C. 332, WHISTLER v. FORESTER, 14 C. B. N. S. 248, 32 L. J. C. P. N. S. 161, 8 L. T. N. S. 317, 11 Week. Rep. 648.

Rights of holder of unindorsed negotiable paper.

Cited in Taliaferro v. First Nat. Bank, 71 Md. 200, 17 Atl. 1036, holding one taking notes by assignment and power of attorney gets no better title than his assignor had; Gibson v. Miller, 29 Mich. 355, 18 Am. Rep. 98, holding one taking a note not indorsed by payee though there are other endorsements, is not a bona fide purchaser; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758, holding the holder of a note transferred by assignment only has no title sufficient to preclude the maker from setting up equities coeval with the inception of the paper; Clark v. Whitaker, 50 N. H. 474, 9 Am. Rep. 286, holding the purchaser of an unendorsed note from payee takes it subject to defenses existing against the payee; Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289, holding no one can transfer a better title than he himself has to a negotiable instrument unless it be actually transferred by indorsement; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 7 L.R.A. 595, 16 Am. St. Rep. 765, 23 N. E. 180, holding the purchaser of a draft or check, who obtains title without an indorsement by the payee, holds it subject to defenses existing between the original parties; Miller v. Tharel, 75 N. C. 148, holding that note payable to bearer and assigned under verbal contract by holder, does not carry better title to note than that vested in person making assignment; Bresee v. Crumpton, 121 N. C. 122, 28 S. E. 351, holding the holder of a note taken before maturity, for value and without notice, to hold it free from equitable defenses of maker, must be an endorsee; Harvey v. Bank of Hamilton, Cameron (Can.) 129, holding the instrument must be transferred by indorsement to give the transferees a better title than the original payees.

Cited in note in 17 L.R.A.(N.S.) 1112, on transferee, without indorsement, of bill or note payable or indorsed "to order," as bona fide purchaser.

Anomalous and unusual transfers of bills or notes.

Cited in First Nat. Bank v. Henry, 156 Ind. 1, 58 N. E. 1057, holding where note is not negotiated in due course of trade the equities are not cut off; Standard Bank v. Stephens, 16 Ont. L. Rep. 115, holding an unauthorized endorsement cannot be said to negotiate a note prior to the ratification of such unauthorized endorsement.

Notice pending legal transfer of bill or note.

Cited in Sturges v. Metropolitan Nat. Bank, 49 Ill. 220, holding a party who at time of transfer of bill had notice of fraud is affected by equities existing between original parties.

Transfers by improper or irregular endorsements.

Cited in Todd v. Liverpool & L. & G. Ins. Co. 20 U. C. C. P. 523 (dissenting opinion), on effect to be given warehouse receipts not properly signed.

Protection afforded bona fide purchaser.

Cited in Cross v. Currie, 5 Ont. App. Rep. 31, holding an accommodation endorser liable to one taking the note from the payee, free from defenses existing between maker and payee.

Cited in 2 Morse Banks, 4th ed. 878, on fraudulently failing to pay check

signed in blank as a forgery on rights of bona fide holder of fraudulently filled in check signed in blank.

— Innocent buyer or indorsee from seller or indorser affected by equities.

Cited in Schloss v. Feltus, 103 Mich. 525, 36 L.R.A. 161, 61 N. W. 797, holding a bona fide purchase of goods in payment of a pre-existing debt will not defeat rights of original vendors of goods who set up fraud in purchase from them; Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147, holding where a vendor has nothing to transfer, nothing can be received by the transfer; Austin v. Bunyard, 6 Best & S. 687, 34 L. J. Q. B. N. S. 217, 11 Jur. N. S. 874, 12 L. T. N. S. 452, 13 Week. Rep. 773, holding the innocent endorsee of a post-dated check is entitled to recover on it from the maker.

Cited in 1 Morse Banks, 4th ed. 672, on holder of check being affected by equities and infirmities.

Protection afforded by an endorsement after maturity.

Cited in Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70, holding a note endorsed after maturity by a payee in whose hands it was invalid, and who parted with it before it became due, is in the hands of the endorsee, subject to all defenses existing against the endorser; Pavey v. Stauffer, 45 La. Ann. 353, 19 L.R.A. 716, 12 So. 512, holding a subsequent endorsement, after maturity or notice of the existence of offsets of the maker against the payee, transfers the equitable title subject to equitable defenses.

Manner of determining liability of an instrument to a stamp duty.

Cited in United States v. Isham, 17 Wall. 496, 21 L. ed. 728, 6 Legal Gaz. 145, holding the liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument; Bull v. O'Sullivan, L. R. 6 Q. B. 209, 40 L. J. Q. B. N. S. 141, 24 L. T. N. S. 130; Gatty v. Fry, L. R. 2 Exch. Div. 265, 25 Week. Rep. 305, 46 L. J. Exch. N. S. 605, 36 L. T. N. S. 182,—holding the instrument is to be looked to itself to determine whether the stamp is sufficient.

Pre-existing debt as consideration.

Cited in Schloss v. Feltus, 103 Mich. 525, 36 L.R.A. 161, 61 N. W. 797, holding that naked pre-existing debt is not such consideration or payment for transfer of stock of goods as will defeat replevin by original vendor on ground of fraud in purchase from him; Currie v. Misa, L. R. 10 Exch. 153, 44 L. J. Exch. N. S. 94, 23 Week. Rep. 450, 4 Eng. Rul. Cas. 317, on the availability of a pre-existing debt as a consideration for a note payable after date.

Negotiable instruments.

Cited in note in 5 Eng. Rul. Cas. 220, on negotiability of bonds.

Right of owner only to sell property.

Cited in Benjamin Sales, 5th ed. 10, on right of owner only to sell property.

Construction of statutes.

Cited in 2 Sutherland, Stat. Const. 2d ed. 914, on consideration given to effects and consequences in construing statute.

4 E. R. C. 338, HARROP v. FISHER, 10 C. B. N. S. 196, 7 Jur. N. S. 1058, 30 L. J. C. P. N. S. 283, 9 Week. Rep. 668.

Effect of an indorsement after notice of equities.

Cited in Osgood v. Artt, 17 Fed. 575, holding indorsement after notice of payor's defense does not destroy the equities of payor against the payee though the instrument is purchased without notice.

Rights of transferee of note without indorsement.

Cited in Bingham v. Goshen Nat. Bank, 118 N. Y. 349, 7 L.R.A. 595, 23 N. E. 180, holding that purchaser of check, made payable to drawer's own order, certification of which was procured by fraud, who by mistake takes it without payee's indorsement, holds it subject to all defenses which bank would have against it in payee's hands; Velie v. Hemstreet, 2 Sask. L. R. 296, holding that bill payable to person or his order must be transferred by indorsement in order that transferee may sue at law.

4 E. R. C. 344, EDIE v. EAST INDIA CO. 1 W. Bl. 295, 2 Burr. 1216.

Restrictive indorsement of bill or note.

Cited in Mott v. Hicks, 1 Cow. 513, 13 Am. Dec. 550, holding an endorser may make a restrictive indorsement.

— Effect of.

Cited in Turnipseed v. Fitzpatrick, 77 Ala. 297, holding an indorsement for collection showing credit was for the remitting bank, does not change the ownership of the instrument.

Cited in 2 Morse, Banks, 4th ed. 1000, on effect of appending words "for collection" to endorsement; Stearns, Suretyship, 196, on effect of special indorsement of negotiable instrument.

Words constituting restrictive indorsement.

Cited in Haskell v. Avery, 181 Mass. 106, 92 Am. St. Rep. 401, 63 N. E. 15, holding fact that the words, "or order" were not added to the indorsement for deposit did not, of itself, limit power of bank to indorse for collection; Bruce v. Westcott, 3 Barb. 374, on the effect of addition of words, "or order" to an endorsement; Blairne v. Bourne, 11 R. I. 119, 23 Am. Rep. 429, holding a bill indorsed, "pay J. C. or order on account of B. G. & S." and indorsed by J. C. shows that no consideration had been paid for it and that the bill was held in trust; Hodges v. Adams, 19 Vt. 74, 46 Am. Dec. 181, holding an indorsement of a note by payee to "pay contents of the within note to W. P. Briggs" is in effect the same as though the words "or order" were inserted; Lee v. Chillicothe Branch Bank, 1 Bond, 387, Fed. Cas. No. 8,186, holding a bill indorsed by the words "credit my account, Jos. B. Scott, cashier," is restrictive in character; Lee v. Chillicothe Branch Bank, 1 Biss. 325, Fed. Cas. No. 8,187, holding that indorsement of bill of exchange "credit my account" is restrictive, and puts end to negotiability; Halbert v. Ellwood, 1 Kan. App. 95, 41 Pac. 67, holding bearer paper does not lose its negotiability by payee's indorsement to a third party without the words, "or order" nor by a blank indorsement by such third party; Johnson v. Mitchell, 50 Tex. 212, 32 Am. Rep. 602, on the effect of transfer of a note made to pass by delivery but indorsed in full; Sigourney v. Lloyd, 4 E. R. C. 355, 8 Barn. & C. 622-634, 3 Mann. & R. 58, holding an indorsement to one for indorser's use was restrictive to that use.

Transferability of bill or note.

Cited in Gerard v. La Coste, 1 Dall. 194, 1 L. ed. 96, 1 Am. Dec. 236, holding if the bill was not originally payable to order it was not assignable at all; Leavitt v. Putnam, 1 Sandf. 199, holding that note indorsed before it became due to indorsee by name, without adding words "or order," is negotiable.

Cited in note in 4 E. R. C. 363, on negotiability of bill or note after indorsement of a designated person.

Rights of successive indorsees of bill or note.

Cited in Eagle Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37, holding as against

the maker the same action is maintainable by the indorsee, whether immediate or remote.

Right of indorsee to overwrite blank indorsement.

Cited in Evans v. Gee, 11 Pet. 80, 9 L. ed. 639, holding the bona fide holder of a bill may write over a blank indorsement the name of one to whom it shall be paid at any time before or after suit is brought against the indorser; Crozer v Chambers, 20 N. J. L. 256, holding the signature of payee on back of note is an assignment to holder who is authorized to over-write the usual words of assignment.

Possession as evidence of ownership of bill or note.

Cited in Gorgerat v. M'Carty, 2 Dall. 144, 1 L. ed. 324, 1 Yeates, 94, 1 Am Dec. 270, holding possession of a bill and protest is not sufficient as proof of payment in suit by payee against an acceptor; Talbot v. Bank of Rochester, 1 Hill, 295, holding the owner of a stolen certificate of deposit endorsed and lost in the mail may recover from holder independent of any defense against the wrongful taker.

Effect of indorsement after maturity.

Cited in Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322, holding an indorsement after maturity ought to be regarded as negotiable to the same extent as an endorsement before maturity.

Consideration presumable from indorsement.

Cited in Fawsett v. National L. Ins. Co. 5 Ill. App. 272, holding where indorsement by payee shows an intention to pass all interest it imports a consideration and title passes, carrying with it the negotiable qualities of the instrument.

Distinguished in Hook v. Pratt, 78 N. Y. 371, 34 Am. Rep. 539, holding an indorsement to one person so as to divest of all beneficial interest therein is presumed to be for a consideration.

Power of corporations to accept bills of exchange.

Cited in Berton v. Central Bank, 10 N. B. 493, holding an incorporated banking company has power to accept bills of exchange as an incident to transaction of business; Bank of Upper Canada v. Widmer, 2 U. C. Q. B. (O. S.) 275, on power of corporations to affect bills of exchange.

Customs obnoxious to law.

Cited in Foley v. Mason, 6 Md. 37, holding it is never admissible to make the legal rights or liabilities of the parties other than they are by the common law; Dickinson v. Gay, 7 Allen, 29, 83 Am. Dec. 656, holding evidence of usage inadmissible as between merchant and manufacturer to show that no implied warranty exists against latent defects in goods sold by sample; Barry v. Morse, 3 N. H. 132, holding where legal effect of an instrument, or of a term used in it, has been settled, no evidence of usage can be admitted; Commercial Bank v. Varnum, 3 Lans. 84, on admissibility of usage to overturn a rule of law; Hone v. Mutual Safety Ins. Co. 1 Sandf. 137; Hardy v. Fairbanks, 2 N. S. 432; Cox v. O'Riley, 4 Ind. 368, 58 Am. Dec. 633,—holding evidence of a usage repugnant to established rules of law inadmissible; United States v. Reindeer, Fed. Cas. No. 16,145, holding usage must be known and acted on publicly by both parties in order to give efficiency to it without a strict conformity to the statute; Goodwin v. Robarts, L. R. 10 Exch. 337, 44 L. J. Exch. N. S. 157, holding evidence of new usage cannot be admitted against one which has become settled and adopted by the common law.

— Customs and Law Merchant.

Cited in Jackson v. New York & C. R. Co. 48 Me. 147, holding proof of custom as to negotiability of coupon bonds inadmissible, the questions of negotiability being one of law, to be determined by the paper itself; Frith v. Barker, 2 Johns. 327, holding evidence of custom or usage ought never be received to contradict a settled rule of commercial law; Hearn v. New England Mut. M. Ins. Co. 3 Cliff. 318, Fed. Cas. No. 6,301, holding evidence of general usage as to a commercial contract is never admissible to contradict settled rules of law.

Distinguished in Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q. B. 658, 67 L. J. Q. B. N. S. 986, 79 L. T. N. S. 270, 14 Times L. R. 587, 3 Com. Cas. 285, holding fact that an established general custom did not form part of what is called "the ancient law merchant" is no sufficient ground for not giving it effect.

Disapproved in Bowen v. Newell, 2 Duer. 584, holding usage of all banks of state in not allowing days of grace upon checks on time governs laws of state on allowance of grace on such checks.

Law Merchant as common law.

Cited in Dunlop v. Silver, 1 Cranch, App. 367, on commercial principles as part of the common law.

Right to show usage and custom in commercial matters.

Cited in Allen v. Merchants' Bank, 15 Wend. 482, holding evidence of the usage and custom of merchants is admissible on questions of commercial law whenever that law is silent or doubtful on the question; Meyers v. York & C. R. Co. 43 Me. 232, holding it the province of the court to decied on negotiability, unless in new cases where the law merchant is doubtful, where evidence of custom is admissible.

Cited in 1 Bolles, Banking, 51, on modifications of banking law by usage.

Effect of special usage.

Cited in Stewart v. Sculder, 24 N. J. L. 96, holding general customs are clearly to be distinguished from particular usages of trade, which must be established in each case by evidence; Bank of Alexandria v. De Neale, 2 Cranch, C. C. 488, Fed. Cas. No. 846, holding special usage of bank in discounting is not binding upon party to note discounted unless upon agreement; Crouch v. Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. N. S. 183, 29 L. T. N. S. 259, 21 Week. Rep. 946, 10 Eng. Rul. Cas. 394, holding incidents of the instrument annexed by the ancient law merchant cannot be taken away by any modern usage.

Distinguished in Thomas v. O'Hara, 1 Mill, Const. 303, holding a special usage of trade may be proved; Gibson v. Brown, 17 Wend. 305, holding a usage of leaving goods at usual stopping places in towns to which goods are consigned, without notice, may be shown by carrier where such usage is uniform and notorious.

Evidence necessary to establish custom.

Cited in Touro v. Cassin, 1 Mott. & M'C. 173, 9 Am. Dec. 680, holding the evidence must be clear, certain and conclusive to establish a particular custom: Farnsworth v. Chase, 19 N. H. 534, 51 Am. Dec. 206, holding the usage must be proved as a fact, and like any other fact; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Grand Bank v. Blanchard, 23 Pick. 305,—holding a custom definitely settled by judicial decisions, is taken notice of by the courts and need not be proved as fact in each case.

Duty of courts to propound an established custom as law.

Cited in Branch v. Burnley, 1 Call (Va.) 147, holding custom judicially

noticeable from time it is proved and decision is based thereon; Crump v. Trytitle, 5 Leigh, 251, holding a uniform and invariable usage which has become known and established as a rule in all transactions with our banking institutions should be propounded as law by our courts; Cookendorfer v. Preston, 4 How. 317, 11 L. ed. 992, holding where a usage is sanctioned by judicial decisions no further proof is necessary to establish it; State v. Hodge, 50 N. H. 510, 4 Legal Gaz. 310, on taking notice judicially of rules of fact recognized as part of law merchant.

Necessity of re-trial of entire case to correct error.

Cited in Tracy v. Cloyd, 10 W. Va. 19, holding where declaration was in tort and defendants pleaded jointly, the court properly set aside verdict of jury as to both defendants and granted a new trial,—nothing being found against one defendant; Clark v. New York, N. H. & H. R. Co. 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356, holding that under statute relating to new trials superior court had jurisdiction to grant new trial upon part of issues.

Disapproved in Lisbon v. Lyman, 49 N. H. 553, holding in case of new trial of jury case only such part of case need be retried as is necessary to correct the error.

New trial on ground of surprise.

Cited in Ditto v. Com. 2 Bibb, 17, holding a new trial on ground of surprise will not be allowed where the evidence to be let in was in possession of party before the trial.

Payment of costs as condition of new trial.

Cited in Boyden v. Moore, 5 Mass. 365, granting a new trial upon return to defendant of costs brought into court.

Necessity of delivery to transfer title.

Cited in note in 36 L. ed. U. S. 181, on necessity and sufficiency of delivery to transfer title.

4 E. R. C. 353, SIGOURNEY v. LLOYD, 8 Barn. & C. 622, 7 L. J. K. B. 73, 3 Mann. & R. 58, 728; 32 Revised Rep. 504, affirmed in 4 E. R. C. 361.

Effect of restrictive indorsements.

Cited in Ditch v. Western Nat. Bank, 79 Md. 192, 23 L.R.A. 164, 47 Am. St. Rep. 375, 29 Atl. 138 (dissenting opinion), on the character of an endorsement to be restrictive; Cleal v. Elliott, 1 U. C. C. P. 252, holding a note cannot in law be endorsed for part, so as to make two distinct holders in separate interests; Lawrence v. Fussell, 77 Pa. 460, 32 Phila. Leg. Int. 219, 7 Legal Gaz. 199, 1 W. N. C. 464, holding where the instrument is specially endorsed its negotiability is at an end; Sims v. Wilkins, 5 Smedes & M. 234, on the effect to be given a restrictive endorsement.

Cited in notes in 64 L.R.A. 590, as to who is real party in interest within statutes defining parties by whom action must be brought; 5 Eng. Rul. Cas. 220, effect of special indorsement on negotiability of bonds.

Cited in Joyce, Defences Com. Pap. 451, on conditional or restricted endorsement as notice of condition.

Effect on negotiability of an indorsement for collection.

Cited in Freeman's Nat. Bank v. National Tube Works Co. 151 Mass. 413, 8 L.R.A. 42, 21 Am. St. Rep. 461, 24 N. E. 779; City Bank v. Weiss, 67 Tex. 331, 60 Am. Rep. 29, 3 S. W. 299,—holding a bank which has received a draft from its correspondent for collection cannot withhold the money from the owner;

Rock County Nat. Bank v. Hollister, 21 Minn. 385; Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429,—holding where the endorsement shows it was held for collection the trust follows it; National City Bank v. Westcott, 118 N. Y. 468, 16 Am. St. Rep. 771, 23 N. E. 900, holding the endorsement for collection rendered the instrument non-negotiable; Corn Exch. Bank v. Farmers' Nat. Bank, 118 N. Y. 443, 7 L.R.A. 559, 23 N. E. 923 (dissenting opinion), on effect to be given an endorsement for collection.

— Of an indorsement for the use of another.

Cited in Munro v. Cox, 30 U. C. Q. B. 363, holding a note payable to a certain person, or his order "for my use," is negotiable and the endorsee is entitled to sue in his own name; McDonald v. Smaill, 25 N. S. 440, on the assignability of an instrument payable to one or order, for use of another; Marine Bank v. Vail, 6 Bosw. 421, holding an endorsement, "Pay.... for the account of the Atlas Ins. Co., Geo. Tracy, sec.," does not terminate the negotiability.

Distinguished in Fawsett v. National L. Ins. Co. 5 Ill. App. 272, holding an endorsement to one person by payee for the benefit of another passes all interest and imports a consideration.

4 E. R. C. 361, LLOYD v. SIGOURNEY, 5 Bing. 525, 3 Moore & P. 229, 3 Younge & J. 220, Dawson & Lloyd 213, 32 Rev. Rep. 510, affirming 4 E. R. C. 353.

Effect to be given an indorsement for collection.

Cited in Rock County Nat. Bank v. Hollister, 21 Minn. 385, holding an indorsement for collection and signed by payee, makes the indorsee agent to collect only; Mechanics' Bank v. Valley Packing Co. 4 Mo. App. 200, holding an indorsement for collection on account of the payee expresses on its face a trust; Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429, holding an indorsement for collection notice to subsequent holders of the trust created by the indorsement; City Bank v. Weiss, 67 Tex. 331, 60 Am. Rep. 29, 3 S. W. 299, holding a bank receiving from its correspondent a draft indorsed for collection cannot withhold the money from the owner.

Cited in Tiffany Ag. 198, on indorsement for collection as notice of limitations upon authority of agent.

— Indorsement for the use of another.

Cited in Haskell v. Avery, 181 Mass. 106, 92 Am. St. Rep. 401, 63 N. E. 15, holding an indorsement, "For deposit—to my credit" and signed is restrictive so that one discounting it cannot retain the proceeds from holder; Lee v. Chillicothe State Bank, 1 Biss. 325, Fed. Cas. No. 8,187, holding an indorsement "credit it my account" terminates the negotiability of a bill; Marine Bank v. Vail, 6 Bosw. 421, holding an indorsement "Pay to.... for the account of Atlas Ins. Co., Geo. Tracy, Sec." does not terminate the negotiability.

Effect of special indorsement.

Cited in Hook v. Pratt, 78 N. Y. 371, 34 Am. Rep. 539, holding that restrictive indorsements which are held to negative presumption of consideration, are such as indicate that they are not intended to pass title; Smith v. Hall, 5 Bosw. 319, holding that note payable to order of corporation and indorsed to plaintiff as security for debt, by words "Pay————for account of corporation" may be sued upon by indorsee; Lawrence v. Fussell, 77 Pa. 460, 32 Phila. Leg. Int. 219, 7 Legal Gaz. 199, 1 W. N. C. 401, holding where note is specially indorsed its negotiability ends and only the special indorsee can sue upon it; Cleal v. Elliott, 1 U. C. C. P. 252, holding a note cannot be indorsed in part, so as to make two distinct holders in separate interests.

Cited in notes in 64 L.R.A. 590, as to who is real party in interest within statutes defining parties by whom action must be brought; 5 Eng. Rul. Cas. 220, on negotiability of bonds.

Cited in Hollingsworth Contr. 355, on special indorsement as notice; Stearns Suretyship, 198, on effect of conditional and restrictive indorsements.

4 E. R. C. 361, ATTWOOD v. MUNNINGS, 7 Barn. & C. 278, 6 L. J. K. B. 9, 1 Mann. & R. 66, 31 Revised Rep. 194

Duty to take notice of limitation on power of agent.

Cited in Johnston v. Wright, 6 Cal. 373, holding a power of attorney to settle and adjust partnership debts followed by general powers does not give power to release a covenant of guaranty where debt guaranteed is not a partnership debt; United States Equitable Life Assur. Soc. v. Poe, 53 Md. 28; Mussey v. Beecher, 57 Mass. 511; Murdock v. Mills, 11 Met. 5,—holding one dealing with a special agent must inquire as to the nature and extent of his agency; McClure v. Mississippi Valley Ins. Co. 4 Mo. App. 148, holding where pretended authority of attorney is derived from partnership articles, the signature of attorney which does not contain firm name should put party dealing with attorney on his guard; Mechanics' Bank v. Schaumburg, 38 Mo. 228, holding where an express authority in writing is given another and different authority cannot be implied; Bowles v. Rice, 107 Va. 51, 57 S. E. 575, holding the powers of an agent acting under written authority must be observed and the limitations noticed by parties dealing with him; LeRoy v. Beard, 8 How. 451, 12 L. ed. 1151, holding the person who deals with the agent is required to look to the instrument to see the extent of the power; Danby v. Coutts & Co. L. R. 29 Ch. Div. 500, 54 L. J. Ch. N. S. 577, 52 L. T. N. S. 401, 33 Week. Rep. 559, 14 Eng. Rul. Cas. 769, on duty of one dealing with an attorney under a special power.

Cited in note in 29 L.R.A.(N.S.) 355, on circumstances sufficient to put purchaser of negotiable paper on inquiry.

Cited in Tiffany Ag. 198, on notice of limitations upon authority of agent.

Distinguished in Farmers' & M. Bank v. Butchers' & D. Bank, 14 N. Y. 623; Farmers' & M. Bank v. Butchers' & D. Bank, 16 N. Y. 125, 69 Am. Dec. 678,—holding one is not chargeable, without proof, with a knowledge of extrinsic facts, after inquiring into the terms of the power, so far as can be done by comparison, and ascertaining that the act of the agent is within the power: North River Bank v. Aymar, 3 Hill, 262, holding where acts of the attorney come within the words of the power persons dealing in good faith with the attorney are not bound to look behind the power.

— As to signing commercial paper.

Cited in Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 N. E. 341, holding the letters "p. p. a. after agents name, if found to mean, "per power attorney" were notice to look for authority to so sign and call for production of the power: Nixon v. Palmer, 8 N. Y. 398, holding the fact that the bill, on its face, was accepted by one person, for another, was notice that such person professed to act under an authority; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, holding if instrument, on its face, shows it was made by one man for another, it warns the taker to inquire, if the assumed agent be authorized: Sumner v. Macy, 3 Woodb. & M. 105, Fed. Cas. No. 13,609, holding the authority of one who signs notes for large and unusual amount as agent should be inquired into; Gore Bank v. Crooks, 26 U. C. Q. B. 251, holding where indorsement of notes purport to be

made by an agent party taking them, should require the production of the authority.

Cited in note in 4 E. R. C. 369, on notice of limited authority of agent signing bill or note.

Distinguished in Exchange Bank v. Monteath, 17 Barb. 171, holding fact that bill purports on its face to have been drawn by procuration does not render it chargeable with attorney's want of authority, in order to be a bona fide holder.

Extent of agent's powers.

Cited in Hockworth v. Hastings Industrial Co. 146 Ky. 387, 142 S. W. 681, holding that powers of attorney receive strict interpretation, and authority thereby given is never extended by intendment, or construction beyond that given in terms, or is absolutely necessary to carry out instructions; Stainback v. Read, 11 Gratt. 281, 62 Am. Dec. 648, holding where power to agent is to act in the name and on behalf of principal only, this gives authority to act in the separate individual business of principal only; Ferreira v. Depew, 17 How. Pr. 418, holding authority given to one partner living abroad "to transact all business of whatsoever nature whether relative to firm or individual property" does not authorize an assignment of individual property for payment of debts; Chamberlin v. Darragh, Walk. Ch. (Mich.) 149, holding the special agent to contract for the sale of land cannot bind his principal when he exceeds his authority; Hammond v. Michigan State Bank, Walk. Ch. (Mich.) 214, holding the authority of the attorney can never be extended beyond that given in terms or necessary to carry power into effect; Hill v. Hambly, 12 B. C. 253, holding the powers of attorney must be construed strictly; Anderson v. Allen, 25 N. S. 22 (dissenting opinion), on construction of authority of an attorney to act; La Banque du Peuple v. Bryant, 17 Quebec L. R. 103, holding power of attorney subject to strict construction whether written or implied from facts.

Cited in Tiffany Ag. 168, 169, 171, on ambiguous authority contained in power of attorney.

In matters affecting commercial paper.

Cited in Wallace v. Branch Bank, 1 Ala. 565, holding a power to "draw and indorse notes in my name" does not authorize the indorsement of a note for mere accommodation of a third party; Valk v. Gaillard, 4 Strobh. L. 99, holding an authority to indorse does not authorize the agent to receive notice of dishonor; Bank of Nova Scotia v. Cushing, 21 N. B. 498, holding the manager of a bank with limited power to issue a bill properly stamped does not bind the bank by a bill in excess of his authority not properly stamped.

Cited in Joyce Defences Com. Pap. 94, on violation of instructions by agent to make or indorse commercial paper.

Distinguished in Re Land Credit Co. L. R. 4 Ch. 460, 39 L. J. Ch. N. S. 27, 20 L. T. N. S. 641, 17 Week. Rep. 689, holding a bona fide holder of bills accepted by the chairman of a trading company whose business was to accept bills, may recover on same though the necessary securities were not deposited.

Effect to be given general words where power of attorney is for particular purpose.

Cited with special approval in Lewis v. Ramsdale, 55 L. T. N. S. 179, 35 Week. Rep. 8, holding power to sell and convert into money was limited to special purposes of the agency.

Cited in Rountree v. Denson, 59 Wis. 522, 18 N. W. 518, holding general words following a power of attorney given for a particular purpose merely give general powers for carrying out the particular purpose; Berry v. Harnage, 39 Tex. 638,

holding a power of attorney to collect debts, followed by general words giving power to execute conveyances in furtherance of such purpose, is insufficient to authorize the selling of real estate; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150, holding general words only give general powers to carry into effect the special purposes for which the power was given; Whiting v. Western Stage Co. 20 Iowa, 554, holding when power is given to do some things with regard to negotiable paper, it cannot be enlarged by construction to do other similar things; Hudson v. Whiting, 17 Cem. 487; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721,—holding general terms are restricted and do not extend beyond the special powers expressly delegated; O'Regan v. Quebec & G. P. S. S. Co. 19 N. R. 528, holding where the authority of an act is based on a special authority conferred, the attorney cannot bind beyond the extent of authority conferred; St. John v. Lockwood, 4 N. B. 443, holding an attorney is not authorized to accept and execute a lease containing burdensome covenants under a power, "to make and execute notes, contracts, etc." Churchill v. McKay, 20 Can. S. C. 472, holding power to settle and adjust claims for salvage services, does not authorize the receipt of salvage money by the attorney; Scarborough v. Reynolds, 12 Ala. 252, holding authority, in the management of a plantation, to demand and sue for money due, gives no power to agent to execute a note in name of principal; Jacobs v. Morris [1901] 1 Ch. 261, 70 L. J. Ch. N. S. 183, 84 L. T. N. S. 112, 49 Week. Rep. 365, holding a power of attorney to purchase goods in connection with business, either for cash or on credit, does not confer a general power to borrow money.

Distinguished in Muth v. Goddard, 28 Mont. 237, 98 Am. St. Rep. 553, 72 Pac. 621, holding where the power of attorney is sufficient in form to warrant the execution of it, the attorney may execute a trust deed conveying the principal's property to secure a partnership debt of which the principal is a member; Wicks v. Hatch, 62 N. Y. 535, holding where the power given authorized the substitution of another in agent's place such substitute had same power as the attorney himself.

Trusts implied from action taken in another's name.

Cited in Taylor v. Wallbridge, 2 Can. S. C. 616, holding land bought in the name of another by one who pays the consideration is generally held to be held in trust for one paying the consideration.

4 E. R. C. 371, AMORY v. MERYWEATHER, 2 Barn. & C. 573, 4 D. & R. 86.

Illegality as defense to note in hands of indorsee.

Cited in Mills v. Rice, 6 Gray, 458, holding that notes made to bank in payment of notes discounted by bank for maker of these notes, in violation of statute, cannot be enforced by bank; Western Bank v. Mills, 7 Cush. 539, holding there can be no recovery on renewal notes given in place of notes illegally discounted; Saltmarsh v. Tuthill, 13 Ala. 390, holding the bona fide indorsee of negotiable paper, founded on a Sunday contract void by statute, may enforce it where taken before maturity, for value and without notice; Embrey v. Jemison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 796, holding notes, having no other consideration than money advanced upon a wagering contract made void by law, have no validity.

Cited in 2 Beach Contr. 1929, on validity of notes given for stock gambling consideration.

Failure of consideration as defense to note.

Cited in Coleman v. Dunlap, 7 N. S. 216, holding where negligence of judg-

ment creditors resulted in loss of remedy against sheriff who caused a loss to the debtor, the debtor may depend on this ground in an action on notes given.

Right of indorsee with notice of illegality.

Cited in Daggett v. Whiting, 35 Conn. 366, holding one receiving checks knowing they were for the accommodation of the transferer and without consideration, and who agrees to look to the one alone he takes from, cannot recover from the maker of the checks.

Rights under illegal bonds.

Cited in Tuskaloosa v. Lacy, 3 Ala. 618, holding there can be no recovery on an official bond conditioned upon the performance of duties in violation of the statute.

4 E. R. C. 375, RE OVEREND, G. & CO. L. R. 6 Eq. 344, 18 L. T. N. S. 230, 16 Week. Rep. 560.

Rights of purchaser of bill or note after maturity.

Cited in Gardner v. Beacon Trust Co. 190 Mass. 27, 2 L.R.A.(N.S.) 767, 112 Am. St. Rep. 303, 76 N. E. 405, 5 Ann. Cas. 581, holding if there are no equities attached to the note the purchaser gets as good title after as before maturity, and it makes no difference that the note is dishonored; Cowan v. Doolittle, 46 U. C. Q. B. 398, holding a recovery may be had by one holding accommodation notes which he got after they were due from the bank which took them before due and gave value for them; Harris v. Greene, 25 N. B. 451, holding that right of assignee of note to enforce same can only be defeated by some superior equity attaching to note itself; MacArthur v. Mac Dowall, 1 Terr. L. Rep. 345, holding, in the absence of any agreement to the contrary, there is no reason for limiting the negotiation of an accommodation note to the period of its currency; MacArthur v. Mac Dowell, 23 Can. S. C. 571, on equities existing where accommodation note is negotiated after due.

Cited in notes in 23 L.R.A. 527, on set off against assignee of commercial paper of claim against assignor; 46 L.R.A. 787, 790, 791, on rights of transferee after maturity of negotiable paper; 4 E. R. C. 397, on title of transferee of overdue note or bill.

Cited in Joyce Defenses Com. Pap. 356, on rights of bona fide holder of accommodation paper taken after maturity.

— After dishonor.

Cited in Young v. MacNider, 25 Can. S. C. 272 (dissenting opinion), on the nature of the right of a transferee of a bill after dishonor; Ex parte Oriental Commercial Bank, L. R. 5 Ch. 358, 39 L. J. Ch. N. S. 588, 22 L. T. N. S. 422, 18 Week. Rep. 474, on notice from fact of bill being overdue.

Cited in note in 4 Eng. Rul. Cas. 664, on rights of person paying bill supra protest for honor.

— Defenses arising subsequent to negotiation.

Cited in Ching v. Jeffery, 12 Ont. App. Rep. 433, holding dealings may occur in relation to note after it has been put in circulation, wholly independent of the original consideration which may limit its negotiable quality after its maturity.

Overruled cases cited as authority.

Cited in Patterson v. McGregor, 28 U. C. Q. B. 280, on text books continuing to cite overruled cases as authority.

Liability of acceptor of bill.

Cited in note in 4 E. R. C. 564, on discharge of accommodation acceptor by receiving value from drawer in satisfaction of bill.

To or from whom consideration must move.

Cited in 1 Page Cont. 109, on persons to whom or from whom consideration for contract must move.

4 E. R. C. 399, BROOKS v. MITCHELL, 11 L. J. Exch. N. S. 51, 9 Mees. & W. 15.

Time at which demand paper is considered payable.

Cited in Morgan v. United States, 113 U. S. 476, 28 L. ed. 1044, 5 Sup. Ct. Rep. 588, holding that negotiable paper payable on demand is not due without demand until after lapse of reasonable time within which to make demand; Williams v. Nicholson, 25 Ga. 560, on note payable on demand as always overdue; Leonard v. Olson, 99 Iowa, 102, 36 L.R.A. 281, 61 Am. St. Rep. 220, 68 N. W. 677, holding that demand must be made of maker of demand note within reasonable time in order to hold indorser; Merritt v. Todd, 23 N. Y. 28, 80 Am. Dec. 213, holding that holder of demand note is not chargeable in favor of indorser with neglect for omitting to make demand within any particular time; Payne v. Gardiner, 29 N. Y. 146 (dissenting opinion), on demand note as continuing security as against endorser; Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461, 2 Legal Gaz. 286, holding that demand note, with interest, transferred three months after date, is subject, where parties have places of business in same street, in hands of transferee, to any defense existing in behalf of maker against payee previous to transfer; Wright v. Lenhart, 4 Phila. 54, 17 Phila. Leg. Int. 125, holding that note payable with interest on demand is not to be considered as over due, without some evidence of demand and refusal of payment; Arents v. Com. 18 Gratt. 750 (dissenting opinion), on demand notes as continuing security; Northern Crown Bank v. International Electric Co. 24 Ont. L. Rep. 57, holding that demand note is intended as continuing security and no inference against its validity arises merely by delay in demanding payment; Thorne v. Scovil, 4 N. B. 537, holding a note payable with interest on demand is in its nature a continuing security; Elliott v. Beech, 3 Manitoba L. R. 213, holding a note payable on a specified date with the proviso that upon the happening of a contingency it shall be payable on demand is a good promissory note; Merchants' Bank v. Whitfield, 2 Derion, Q. B. 157, holding demand note given to secure over drafts was continuing security.

Cited in note in 4 E. R. C. 405, on right to treat demand note as overdue.

Modified in Carll v. Brown, 2 Mich. 401, holding that note payable on demand, unless indorsed within reasonable time, will be considered overdue.

Disapproved in Tomlinson Carriage Co. v. Kinsella, 31 Conn. 268, holding paper payable on demand is usually held to be payable in a reasonable time in this country.

Necessity of demand upon default in interest payment to hold endorser.

Cited in Morton v. New Orleans & S. R. Co. 79 Ala. 590, holding that negotiable bonds not due, with attached coupons past due and unpaid, do not thereby appear dishonored on their face; National Bank v. Kirby, 108 Mass. 497, holding that holder of note payable in four years with interest payable annually, loses no rights against parties because of failure to collect interest when due; First Nat. Bank v. Forsyth, 67 Minn. 257, 64 Am. St. Rep. 415, 69 N. W. 909, holding that overdue instalment of interest, known to indorsee,—dishonors nego-

tiable paper, and renders it subject to existing defenses between original parties: Commercial Bank v. Allen, 10 Manitoba L. Rep. 330, holding it not necessary that holder demand payment of principal upon default in payment of interest in order to hold indorser on the note.

Title of bona fide purchaser of negotiable paper.

Cited in 2 Dillon Mun. Corp. 5th ed. 1350, on title of bona fide purchaser of negotiable paper.

Rights of indorsee after maturity.

Cited in Hall v. Francis, 4 U. C. C. P. 210, on sufficiency of complaint upon note by indorsee after maturity.

4 E. R. C. 401, GLASSCOCK v. BALLS, 59 L. J. Q. B. N. S. 51, 62 L. T. N. S. 163, L. R. 24 Q. B. Div. 13, 38 Week. Rep. 155.

When demand note is overdue.

Cited in Northern Crown Bank v. International Electric Co. 22 Ont. L. Rep. 339, holding that demand note indorsed on day it bore date was not overdue when negotiated so as to affect indorsee with defects of title; Northern Crown Bank v. International Electric Co. 24 Ont. L. Rep. 57, holding that demand note is not to be treated as overdue merely because it bears date some time back.

Cited in note in 4 Eng. Rul. Cas. 405, on right to treat demand note as overdue.

Discharge of note by payment.

Cited in Glover v. Southern Loan & Sav. Co. 31 Ont. Rep. 552, holding that notes, security for payment of which constitutes lien on land, are not paid by application of money from sale of land by person not primarily liable at time when notes were not due.

Cited in Joyce Dolomite Cons. Pap. 851, on payment to original payee or intermediate party as a defense against a bona fide holder.

Release of note through agent.

Cited in MacArthur v. MacDonald, 1 Terr. L. Rep. 345, holding a release by pledgee and repledge to same after money transfers was legally accomplished without paper having left pledgee's hands, it being agent for the parties.

4 E. R. C. 409, BEILBUT v. NEVILL, 39 L. J. C. P. N. S. 245, L. R. 5 C. P. 477, 22 L. T. N. S. 662, 18 Week. Rep. 825, affirming the decision of the Court of Common Pleas, reported in 38 L. J. C. P. N. S. 273, L. R. 4 C. P. 354, 20 L. T. N. S. 490, 17 Week. Rep. 853.

Right of parties separately interested in note to sue.

The decision of the Court of Common Pleas was distinguished in Goldman v. Blum, 58 Tex. 630, holding an action may be maintained on the title held by any of the parties interested in a note transferred in part and in part reserved to the original payee.

Avoidance of previous transfer by act of bankruptcy.

Cited in Re Lane, 2 Low. Dec. 333, Fed. Cas. No. 8,044, on avoidance of a firm obligation creating a preference in a separate creditor.

The decision of the Court of Common Pleas was cited in Johns v. Barbour, 15 N. S. 43, holding a trust deed for general benefit of creditors, voidable as in contravention of the bankruptcy act, remains valid until impeached by the assignee.

— Status of assignee.

Cited in Bennett v. Gambee, L. R. 2 Exch. Div. 11, 46 L. J. Exch. N. S. 33, 35

L. T. N. S. 764, 25 Week. Rep. 81, holding an election not to continue an action and judgment taken against the debtors does not bar a later action under the authority of the bankrupt laws.

Rights of purchasers of firm notes.

Cited in Ross v. Chandler, 45 Can. S. C. 127, holding that bank cashing check of partner will be protected where it had no notice of intention of partner to misapply funds and nothing was shown that would put it upon inquiry.

Rights in property received from agent.

Cited in Cady v. South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906, holding that proceeds of sale of livestock sold by commission merchant deposited in bank cannot be used by bank to cover over-draft of commission merchant.

Cited in Keener Quasi Contr. 184, on right to recover from third person property received from agent.

4 E. R. C. 416, JONES v. GORDON, L. R. 2 App. Cas. 616, 47 L. J. Bankr. N. S. 1, 37 L. T. N. S. 477, 26 Week. Rep. 172, affirming the decision of the Court of Appeal, reported in L. R. 1 Ch. Div. 137, 47 L. J. Bankr. N. S. 1.

Suspicion as notice to holder of negotiable paper.

Cited in Arnd v. Aylesworth, 145 Iowa, 185, 29 L.R.A.(N.S.) 638, 123 N. W. 1000, holding that knowledge of suspicious circumstances, may be sufficient evidence of bad faith on part of purchaser of note procured from maker, by fraud, to take that question to jury; Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45, holding neither knowledge of suspicious circumstances nor doubts as to genuineness of title, nor gross negligence of taker, either singly or taken together will defeat holder's recovery, where they do not amount to proof of want of good faith; Detroit Nat. Bank v. Union Trust Co. 145 Mich. 656, 116 Am. St. Rep. 319, 108 N. W. 1092, holding notice of facts which would be sufficient to arouse the suspicion of an ordinary prudent man is not enough to preclude good faith in a purchase; Merchants' Nat. Bank v. Hanson, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849, holding the purchaser of notes with uncanceled indorsements to his indorsee for collection on account is chargeable with mala fides; National Bank v. Young, 41 N. J. Eq. 531, 7 Atl. 488, holding mere notice of facts, which would put a prudent person upon inquiry, is not sufficient to impeach the title of the holder of negotiable paper taken for value before maturity; Young v. MacNider, Rap. Jud. Quebec 4 C. S. 208, holding broker who took matured negotiables from a representative to secure his personal debt were not protected; Young v. MacNider, 25 Can. S. C. 272 (dissenting opinion), on duty of inquiring as to authority of agent to pledge paper; Marthinson v. Patterson, 20 Ont. Rep. 720, holding that one having notice of prior mortgage, when he took his own mortgage, was no reason for depriving him of status of subsequent mortgagee in good faith, under statute.

Citd in note in 4 Eng. Rul. Cas. 434, on notice of fraud in issuance of accommodation paper by insolvent persons.

Cited in Hollingsworth Contr. 352, on notice of fraud to bona fide of holder of negotiable instrument; 1 Thomas Neg. 2d ed. 182, on gross negligence as evidence of bad faith.

— Notice from inadequacy of price or excessiveness of discount.

Cited in Farber v. National Forge & Iron Co. 140 Ind. 54, 39 N. E. 249, holding the courts do not inquire into the adequacy of a bona fide consideration; Millard v. Barton, 13 R. I. 601, 43 Am. Rep. 51, holding one is not protected as a bona

fide holder where he purchased a note for a sum so much below its face value as to have made a reasonable man suspicious that something was wrong.

Cited in note in 29 L.R.A.(N.S.) 373, 380, on amount of discount as sufficient to put purchaser of negotiable paper on inquiry.

Cited in Joyce Defences Com. Pap. 214, on effect on bona fides of purchasing commercial paper at under-value.

The decision of the Court of Appeal was cited in Morton v. New Orleans & S. R. Co. 79 Ala. 590, holding one is not protected as a bona fide holder where he purchased a note for a sum so much below its face value as would have made a reasonable man suspicious that something was wrong.

— Burden of proof where evidence of fraud is shown.

Cited in Baxter v. Biladeau, 9 Quebec L. R. 268, on shifting of presumption when fraud in the note is proved; Tatam v. Haslar, L. R. 23 Q. B. Div. 345, 58 L. J. Q. B. N. S. 432, 38 Week. Rep. 109, holding where some evidence of fraud has been given the onus is upon holder to prove both that he gave value and that he had no notice of the fraud.

What constitutes good faith.

Cited in Benjamin Sales, 5th ed. 28, 924, on what constitutes good faith.

4 E. R. C. 436, SMITH v. UNION BANK, 45 L. J. Q. B. N. S. 119, 33 L. T. N. S. 557, L. R. 1 Q. B. Div. 31, 24 Week. Rep. 194, affirming the decision of the Court of Queen's Bench, reported in 44 L. J. Q. B. N. S. 117, L. R. 10 Q. B. 291.

Effect of direction on check to pay it through specified agency.

Cited in Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 32 L.R.A. 712, 54 Am. St. Rep. 753, 24 S. E. 524, holding that stipulation stamped on face of check that it will not be paid if presented through specified agency may be upheld to prevent any right of action on check by prohibited agency.

Cited in note in 30 L.R.A.(N.S.) 701, on effect of direction on check to pay same through specified agency.

Title to note purchased from thief.

Cited in Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959, holding that under statute, holder in due course of note payable to bearer can acquire good title to note from one who has stolen it.

Protection of banker paying check on forged indorsement.

Cited in note in 3 Eng. Rul. Cas. 758, on protection of banker paying crossed check on forged indorsement.

4 E. R. C. 440, NATIONAL BANK v. SILKE, 60 L. J. Q. B. N. S. 199, 63 L. T. N. S. 787, [1891] 1 Q. B. 435, 39 Week. Rep. 361.

Bona fide holders of bills or notes.

Cited in note in 4 E. R. C. 329, on who are bona fide holders of bills or notes.

4 E. R. C. 445, HEYLYN v. ADAMSON, 2 Burr. 669, 2 Ld. Kenyon, 379.

Sufficiency of notice of dishonor and protest.

Cited in Peter v. Beverly, 10 Pet. 572, 9 L. ed. 522, on the sufficiency of notice of protest and nonpayment.

— Failure to notify prior endorser or drawer.

Cited in Henry v. State Bank, 3 Ind. 216, holding an indorser of a note who had received due notice of nonpayment of, was not relieved from liability because of a failure to give a prior indorser such notice.

Necessity of notice of nonpayment being given indorser of bill or note.

Cited in Bank of Columbia v. French, 1 Cranch, C. C. 221, Fed. Cas. No. 867, holding an indorser for the accommodation of the maker of a note is not entitled to strict notice unless he has actually sustained damage by the want of notice.

Cited in 2 Bolles Banking, 608, on necessity of holder giving notice of nonpayment.

Liability of indorser of unpaid bill or note.

Cited in Foster v. Faulk, 41 Me. 429, holding the indorser of a check may be held liable thereon on proper notice after the drawee upon a legal demand has refused payment; Kirkpatrick v. Heaton, 3 Brev. 92, holding an indorsee was not entitled to recover from an indorser on a note where he received part payment thereon and made no application to the indorsor until a year after the note was due; Dwight v. Emerson, 2 N. H. 159, on demand and notice as necessary in order to hold indorser liable on his contract of indorsement; Edwards v. Thayer, 2 Bay, 217, on what is necessary to fix the liability of an indorser of a promissory note.

Demand of payment as necessary to fix liability of drawers and indorsers of bill.

Cited in Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 153, on demand of payment from acceptor as necessary to hold drawers and indorsers of a bill liable thereon; Munroe v. Easton, 2 Johns. Cas. 75, holding that drawer of bill which has been accepted, is not responsible, until after default of acceptor, and holder must use due diligence to demand payment of acceptor before he can resort to drawer; Laenze v. State, Addison (Pa.) 59, on demand and notice as not necessary to be given indorser where the bill has not been accepted; Whittlesey v. Dean, 2 Aik. (Vt.) 263, holding that indorsee, to fix indorser's liability, must present note for payment at time it falls due, and must give notice to indorser of nonpayment.

Effect of indorsement of bill or note as new contract.

Cited in Bowes v. Industrial Bank, 58 Ill. App. 498, holding the indorsement of a bill of exchange may be considered as a new bill drawn by the indorser on the acceptor in favor of the payee; Lloyd v. Keach, 2 Conn. 175, 7 Am. Dec. 256; Howard v. Central Bank, 3 Ga. 375; Winnebago County State Bank v. Hustel, 119 Iowa, 115, 93 N. W. 70; Middleton v. Griffith, 57 N. J. L. 442, 51 Am. St. Rep. 617, 31 Atl. 405; Merritt v. Todd, 23 N. Y. 28, 80 Am. Dec. 243 (dissenting opinion); Aymar v. Sheldon, 12 Wend. 439, 27 Am. Dec. 137; Case v. Heffner, 10 Ohio, 180; Dunlop v. Harris, 5 Call (Va.) 16; First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866,—on an indorsement as being an order by the indorser upon the maker of a note to pay the mount thereof to the indorser; Freeman v. Brittin, 17 N. J. L. 191; Cox v. Adams, 2 Ga. 158,—on the indorsement of a bill or note as constituting a new contract; Dunlop v. Silver, 1 Cranch, App. 367; Hall v. Capital Bank, 71 Ga. 715,—on the effect of the indorsement of a note on the relationship of the parties thereto; Ellis v. Brown, 6 Barb. 282 (dissenting opinion); Stuckert v. Anderson, 3 Whart. 116; Mead v. Small, 2 Me. 207, 11 Am. Dec. 62,—on the indorsement of a promissory note as creating in legal effect an accepted bill of exchange; De Hass v. Dibert, 30 L.R.A. 189, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227; Leidy v. Tammany, 9 Watts, 353; Veazie v. Willis, 6 Gray, 90,—on the liability created by the indorsement of a promissory note; Jarvis v. McMain, 10 N. C. (3 Hawks) 10, on a note before indorsement as bearing no resemblance to a bill of exchange; Parker v. Kennedy, 1 Bay, 398

(dissenting opinion), on the effect of an indorsement on a bond; Astor v. Benn, Stuart, K. B. (Quebec) 69, on indorsement as a new bill.

Instruments equivalent to a bill of exchange.

Cited in Carter v. Burley, 9 N. H. 558, on right to treat indorsement of promissory note as bill of exchange, in action by indorsee against indorser; Podge v State, 3 Ohio St. 229, holding that indorsement of promissory note is subject of forgery under Crimes Act, which mentions bills of exchange, etc., but not such indorsements.

Distinguished in Tevis v. Young, 1 Met. (Ky.) 197, 71 Am. Dec. 474, where an instrument having all the forms except the name of the drawer was not effective as a bill of exchange.

Order of liability of indorsers.

Distinguished in Quin v. Sterne, 26 Ga. 223, 71 Am. Dec. 204, where indorser of bearer's paper was sued on note as a joint maker.

Liability of accommodation drawer or acceptor of a note or bill.

Cited in White v. Hopkins, 3 Watts & S. 99, 37 Am. Dec. 542, holding the accommodation acceptor of a bill of exchange could not set up that holder knew he was an accommodation acceptor when he received the bill and that a new bill had since been received in part payment; Bell v. Ottawa Trust & Deposit Co. 28 Ont. Rep. 519, holding a partner joining as maker in a promissory note of the firm for their accommodation is primarily liable thereon.

Drawee of bill as original debtor after acceptance.

Cited in Ash v. Brewton, 1 Bay, 243, holding that drawee of bill of exchange is original debtor after acceptance.

4 E. R. C. 456, RAMCHURN MULLICK v. LUCHMEECHUND RADAKISSEN, 9 Moore, P. C. C. 46.

Timeliness of presentment for payment of bill or note.

Cited in Angaletos v. Meridian Nat. Bank, 4 Ind. App. 573, 31 N. E. 368, holding that holder of bill of exchange payable on demand is bound to put it into circulation without unreasonable delay, or forward it to drawee for acceptance or payment; Prescott Bank v. Caverly, 7 Gray, 217, 66 Am. Dec. 473, holding that draft payable at sight must be presented for payment within reasonable time after receipt from indorser; Stewart v. Smith, 17 Ohio St. 82, holding that drawer of negotiable check is not discharged from liability by delay of holder to make presentment and give notice of dishonor, unless he has suffered loss thereby; Banque du Peuple v. Denicourt, Rap. Jud. Quebec 10 C. S. 428, on necessity that presentment for payment be made within a reasonable time in order to render an indorser liable.

Cited in Joyce, Defenses, Com. Pap. 637, on necessity for presentment or negotiation of commercial paper within a reasonable time.

Necessity of presentment and notice of dishonor.

Cited in R. v. Bank of Montreal, 1 Can. Exch. 154, on notice of dishonor as not essential to render drawer of a check or other bill liable thereon.

4 E. R. C. 467, GIBB v. MATHER, 8 Bing. 214, 2 Cromp. & J. 254, 1 L. J. Exch. N. S. 87, 1 Moore & S. 387, 2 Tyrw. 189, 34 Rev. Rep. 688.

Peace for presentment of bill or note.

Cited in Spann v. Baltzell, 1 Fla. 338, 46 Am. Dec. 346, on necessity that pre-

sentment of bill or note be made at the particular place designated in the instrument for payment.

Disapproved in Bank of Upper Canada v. Parsons, 3 U. C. Q. B. 383, holding by reason of decisions of Canadian courts presentment of a note for payment and need not be made at a particular place when the note does not provide that it is not payable elsewhere.

4 E. R. C. 477, PHILIPS v. ASTLING, 11 Revised Rep. 547, 2 Taunt. 206

Right of guarantor of bill or note to notice of nonpayment.

Cited in Reynolds v. Douglass, 12 Pet. 497, 9 L. ed. 1171; Knight v. Dunsmore, 12 Iowa, 35,—holding the guarantor of a promissory note is not entitled to notice of nonpayment where the maker is insolvent; Talbot v. Gay, 18 Pick. 534; Grice v. Ricks, 14 N. C. (3 Dev. L.) 62; Oxford Bank v. Haynes, 8 Pick. 423, 19 Am. Dec. 334,—holding guarantor of a promissory note is not liable thereon where no notice is given of nonpayment by maker who at the time is solvent; Wildes v. Savage, 1 Story, 22, Fed. Cas. No. 17,653; Beebe v. Dudley, 26 N. H. 249, 59 Am. Dec. 341,—holding it unnecessary to give notice to guarantor of nonpayment where at time the principal debtor was insolvent; Foote v. Brown, 2 McLean, 369, Fed. Cas. No. 4,909; Lewis v. Brewster, 2 McLean, 21, Fed. Cas. No. 8,318,—holding a guarantor is entitled to notice of dishonor of notes he had guaranteed; Goldie v. Maxwell, 1 U. C. Q. B. 425, holding notice of dishonor must be averred as against the guarantor of a bill; Louisville Mfg. Co. v. Welch, 10 How. 461, 13 L. ed. 497; Read v. Curtis, 7 Me. 186, 22 Am. Dec. 184; McDougal v. Calef, 34 N. H. 534; Douglass v. Howland, 24 Wend. 35; Craft v. Isham, 13 Conn. 28,—on when a guarantor is entitled to notice of nonpayment; Rhett v. Poe, 2 How. 457, 11 L. ed. 338; Simons v. Steele, 36 N. H. 73; Newbury Bank v. Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Taylor v. M'Cune, 11 Pa. 460; Gibbs v. Cannon, 9 Serg. & R. 198, 11 Am. Dec. 699; Welch v. Walsh, 177 Mass. 555, 52 L.R.A. 782, 83 Am. St. Rep. 302, 59 N. E. 440,—on right of guarantor of a promissory note to notice of nonpayment; Woolley v. Sergeant, 8 N. J. L. 262, 14 Am. Dec. 419, holding that necessity of presentment and demand in order to hold surety extends only to commercial paper.

Cited in note in 20 L.R.A. 261, on necessity of notice of default to bind guarantor.

Cited in Brandt Suretyship, 3d ed. 447, as to when notice of default in payment by principal need not be given guarantor of overdue debt, lease, and negotiable instrument by separate contract.

Distinguished in Donley v. Camp, 22 Ala. 659, 58 Am. Dec. 274, holding a guarantor of a promissory note assigning and guarantying "for value received" is not entitled to notice of nonpayment; Woolley v. Sergeant, 8 N. J. L. 262, 14 Am. Dec. 419, holding the guarantor of an instrument in effect not negotiable was not entitled to notice of nonpayment; Trask v. Duval, 4 Wash. C. C. 97, Fed. Cas. No. 14,144, where the guarantor had not placed himself in the shoes of the principal debtor by the form of his guaranty; Le Mesurier v. Sherwood, 7 U. C. Q. B. 530, holding notice of the nonpayment of drafts was unnecessary to the guarantor of to save acceptor from loss; Wilson v. Brown, 6 Ont. App. Rep. 87, holding persons making a joint and several promissory note with another as sureties, could not set up the defense of want of notice of nonpayment.

Secondary nature of liability on contract of guaranty.

Cited in Kirkpatrick v. White, 29 Pa. 176, holding to recover from the bail of a defaulting constable the plaintiff must show the exercise of reasonable dilligence

to recover from the principal by legal process; Dwight v. Williams, 4 McLean, 581, Fed. Cas. No. 4,218, holding any and every course necessary to reach the property of the obligor was a condition precedent to the liability of the guarantor of a bond and mortgage; Lane v. Levillian, 4 Ark. 76, 37 Am. Dec. 769, considering the nature of a guarantor's liability.

Necessity of notice of acceptance of guaranty.

Cited in Powers v. Bumeratz, 12 Ohio St. 273, on necessity of notice of acceptance of guaranty.

Distinguished in Wilcox v. Draper, 12 Neb. 138, 41 Am. Rep. 763, 10 N. W. 579, holding a direct promise of guaranty requires no notice of acceptance.

Liability of guarantor or surety how discharged.

Cited in Townsend v. Riddle, 2 N. H. 448, holding a delay to collect the debt from the principal until the remedy of the surety is lost does not exonerate surety; Watriss v. Pierce, 32 N. H. 560, holding sureties on a bond for the securing of a loan, where without their knowledge a less amount than that agreed was loaned and different securities given; Wright v. Johnson, 8 Wend. 512, holding a guarantor was discharged where a guaranty for advanced to be made was given by the debtor to a creditor for a debt then due; Thompson v. McLean, 17 U. C. Q. B. 495, holding sureties for sheriff of united counties was not liable for him as sheriff of one of the counties after the union had been dissolved; McWilliams v. Mason, 6 Duer, 276; Hohn v. Shideler, 164 Ind. 242, 72 N. E. 575,—on acts of creditor discharging surety; McPherson v. Dickson, 8 U. C. Q B. 29, on defense of collusion between creditor and principal to defraud surety.

Cited in 1 Brandt Suretyship, 3d ed. 833, on what will release surety from liability.

Necessity of presentment and demand.

Cited in Gillespie v. Hannahan, 4 M'Cord, L. 503; Barrett v. May, 2 Bail. L. 1; Bashford v. Shaw, 4 Ohio St. 263,—on necessity that presentment and demand be made in order to charge a guarantor or indorser.

Cited in note in 4 E. R. C. 482, on what excuses nonpresentment for payment.

— Where maker or drawee is absent or nonresident.

Cited in Foster v. Julien, 24 N. Y. 28, 80 Am. Dec. 320, holding the indorser of a note the maker of which has left the state may be charged without a demand or presentment at his last place of residence in state.

Cited in Crawford Neg. Inst. L. 3d ed. 101, on what constitutes a sufficient presentment of negotiable paper.

— Where executed by resident agent.

Cited in Luning v. Wise, 64 Cal. 410, 1 Pac. 495, holding presentment and demand was not required to be made of a nonresident maker of a note in order to hold indorser, where presentment was made to joint maker who signed for nonresident maker under a power of attorney.

4 E. R. C. 483, WALTON v. MASCALL, 2 Dowl. & L. 410, 14 L. J. Exch. N. S. 54, 13 Mees. & W. 452.

Right of guarantor or surety to notice of demand and nonpayment.

Cited in Fegley v. Jennings, 14 Fla. 203, 103 Am. St. Rep. 142, 32 So. 873, holding in a suit upon a guaranty of the prompt payment of a promissory note at maturity a demand and notice of dishonor need not be alleged; Pleasantville Mut. Loan & Bldg. Soc. v. Moore, 70 N. J. L. 306, 57 Atl. 1034, holding the absolute guarantor of the payment of a non-negotiable promissory note is not entitled

to notice of nonpayment; Wilson v. Brown, 6 Ont. App. Rep. 87, holding persons joining in the making of a promissory note as sureties were not entitled to set up as a defense want of notice of nonpayment; Palmer v. Baker, 23 U. C. C. P. 302, holding a person absolutely guaranteeing the payment of a promissory note was not entitled to notice of nonpayment; Vinal v. Richardson, 13 Allen, 521; Union Bank v. Coster, 3 N. Y. 203, 53 Am. Dec. 280; Bull v. Bliss, 30 Vt. 127; Welch v. Walsh, 177 Mass. 555, 52 L.R.A. 782, 83 Am. St. Rep. 302, 59 N. E. 440,—on right of guarantor of a promissory note to notice of demand and nonpayment.

Cited in note in 20 L.R.A. 262, on necessity of notice of default to bind guarantor.

Necessity of presentment of a bill or note.

Cited in McRobbie v. Torrance, 1 Manitoba, L. R. 426, holding no presentment was necessary where the bank at which the note was made payable had suspended business before the maturity of the note; McPhee v. McPhee, 19 Ont. Rep. 603, on presentment for payment as not necessary to charge a guarantor of a note.

Taking of new obligation or security as suspending the time of payment of the debt.

Cited in Bank of Ohio Valley v. Lockwood, 13 W. Va. 392, 31 Am. Rep. 768; American Button Hole Overseaming & Sewing Mach. Co. v. Gurnee, 44 Wis. 49; Thompson v. Wilson, 1 U. C. C. P. 57; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934,—on the taking of new collateral security as suspending the collection of an existing demand; Shaw v. First Associated Reformed Presby. Church, 39 Pa. 226, on the taking of a negotiable security for a debt as suspending the creditors right to sue for the debt until such note becomes due.

Distinguished in Brengle v. Bushey, 40 Md. 141, 17 Am. Rep. 586, holding the taking of a mortgage to secure the payment of a promissory note does not suspend the remedy on the note.

— Discharge of sureties.

Cited in Andrews v. Marrett, 58 Me. 539, holding the act of the holder of non-negotiable overdue note in accepting from the principal debtor new negotiable note payable at a future date extended the time of payment of the debt and discharged the surety on the original note; Armistead v. Ward, 2 Patton & H. (Va.) 504, holding an executed agreement between a creditor and his principal debtor for forbearance to sue in consideration of the payment of a usurious premium discharges the sureties.

Bill or note where payable.

Cited in Gage v. McSweeney, 74 Vt. 370, 52 Atl. 969, holding the maker of a promissory note which does not specify the place of payment need not go into another state to make a tender of payment.

Debt as consideration for bill or note.

Cited in Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61 (dissenting opinion), on negotiable paper transferred by indorsement as collateral security for a pre-existing indebtedness.

Right of party bound to pay to wait for demand.

Cited in Benjamin Sales, 5th ed. 760, on right of party bound to pay to wait for demand.

4 E. R. C. 490. CHAPMAN v. KEANE, 3 Ad. & El. 193, 4 L. J. K. B. N. S. 185, 4 Nev. & M. 607.

Notice of dishonor by others than holder of bill.

Cited in Brailsford v. Williams, 15 Md. 150, 74 Am. Dec. 559, holding in an

action by an indorsee against the drawer of a bill of exchange notice of the dishonor of the bill from the acceptor is sufficient to bind the drawer; Kremer v. New York Edison Co. 104 App. Div. 433, 92 N. Y. Supp. 883, holding notice of dishonor of a note might be given to an accommodation indorser for a firm by such firm as the agent of the holder; Brown v. Ralston, 9 Leigh, 532; West River Bank v. Taylor, 34 N. Y. 128,—on it not being essential that notice of dishonor be made by the holder of a bill or note; Cosgrave v. Boyle, 5 Ont. App. Rep. 458 (dissenting opinion), on right of holder of note to rely upon notice of dishonor given by other party.

Cited in Crawford Neg. Inst. L. 3d ed. 116, as to who must give notice of dishonor.

4 E. R. C. 494, BERRIDGE v. FITZGERALD, 10 Best & S. 668, 38 L. J. Q. B. N. S. 335, L. R. 4 Q. B. 639, 17 Week. Rep. 917.

Diligence required in giving notice of dishonor to proper place.

Cited in New York Belting & Packing Co. v. Ela, 61 N. H. 352, holding on facts due diligence had been exercised by the holder of a note in attempting to give indorser notice of dishonor; Baillie v. Dickson, 7 Ont. App. Rep. 759, on the diligence incumbent upon the holder of a note to find the residence of a party entitled to notice of dishonor.

Notice of dishonor mailed to designated place.

Cited in Importers' & T. Nat. Bank v. Shaw, 144 Mass. 421, 11 N. E. 666, holding that notice of nonpayment of note sent to former place of business of indorser, by mail, was sufficient; Hay v. Burke, 16 Ont. App. Rep. 463, holding notice of dishonor may be addressed to the place designated by the person entitled to it even though other knows that such place was not such person's place of business or residence.

4 E. R. C. 498, STUDDY v. BEESTY, 60 L. T. N. S. 647, [1889] W. N. 14.

4 E. R. C. 506, RALLI v. DENNISTOUN, 6 Exch. 483, 20 L. J. Ex. Ch. N. S. 278.

4 E. R. C. 515, HARMER v. STEELE, 4 Exch. 1, 19 L. J. Ex. Ch. N. S. 31.

Right to give negotiable instrument in satisfaction of a precedent debt.

Cited in Commercial Bank v. Page, 13 N. B. 526, on right to give a negotiable instrument in full satisfaction of antecedent debt.

Effect of note or bill coming into maker's or acceptor's hands.

Cited in Cross v. Currie, 5 Ont. App. Rep. 31, holding the holder of a note received from the maker might recover from an accommodation indorser thereon who gave note to drawer to retire another but which drawer gave it to plaintiff in payment of a debt; Glover v. Southern Loan & Sav. Co. 31 Ont. Rep. 552, holding that notes secured by mortgage on land, are not paid by application of proceeds of land to discharge lien, prior to maturity of notes, by person holding prior mortgage; Witte v. Williams, 8 S. C. 290, 28 Am. Rep. 294, holding that acceptor of bill of exchange may before maturity, transfer it to bona fide holder, and no presumption of payment arises from fact of his possession before maturity.

Cited in note in 46 L.R.A. 781, on possession of bill by acceptor as payment.

4 E. R. C. 523, TURNER v. LEECH, 4 Barn. & Ald. 451, 23 Revised Rep. 344.

Notice to successive indorsers.

Cited in Holland v. Turner, 10 Conn. 308, holding the sending of a note, protest

and notice of dishonor by bank which note was made payable to bank sending it for collection was not sufficient to charge the indorser.

Time within which notice of dishonor must be given by subsequent indorsers to bind prior ones.

Cited in Carter v. Burley, 9 N. H. 558; Farmer v. Rand, 16 Me. 453,—holding fact that indorser receives notice of dishonor earlier than required does not enlarge the time in which notice may be given to subsequent indorser; Howland v. Adrian, 30 N. J. L. 41, holding a party sending a notice of dishonor must mail it on the next day after receiving it although the party from whom he received it has not taken all the time allowed him.

Right to charge prior or subsequent indorsers.

Cited in Boggs v. Branch Bank, 10 Ala. 970, holding the first indorser of a bill whose liability has not been fixed by the holder cannot by notice of its dishonor charge a subsequent indorser whose liability has been discharged by the laches of the holder; Tarratt v. Wilmot, 6 N. B. 353, on inability of indorser to pay bill after dishonor and thereby revive liability of prior indorser who was not seasonably notified.

Cited in notes in 4 Eng. Rul. Cas. 505, on effect of waiver of notice of dishonor by subsequent indorser; 4 Eng. Rul. Cas. 525, on discharge of prior indorser by lack of notice of dishonor.

4 E. R. C. 526, PEACOCK v. PURSSELL, 14 C. B. N. S. 728, 10 Jur. N. S. 178, 32 L. J. C. P. N. S. 266, 8 L. T. N. S. 636, 11 Week. Rep. 834.

Collateral security becoming satisfaction of the debt.

Cited in Whittemore v. Hamilton, 51 Conn. 153, holding on the release by a person of the collateral security held by him for a debt equity would apply the value thereof as a protanto payment upon the debt.

—Commercial paper allowed to become discharged for want of presentment and notice.

Cited in Mauney v. Coit, 80 N. C. 300, 30 Am. Rep. 80, holding the failure of the holder of a draft given in settlement of an antecedent debt to present it when due operated as a satisfaction of the debt; Hart v. McDougall, 25 N. S. 38, holding same where plaintiffs failed to present the draft given as collateral security within the proper time; McKay v. O'Neil, 22 N. S. 346, holding the collection of debt might be restrained where collateral security was taken for it and the value of that security was destroyed by the default of the holder of it; Beer v. McLeod, 22 N. S. 535, holding plaintiffs who had taken a draft from defendant in settlement of a claim could not recover on the debt where they failed to present it for payment at the proper time; Yglesias v. Mercantile Bank, L. R. 3 C. P. Div. 60, holding same where the drafts given as collateral security were canceled; Commercial Bank v. Page, 13 N. B. 326; Brett v. Lovett, 8 N. S. 472; Anderson v. Archibald, 9 N. S. 88; Ray v. McConnell, 18 Ont. Rep. 409; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61,—on failure to enforce collateral security held for a debt is operating as a satisfaction of the debt.

Cited in notes in 10 L.R.A.(N.S.) 540, on effect of laches of recipient of note of third person, in presenting it for payment; 68 L.R.A. 485, on effect of failure of holder to make demand or give notice of dishonor of paper held as collateral or conditional payment; 4 Eng. Rul. Cas. 504, on necessity of notice of dishonor or waiver thereof.

Cited in Benjamin, Sales, 5th ed. 785, 789, on duty of seller where bill is given as collateral security, to give notice of dishonor to buyer.

Disapproved in Coleman v. Lewis, 183 Mass. 485, 68 L.R.A. 482, 97 Am. St. Rep. 450, 67 N. E. 603, holding a failure to enforce notes held as collateral security for a debt did not operate as a payment of the debt.

Effect of failure to enforce collateral security held for a debt.

Cited in Hazard v. Wells, 2 Abb. N. C. 444; Scott v. First Nat. Bank, 5 Ind. Terr. 292, 68 L.R.A. 488, 82 S. W. 751,—holding a bank to whom a debtor assigns a note as collateral security for a debt is liable to pledgeor for value thereof where it fails to enforce the collection of the note when due; Sawyer-Massey Co. v. Weder, 6 D. L. R. 305, holding that creditor holding notes as collateral security is liable to debtor for amount of notes barred by statute which might have been collected with due diligence.

Realization on collateral security as satisfaction of the debt.

Cited in Cooper v. Molsons Bank, 26 Can. S. C. 611, on the receipt of the proceeds of a collateral security by creditor as a payment of the debt.

4 E. R. C. 530, MACDONALD v. WHITFIELD, L. R. 8 App. Cas. 733, 52 L. J. P. C. N. S. 70, 49 L. T. N. S. 446, 32 Week. Rep. 730.

Liability inter se of parties to note.

Cited in George v. Bacon, 138 App. Div. 208, 123 N. Y. Supp. 103, holding that, under negotiable instrument law, prima facie presumption of successive liability disappears on proof that indorsers agreed to be jointly liable; Canadian Bank v. Perrom, 31 Ont. Rep. 116, holding that person who put his name on back of note before it was endorsed by payee was not liable on note to payee as endorser surety or otherwise; Bell v. Ottawa Trust & Deposit Co. 28 Ont. Rep. 519, on position, rights, and liabilities of makers of notes inter se; Lachance v. Duval, Rap. Jud. Quebec, 37 S. C. 475, holding that indorser of note to his order who has become holder by paying it, cannot obtain reimbursement from prior indorsers, sureties and maker.

Cited in Crawford Neg. Inst. L. 3d ed. 93, on order in which endorsers are liable.

— Accommodation parties as securities.

Cited in Kellogg v. Lopez, 145 Cal. 497, 78 Pac. 1056, holding parties to note were sureties of an association, and as such entitled to contribution from each other, where note was made and indorsed for accommodation of the association; Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157, holding where there was understanding between directors that they should indorse notes for benefit of corporation and that indorsements were to be joint, indorsers were co-sureties between themselves; McRae v. Lionais, Rap. Jud. Quebec, 16 C. S. 262, holding parties for accommodation of other parties may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it; Steacy v. Stayner, 7 Ont. L. Rep. 684, holding one accommodation indorser who paid note might recover one half the amount from another accommodation indorser.

Cited in note in 28 L.R.A.(N.S.) 1043, on rights inter se of accommodation parties to commercial paper.

Contribution among sureties.

Cited in Wolmershausen v. Gullick [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773,

3 Reports, 610, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823, 21 Eng. Rul. Cas. 634, on right of surety to contribution when he has not paid.

Parol evidence to vary note.

Cited in Hebert v. Poirier, Rap. Jud. Quebec, 40 C. S. 405, holding that parol testimony is admissible to show that there was no consideration for note.

Cited in note in 4 Eng. Rul. Cas. 207, on parol evidence as to note or bill of exchange.

—To show true relation of parties to negotiable instrument.

Cited in Egbert v. Hanson, 34 Misc. 596, 70 N. Y. Supp. 573, holding agreement among successive accommodation indorsers to be bound jointly may be proved by parol or evidence by circumstances of case; Wells v. McCarthy, 10 Manitoba L. Rep. 639, holding all facts and circumstances attendant upon making, issue, and transference of bill or note may be referred to to ascertain true relation to each other of parties who put their signatures thereon as makers or indorsers; Small v. Henderson, 27 Ont. App. Rep. 492, on admissibility of evidence to show liability of one who indorses note before its delivery to payee; Northfield v. Lawrence, 7 Mont. L. Rep. 148, holding parol evidence admissible to establish real relationship of parties to note and circumstances under which it was indorsed.

Distinguished in Polhemus v. Prudential Realty Corp. 74 N. J. L. 570, 67 Atl. 303, holding when there are several parties to bill or note who have become such for benefit of another, their status is, in absence of proof to the contrary, that which is shown by paper upon which they have placed their names.

Contract of guaranty of commercial paper within statute of frauds.

Cited in Miller v. Ridgely, 22 Fed. 889, holding that in England guarantor is not bound unless his contract is in writing.

Distinguished in Re Boutin, Rap. Jud. Quebec, 12 C. S. 186, where question objected to as tending to prove parol obligation to pay another's debt, was held not to lead to prove independent contract of guarantee.

1 E. R. C. 552, COOK v. LISTER, 13 C. B. N. S. 543, 9 Jur. N. S. 823, 32 L. J. C. P. N. S. 121, 7 L. T. N. S. 712, 11 Week. Rep. 369.

Right to payment made upon commercial paper as among parties thereto or interested therein.

Cited in Madison Square Bank v. Pierce, 137 N. Y. 444, 20 L.R.A. 335, 33 Am. St. Rep. 751, 33 N. E. 557, on right of holder to recover whole debt against maker or acceptor for himself and as trustee for indorser to extent of his acquired interest; Atty. Gen. v. Supreme Council, A. L. H. 206 Mass. 183, 92 N. E. 147, holding that rule that surrender of negotiable instrument operates as release does not apply to surrender of common law contract to pay money upon certain event; Canadian Bank v. Ross, 22 U. C. C. P. 497 (dissenting opinion), on right of action of holder of bill against acceptor as affected by equities between parties; Ex parte Bishop, L. R. 15 Ch. Div. 400, 50 L. J. Ch. N. S. 18, 43 L. T. N. S. 105, 29 Week. Rep. 144, on right of one who voluntarily pays or becomes liable upon bill to recover from person primarily liable.

Cited in note in 4 Eng. Rul. Cas. 522, on discharge of all other acceptors from liability by possession of one acceptor at maturity.

—As between real and accommodation parties.

Cited in Roche v. Kempt, 33 U. C. Q. B. 387, on right of accommodation maker to benefit of payment made by payee and indorser; Preston v. Hunton, 37 U. C.

Q. B. 177, on right of bank, paid by plaintiff, to proceed in insolvency as holder of notes for benefit of plaintiff; Dill v. Wheatley, 34 N. S. 526, holding that acceptor of draft for accommodation of third person is liable where he refuses to accept third draft in renewal of second draft which was given in payment of first where holder furnished money to retire first drafts; Ex parte Swan, L. R. 6 Eq. 344, 18 L. T. N. S. 230, 16 Week. Rep. 560, 4 Eng. Rul. Cas. 375, holding broad proposition that transferee of bill after dishonor can under no circumstances have better right against acceptor than drawer would have, is not maintainable.

Voluntary discharge of obligation by person not obligor.

Cited in Compton v. Elliott, 16 Jones & S. 211, holding party may release cause of action against one person upon consideration flowing from another; Bogart v. Robertson, 11 Ont. L. Rep. 295, on remedy of one compelled to pay note where he has officiously renewed his liability thereon; Re Rowe [1904] 2 K. B. 483, 73 L. J. K. B. N. S. 594, 52 Week. Rep. 628, 91 L. T. N. S. 220, as to whether creditor is bound to give credit for voluntary payment of stranger in connection with debtor's obligation.

Cited in note in 23 L.R.A. 122, on effect of payment of debt by volunteer or stranger to original undertaking.

Cited in Benjamin Sales, 5th ed. 764, 765, on effectiveness of payment by stranger.

4 E. R. C. 565, RE GENERAL SOUTH AMERICAN CO. L. R. 7 Ch. Div. 637, 47 L. J. Ch. N. S. 67, 37 L. T. N. S. 599, 26 Week. Rep. 232.

Measure of damages on dishonour of note.

Cited in note in 4 Eng. Rul. Cas. 305, on measure of damages incurred by dishonour of bill or note.

4 E. R. C. 576, OVEREND, G. & CO. v. ORIENTAL FINANCIAL CORP. L. R. 7 H. L. 348, 31 L. T. N. S. 322, affirming the decision of the Lord Chancellor, reported in 41 L. J. Ch. N. S. 332, L. R. 7 Ch. 142, 20 Week. Rep. 253.

Discharge of surety by dealings of creditor with principal debtor.

Cited in Coffey v. Reinhardt, 114 N. C. 509, 19 S. E. 370, holding surety discharged by failure to bring action within period of limitation; Allison v. McDonald, 23 Can. S. C. 635, on effect of release of mortgage securing debt upon liability of surety to creditor; Clarke v. Birley, L. R. 41 Ch. Div. 422, 58 L. J. Ch. N. S. 616, 60 L. T. N. S. 948, 37 Week. Rep. 746, holding mere provision for additional security is not equivalent to reservation of rights against sureties under other securities.

Cited in note in 21 E. R. C. 660, on discharge of surety by alteration of contract between creditor and principal.

Cited in 1 Brandt, Suretyship, 3d ed. 740, as to when surety is discharged by payment of interest in advance.

The decision of the Lord Chancellor was cited in Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378, holding that creditor of bankrupt does not, by consenting to resolution for composition, under statute, release person liable as surety for same debt; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130, holding mortgagee cannot deal with grantee of equity of redemption, to prejudice of mortgagor's right of subrogation without discharging mortgagor.

— Extensions.

Cited in Re Goodwin, 5 Dill. 140, Fed. Cas. No. 5,549, holding that accommodation maker of note is not, as respects holder with notice, principal debtor, and

where holder, with knowledge that maker is accommodation maker, gives additional time to party who is principal debtor, accommodation debtor is discharged.

Cited in Stearns, Suretyship, 121, on giving of collateral security as a good consideration for an agreement to extend time to principal; Stearns, Suretyship, 125, on extension of time to principal as a defense to person in situation of surety.

Distinguished in Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 150, where agreement was made to extend time of mortgage.

The decision of the Lord Chancellor was cited in Big Rapids Nat. Bank v. Peters, 120 Mich. 518, 79 N. W. 891, holding question of surety's discharge by extension of time properly left to jury; Blackwood v. Percival, 14 Manitoba L. Rep. 216, on release of surety by giving of time to principal debtor.

— Controlling effect of knowledge of actual relation of debtors not ostensibly or originally principal and surety.

Cited in Guild v. Butler, 127 Mass. 386, holding creditor is affected by knowledge of true relation of debtors acquired at any time before he does act which alters position of surety; Scott v. Scruggs, 9 C. C. A. 246, 23 U. S. App. 280, 60 Fed. 721; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437,—holding rule that extension of time to principal releases surety applies though creditor did not know of relation at time of original contract; Munroe v. O'Neil, 1 Manitoba L. R. 245, holding surety released by extension of time to principal debtor where creditor was aware of arrangement between debtors creating relation of surety and principal; Birkett v. McGuire, 7 Ont. App. Rep. 573, on change of relation of debtors from that of principal debtors to that of principal and surety; Fisken v. Meehan, 40 U. C. Q. B. 146 (dissenting opinion), on duty of creditor to deal with debtors as principal and surety after learning that such is their relation; Bailey v. Griffith, 40 U. C. Q. B. 418, holding that after knowledge of creation of relation of principal and surety, even between joint debtors, the creditor, without being party to the change, and without assenting to it, if having knowledge of it, is bound not to act to prejudice of surety's equitable rights; Duncan, F. & Co. v. North & South Wales Bank, L. R. 6 App. Cas. 1, 50 L. J. Ch. N. S. 355, 43 L. T. N. S. 706, 29 Week. Rep. 763, 4 Eng. Rul. Cas. 591, on rights of surety belonging to person who, as between himself and another debtor, is in fact a surety, though creditor is no party to contract of suretyship; Rouse v. Bradford Bkg. Co. [1894] 2 Ch. 32, [1894] A. C. 586, 63 L. J. Ch. N. S. 890, 6 Reports, 349, 71 L. T. N. S. 522, 43 Week. Rep. 78, 21 Eng. Rul. Cas. 650, holding where two debtors are principal debtors at time of contract and one of them afterwards, as between himself and co-debtor, becomes surety, dealing with one who remains principal debtor discharges surety.

Cited in 1 Brandt, Suretyship, 3d ed. 100, on creditor's knowledge of suretyship at time of doing act complained of as sufficient to secure surety his rights.

The decision of Lord Chancellor was cited in Birkett v. McGuire, 7 Ont. App. Rep. 53 (dissenting opinion), on discharge of surety by giving time and on effect of creditor's knowledge of change in what appeared to be relation of debtors at time of contract; Swire v. Redman, L. R. 1 Q. B. Div. 536, 35 L. T. N. S. 470, 24 Week. Rep. 1069, holding it is not material that knowledge on part of creditor that surety was such from the beginning, was not acquired till after surety had become liable to creditor.

Order of liability on bill or note.

The decision of Lord Chancellor was cited in Ianson v. Paxton, 23 U. C. C. P.

439 (dissenting opinion), on effect of position in which parties are upon bill or note.

Relation of obligors upon negotiable instrument.

Cited in Jennings v. Moore, 189 Mass. 197, 75 N. E. 214, holding that in equity true relation of parties to negotiable instrument may be inquired into; Ontario Bank v. Chaplin, 20 Can. S. C. 152, on existence of joint and several liability in case of guaranty by one person of notes of others.

4 E. R. C. 591, DUNCAN, F. & CO. v. NORTH & SOUTH WALES BANK, L. R. 6 App. Cas. 1, 50 L. J. Ch. N. S. 355, 43 L. T. N. S. 706, 29 Week. Rep. 763, reversing the decision of the Court of Appeal, reported in 11 Ch. D. 88.

Indorser's remedy against those for whom he has paid.

Cited in Purdon v. Nichols, 16 Ont. Rep. 699, on remedy in equity of indorser who has paid note, as against those who should have paid; Molsons Bank v. Heilig, 26 Ont. Rep. 276 (modifying 25 Ont. Rep. 503), holding holder of note endorsed by defendant entitled to judgment upon note without prejudice to defendants' right to make plaintiff account for dealings with surety; Cosgrave v. Bayle, 6 Can. S. C. 165, holding that endorser of note is entitled to benefit of notice of dishonor duly given by other party to paper.

Cited in notes in 4 Eng. Rul. Cas. 455, on position of indorser as surety; 4 Eng. Rul. Cas. 547, on presumptive order of liability among parties to bill or note.

Distinguished in Hood v. Coleman Mill & Lumber Co. 27 Ont. App. Rep. 203, where transaction of suretyship was not one which arose simply out of indorsement of note.

— Right to apply securities.

Cited in Merrimack v. Citizens' Nat. Bank, 65 N. H. 253, 9 L.R.A. 282, 23 Am. St. Rep. 39, 20 Atl. 500, to the point that indorser has all rights of a surety as to collateral, although he indorsed note and procured it to be discounted in ordinary course of business; Waterous Engine Works Co. v. Wilson, 11 Manitoba L. Rep. 287, holding party liable to and paying holders of notes entitled to benefit of securities given for the debt, even though securities have been actually transferred to holders of the notes; Trecise v. Burkett, 1 Ont. 80, holding indorser of note entitled to securities held by maker to secure himself where indorser had paid note.

Suretyship.

Cited in Forster v. Ivey, 2 Ont. L. Rep. 480, holding one cannot be surety for debt of another unless that other is himself liable as debtor.

Cited in notes in 21 Eng. Rul. Cas. 630, on right to contribution between co-sureties; 21 E. R. C. 644, on right of contribution against surety who is to be liable only on default of another surety.

Rights of sureties known to creditor to be such as between themselves.

Cited in Bristol & W. of E. Land, Mortg. & Invest. Co. v. Taylor, 24 Ont. Rep. 288; O'Clara v. Union Bank, 22 Can. S. C. 101,—on discharge of surety by creditor; Birkett v. McGuire, 7 Ont. App. Rep. 53 (dissenting opinion), on duty of creditor to respect right of surety when informed that one of two debtors is in fact surety for another.

Cited in note in 4 Eng. Rul. Cas. 590, on discharge of surety by giving time to principal.

Subrogation of surety to securities held for debt.

Cited in North Ave. Sav. Bank v. Hayes, 188 Mass. 175, 74 N. E. 311, holding

when surety pays he is subrogated to rights in securities pledged by co-surety to secure note; Gananoque v. Sturdee, 1 Ont. 1, as to extent to which equity will go in giving surety benefit of securities held by creditors or co-sureties belonging to principal; Winslow v. Verner, 30 N. B. 150 (dissenting opinion), on right of surety paying debt to securities in hands of creditor; Nicholas v. Ridley [1904] 1 Ch. 192, 73 L. J. Ch. N. S. 145, 52 Week. Rep. 226, 89 L. T. N. S. 653, holding where person responsible for another's debt is principal as towards creditor, such person is not entitled to surety's rights.

Cited in notes in 68 L.R.A. 524, 525, 529, 559; 21 Eng. Rul. Cas. 614,—on subrogation of surety paying debt.

Cited in 1 Brandt, Suretyship, 3d ed. 691; Stearns Suretyship, 466,—on subrogation of surety to securities held by creditor.

Distinguished in Re Hamilton, 10 Manitoba L. Rep. 573, where one who joins in mortgage of his own property with that of another was held to have direct right of redemption as between himself and mortgagee; Forbes v. Jackson, L. R. 19 Ch. Div. 615, 51 L. J. Ch. N. S. 690, 30 Week. Rep. 652, 21 Eng. Rul. Cas. 607, where question was between surety and principal debtor as to surety's right to security furnished by principal.

4 E. R. C. 612, RE AGRA & M. BANK, 36 L. J. Ch. N. S. 222, L. R. 2 Ch. 391, 16 L. T. N. S. 162, 15 Week. Rep. 414.

Liability upon letter of credit for bills pursuant thereto.

Cited in Exchange Bank v. Rice, 98 Mass. 288, on liability of signer of letter of credit to those drawing bills or advancing money on face of it; Bank of Montreal v. Thomas, 16 Ont. Rep. 503, holding sender of telegram for purpose of inducing draft liable to holder for money advanced on draft; Merchants' Bank v. Winter, N. F. (1897-1903) 30, holding that letter of credit is not to be affected by private arrangement which parties to it do not choose to put upon face of document.

Cited in note in 4 E. R. C. 619, 620, on duty of bank giving letter of credit to accept and pay bills drawn on it.

Distinguished in Roman v. De La Serna, 40 Tex. 306, where question involved was as to effect of full compliance with, or discharge of, obligation of letter to holder of it, before advances on it and sale of bills acceptance of which was refused; Union Bank v. Cole, 47 L. J. C. P. N. S. 100, where plaintiffs could not recover as assignees of contract in action to recover for failure to accept bills.

Assignment of chose of action free from antecedent equities.

Cited in McKean v. Jones, 19 Can. S. C. 489 (affirming 29 N. B. 340), holding chose in action may be assigned free from equities by assignment which is absolute in fact; Parsons v. Crabb, 34 U. C. Q. B. 156, on assignment of chose of action in equity; Martin v. Bearman, 45 U. C. Q. B. 205, holding general rule is that assignee of chose in action takes it subject to equities existing between original parties to contract; McKenzie v. Montreal & O. R. Co. 29 U. C. C. P. 333, holding company issuing debentures payable to bearer, or to person named as bearer, does so with intent they shall be delivered over as ordinary transferable instrument; Quebec Bank v. Taggart, 27 Ont. Rep. 162, holding assignment of insurance policy unaffected by prior equities where assignment indorsed on policy clearly showed such was intention; Harvey v. Bank of Hamilton, Cameron (Can.) 129, on assignment of chose in action free from antecedent equities by contract showing that intent; Re Rumford Canal Co. L. R. 24 Ch. Div. 85, 52 L. J. Ch. N. S. 729, 49 L. T. N. S. 118, holding where company have

power to issue securities, they cannot set up equity against equitable transferee thereof, whether security was transferable at law or not, if by original conduct in issuing the security, or by their subsequent dealing with transferee he has superior equity; Re Blakely Ordnance Co. L. R. 3 Ch. 154, 37 L. J. Ch. N. S. 418, 18 L. T. N. S. 132, 16 Week. Rep. 533, holding rule which makes assignments of choses in action subject to equities existing between original parties must yield when contrary intention appears from nature or terms of contract.

Cited in Hollingsworth, Contr. 305, on assignment in equity of benefits in contract.

Distinguished in Graham v. Johnson, L. R. 8 Eq. 36, 38 L. J. Ch. N. S. 374, 21 L. T. N. S. 77, 17 Week. Rep. 810, holding assignee of mere bond bound to know that he took it subject to equities between obligor and obligee; Re Natal Invest. Co. L. R. 3 Ch. 355, 16 Week. Rep. 637, 37 L. J. Ch. N. S. 362, 18 L. T. N. S. 171, where question arose upon single instruments.

— Negotiability of instrument.

Cited in Re Imperial Land Co. L. R. 11 Eq. 478, 40 L. J. Ch. N. S. 343, 24 L. T. N. S. 255, holding certain instruments were either promissory notes or distinct promises to all the world that company would pay to order of person named and that it was not competent for company to set up equities of its own; Maitland v. Chartered Mercantile Bank, 38 L. J. Ch. N. S. 363, 2 Hem. & M. 440, 12 L. T. N. S. 372, holding marginal note upon bill of exchange authorizing drawing of the bill was assignable contract negotiable with bill of exchange; Re General Estates Co. L. R. 3 Ch. 758, 16 Week. Rep. 919, holding certain instruments finally issued by way of cash payment negotiable; Macleth v. Smart, 14 Gratt. Ch. (U. C.) 298, to the point that acceptances are negotiable instruments, given for purpose of being negotiated and in which acceptor has no equity to have kept in hand.

Offer and acceptance as contract.

Cited in Vigo Agri. Soc. v. Brumfiel, 102 Ind. 143, 52 Am. Rep. 657, 1 N. E. 382, 1 Am. Neg. Cas. 883, holding that where there is publication of offer, contract is complete when it is accepted, provided acceptance takes place prior to withdrawal of offer; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379, holding that announcement that certain property will be sold at auction to highest bidder, is not offer to sell, which becomes binding, even conditionally, on owner when bid is made; Boyd v. Greene, 162 Mass. 566, 39 N. E. 277, on offer and bid at auction sale as contract; McIntosh v. Moynihan, 18 Ont. App. Rep. 237, on effect of acceptance of written offer to buy on certain terms where no person is designated as vendee.

Cited in note in 6 E. R. C. 136, on performance of conditions as acceptance of offer addressed to world at large.

Cited in 1 Beach, Contr. 54, on general nature of contract by offer and acceptance; Benjamin, Sales, 5th ed. 487, on auctioneer in sale "without reserve" contracting with highest bona fide bidder that he shall become purchaser; Hollingsworth, Contr. 12, on open letter of credit as a contract.

Right of set-off.

Cited in Harris v. Greene, 25 N. B. 451, to the point that no right of set-off exists between absolute debt and liability which may, or even which must, terminate in debt.

Cited in Joyce, Defenses, Com. Pap. 783, on right of set-off against bona fide holder of bill.

Estoppel.

Cited in Wellband v. Walker, 20 Manitoba L. Rep. 510, holding that person who gives another authority to purchase shares of stock in his own name, is estopped from claiming same as against one who advanced money on agreement for purchase of such stock without notice.

4 E. R. C. 622, BEEMAN v. DUCK, 12 L. J. Exch. N. S. 198, 11 Mees. & W. 251.

Admission of genuineness of indorsement by acceptance of bill.

Cited in First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 26 L.R.A. 289, 38 N. E. 739, holding that even if drawer draws bill or check payable to himself or his own order, and at once indorses it, acceptance or payment of it by drawee admits only genuineness of drawer's original signature, but not genuineness of his indorsement; Ryan v. Bank of Montreal, 14 Ont. App. Rep. 533 (dismissing appeal from 12 Ont. Rep. 39), on liability of acceptor of bill bearing forged indorsement of payee's name, where drawer and payee are the same; Garland v. Jacomb, L. R. 8 Exch. 216, 28 L. T. N. S. 877, 21 Week. Rep. 864, as to whether person who accepts bill with intent that another shall indorse it and so raise money upon it is estopped from denying the indorsement.

Cited in notes in 27 L.R.A. 640, on drawee's duty to know signature of drawer; 4 E. R. C. 634, 635, 636, on estoppel of acceptor to deny genuineness and validity of drawer's signature.

Cited in Joyce, Defences Com. Pap. 794, on estoppel by acceptance as against bona fide indorsee for value; 2 Morse, Banks, 4th ed. 837, on estoppel to deny genuineness of signature to check.

Distinguished in London & S. W. Bank v. Wentworth, L. R. 5 Exch. Div. 96, 49 L. J. Q. B. N. S. 657, 42 L. T. N. S. 188, 28 Week. Rep. 516, holding where acceptor signs his name upon blank piece of stamped paper or on paper upon which drawing in blank has been written, acceptor is liable to bona fide holder for value without notice, if name of stranger or fictitious name be inserted as drawer.

Effect of forged indorsement of bill.

Cited in Smith v. Boyer, 41 How. Pr. 258, holding forged indorsement cannot transfer any interest in bill, and holder has no right to demand the money.

Cited in note in 10 L.R.A.(N.S.) 70, on right of drawee to recover money paid on forged check or draft.

Cited in Joyce, Defences Com. Pap. 822, on estoppel of maker or drawee to set up forgery as a defense; Magee Banks, 297, on rights against drawer of bank paying up check on a forged indorsement.

Effect of drawing bill in favor of fictitious payee.

Cited in Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336, holding one who draws bill to fictitious payees in ignorance that they are fictitious cannot set up such fact as defense to bill in hands of bona fide holder: Vagliano v. Bank of England, L. R. 22 Q. B. Div. 103, 58 L. J. Q. B. N. S. 27, 61 L. T. N. S. 419, 37 Week. Rep. 640, 53 J. P. 564, holding distinction must be drawn between forged signature of real person and signature of fictitious person in construing statute allowing bills payable to fictitious persons to be treated as payable to bearer; Vagliano v. Bank of England, L. R. 23 Q. B. Div. 243, 58 L. J. Q. B. N. S. 357, 61 L. T. N. S. 419, 37 Week. Rep. 640, 53 J. P. 564, on distinction between use of name of one person as both payee and drawer and use of such name as drawer only.

Cited in note in 39 L.R.A. 425, on use of fictitious name as affecting validity of instrument.

4 E. R. C. 626, PHILLIPS v. IM THURN, 35 L. J. C. P. N. S. 220, L. R. 1 C. P. 463, 14 L. T. N. S. 406, 14 Week. Rep. 653.

Effect of making bill or note payable to fictitious person.

Cited in Lane v. Krekle, 22 Iowa, 399, holding that fact note is made payable to fictitious person is no defense to it in hands of bona fide holder; Kohn v. Watkins, 26 Kan. 691, to same effect as to bill.

Cited in Joyce, Defences Com. Pap. 20, on liability on instrument payable to fictitious person.

Distinguished in Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240, where party signed notes with fictitious names or names whose use was unauthorized; Armstrong v. National Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866, holding party cannot be said to have affirmed genuineness of indorsement of check where there was no indorsement upon it when it left his hands; Chism v. First Nat. Bank, 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387, holding drawee bank liable where it paid upon forged indorsement of fictitious person a bill of which others were owners, had possession of same, and refused to account therefor; Agricultural Sav. & L. Asso. v. Federal Bank, 6 Ont. App. Rep. 192, where payees were existing persons with whom plaintiffs believed they were dealing; Vagliano Bros. v. Bank of England, L. R. 23 Q. B. Div. 243, 58 L. J. Q. B. N. S. 357, 61 L. T. N. S. 419, 37 Week. Rep. 640, 53 J. P. 564, dismissing appeal from L. R. 22 Q. B. Div. 103, where persons were held not to be fictitious or nonexisting payees within meaning of statute.

Estoppel of indorser to deny validity of indorsed instrument.

Cited in Todd v. Liverpool & L. & G. Ins. Co. 20 U. C. C. P. 523 (dissenting opinion), on estoppel of warehouseman and his clerk who signed warehouse receipts in his own name to deny that clerk was warehouseman and received grain in store for warehouseman as owner, where warehouseman indorsed receipts.

Cited in Joyce, Defences Com. Pap. 794, on estoppel by acceptance as against bona fide endorsee for value; Joyce, Defences Com. Pap. 824, on estoppel of maker or drawee to set up forgery as a defense.

Elements of equitable estoppel.

Cited in McKay v. Bennett, 14 N. S. 96, on existence of equitable estoppel in absence of fraud or intention to deceive.

4 E. R. C. 637, BAXENDALE v. BENNETT, 47 L. J. Q. B. N. S. 624, L. R. 3 Q. B. Div. 525, 26 Week. Rep. 899.

Liability for negligence in issuing or handling of negotiable instruments.

Cited in O'Herron v. Gray, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429, holding that negligence of guardian in leaving certificates of stock indorsed with her signature in bank for safe keeping is not proximate cause of advance of money upon them to cashier who feloniously takes them; Linick v. A. J. Nutting & Co. 140 App. Div. 265, 125 N. Y. Supp. 93, holding that one who voluntarily intrusts another with commercial paper, with place of payment blank to be filled in by latter, is liable to innocent holder, though different place than agreed place is inserted; Burrows v. Klunk, 70 Md. 451, 3 L.R.A. 576, 14 Am. St. Rep. 371, 17 Atl. 378, holding that indorser of complete note who delivers it to maker to be carried to payee, is not liable to bona fide holder for increased amount of note, if maker raises it before delivering it, merely because spaces

were left in such manner as to permit insertion of words and Cairo Valley v. Terrill, 95 Me. 553, 55 L.R.A. 730, 85 Am. St. Rep. 425, 50 Atl. 896, holding that in absence of gross carelessness maker of negotiable instrument which was never delivered, is not liable to bona fide purchaser from payee who stole it; District of Columbia v. Connell, 130 U. S. 655, 32 L. ed. 1041, 9 Sup. Ct. Rep. 694, holding that when maker of negotiable instrument lawfully cancels it before maturity, his liability upon it ceases, and cannot be revived without his consent; Simmons v. Atchison & L. Co. 69 Miss. 862, 23 L.R.A. 304, 12 So. 263, holding that filling blanks in note by insertion of words "or bearer" constitutes material alteration which will avoid note; Merchants' Nat. Bank v. Baltimore C. & R. S. B. Co. 102 Md. 573, 63 Atl. 108, holding that rule where one of two innocent persons must suffer by wrongful act of third, he must bear loss who put in power of third person to do wrong, has no application to case where third person has fraudulently altered commercial paper. Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 709, 42 N. E. 988, holding that permitting surrendered certificates of stock to remain uncancelled in safe of corporation to which employee has access, and relying upon him to cancel certificates is not such negligence as will render corporation liable for fraudulent use of them by employee; Bangor Electric Light & P. Co. v. Robinson, 52 Fed. 520, that owner of certificate of stock is not deprived of title thereto by its being feloniously taken by one having access to its place of deposit and sold to an innocent purchaser for value; Millard v. Barton, 13 R. I. 601, 43 Am. Rep. 51, holding that note fraudulently procured by payee, is subject to defense in suit by purchaser for valuable consideration, where it did not appear that purchaser bought it in due course or for its full value; Branch v. Sinking Fund Comrs. 80 Va. 427, 56 Am. Rep. 599, holding that note payable to bearer which has been delivered, and stolen from owner, may be recovered upon by bona fide holder for value; Luther v. Clay, 100 Ga. 236, 39 L.R.A. 95, 28 S. E. 46, holding that purchaser of premises took subject to lien of mortgage which had been fraudulently satisfied on record by mortgagor who obtained original mortgage from mortgagee merely for inspection; Young v. Brewster, 62 Mo. App. 628 holding that one who takes from thief tax bills indorsed in blank gets no better title than thief possessed; Long Island Loan & T. Co. v. Columbus, C. & I. C. R. Co. 65 Fed. 455, holding that railroad bonds payable to bearer, placed in hands of president to sell or exchange are valid in hands of purchaser in good faith, though they were disposed of by president for his own benefit; Saderquist v. Ontario Bank, 14 Ont. Rep. 586, holding that delay by depositor in making demand for money, in absence of any negligence upon his part would not prevent recovery from bank which paid money on forged check to person with whom receipt for money was left; Swaisland v. Davidson, 3 Ont. Rep. 320, holding that doctrine of negligence does not apply to perfected negotiable instruments; Merchants' Bank v. McKay, 15 Can. S. C. 672 (dissenting opinion), on right to suppose crime will not be committed and to act in accordance therewith in handling negotiable paper in commercial transactions; Rex v. Barnes, 21 Manitoba L. Rep. 557, holding that person is not liable on check payable to payee named or bearer, which was never delivered, but was stolen from desk; Ray v. Wilson, 45 Can. S. C. 401 (affirming 24 Ont. L. Rep. 122), holding that note signed in blank and placed in custody of agent to be used for special purpose only, is not valid in hands of third person where it was never used for such special purpose; Cross v. Currie, 5 Ont. App. Rep. 31 (affirming 43 U. C. Q. B. 599), holding that one who indorsed note for accommodation for purpose of taking up similar note, and delivers note to

maker, is liable upon same although maker uses it to pay another debt; Hubbert v. Home Bank, 20 Ont. L. Rep. 651, holding that document in form of note, but "wanting" in some "material particular" is not delivered in order that it may be converted into note, payment cannot be enforced against maker; Ontario Bank v. Gibson, 4 Manitoba L. R. (440) affirming 3 Man. L. 496), holding person who endorses note and hands it to his agent to be issued upon its indorsement by another as co-surety not liable on note where intended co-surety does not indorse; Nash v. DeFreville [1900] 2 Q. B. 72, 69 L. J. Q. B. N. S. 484, 48 Week. Rep. 434, 82 L. T. N. S. 642, 16 Times L. R. 268, distinguishing between handing of negotiable instruments "as such" from one person to another, and depositing for safe custody securities capable of being negotiated; Bergman v. Wheeler [1902] 1 K. B. 361, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, holding mere possession of promissory note complete and regular on face of it, and payable to named payee would not be conclusive evidence that maker had given authority to person in whose possession it was to deliver it to the payee.

Cited in notes in 22 L.R.A. 687, on liability of maker or drawer on raised negotiable paper; 4 E. R. C. 514, on discharge from liability on bill or note by cancelation of signature.

Cited in Crawford Negl. Inst. L. 2d ed. 26, on validity of incomplete instrument completed and negotiated without authority; Hollingsworth Contr. 344, on liability to transferee of negotiable instrument by delivery; 2 Morse Banks, 4th ed. 1081, on right of bona fide holder to compel redemption of bank bills stolen from bank.

Distinguished in Crown Bank v. London Guarantee & Acci. Co. 17 Ont. L. Rep. 95, holding that guarantee company was liable to bank for money stolen by teller although if accountant were not negligent teller would not have had access to funds at time they were stolen; Robinson v. Board of School Trustees, 34 N. B. 303, where debenture was negligently allowed to get into circulation; Merchants' Bank v. Good, 6 Manitoba L. Rep. 339, where defendant expressly handed over note with signature for purpose of its being used as his promissory note by payee; Schofield v. Londesborough [1894] 2 Q. B. 960 [1895] 1 Q. B. 536, [1896] A. C. 514, 65 L. J. Q. B. N. S. 595, 75 L. T. N. S. 264, 45 Week. Rep. 124, on ground decision of court in cited case did not take away supposed duty of acceptor to guard against fraudulent alterations of bill; Patent Safety Gun Cotton Co. v. Wilson, 49 L. J. C. P. N. S. 713, where plaintiffs had notorious thief in their service and gave him every opportunity to indorse cheques.

What constitutes "issue" of instrument.

Cited in West Cumberland Iron & Steel Co. v. Winnipeg & H. Bay R. Co. 6 Manitoba L. Rep. 388, holding word issue may be used to signify preparations signing and sealing of documents and placing them entirely out of one's possession and control.

When negligence is proximate cause of forgery.

Cited in Agricultural Sav. & L. Assn. v. Federal Bank, 6 Ont. App. Rep. 199 (affirming 45 U. C. Q. B. 214), holding that negligence of person is not sufficient to charge his loss to another on forged instrument, where such negligence was not proximate cause of loss; Re Cooper, L. R. 20 Ch. Div. 611, 51 L. J. Ch. N. S. 862, 47 L. T. N. S. 89, 30 Week. Rep. 618, holding negligence in not registering will was not proximate cause of forgery or of fraud which was result of forgery.

Doctrine of estoppel.

Cited in Heinisch v. Edmonton, 2 Terr. L. Rep. 462; London & S. W. Bank v. Wentworth, L. R. 5 Exch. Div. 96, 49 L. J. Q. B. N. S. 657, 42 L. T. N. S. 188,

28 Week. Rep. 516, on doctrine of estoppel and its application; McInnis v Getsman, 1 Sask. L. R. 172, holding that if person executes transfer with mind and intention to execute it, though his assent may have been obtained by fraud he is estopped from denying its validity as against subsequent bona fide purchasers.

Cited in notes in 4 E. R. C. 646, 648, on estoppel to deny liability to bona fide holder on commercial paper issued in blank and subsequently filled up; 11 Eng. Rul. Cas. 100, on estoppel by conduct.

4 E. R. C. 649, CROWE v. CLAY, 9 Exch. 604, 18 Jur. 654, 23 L. J. Exch. N. S. 150, 2 Week. Rep. 204, reversing the decision of the Court of Exchequer, reported in 8 Exch. 295.

Maintenance of action on lost note.

Cited in Hudson v. Wright, 204 Mo. 412, 103 S. W. 8, holding that at common law no action could be maintained upon lost note except in equity; Atkinson v Gould, 8 N. S. 482 (dissenting opinion), on right of recovery upon unindorsed negotiable bill not under control of plaintiff.

Payment or discharge of debt by giving of negotiable instrument.

Cited in Johnson v. Amarillo, 88 Tex. 505, 31 S. W. 503, holding that giving of note for antecedent debt will not extinguish it unless such was intention of parties; Campbell v. McCaskell, 7 N. S. 36, holding unequivocal evidence that note was accepted as payment for goods as satisfaction and extinguishment of debt is required to give note that effect; Commercial Bank v. Page, 13 N. B. 326, holding negotiable instrument may be given for debt and be valid and binding agreement, though it does not absolutely extinguish original debt.

Cited in notes in 35 L.R.A.(N.S.) 49, on payment by commercial paper; 4 Eng. Rul. Cas. 529, on liability of creditor failing to collect bill or note when due.

Cited in Benjamin Sales, 5th ed. 782, on payment by bill or note as not necessarily a satisfaction or discharge of the debt; Benjamin Sales, 5th ed. 788, on effect of loss of bill received in payment of goods sold; Parsons Partn. 4th ed. 483, on necessity of consent and consideration to discharge of debt of old firm on change in partnership.

Liability of debtor upon debt evidenced by outstanding negotiable instrument.

Cited in Battle v. Coit, 26 N. Y. 404, holding that where one partner sold interest to others, receiving bills of exchange to which some were not parties, his release to them was defense to action for purchase money by indorsee of bills; Waterous Engine Works Co. v. Wilson, 11 Manitoba L. Rep. 287, holding debtor who has given negotiable bill or note cannot set up transfer of bill or note by creditor without pleading it; Freeman v. Canadian Guardian Life Ins. Co. 17 Ont. L. Rep. 296, as to what is laches of creditor such as will satisfy debt for which valid note or bill has been delivered.

Distinguished in Edwards v. Walters [1896] 2 Ch. 157, 65 L. J. Ch. N. S. 557, 74 L. T. N. S. 396, 44 Week. Rep. 547, where devisees of maker held note and were not liable to be sued thereon by any one suit was against them and maker's representatives; Charles v. Blackwell, L. R. 2 C. P. Div. 151, 46 L. J. C. P. N. S. 368, 36 L. T. N. S. 195, 25 Week. Rep. 472, where cheque was payable to order.

4 E. R. C. 654, GERALOPULO v. WIELER, 10 C. B. 690, 15 Jur. 316, 20 L. J. C. P. N. S. 105.

Parol evidence of contents of writing.

Cited in note in 11 E. R. C. 213, on parol evidence as to contents of written instrument.

4 E. R. C. 665, McLEAN v. FLEMING, 1 Asp. Mar. L. Cas. 160, 5 Sc. Sess. Cas. 3d. Series 893, L. R. 2 H. L. Sc. App. Cas. 128, 25 L. T. N. S. 317.

Bill of lading — Conclusiveness as to receipt of or quantity described.

Cited in American Sugar Ref. Co. v. Maddock, 36 C. C. A. 42, 93 Fed. 980; Maddock v. American Sugar Ref. Co. 91 Fed. 166,—holding a vessel is not liable for a shortage in the number of bags of sugar set out in a bill of lading signed by the master, although such bill and the sugar represented by it have passed to a bona fide purchaser where no fraud is charged and it is conceded that all the sugar actually received on board or which came into the hands of the master was delivered; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; National Bank v. Chicago, B. & N. R. Co. 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342,—holding bill of lading issued by a station or shipping agent of common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier even to an innocent consignee or indorsee for value; Melady v. Jenkins S. S. Co. 18 Ont. L. Rep. 251, holding bills of lading signed by master prima facie evidence that quantities mentioned in them had been received on board vessel; Murton v. Kingston & M. Forwarding Co. 32 U. C. C. P. 366, as to it concluding person signing same; Brown v. Powell Duffryn Steam Coal Co. L. R. 10 C. P. 562, 44 L. J. C. P. N. S. 289, 32 L. T. N. S. 621, 23 Week. Rep. 549, 2 Asp. Mar. L. Cas. 578, holding the ship owner was not estopped by the master's signature to the bill of lading from showing that some of the goods were never actually put on board.

Cited in notes in 27 L.R.A. 172, on liability of owner on false bill of lading signed by master of ship; 24 Eng. Rul. Cas. 359, on force and effect of bill of lading.

Cited in 4 Elliott Railr. 2d ed. 48, on bills of lading as evidence of receipt of goods; 4 Elliott Railr. 2d ed. 50, on bills of lading as evidence of condition, weight, or contents of goods; Porter Bills of L. 16, on statement of weight and quantity in bill of lading as only prima facie evidence of amount; Porter Bills of L. 19, on effect of statement of quantity in bill of lading on burden of proof; Porter Bills of L. 39, on effect of qualifying qualities in bill of lading; Porter Bills of L. 271, on effect of stipulations in bill of lading as to lien for freight; Porter Bills of L. 315, 316, on carrier's nonliability on unauthorized issuance of bill of lading by agent without receiving the goods.

— Negotiability.

Cited in Lazard v. Merchants' & M. Transp. Co. 78 Md. 1, 26 Atl. 897, holding bills of lading not negotiable.

Cited in Joyce Defences Com. Pap. 527, on effect of making bill of lading negotiable.

Distinguished in Crossman v. Burrill, 179 U. S. 100, 45 L. ed. 106, 21 Sup. Ct. Rep. 38, holding indorsees of bills of lading who were not the persons who had originally authorized the chartering of the ship were not bound by the provisions of the charter party.

Authority of master to sign bills of lading.

Cited in note in 24 E. R. C. 275, on authority of master of ship.

Cited in 1 Hutchinson Car. 3d ed. 169, on authority of master to sign bills of lading.

Compensation for dead freight under charter party.

Cited in Leroy v. Buyers, 36 La. Ann. 705; Lord v. Davidson, 17 Can. S. C. 166,—as to compensation recoverable by ship owner.

Cited in note in 8 E. R. C. 605, on right to lien for dead freight.

Distinguished in Gray v. Carr, L. R. 6 Q. B. 522, 25 L. T. N. S. 213, 40 L. J. Q. B. N. S. 267, 19 Week. Rep. 1173, 1 Asp. Mar. L. Cas. 115, 8 Eng. Rul. Cas. 479, where the liability was on a bill of lading and not a charter party and lien for "dead freight" was not allowed.

Evidence of receipt of goods.

Cited in Kelley v. Cunard S. S. Co. 120 Fed. 536, holding upon the issue whether goods claimed to have been shipped in a foreign port but which were not delivered by carrier were in fact received on board the acts of the ship's officers whose customary duty it is to check off merchandise received aboard, is received as evidence of great importance.

Estoppel.

Cited in Whitechurch v. Cavanagh [1902] A. C. 117, 71 L. J. K. B. N. S. 400, 86 L. T. N. S. 349, 50 Week. Rep. 218, 17 Times L. R. 240, holding a corporation was not estopped from showing that its secretary had no shares to transfer on its behalf.

Cited in note in 11 E. R. C. 121, on estoppel of warehousemen or bailee by giving receipt.

1 E. R. C. 675, VALIERI v. BOYLAND, 12 Jur. N. S. 566, 35 L. J. C. P. N. S. 215, L. R. 1 C. P. 382, 14 L. T. N. S. 362, 14 Week. Rep. 637.

Negotiability of bill of lading.

Cited in Price v. Wisconsin M. & F. Ins. Co. 43 Wis. 207, as to negotiability of warehouse receipts; Hale v. Milwaukee Dock Co. 29 Wis. 482, 9 Am. Rep. 603, holding indorsement or delivery of bill of lading or warehouse receipt does not convey the contract itself but only the property represented by it and becomes a mere evidence of the title of the holder in such property.

4 E. R. C. 680, GRILL v. GENERAL IRON SCREW COLLIERY CO. 37 L. J. C. P. N. S. 205, L. R. 3 C. P. 476, 18 L. T. N. S. 485, 16 Week. Rep. 796, affirming the decision of the Court of Common Pleas, reported in 12 Jur. N. S. 727, 35 L. J. C. P. N. S. 321, 14 L. T. N. S. 711, L. R. 1 C. P. 600, 14 Week. Rep. 893.

Limitation of liability of marine carriers from barratry, theft, negligence, and the like.

Cited in Steinman v. Angier Line [1891] 1 Q. B. 619, 60 L. J. Q. B. N. S. 425, 64 L. T. N. S. 613, 39 Week. Rep. 392, 7 Asp. Mar. L. Cas. 46, holding exemption cause in bill of lading by which defendants were exempted from liability in respect of losses caused by "pirates, robbers or thieves of whatever kind, whether on board or not, or by land or sea," did not apply to thefts committed by persons employed in service of the ship; The Chasca, L. R. 4 Adm. & Eccl. 446, 44 L. J. Prob. N. S. 17, 32 L. T. N. S. 838, 2 Asp. Mar. L. Cas. 600, holding exemption from liability from perils of sea did not relieve from liability for loss caused by barratry; Notara v. Henderson, L. R. 7 Q. B. 225, 41 L. J. Q. B. N. S. 158, 26 L. T. N. S. 442, 20 Week. Rep. 442, 1 Asp. Mar. L. Cas. 278; Price v. Union Lighterage Co. [1903] 1 K. B. 750, 72 L. J. K. B. N. S. 374, 88 L. T. N. S. 428, 51 Week.

Rep. 477, 9 Asp. Mar. L. Cas. 398, 8 Com. Cas. 155 (affirmed in [1904] 1 K. B. 412, 73 L. J. K. B. N. S. 222, 52 Week. Rep. 325, 89 L. T. N. S. 731, 20 Times L. R. 177, 9 Com. Cas. 120),—holding it does not relieve carrier from liability for negligence unless it so expressly provides; Trinder, A. & Co. v. Thames & M. Ins. Co. [1898] 2 Q. B. 114, 67 L. J. Q. B. N. S. 666, 78 L. T. N. S. 485, 46 Week. Rep. 561, 8 Asp. Mar. L. Cas. 373, 14 Times L. R. 386, 3 Com. Cas. 123, as to exemption from liability not releasing carrier from liability for negligence.

Cited in notes in 4 Eng. Rul. Cas. 693, on exemption of carrier from liability for negligence by exceptions contained in bill of lading; 24 E. R. C. 358, on termination of ship owner's liability from charter party or bill of lading; 21 E. R. C. 397, on exemption from liability due to dangers and accidents of the sea.

Cited in 1 Hutchinson Car. 3d ed. 524, on exceptions to liability in bills of lading of carriers by water; Porter Bills of L. 150, on conditions under which loss by collision may arise; Porter Bills of L. 210, on what are not perils of the sea.

The decision of Court of Common Pleas was cited in Compania de Navigacion v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12; Liverpool & G. W. Steam Co. v. Phœnix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469,—holding a common carrier by sea cannot, by any stipulation with a shipper of goods exempt himself from all responsibility for loss or damage by perils of the sea arising from negligence of officers or crew; Tranmer v. Black Diamond S. S. Co. 16 Can. S. C. 156 (dissenting opinion), as to when ship owner liable; Dixon v. Richelieu Nav. Co. 15 Ont. App. Rep. 647 (dissenting opinion), as to exemption not covering loss by carrier's negligence; Chartered Mercantile Bank v. Netherlands, India Steam Nav. Co. L. R. 9 Q. B. Div. 118, L. R. 10 Q. B. Div. 521, 52 L. J. Q. B. N. S. 220, 48 L. T. N. S. 546, 31 Week. Rep. 445, 5 Asp. Mar. L. Cas. 65, 47 J. P. 260, as to whether exemption from perils of sea includes loss occasioned by collision; Wilson v. The Xantho, L. R. 12 App. Cas. 503, 56 L. J. Prob. N. S. 116, 57 L. T. N. S. 701, 36 Week. Rep. 353, 6 Asp. Mar. L. Cas. 207, holding foundering caused by a collision with another vessel is within exception "dangers and accidents of the sea" in a bill of lading; and excuses the ship owner for non delivery of the goods if it occurs without fault in the carrying ship.

— Burden of proof.

The decision of the Court of Common Pleas was cited in The Glendarroch [1894] P. 226, 63 L. J. Prob. N. S. 89, 6 Reports, 686, 70 L. T. N. S. 344, 7 Asp. Mar. L. Cas. 420, 24 Eng. Rul. Cas. 385, holding that as the loss apparently fell within the exception, the burden of showing that the defendants were not entitled to the benefit of the exception by reason of negligence, lay upon the plaintiff.

Negligence.

Cited in note in 18 E. R. C. 657, on liability for negligence of person undertaking service for reward.

Cited in Black Proof & Pl. Accident Cas. 286, on forms of declarations for negligence.

The decision of the Court of Common Pleas was cited in Oppenheim v. White Lion Hotel Co. L. R. 6 C. P. 515, 40 L. J. C. P. N. S. 231, 25 L. T. N. S. 93; Dudley v. Camden & P. Ferry Co. 45 N. J. L. 368, 46 Am. Rep. 781,—as to definition of negligence; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Lake Erie & W. R. Co. v. Ford, 167 Ind. 205, 78 N. E. 969; Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; Maslin v. Baltimore & O. R. Co. 14 W. Va. 180, 35

Am. Rep. 748,—holding it is the failure to bestow the care and skill which the situation demands.

— Degrees of "slight," "ordinary," and "gross."

Cited in Reinhard Ag. 206, on degrees of negligence of gratuitous bailees and bank directors.

The decision of the Court of Common Pleas was cited in Gurney v. Mackay, 37 U. C. Q. B. 325, as to definition of gross negligence; Chicago R. I. & P. R. Co. v Hamler, 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 1 Ann. Cas. 42, holding negligence whether it be termed slight, ordinary or gross is but the omission of a duty, and if actionable at all entails but one measure of liability unless the negligence was willful or intentional; Purple v. Union P. R. Co. 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123; Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374; Atchison v. Wills, 21 App. D. C. 548; Reed v. Western U. Teleg. Co. 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W. 904,—holding there is no distinction between negligence and gross negligence; Union P. R. Co. v. Rollins, 5 Kan. 167; Hand v. Central Pennsylvania Teleph. & Supply Co. 1 Lack. Leg. News, 351; McPheeters v. Hannibal & St. J. R. Co. 45 Mo. 22,—as to there being no difference between negligence and gross negligence; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Dudley v. Camden & P. Ferry Co. 42 N. J. L. 25, 36 Am. Rep. 501,—as to the degrees of negligence; Western U. Teleg. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, as to definition of gross negligence; State v. Manchester & L. R. Co. 52 N. H. 528; Charlotte Trouser Co. v. Seaboard Airline R. Co. 139 N. C. 382, 51 S. E. 973; Cleveland, C. C. & Q. R. Co. v. Elliott, 28 Ohio St. 340,—to the point term "gross negligence," is merely negligence with addition of vituperative epithet; Carlisle v. Grand Trunk R. Co. 25 Ont. L. Rep. 372, 1 Dom. L. R. 130, to the point that gross negligence is same thing as negligence with addition of vituperative epithet; Fitzgerald v. Grand Trunk R. Co. 4 Ont. App. Rep. 601; Giblin v. McMullen, L. R. 2 P. C. 317, 38 L. J. P. C. N. S. 25, 5 Moore P. C. N. S. 434, 21 L. T. N. S. 214, 17 Week. Rep. 445, 3 Eng. Rul. Cas. 613; Scaramanga v. Stamp, L. R. 4 C. P. Div. 316, 48 L. J. C. P. N. S. 478, 41 L. T. N. S. 191,—as to definition of gross negligence.

Liability of carrier of goods.

The decision of the Court of Common Pleas was cited in Reed v. Western U. Teleg. Co. 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W. 904, holding that stipulation limiting liability of telegraph company for errors and mistakes in transmission of unrepeated messages is not valid so far as it applies to mistake caused by negligence of operators; Courtnay v. Canadian Development Co. 8 B. C. 53, as to when liable when accident happens through act of God.

Causa Causans.

The decision of the Court of Common Pleas was cited in The City of Norwich, 3 Ben. 575, Fed. Cas. No. 2,760, holding in an action against a carrier who undertook to carry goods safely it is shown guilty of a negligence which set in motion a train of circumstances, not necessarily but naturally leading to the loss which occurred, the carrier is liable; Fenton v. J. Thorley & Co. [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 89 L. T. N. S. 314, 52 Week. Rep. 81, 19 Times L. R. 684, as to it being regarded in certain actions for tort.

The decision of the Court of Common Pleas was distinguished in Harkley v. Provincial Ins. Co. 18 U. C. C. P. 335, holding on policy of marine insurance that damage resulted from causes other than perils of sea would not take case out of policy.

Burden of proof in admiralty.

The decision of the Court of Common Pleas was cited in Smith v. The Bronx, 86 Fed. 809, holding the burden of proving that the damages to be recovered were caused by the wrongdoing of the offending vessel remains on the libellant, and does not shift during the trial; but the introduction of evidence may give rise to a presumption of fact, and thus put upon a party the burden of explaining a situation from which, in the absence of explanation his liability would be presumed.

Barratry.

Cited in note in 14 E. R. C. 355, on what constitutes barratry.

Cited in Porter Bills of L. 145, on what constitutes barratry.

The decision of the Court of Common Pleas was cited in Atkinson v. Great Western Ins. Co. 4 Daly, 1, as to the definition of.

Suppression of depositions.

Cited in Claverie v. Gory, 4 Terr. L. Rep. 470, holding deposition taken under commission without authority may be suppressed without any application to suppress.

The decision of the Court of Common Pleas was cited in Thompson v. Seguin, 8 Manitoba L. Rep. 79; Lodge v. Thompson, 26 U. C. Q. B. 588,—holding depositions taken under commission will not be suppressed at trial for irregularities unless taken without authority; Wright v. Shattuck, 4 Terr. L. R. 317, holding that order to suppress deposition of party may be made at chambers upon summons, or to court directly.

The decision of the Court of Common Pleas was distinguished in Millville Mut. M. & F. Ins. Co. v. Driscoll, 11 Can. S. C. 183 (allowing appeal from 23 N. B. 160) holding the failure to administer the interrogatories according to the terms of the commission was a substantial objection and rendered the evidence incapable of being received.

Construction of statutes.

The decision of the Court of Common Pleas was cited in Hutchins v. Covert, 39 Ind. App. 382, 78 N. E. 1061, holding subsequently passed statutes upon the same subject matter may be looked to as an aid in the interpretation of a prior statute.

4 E. R. C. 697, STEEL v. STATE LINE S. S. CO. L. R. 3 App. Cas. 72, 3 Asp. Mar. L. Cas. 516, 37 L. T. N. S. 333.

Contract limiting liability of carrier.

Cited in The Silvia, 15 C. C. A. 362, 35 U. S. App. 395, 68 Fed. 230; The Silvia, 64 Fed. 607,—holding that under act of Congress of 1893, ship owner is not liable for damage resulting from omission of officers to close iron covers over glass port lights, in consequence of which water broke through glass and injured cargo; Insurance Co. of N. A. v. North German Lloyd Co. 106 Fed. 973, holding if taking a cargo to a vessel in lighters be part of the loading of the vessel a stipulation in the bill of lading relieving the carrier from failure to provide a fit lighter is prohibited by the Harter Act declaring it unlawful for owner of vessel engaged in transporting merchandise to stipulate against liability from loss from negligence in loading; Stevens v. Navagazione Generale Italiana, 39 Fed. 562, holding a bill of lading exempting the vessel owners from liability for "damage done by vermin" does not exonerate them from responsibility by rats resulting from their negligence in omitting to fumigate the ship before loading;

The Titania, 19 Fed. 101, holding by law of England exemption from liability in bill of lading will not relieve carrier from liability from loss caused by its negligence unless exemption be specific; The Svend, 1 Fed. 54, holding exceptions in bill of lading against breakage, leakage and rust as well as perils of the sea do not relieve a carrier from liability where a cargo of iron was injured by salt water, owing to improper storage and defective construction of vessel; Compania de Navigacion v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12, holding exemption from liability from loss by "perils of the sea" does not relieve carrier from liability on account of negligence; The Rover, 33 Fed. 515; The Caledonia, 43 Fed. 681; The Italia, 59 Fed. 617; Glengoil S. S. Co. v. Pilkington, 28 Can S. C. 146,—holding exemptions from liability in bill of lading applied only to loss or damage resulting from acts done during the carriage of the goods and did not cover damages caused by neglect or improper storage prior to commencement of voyage.

Cited in notes in 4 Eng. Rul. Cas. 694, on exemption of carrier from liability for negligence by exceptions contained in bill of lading; 24 E. R. C. 370, on limitation of liability in charter party or bill of lading.

Distinguished in Trainor v. Black Diamond S. S. Co. 16 Can. S. C. 156, construing a bill of lading as exempting carrier from liability for damages caused by improper storage.

Disapproved in The Brantford City, 29 Fed. 373; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469,—holding a common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from all responsibility for loss or damage by perils of the sea, arising from negligence of officers or crew.

— As to seaworthiness.

Cited in The Exe, 52 Fed. 155, holding exceptions as to perils of sea do not include unseaworthiness; The Carib Prince, 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753, holding exceptions in bill of lading of damage from "latent defects in hull" etc., do not include unseaworthiness existing at inception of voyage, and at time bill of lading was signed and resulting from a latent defect in a rivet in a water tank; Church Cooperage Co. v. Pinkney, 95 C. C. A. 462, 170 Fed. 266, holding that ship which is fit for carrying of article is one which will carry such article without injury, and liability of shipowner extends to latent injury.

Distinguished in The Regulus, 18 Fed. 380, holding exception in bill of lading against loss by negligence did not exempt carrier from liability from loss occasioned by unseaworthiness of vessel; Union S. S. Co. v. Drysdale, 32 Can. S. C. 379 (reversing 8 B. C. 228), holding where on a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date after which the same would be completely barred, the limitation applied to a claim for damages caused by unseaworthiness of steamer.

Seaworthiness, what constitutes.

Cited in The Manitoba, 104 Fed. 145, holding under facts vessel was unseaworthy; The British King, 89 Fed. 872; The Silvia, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7 (affirming 68 Fed. 330, 15 C. C. A. 362, 35 U. S. App. 395 which affirmed 64 Fed. 607),—holding on facts the vessel was unseaworthy; International Nav. Co. v. Farr & B. Mfg. Co. 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591, holding question whether ship is reasonably fit to carry her

cargo must be determined upon the whole circumstances and the whole evidence.

Cited in 1 Hutchinson, Car. 3d ed. 384, on unfastened ports as rendering vessel unseaworthy.

— Implied warranty of.

Cited in Neilson v. Coal, Cement & Supply Co. 122 Fed. 617; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537; The Edwin I. Morrison, 153 U. S. 199, 38 L. ed. 688, 14 Sup. Ct. Rep. 823,—holding there is an implied warranty of seaworthiness of ship.

Cited in notes in 5 E. R. C. 272, on implied contract by carrier of seaworthiness and fitness of vessel; 5 E. R. C. 649, on implied warranty of seaworthiness by shipowner entering into charter party; 14 E. R. C. 66, on implied warranty of seaworthiness of vessel insured.

Cited in Hughes, Adm. 57, on seaworthiness as implied condition of marine insurance on vessel, cargo or freight; Hughes, Adm. 160, on implied condition in charter party of seaworthiness and against deviation.

4 E. R. C. 717, TATTERSALL v. NATIONAL S. S. CO. 5 Asp. Mar. L. Cas. 206, 53 L. J. Q. B. N. S. 332, 50 L. T. N. S. 299, L. R. 12 Q. B. Div. 297, 32 Week. Rep. 566.

Implied warranty of fitness and seaworthiness.

Cited in Church Cooperage Co. v. Pinkney, 163 Fed. 653, holding that under charter-party in which it was stipulated that vessel would be cleansed as much as possible, owner was not liable for damage to cargo by odor of creosote, where charter-party recited that vessel was then carrying creosote; The Brantford City, 29 Fed. 373; Church Cooperage Co. v. Pinkney, 95 C. C. A. 462, 170 Fed. 266,—holding that ship is impliedly warranted to be fit to carry merchandise which she undertakes to carry; The Exe, 52 Fed. 155; The Caledonia, 43 Fed. 681; The Rover, 33 Fed. 515,—holding that stipulations in charter party that vessel is not responsible for delivery of cargo in bad condition, or from damage from perils of steam, or machinery, do not absolve owner from duty of providing seaworthy vessel; The Italia, 59 Fed. 617, holding that exceptions in bill of lading did not apply to damage caused cargo by water which escaped through hole in lead piping caused by rats; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537, holding that exceptions in contract of carriage limit liability but not duty of owner, and do not in absence of express provisions protect owner against consequences of furnishing unseaworthy vessel; Union S. S. Co. v. Drysdale, 32 Can S. C. 379 (reversing 8 B. C. 228), holding that stipulation in bill of lading that claim for damage must be presented within one month, applied to claim for damage caused by unseaworthiness of vessel; Queensland Nat. Bank v. Peninsular & O. Steam Nav. Co. [1898] 1 Q. B. 567, 8 Asp. Mar. L. Cas. 338, 3 Com. Cas. 51, 67 L. J. Q. B. N. S. 402, 78 L. T. N. S. 67, 14 Times L. R. 166, 46 Week. Rep. 324; The Maori King v. Hughes [1895] 2 Q. B. 550, 14 Reports, 646, 73 L. T. N. S. 141, 44 Week. Rep. 2, 65 L. J. Q. B. N. S. 168,—holding there is an implied warranty of seaworthiness.

Cited in note in 5 E. R. C. 272, on implied contract by carrier of seaworthiness and fitness of vessel.

Exceptions to liability in bill of lading.

Cited in 1 Hutchinson, Car. 3d ed. 531, on liability of carrier by water notwithstanding exceptions in bill of lading if loss is caused by negligence.

Liability of carrier for damage before commencement of voyage.

Cited in Whitman v. Western Counties R. Co. 17 N. S. 405, holding that carrier was liable for damage occurring while loading machine on car, caused by servants negligence although carriage was under special contract releasing carrier from damages; Trainor v. Black Diamond S. S. Co. 16 Can. S. C. 156 (dissenting opinion), on liability of shipowner for negligent stowage before commencement of voyage under stipulations limiting liability; Glengoil S. S. Co. v. Pilkington, 28 Can. S. C. 146, holding that stipulation in bill of lading did not apply to damage caused by improper towage prior to commencement of voyage; Spedding v. Grand Trunk R. Co. Rap. Jud. Quebec 40 C. S. 463, holding that liability of carrier, under statute, begins only from delivery of goods, and where shipper puts goods in car on siding, delivery to company takes when it seals car.

Liability of carrier of live stock.

Cited in note in 26 L.R.A.(N.S.) 714, on liability of carrier for damage to live stock by contagious disease contracted during transit.

Cited in 4 Elliott, Railr. 2d ed. 302, on liability of carrier of live stock for negligence.

4 E. R. C. 725, TURNER v. LIVERPOOL DOCKS, 6 Exch. 543, 20 L. J. Exch. N. S. 393.

Bill of lading as instrument of title and transfer.

Cited in New Haven Wire Co. v. Cases, 57 Conn. 352, 5 L.R.A. 300, 18 Atl. 266, as to when title passes by delivery of; Hieskell v. Farmers' & M. Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745, 7 W. N. C. 249, holding bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself investing the indorsers with a constructive custody, which serves all purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and pursuant to bill of lading, to person entitled to receive same; Royal Canadian Bank v. Miller, 28 U. C. Q. B. 593, as to how transferred; Kyle v. Lake Huron & B. R. Co. 16 U. C. C. P. 76, holding a bill of lading is not conclusive proof of the change of property, it is a question of evidence whether such an operation should be given it.

Cited in note in 23 E.R. C. 381, on transfer of title by bill of lading.

Cited in Benjamin, Sales, 5th ed. 385, on passing of title to goods where bill of lading is taken to order of fictitious person; Benjamin, Sales, 5th ed. 391, on passing of title to goods where bill of lading is taken to order of seller as buyer's agent only; 1 Mechem, Sales, 651, 655, on bill of lading to seller's order as a reservation of the jus disponendi preventing passing of title.

— In name or to order of shipper.

Cited in Suerard v. The Loospring, 42 Fed. 853; Dows v. National Exch. Bank 91 U. S. 618, 23 L. ed. 214; Farmers' & M. Bank v. Brown, 10 Jones & S. 522,—holding bill of lading taken in name of shipper prima facie evidence of his intention to reserve the jus disponendi; Corby v. Williams, 7 Can. S. C. 470, holding that title to property remained in consignor and assignee of bill of lading until payment of draft by consignee, where bill of lading was in shipper's name; Falke v. Fletcher, 34 L. J. C. P. N. S. 146, 18 C. B. N. S. 403, 11 Jur. N. S 176, 13 Week. Rep. 346, as to merchant shipping goods taking bill of lading in his own name; The Ferreri, 9 Fed. 468; Gabarrow v. Kreeft, L. R. 10 Exch. 274, 44 L. J. Exch. N. S. 238, 33 L. T. N. S. 365, 24 Week. Rep. 146, 3 Asp. Mar. L. Cas. 36,—holding shipper may take bill of lading deliverable to himself.

Sale by transfer of bill of lading with draft attached.

Cited in Refining & Storage Co. v. Miller, 7 Phila. 97, 25 Phila. Leg. Int. 228; Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 72 S. C. 450, 2 L.R.A.(N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 Ann. Cas. 261; Vaughn v. New York, N. H. & H. R. Co. 27 R. I. 235, 61 Atl. 695,—holding where property is shipped accompanied by draft attached to bill of lading the title does not pass until payment of draft and delivery of bill of lading.

Cited in Porter, Bills of L. 397, on consignee's right to claim possession of goods before acceptance of draft attached to bill of lading.

Distinguished in Shepherd v. Harrison, L. R. 4 Q. B. 196, 38 L. J. Q. B. N. S. 105, 20 L. T. N. S. 24, L. R. 5 H. L. 116, 40 L. J. Q. B. N. S. 148, 24 L. T. N. S. 857, 20 Week. Rep. 1, 23 Eng. Rul. Cas. 349, holding the intention of vendor was that property in the goods should not pass to plaintiff until he had accepted bill of exchange.

Transition of title to goods sold and in transit.

Cited in Gossler v. Schepeler, 5 Daly, 476; Clark v. Rose, 29 U. C. Q. B. 168; Corby v. Williams, 7 Can. S. C. 470,—holding delivering of goods contracted for on board ship when bill of lading is taken is not a delivery to the buyers but to the captain as bailee to deliver to the person indicated by bill of lading; Mason v. Great Western R. Co. 31 U. C. Q. B. 73 (dissenting opinion), as to when title passes; Mirabita v. Imperial Ottoman Bank, L. R. 3 Exch. Div. 164, 47 L. J. Exch. N. S. 418, 38 L. T. N. S. 597, 3 Asp. Mar. L. Cas. 591, holding under circumstances there was an appropriation by vendors of cargo subject to payment of the price.

Stoppage in transitu.

Cited in Hoover v. Tibbits, 13 Wis. 80, holding the vendors' right of stoppage in transitu continues until there has been an actual or constructive delivery of goods to vendee; Berndtson v. Strang, L. R. 4 Eq. 481, 36 L. J. Ch. N. S. 879, 16 L. T. N. S. 583, 15 Week. Rep. 1168, holding although the bill of lading was indorsed by vendor in blank, and handed over to the purchaser in exchange for the accepted bill of exchange, that did not complete the delivery of the goods or deprive vendor of right of stoppage in transitu; Childs v. Northern R. Co. 25 U. C. Q. B. 165; Ex parte Francis, 56 L. T. N. S. 577, 6 Asp. Mar. L. Cas. 138, 4 Morrell, 146,—as to when it exists.

— Goods on board buyer's ship.

Cited in Sturtevant v. Orser, 24 N. Y. 538, 82 Am. Dec. 321, holding that goods delivered to vendee upon his own vessel to be transported by himself was not subject to stoppage in transitu.

Cited in 2 Mechem, Sales, 1300, 1302, on right of stoppage in transitu in case of shipment on vessel owned by buyer.

Distinguished in Wiley v. Smith, 1 Ont. App. Rep. 179; Schotsmans v. Lancashire & Y. R. Co. L. R. 2 Ch. 332, 36 L. J. Ch. N. S. 361, 16 L. T. N. S. 189, 15 Week. Rep. 537,—holding delivery on board purchaser's ship was delivery to the purchaser so as to preclude stoppage in transitu before the delivery of the goods at the port of consignment.

Sufficiency of delivery to pass title.

Cited in Ward v. Taylor, 56 Ill. 494, holding that goods consigned to vendor in care of vendee, are not delivered to vendee so as to pass title; Farmers' & M. Nat. Bank v. Atkinson, 74 N. Y. 568, holding that where commercial correspondents on order of principal, make purchase of property ultimately for

him, but on their own credit, they may retain title in themselves until they are reimbursed; Martin v. Hill, 12 Barb. 631, holding that interest acquired under mortgage of personalty, valid here, will not be divested by proceedings in invitum in another state, to which property may be taken for temporary purpose by mortgagor; Gowans v. Consolidated Bank, 43 U. C. Q. B. 318, holding that goods invoiced to and paid for by plaintiff, did not become his property, where goods were stored with warehouseman who gave defendant warehouse receipts for them.

Cited in note in 22 L.R.A. 421, 424, on passing of title to property by delivery to carrier for transportation to consignee or vendee.

Cited in Benjamin, Sales, 5th ed. 883, 884, on right of seller to restrain effect of delivery on buyer's vessel by bill of lading; 1 Mechem, Sales, 610, on putting of goods into buyer's conveyance as an appropriation of same; 1 Mechem, Sales, 672, as to when title passes to goods which are to be delivered f. o. b.

— Effect of reservation of right of disposal of goods.

Cited in Benjamin, Sales, 5th ed. 382, 400, on effect of reservation of right of disposal on passing of title to goods sold; 1 Mechem, Sales, 660, 661, on effect on passing of title to goods of seller's reservation of the jus disponendi; Porter, Bills of L. 368, on shipment in vendee's vessel as not conclusively rebutting presumption of seller's reserved control.

4 E. R. C. 746, OGG v. SHUTER, 3 Asp. Mar. L. Cas. 77, L. R. 1 C. P. Div. 47, 45 L. J. C. P. N. S. 44, 33 L. T. N. S. 492, 24 Week. Rep. 100, reversing the decision of the Court of Common Pleas, reported in 32 L. T. N. S. 114, 23 Week Rep. 319, 44 L. J. C. P. N. S. 161, L. R. 10 C. P. 159.

Sales — when title passes.

Cited in Jones v. Brewer, 79 Ala. 545, holding under a contract for sale and purchase of a manufactured article, the property does not pass to the purchaser by his order to the manufacturer and its acceptance, there must be the selection and appropriation of one particular article, and facts showing an intention to pass the title to purchaser; H. Baars & Co. v. Mitchell, 83 C. C. A. 466, 154 Fed. 322; Bernhart v. McCutcheon, 12 Manitoba L. Rep. 394,—holding there was sufficient appropriation of goods under the contract to pass title; Hatch v. Standard Oil Co. 100 U. S. 124, 25 L. ed. 554; Gowans v. Consolidated Bank, 43 U. C. Q. B. 318,—as to what is sufficient appropriation of goods to pass title; Wilson v. Mason, 38 U. C. Q. B. 14, as to when title passes; Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Wright v. Shattuck, 5 Terr. L. Rep. 264,—holding question is one of intention to be gathered from all the circumstances; H. Baars & Co. v. Mitchell, 83 C. C. A. 466, 154 Fed. 322, holding that contract to sell all lumber of certain description then on hand and all that should be manufactured by vendee during certain time, and providing for certain payments every 30 days, conveyed title to lumber piled separately and for which percentage of value required paid; Smith v. Edwards, 29 Hun, 493, holding that intent of parties as to when title to goods sold should pass is to be gathered from contract and surrounding circumstances.

Cited in notes in 17 L.R.A. 180, on essentials to valid sale of goods; 22 L.R.A. 415, on passing of title to property by delivery to carrier for transportation to consignee or vendee; 62 L.R.A. 803, on effect of contract to ship goods f. o. b. upon passing of title; 26 L.R.A.(N.S.) 7, 10, 29, on sufficiency of selection or designation of goods sold out of larger lot; 4 E. R. C. 755, on rights of unpaid

vendor retaining bill of lading; 23 E. R. C. 380, on passing of title on conditional sale of goods.

Cited in Benjamin, Sales, 5th ed. 683, on meaning of contract for delivery of goods f. o. b.; Benjamin, Sales, 5th ed. 948, on buyer's right to maintain action for purchase price after resale; 4 Elliott, Railr. 2d ed. 63, on bill of lading issued to true owner of goods as muniment of title.

— Shipment on bill of lading with draft attached.

Cited in Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 72 S. C. 450, 2 L.R.A.(N.S.) 79, 110 Am. St. Rep. 627, 52 S. E. 191, 5 Ann. Cas. 261, holding that attaching draft for purchase price to bill of lading, and forwarding it for collection, reserves title in consignor, although bill of lading is in name of consignee; Scott v. Melady, 27 Ont. App. Rep. 193, holding there was no appropriation to make sale an executed one where wheat was shipped on bill of lading with draft attached and sampling was done after clearing port; Graham v. Laird Co. 20 Ont. L. Rep. 11, holding that shipment under contract for sale f. o. b. at certain place did not constitute constructive delivery to carrier for purchaser, where drafts accompanied bills of lading made out to seller.

Cited in Benjamin, Sales, 5th ed. 397, on passing of title to goods where bill of lading together with bill of exchange is transmitted to seller's agent.

Retention of jus disponendi.

Cited in Corby v. Williams, 7 Can. S. C. 470; Mirabita v. Imperial Ottoman Bank, L. R. 3 Exch. Div. 164, 47 L. J. Exch. N. S. 418, 38 L. T. N. S. 597, 3 Asp. Mar. L. Cas. 591,—as to when retained by shipper.

Cited in Benjamin, Sales, 5th ed. 932, on reservation of right of resale under agreement to sell; Benjamin, Sales, 5th ed. 377, 401, on effect of reservation of right of disposal on passing of title to goods sold; Benjamin, Sales, 5th ed. 937, on default of buyer which will justify a resale; Benjamin, Sales, 5th ed. 950, on necessity for repudiation by buyer to justify the seller in dealing with thing sold; Hollingsworth, Contr. 381, on rights of parties under bill of lading; 2 Mechem, Sales, 1286, on origin and nature of right of stoppage in transitu.

4 E. R. C. 756, LICKBARROW v. MASON, 5 T. R. 367, 4 Bro. P. C. 57, 2 H. Bl. 211, reversing the decision of the Exchequer Chamber, reported in 1 H. Bl. 357, which reverses the decision of the Court of King's Bench, reported in 6 East, 20n, 1 Smith, Lead. Cas. 693, 2 T. R. 63. Second decision of the King's Bench reported in 5 T. R. 683, 1 Revised Rep. 425.

The chronology of the case is set out in 6 East, 20, note, 1 Smith, Lead. Cas. 693, 1 Revised Rep. 427.

Qualities of bills of lading or warehouse receipts — Effect of transfer thereof.

Referred to as leading case in First Nat. Bank v. Schmidt, 6 Colo. App. 216, 40 Pac. 479, as settling which equity must prevail as between bona fide transferee of bill of lading and vendor of goods who attempts to exercise right of stoppage in transitu; Skilling v. Bollman, 6 Mo. App. 76, holding common law rule is that property of goods in transit passes by indorsement of bill of lading to bona fide holder for valuable consideration, also indorser or assignor conveys only his own rights by indorsement, unless bills of lading are made negotiable by statute; Davis v. Bradley, 28 Vt. 118, 65 Am. Dec. 226, on necessity of bill being made to be delivered to assigns in order to render it valid in hands of bona fide purchaser of the goods.

Cited in Robinson v. Memphis & C. R. Co. 9 Fed. 129, to the point that there

is no distinction between bill of lading given by carrier on land and one given by carrier on water; Lineker v. Ayeshford, 1 Cal. 75, holding that bill of lading is not negotiable instrument so far as to enable indorsee, who has no property in goods, and no lien, to sue master of ship, in his own name, where it appears on face of complaint that indorsee is mere agent of shippers; Dodge v. Meyer, 61 Cal. 405, holding that by indorsement of bill of lading or delivery without indorsement, property in goods may be transferred, where such was intent; Spangler v. Butterfield, 6 Colo. 356, holding that assignment and delivery of warehouse receipts amounts to symbolical delivery of property, and vests title to property in assignee; Citizens' Bkg. Co. v. Peacock, 103 Ga. 171, 29 S. E. 752, holding that when warehouse receipts for cotton are delivered in pledge, effect of such delivery is to deliver cotton itself; Hunter v. Mathewson, 27 Ill. App. 192, holding that where sale is actually intended, invoice, or other instrument, which specifies and enumerates property sold, may be substituted for bill of lading in constituting symbolical delivery; Northrop v. First Nat. Bank, 27 Ill. App. 527, holding that assignee of warehouse receipt is not bound by verbal arrangement between parties, touching claim of party holding property; Montgomery, W. & Co. v. American Trust & Sav. Bank, 71 Ill. App. 29; Broadwell v. Howard, 77 Ill. 305,—holding that usage has made possession of warehouse receipts equivalent to possession of property itself; Weyand v. Atchison, F. & S. R. Co. 75 Iowa, 573, 1 L.R.A. 650, 9 Am. St. Rep. 504, 39 N. W. 899, holding that carrier is liable for delivery of goods to person on mere presentation of bill of lading unindorsed, when shipper had taken bill of lading for delivery of goods to himself; First Nat. Bank v. Mt. Pleasant Mill Co. 103 Iowa, 518, 72 N. W. 689, holding that bank which discounts draft with bill of lading attached and credits drawer with amount, acquires interest in property shipped paramount to that of subsequent attaching creditor, though it advanced no money before attachment was affected; Prince v. Boston & L. R. Corp. 101 Mass. 542, 100 Am. Dec. 129, holding that delivery of bill of lading to consignee is sufficient to show delivery of goods to him, although such bill was signed by person who was not master of vessel, but was supposed to be by consignor; Slater v. Gillard, 1 Treadway, Const. 248; Winslow v. Norton, 29 Me. 419, 50 Am. Dec. 601,—holding that transfer of bill of lading by indorsement to bona fide purchaser passes legal title to property; Shingleur v. Vanton Cotton Warehouse Co. 78 Miss. 875, 84 Am. St. Rep. 655, 29 So. 770, holding that purchaser of goods who receives from vendor warehouse receipts, can maintain replevin against warehouseman, although receipts were not indorsed by bailor; Dows v. Greene, 24 N. Y. 638, holding that transferee of bill of lading transfers title to goods; First Nat. Bank v. Kelly, 57 N. Y. 34, holding that indorsement and delivery of bill of lading to bank as collateral security for paper discounted, operates same as delivery of goods; Dean v. Driggs, 137 N. Y. 274, 19 L.R.A. 302, 33 Am. St. Rep. 721, 33 N. E. 326, holding that negotiability of warehouse receipt does not create liability of warehouseman to bona fide holder for correctness of description of property which is made in good faith in accordance with apparent character of property; Merchants' Bank v. Union R. & Transp. Co. 8 Hun, 249, holding that transfer of bill of lading without indorsement is symbolical delivery of goods, and good against all persons except innocent indorser for valuable consideration; First Nat. Bank v. Northern R. Co. 58 N. H. 203, holding that transfer of bill of lading entitles transferee to possession of goods, subject only to lien of carrier for freight or to claims of assignee into whose possession property may have come before transfer of bill of lading; Mason v. A. E.

Nelson Cotton Co. 148 N. C. 492, 18 L.R.A.(N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625, holding that assignee of bill of lading as collateral security for draft upon consignee of property, which he discounts, is not liable for breach of warranty by consignor in sale of property; Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350; Solomon v. Bushnell, 11 Or. 277, 50 Am. Rep. 475, 3 Pac. 677,— holding that in absence of statute, warehouseman's receipt is not negotiable instrument, and assignment thereof operates merely to transfer of property deposited, and passes no better title than vendor had; Dean v. Shipper, 35 Pa. 239, 78 Am. Dec. 334, holding that fraudulent holder of bill of lading can pass no title to goods; Empire Transp. Co. v. Steele, 70 Pa. 188, to the point that indorsee of bill of lading is bound to make inquiry on bills of lading do not rest on same footing as bills of exchange; Griffith v. Ingledew, 6 Serg. & R. 429, 9 Am. Dec. 444, holding that under bill of lading directing delivery of goods to consignee or assigns, consignee could sue carrier in his own name for negligent carriage of goods; Tilden v. Minor, 45 Vt. 196, holding that assignment of bill of lading as collateral security, conveys title to cargo; Price v. Wisconsin M. & F. Ins. Co. 43 Wis. 267; Rice v. Cutler, 17 Wis. 352, 84 Am. Dec. 747,— holding that object of statute relating to warehouse receipts is not to prevent owner of property from passing title, but to protect those dealing with persons who are entrusted with such evidences only as factors or agents; Winslow v. Norton, 29 Me. 419, holding endorsement of bill of lading, bona fide, and for valuable consideration, operated as sale and transfer of property at sea; First Nat. Bank v. Northern R. Co. 58 N. H. 203, holding transfer of bill of lading for value to bona fide purchaser, for value, or as security for advances on the goods, entitles assignee or pledgee to possession, subject to lien of carrier, or claims of consignee into whose possession the property may have come before transfer of the bill; Dows v. Greene, 24 N. Y. 638, holding assignment and delivery of bill of lading equivalent in legal force to sale and delivery at common law; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589, 6 Abb. N. C. 413, holding that legal title to property passed by bill of lading and fact that party receiving title was to account to sender did not alter case; Zink v. People, 6 Abb. N. C. 413, holding that transfer of bill of lading passes title to property, and fact that transferee was afterwards to account to consignor does not alter case; Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541, holding assignment of bill of lading conveys only title of actual consignor who alone is bound by it; Holbrook v. Vose, 6 Bosw. 76, holding assignment of bill of lading to third person for valuable consideration advanced bona fide on faith of bill without notice of impending insolvency of buyer, or of other circumstances which would make such transfer inequitable as against vendor, devests right of vendor to stop goods, as against such bona fide holder; Jordan v. James, 5 Ohio, 88, holding consignee upon bill of lading to himself or assigns may sell and transfer title while goods are in transit, by indorsing bill of lading, though goods have not been paid for; Slater v. Gillard, 3 Brev. 115, 1 Treadway Const. 248, holding one who accepts bills upon faith of intended consignment does not thereby instantly acquire lien upon cargo expected to be consigned; Neill v. Rogers Bros. Produce Co. 41 W. Va. 37, 23 S. E. 702, holding goods in hands of railroad company not subject to levy of attachment as property of shipper, where bank was holder of bill of lading for value; Royal Canadian Bank v. Carruthers, 28 U. C. Q. B. 578, holding that endorsee of bill of lading may change general endorsement to special; The Figlia Maggiore, L. R. 2 Adm. & Eccl. 106, 37 L. J. Prob. N. S. 52, 18 L. T. N. S. 532, holding assignees for value of bills of lading entitled to sue for breach of

contract of carriage; The Freedom, L. R. 3 P. C. 594, 24 L. T. N. S. 452, 1 Asp. Mar. L. Cas. 136, holding indorsee of bill of lading vested with legal title to goods and entitled to sue carrier for damage thereto under statute; Chartered Bank of India v. Henderson, L. R. 5 P. C. 501, 30 L. T. N. S. 578, on passing of legal interest in goods by indorsement of bill of lading; Glyn v. East & West India Dock Co. L. R. 5 Q. B. Div. 129, L. R. 6 Q. B. Div. 475, L. R. 7 App. Cas. 591, 47 L. T. N. S. 309, 31 Week. Rep. 201, 52 L. J. Q. B. N. S. 146, 4 Eng. Rul. Cas. 818, 50 L. J. Q. B. N. S. 62, 43 L. T. N. S. 584, holding shipowner discharged from liability for goods by delivery of them to holder of second of three bills of lading where first bill had been indorsed by consignee to another party for a loan, which party afterward asserted claim to the goods; Bateman v. Green, Ir. Rep. 2 C. L. 607 (affirming Ir. Rep. 2 C. L. 166), on indorsement of bill of lading.

Cited in notes in 25 L. ed. U. S. 892, on negotiability and transfer of bill of lading; 4 Eng. Rul. Cas. 789, on rights of transferee of bill of lading.

Cited in Benjamin, Sales, 5th ed. 845, on nature and effect of bill of lading; 4 Elliott, Railr. 2d ed. 65, on assignability and non-negotiability of bills of lading; 4 Elliott, Railr. 2d ed. 252, on necessity of delivery by carrier to right person.

Referred to as leading case and distinguished in Dows v. Perrin, 16 N. Y. 325, holding that when bill of lading is obtained by fraud from owner of goods, bona fide indorsee or transferee has no better title than indorser had.

Distinguished in Ilsley v. Stubbs, 9 Mass. 65, 6 Am. Dec. 29, where assignment relied on for plaintiffs was not of bill of lading in possession of consignee.

Explained in Trueman v. Bain, 25 N. B. 298, holding indorsement and delivery of bill of lading does not pass whole legal property; Sewell v. Burdick, L. R. 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 4 Eng. Rul. Cas. 758, reversing L. R. 13 Q. B. Div. 159, 53 L. J. Q. B. N. S. 399, 51 L. T. N. S. 453, 32 Week. Rep. 746, which reversed L. R. 10 Q. B. Div. 363, 52 L. J. Q. B. N. S. 428, 48 L. T. N. S. 705, 31 Week. Rep. 796, 5 Asp. Mar. L. Cas. 79, holding one taking bill of lading by indorsement for loan is not liable in action by shipowner for charges on the property.

Referred to as leading case and limited in Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 599, holding transferable quality of bill of lading is not negotiability in any just sense of that term.

Limited in Griffiths v. Perry, 1 El. & El. 680, 28 L. J. Q. B. N. S. 204, 5 Jur. N. S. 1076, refusing to extend doctrine of cited case by analogy to case of indorsement of delivery order.

The decision of the Exchequer Chamber is cited in Empire Transp. Co. v. Steele, 70 Pa. 188, holding indorsee of bill of lading takes only such title as indorser had; Franklin Trust Co. v. Philadelphia, B. & W. R. Co. 222 Pa. 96, 22 L.R.A.(N.S.) 828, 70 Atl. 949, holding bills of lading do not occupy position of bills of exchange or other commercial paper; Griffith v. Ingledew, 6 Serg. & R. 429, 9 Am. Dec. 444, holding bill of lading nakedly transfers property to consignee who may sue carrier for negligent carriage.

The decision of the Exchequer Chamber is distinguished in Curry v. Roulstone, 2 Overt. 110, Fed. Cas. No. 3,497, on ground of difference between the bill of lading in citing and that in cited case.

The first King's Bench decision is referred to as leading case in Relyea v. New Haven Rolling Mill Co. 42 Conn. 579, 75 Fed. 420, holding master who is owner

of vessel bound by statements in bill of lading where consignee was misled thereby; Irving Nat. Bank v. Thomas Emery's Sons, 1 Cin. Sup. Ct. Rep. 76, holding transfer of bill of lading to secure draft passes property in the goods, whether bill is indorsed or not; National Bank v. Baltimore & O. R. Co. 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134, holding bank which in good faith discounts draft with bill of lading attached entitled to the goods as against person who sells them to vendee on credit and afterwards obtains them from carrier before delivery to consignee; Bank of Batavia v. New York, L. E. & W. R. Co. 33 Hun, 589, on character of bills of lading, their purpose, principles applicable to them and custom of obtaining advances thereon.

The first King's Bench decision was cited with special approval in Millhiser Mfg. Co. v. Gallego Mills Co. 101 Va. 579, 44 S. E. 760, holding doctrine that warehouse receipt vests in bona fide purchaser of it for value, or in bona fide pledgee for value, legal title to and possession of property represented by the receipt rests upon principles of equitable estoppel, not upon theory of symbolical delivery.

The first King's Bench decision was explained as leading case in Mechanics' Bank v. New York & N. H. R. Co. 4 Duer, 480, holding negotiable quality of bill of lading is not negotiability in any just sense of that term.

The first King's Bench decision is cited in Vogelsang v. Fisher, 128 Mo. 386, 31 S. W. 13, holding one who takes mortgage of property or bill of lading or warehouse receipt, as security for antecedent debt, merely, cannot be regarded as purchaser for value in sense that he would take his security freed from existing equities; Buffington v. Curtis, 15 Mass. 528, 8 Am. Dec. 115, holding mere indorsement of bill of lading without delivery of it does not transfer property of goods; Blossom v. Champion, 28 Barb. 217, holding bill of lading is so far negotiable that indorsee for value, without notice, is entitled to rights and protection of bona fide purchasers; Hauterman v. Bock, 1 Daly, 366, holding that inserting name of person as consignee in bill gives such person no property in the goods, nor right to their possession until bill of lading is delivered to such person: Harrison v. Mora, 150 Pa. 481, 24 Atl. 705, 23 Pittsb. L. J. N. S. 113, holding title to goods transferred where bill of lading was to be and was actually given; The Loon, 7 Blatchf. 244, Fed. Cas. No. 8,499, on imputation of negotiable quality to bills of lading; Busby v. Winchester, 27 N. B. 231, holding indorsement and delivery of bill of lading may transfer property in the goods, but not contract of master of vessel in relation to the goods; Goodwin v. Robarts, L. R. 10 Exch. 337, 44 L. J. Exch. N. S. 157, 32 L. T. N. S. 199, holding it is from mercantile usage, as proved in evidence, and ratified by judicial decision in cited case, that efficacy of bills of lading to pass property in goods is derived.

The first King's Bench decision is distinguished in Rodger v. Comptoir d'Escompte, L. R. 2 P. C. 393, 5 Moore, P. C. C. N. S. 538, 38 L. J. C. P. N. S. 30, 21 L. T. N. S. 33, 17 Week. Rep. 468, where bills of lading were not in possession of assignor at time of assignment but were subsequently indorsed.

The first King's Bench decision was referred to as leading case and limited in Mason v. A. E. Nelson Cotton Co. 148 N. C. 492, 18 L.R.A.(N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625, holding assignee and holder of bill of lading is regarded as absolute owner of the goods only when by terms of contract between assignor and assignee entire title was to pass to assignee.

— Effect of stoppage in transitu on transferee's rights.

Referred to as leading case in Gurney v. Behrend, 23 L. J. Q. B. N. S. 265, 3 El. & Bl. 622, 18 Jur. 856, 2 Week. Rep. 425, holding bona fide transferee, for

value, of bill of lading, indorsed by shipper or his consignee, and put into circulation by authority of shipper or consignee, has absolute title to the goods, freed from right of unpaid vendor to stop in transitu, as against purchaser.

Cited in McElwee v. Metropolitan Lumber Co. 16 C. C. A. 232, 37 U. S. App. 266, 69 Fed. 302, holding that right of stoppage in transitu can only be defeated by transfer of bill of lading to indorsee who bona fide gave value for it; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17, holding that right of stoppage in transitu is lost, when before it is exercised, purchaser has sold goods, and indorsed bill of lading to sub-purchaser in good faith; Wilson v. Churchman, 4 La. Ann. 452, holding that under code right of stoppage in transitu can be defeated by negotiation of bill of lading only where transferee has received it in good faith and for value; Bank of Little Rock v. Fisher, 55 Mo. App. 51, on termination of right of stoppage in transitu by assignment by vendee of bill of lading in good faith and for value to third party; Gass v. Mills, 134 App. Div. 184, 118 N. Y. Supp. 982, holding that words "not negotiable" stamped on face of bill of lading, give notice to purchasers, and are sufficient to put purchaser on inquiry as to facts of right of stoppage in transitu by consignor; Rosenthal v. Dessau, 11 Hun, 49, holding that apparent sale, fraudulently made without consideration, and indorsement of bill of lading, for purpose of defeating right of stoppage in transitu will not have that effect; Holbrook v. Vose, 6 Bosw. 76, holding that assignment of bill of lading for goods made to third person for valuable consideration advanced on faith of bill of lading divests right of vendor to stop goods, as against bona fide holder of bill; Forsyth v. Bell, 18 N. S. 374 (dissenting opinion), on effect on right of stoppage in transitu where bill of lading is assigned in bad faith.

Cited in 2 Mechem Sales, 1308, on effect of indorsement of bill of lading on right of stoppage in transitu.

The decision of the Exchequer Chamber is cited in Stafford v. Webb, 1 Hill & D. Supp. 213, holding that under agreement by which advances were made by plaintiff on consignment of flour to them right of stoppage in transitu did not remain in consignor where full amount of price was advanced.

The first King's Bench decision is referred as leading case in Newhall v. Central P. R. Co. 51 Cal. 345, 21 Am. Rep. 713, holding bona fide indorsee of bill of lading under indorsement made after carrier has been given notice of stoppage is entitled to the goods: Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147, holding owner of goods, or one having legal right to sell or pledge them may invest another with full title and constructive possession of them, by transferring to him bill of lading or warehouse receipt, so as to discharge vendor's lien or his right of stoppage in transitu, if transfer is bona fide and for valuable consideration; Becker v. Hallgarten, 86 N. Y. 167, holding right of stoppage may always be defeated by indorsing and delivering a bill of lading of the goods to bona fide indorsee for valuable consideration, without notice of facts on which right of stoppage would otherwise exist.

The first King's Bench decision is referred to as leading case and distinguished in Bonner v. Marsh, 10 Smedes & M. 376, 48 Am. Dec. 754, where creditor of shipper attached goods in transit by boat, the bill of lading being forwarded on the boat to consignee, also shipper's creditor; Parker v. M'Iver, 7 Desauss, Eq. 274, 1 Am. Dec. 656, where case was between creditors of bankrupt attaching goods not paid for which were consigned to bankrupt subsequent to his becoming so; consignor being in foreign country, ignorant of situation of consignee, which goods were never delivered to bankrupt.

The first King's Bench decision is cited in Ætna Nat. Bank v. Union P. R. Co.

69 Mo. App. 246, holding one to whom bills of lading have been negotiated for value before property is stopped in transitu, or after they are stopped, without notice of stoppage, is entitled to the property represented by the bills; Leask v. Scott, L. R. 2 Q. B. Div. 376, 46 L. J. Q. B. N. S. 576, 36 L. T. N. S. 784, 25 Week. Rep. 654, 3 Asp. Mar. L. Cas. 469, 4 Eng. Rul. Cas. 790, holding vendor's right of stoppage in transitu defeated by transfer of bill of lading for past consideration; Re Westzinthus, 5 Barn & Ad. 817, 4 E. R. C. 845, holding shipper by stopping after bill of lading was indorsed as collateral to a third person was superior to consignee in respect to surplus but inferior to indorsee in respect to debt secured; Relyea v. New Haven Rolling-Mill Co. 75 Fed. 420, holding that consignor's right of stoppage in transitu is, by indorsing bill of lading to purchaser.

— As symbol of possession.

Cited in 4 Elliott, Railr. 2d ed. 48, on bills of lading as evidence of receipt of goods.

The first King's Bench decision is cited in Harrison v. Hixson, 4 Blackf. 226, holding bill of lading, with no qualifying terms, is not conclusive evidence that property consigned belongs to consignee, but rebuttable by testimony showing consignor is real owner; Audenreid v. Randall, 3 Cliff. 99, Fed. Cas. No. 644, holding title to property is transferred by indorsement and delivery of bill of lading and its acceptance is sufficient to take case out of statute of frauds; Dows v. Rush, 28 Barb. 157, holding possession of bill of lading is equivalent to possession of the property itself.

— Loss as between two innocent persons.

The first King's Bench decision is referred to as leading case in Matthews v. Massachusetts Nat. Bank, Holmes, 396, Fed. Cas. No. 9,286, 6 Legal Gaz. 308, on indorsement of bills of lading and authority on point that where one of two innocent persons must suffer by fraud of a third that party must suffer who has exhibited greater degree of negligence.

Bills of lading in sets.

The first King's Bench decision is cited in First Nat. Bank v. Ege, 109 N. Y. 120, 4 Am. St. Rep. 431, 16 N. E. 317, on use of duplicate bills of lading.

Bills of lading in blank and filling indorsements thereon.

Cited in Beckwith v. Angell, 6 Conn. 315, on effect of indorsement of bill of lading in blank; Gibson v. Stevens, 3 McLean, 551, Fed. Cas. No. 5,401, holding that when indorsement of bill of lading is in blank, it may be filled up as a bill of exchange; Royal Canadian Bank v. Carruthers, 28 U. C. Q. B. 578, holding change of general to special indorsement does not constitute material alteration of bill of lading.

Rights of consignee.

The first King's Bench decision is cited in Lane v. Melville, 3 U. C. Q. B. 124, holding goods were not consigned to defendant where there was no bill of lading designating him as consignee.

Bill of lading as contract.

Cited in note in 4 Eng. Rul. Cas. 843, as to how long bill of lading remains in force.

The decision of the Exchequer Chamber is cited in Sayward v. Stevens, 3 Gray, 97, holding contract of carrier is indivisible, and he can recover for no portion of voyage that has been made, until whole is finished and goods have reached their destination; Blanchard v. Page, 8 Gray, 281, holding bill of lading constitutes

written single contract between ship owner and person who on bill of lading appears to be shipper, binding ship owner to shipper, and subjecting him to liabilities of common carrier of goods by sea; Covell v. Hill, 6 N. Y. 374, holding paper reciting that certain quantity of lumber was shipped on board canal boat for designated place, no consignee being named, signed by consignor, was not bill of lading; Jennings v. Grand Trunk R. Co. 52 Hun, 227, 5 N. Y. Supp. 140 (dissenting opinion), to effect that bill of lading is written evidence of contract of carriage of goods from one place to another for stipulated price.

Liability of carrier for goods for which bill of lading is given without loading.

The first King's Bench decision is referred to as leading case in Little Miami, C. & X. R. Co. v. Dodds, 1 Cin. Sup. Ct. Rep. 47, holding clearest evidence required to show that carrier did not receive goods for which he has issued bill of lading.

The first King's Bench decision is cited in Hunt v. Mississippi C. R. Co. 29 La. Ann. 446, holding carrier not bound by bill of lading signed by his agent where no goods are received; Sioux City & P. R. Co. v. First Nat. Bank, 10 Neb. 556, 35 Am. Rep. 488, 7 N. W. 311, holding carrier liable for goods which it did not receive but for which its agent issued bills of lading; Roy & Roy v. Northern P. R. Co. 42 Wash. 572, 6 L.R.A.(N.S.) 302, 85 Pac. 53, 7 Ann. Cas. 728, holding if transportation company is able to show certain bill of lading has been fraudulently or erroneously issued no goods having been actually received for shipment, such showing will constitute complete defense against any liability upon its part to bona fide purchaser or holder; Ronne v. Montreal Ocean S. S. Co. 19 N. S. 312, holding bill of lading valid where it was signed by agent according to usage of business and evidence of its truthfulness was uncontradicted; Grant v. Norway, 24 E. R. C. 258, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. N. S. 93, holding it a fraud to give a bill of lading for goods not shipped on board and that ship's owners are not liable to indorsees of such a bill.

The first King's Bench decision is disapproved in Lake Shore & M. S. R. Co. v. National Live Stock Bank, 178 Ill. 506, 53 N. E. 326, holding that where it appears no goods have been received by carrier for shipment and bill of lading has been signed by carrier's agent, it is susceptible of explanation, and if no goods were received it does not bind carrier; Baltimore & O. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26, holding railroad company not liable to one who advances money upon its bill of lading fraudulently issued by its agent for goods not received.

Ownership of goods in transit — Right to sue carrier.

Cited in Stimpson v. Gilchrist, 1 Me. 202, holding ownership of property is material in deciding question with whom carrier contracts; Southern Exp. Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4, holding consignor might maintain action against carrier for loss of property shipped where consignor paid carriage and made special contract therefor; Potter v. Lansing, 1 Johns. 215, 3 Am. Dec. 310, holding mere agent purchasing on commission cannot bring action against carrier.

The decision of Exchequer Chamber is cited in Waterman v. Chicago, M. & St. P. R. Co. 61 Wis. 464, 50 Am. Rep. 145, 21 N. W. 611, holding where person is described in contract of carriage as consignor, consignee and sole owner, he may sue carrier for overcharge.

The first King's Bench decision is cited in Clark v. Great Western R. Co. 8 U. C. C. P. 191, on right of consignor to maintain action against carrier for damage to or loss of goods.

Power of master of vessel to take steps to complete contract of carriage.

The decision of Exchequer Chamber is cited in Waterhouse v. Rock Island Alaska Min. Co. 38 C. C. A. 281, 97 Fed. 466, holding master has power to bind owner of ship beyond limits of ship's own voyage by chartering another vessel to perform connecting transportation.

Right of stoppage in transitu.

Referred to as leading case in Cassaboglou v. Gibbs, L. R. 11 Q. B. Div. 797, 52 L. J. Q. B. N. S. 538, 48 L. T. N. S. 850, 32 Week. Rep. 138, holding right of stoppage in transitu may exist as between others than vendor and vendee.

Cited in The Natchez, 31 Fed. 615, holding that by substantial delivery of goods by carrier to consignee, consignors lose any right they may have had to stop consigned goods in transitu; Markwald Caspari & Co. v. Their Creditors, 7 Cal. 213, holding that depositing goods at intermediate point with agent of vendee to the forwarded to destination does not cut off right of stoppage in transitu; Ilsley v. Stubbs, 9 Mass. 65, 6 Am. Dec. 29, holding that right of stoppage in transitu may be exercised, even where part of purchase price has been paid; Langstaff & Co. v. Stix, 64 Miss. 171, 60 Am. Rep. 49, 1 So. 97, holding that right of stoppage in transitu cannot be exercised after arrival of goods and payment of freight by consignee, and while goods are in hands of station agent at request of consignee; Reynolds v. Boston & M. R. Co. 43 N. H. 580, holding that right of stoppage in transitu terminates only with actual delivery, unless carrier consents to hold goods for consignee, or wrongfully refuses to deliver them; Schaettle v. Benedict, 1 Disney (Ohio) 445, holding that right of stoppage in transitu exists in favor of unpaid vendor, at any time before delivery, in case of insolvency of vendee actually existing; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188, holding that right of stoppage in transitu continues until termination of voyage, and delivery of goods to consignee, or his agent; Eaton v. Cook, 32 Vt. 58, holding that when goods are sold to one person, who before delivery to him, resells them to another, and this is known to original vendor, who consigns them to second purchaser, original vendor will have no right of stoppage in transitu; Rogers v. Mississippi & D. S. S. Co. 14 Quebec L. Rep. 99, holding that right of stoppage in transitu is not a mere lien; Abinovitch v. Ehrenbach, Rap. Jud. Quebec, 41 C. S. 55, holding that goods are in transitu so long as they are in hands of carrier as such, whether he was or was not appointed by consignee; Newhall v. Vargus, 15 Me. 314, 33 Am. Dec. 617, holding principle upon which right of stoppage proceeds is that of restoring party to his lien, by placing him in same position as if he had never parted with possession; Bank of Little Rock v. Fisher, 55 Mo. App. 51, on loss of vendor's right of stoppage through delivery of bill of lading to vendee and assignment thereof to third party by vendee during transit; Daws v. Greene, 24 N. Y. 638, holding bona fide transferee of bill of lading has title to goods freed from right of unpaid vendor to stop in transitu or against purchaser; Babcock v. Bonnell, 80 N. Y. 244, on source of right of stoppage; Clark v. Mauran, 3 Paige, 373, holding claim of seller or consignor is founded upon supposition that he has parted with legal interest in property; but that under the circumstances he has equitable claim to revest property in himself, or prevent its going into actual possession of consignee until price is paid; Patten's Appeal, 45 Pa. 151, 84 Am. Dec. 479, holding stoppage did not work rescission of sale; Re Westzinthus, 3 L. J. K. B. N. S. 56, 5 Barn. & Ad. 817, 2 Nev. & M. 644, 39 Revised Rep. 665, holding unpaid vendor, by his attempted stoppage in transitu acquired right to goods in equity, subject to lien of indorsee of bill of lading, as against vendee, and his assignees.

Cited in note in 23 Eng. Rul. Cas. 409, on right of stoppage in transitu.

Cited in Benjamin, Sales, 5th ed. 883, on right of stoppage in transitu while goods are in hands of carrier; Benjamin, Sales, 5th ed. 919, on defeasibility of right of stoppage in transitu; Benjamin, Sales, 5th ed. 870, 912, 914, on seller's right of stoppage in transitu; 4 Elliott, Railr. 2d ed. 285, on stoppage in transitu as excuse for nondelivery of goods by carrier; 4 Elliott, Railr. 2d ed. 292, on termination of right of stoppage in transitu.

Distinguished in Walter v. Ross, 2 Wash. 283, Fed. Cas. No. 17,122, where case was not one of sale by shipper to consignee.

The decision of Exchequer Chamber is cited in Williams v. Moore, 5 N. H. 235, holding unpaid vendor has right of stoppage on failure of vendee; Lupin v. Marie, 6 Wend. 77, 21 Am. Dec. 256, as to whether right of stoppage in transitu is based upon ground sale is incomplete; Harris v. Hart, 6 Duer, 606, holding right of stoppage is strictly legal; Jordan v. James, 5 Ohio, 88, holding if vendor is paid in part he may stop for balance; Conyers v. Ennis, 2 Mason, 236, Fed. Cas. No. 3,149, on limitation of right of stoppage to cases where property is in transit.

The first King's Bench decision is cited in Neilson v. Blight, 1 Johns. Cas. 205 (dissenting opinion), on nonexistence of right of stoppage when goods are not ambulatory; Stevens v. Wheeler, 27 Barb. 658, holding vendor of goods cannot exercise right of stoppage after goods have been delivered by carrier to third person, on order of vendee, although never delivered to vendee at place directed by him at time of purchase.

Common law rights of lien.

Cited in Moses v. Rasin, 14 Fed. 772, on right of vendor who has discounted note given for purchase money to withhold goods for nonpayment of price; Foster v. Danforth, 59 Fed. 750, holding that liens depend, not only on agreement or employment, but upon possession and control; Gibson v. Stevens, 3 McLean, 551, Fed. Cas. No. 5,401, holding that to constitute lien there must be actual or constructive possession of thing upon which lien is claimed; Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4,960, holding that in maritime law and in equity liens exist independently of possession; Fallon v. O'Donnell, 13 Colo. 559, holding that vendor of land who enters into subsequent contract with his vendee, releasing trust deed, lien merely being reserved, has no interest in land which can be sold under execution; Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617, holding that vendor of goods not paid for, may retain possession against vendee, not by aid of equity but on grounds of law; Advance Thresher Co. v. Beck, 21 N. D. 55, 128 N. W. 315, Ann. Cas. 1913B, 517; Degner v. Baltimore, 74 Md. 144, 21 Atl. 697, to the point that lien is qualified right, which in given case may be exercised over property of another; Seebaum v. Handy, 46 Ohio St. 560, 22 N. E. 869, holding that lien given by statute for feed and care of horses is waived by parting with possession to owner without charges being paid; Slater v. Gaillard, 3 Brev. 115, holding that one making acceptance upon strength of consignment of goods to come to drawer, has no lien on proceeds which come to his hands where cargo was assigned to third person before vessel had completed voyage; Fitzpatrick v. Edgar, 5 Ala. 499, holding lien is not an absolute but qualified right, given by law or created by act of the parties, by which real or personal property is charged with payment of a debt or duty; Voss v. Robertson, 46 Ala. 483, holding liens at law exist only in cases where party entitled to them has possession of the goods; Fallon v. Worthington, 13 Colo. 559, 6 L.R.A. 708, 16 Am. St. Rep. 231, 22 Pac. 960, holding lien necessarily excludes idea of ownership by party claiming it; Stoner v. Brown, 18 Ind. 464, holding person

having equitable right to possess note and control its proceeds not entitled to protection as against bona fide purchaser without notice; Anderson v. State, 23 Miss. 459; Degner v. Baltimore, 74 Md. 144, 21 Atl. 697,—distinguishing between right of prior payment from proceeds of property and technical lien; Doane v. Russell, 3 Gray, 382; Aldine Mfg. Co. v. Phillips, 118 Mich. 162, 42 L.R.A. 531, 74 Am. St. Rep. 380, 76 N. W. 371; Briggs v. Boston & L. R. Co. 6 Allen, 246, 83 Am. Dec. 626,—holding lien only gives right to retain property; it gives no right to sell it; Bryant v. Warren, 51 N. H. 213, holding lien is not founded on property; Ward v. Wordsworth, 1 E. D. Smith, 598, 9 How. Pr. 16, holding reason mason and carpenter have not lien at common law upon building is that element of possession is wanting; Ward v. Syme, 9 How. Pr. 16, to the point that possession of thing upon which lien is claimed is necessary at common law: Ruggles v. Walker, 34 Vt. 468, holding right of lien lost by lienor's sale of his right and loss of his dominion over the property; Foster v. Danforth, 59 Fed. 750, holding liens depend not only upon agreement or employment, but upon possession or control; Marsh v. Minnie, 6 Am. L. Reg. 326, Fed. Cas. No. 9,117, distinguishing between lien at common law and maritime lien as regards necessity of possession by lienor; Ex parte Foster, 2 Storey, 131, Fed. Cas. No. 4,960, holding attachment does not come up to exact meaning of a lien either in general sense of common law, or in that of maritime law, or in that of equity jurisprudence; Dudley's Case, Fed. Cas. No. 4,114, as to whether plaintiff in judgment and execution has lien or security upon property of petitioner in bankruptcy: Leland v. The Medora, 2 Woodb. & M. 92, Fed. Cas. No. 8,237, holding that at common law a lien generally ceases with loss of possession: Packard v. Louisa, 2 Woodb. & M. 48, Fed. Cas. No. 10,652, holding most liens, other than maritime, if at common law, are dissolved by any separation from the goods, which is permanent and of much length; Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824, holding person having lien upon chattels has no right himself to sell such chattels in discharge of his lien.

Cited in 4 Elliott Railr. 2d ed. 358, on enforcement of carrier's lien.

The decision of Exchequer Chamber is cited in Woodward v. Solomon, 7 Ga. 246, holding right of possession does not follow from right of property; Lemont v. Lord, 52 Me. 365, holding master has right to retain possession of goods, on behalf of owners, for purpose of transhipping in order to earn original freight or part at least; Shapley v. Bellows, 4 N. H. 347, holding that by principles of common law, vendor of goods has lien thereon as long as they remain in his possession and vendee neglects to pay price; Williams v. Moore, 5 N. H. 235, holding vendor of goods not sold upon credit has right to retain them until price is paid: Inslee v. Lane, 57 N. H. 454, holding essential ground of right of lien is possession: that of stoppage in transitu is nondelivery to vendee; Jordan v. James, 5 Ohio, 88, holding in case of vendor's lien, lien or special property is vested in vendor, though general property in goods is vested in purchaser.

The first King's Bench decision is cited in Boyd v. Mosely, 2 Swan, 661, holding right of lien for price of goods cannot exist after seller has parted with his possession.

— Factor's lien.

Cited with special approval in Jarvis v. Rogers, 15 Mass. 389, holding factor's lien extinguished by his breach of trust in tortiously pawning property.

Cited in Jarvis v. Rogers, 15 Mass. 389, holding that factor has no lien upon scrip certificates for balance due upon notes held by him where such scrip certificates were not in his possession; Davis v. Bradley, 28 Vt. 118, 65 Am. Dec.

226, holding that to give lien upon goods consigned to factor, but not actually received by him, consignment must be to him in terms, and he must have made advances or acceptances upon faith of it; Walther v. Wetmore, 1 E. D. Smith 7, holding pledge by factor of goods of his principal, to secure advances made to himself is illegal and confers no right upon pledgee, not even to extent of the factor's lien; Bradford v. Kimberly, 3 Johns. Ch. 431, holding factor may retain goods or proceeds thereof not only for charges incident to particular cargo but for balance of his general account; and this allowance is made after goods are converted into money as well as while they are in specie; Jordan v. James, 5 Ohio, 88, holding factors have liens upon goods of their principals for charges incident to them, for general balance due them as factors, and also for outstanding debts for which they are only security; but as between principal and factor who has made no advancements or engagements for his principal, principal has right to take back goods at will, as also in case of consignee's insolvency before he obtains possession; also that factor may sell where he made advances or engagements; Plattner Implement Co. v. International Harvester Co. 66 C. C. A. 438, 133 Fed. 376, holding lien in favor of factor is implied by law upon all goods in hands of consignee who is given power to sell them for advances made for his consignor in conducting the business of his agency; Vowell v. West, 4 Cranch, C. C. 100, Fed. Cas. No. 17,024, holding factor has right to set off debt due from his principals to him against debt due from him to them; Meany v. Head, 1 Mason, 319, Fed. Cas. No. 9,379, holding that, as against his principal, the lien of a factor gives him no special or general property..

Liability as between innocent person because of third person's ability to occasion loss.

Referred to as leading case in Trevathan v. Caldwell, 4 Heisk. 535, holding that wherever one of two innocent persons must suffer by the acts of a third party, he who has enabled that third party to occasion that loss must sustain it.

Cited in Moore v. Hil, 38 Fed. 330 (dissenting opinion), on application of rule that whenever one of two innocent persons must suffer by act of third, he who has enabled such person to occasion loss must sustain it; Bragg v. Meyer, McAll. 408, Fed. Cas. No. 1,801, holding that person intrusting property to broker for sale can recover it from pledgee of broker; Ammon v. Gamble-Robinson Commission Co. 111 Minn. 452, 127 N. W. 448, holding that subvendee will get good title from vendee with absolute bill of sale, although property was delivered to original vendee upon implied condition that check given in place of cash would be paid: McClelland v. Scroggin, 35 Neb. 536, 53 N. W. 469, to the point that person is not necessarily bound to stand loss of third party because he enables another to establish false credit by intrusting him with possession of goods; Dudley v. Hawley, 40 Barb. 397, holding that mere possession by mortgagor of personal property for more than year after forfeiture of mortgage, with assent of mortgagee, does not enable former to give good title in absence of authority to sell; Bowers v. Bryan Lumber Co. 152 N. C. 604, 68 S. E. 19, holding that surety company is liable on bond issued by its agents, where such company put it within power of agents, by furnishing bond signed and sealed, to cause loss to innocent third persons; Walker v. Walker, 5 Heisk. 425; McCramer v. Thompson, 21 Iowa, 244,— to the point that whenever one of two innocent persons must suffer by act of third, he who has enabled such person to occasion loss must sustain it; Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519, holding that title to chattels did not pass to one who representing that he was agent for third purchased them on

credit, and purchaser from such person so gaining possession through fraud got no title.

Cited in Benjamin Sales, 5th ed. 12, on rule as to loss as between innocent persons.

Limited in Farquharson Bros. v. King & Co. [1902] A. C. 325, 71 L. J. K. B. N. S. 667, 86 L. T. N. S. 810, 51 Week. Rep. 94, 18 Times L. R. 665 (reversing 2 K. B. N. S. 697, 70 L. J. K. B. N. S. 985, 85 L. T. N. S. 264, 49 Week. Rep. 673, 17 Times L. R. 689, holding doctrine is too wide and cannot be relied upon without considerable qualification.

The first King's Bench decision is referred to as leading case in Rawls v. Deshler, 3 Keyes, 572, 4 Abb. App. Dec. 12, holding that whenever one of two innocent persons must suffer by acts of a third, he who has enabled such third person to occasion the loss must sustain it.

The first King's Bench decision is cited in Fairchild v. Brown, 11 Conn. 26, holding that where one of two innocent persons must suffer, by wrong of a third. the loss must be borne by him who furnished the means of perpetrating it; Smith v. Peoria County, 59 Ill. 412; Preston v. Witherspoon, 109 Ind. 457, 58 Am. Rep. 417, 9 N. E. 585; McAdams v. Bailey, 169 Ind. 518, 13 L.R.A.(N.S.) 1003, 124 Am. St. Rep. 240, 82 N. E. 1057; Allen v. Davis, 17 Ind. App. 338, 45 N. E. 798; State v. Peck, 53 Me. 284; Peake v. Thomas, 39 Mich. 584; Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423; Citizens' Nat. Bank v. Smith, 55 N. H. 593; Woodward v. Bixby, 68 N. H. 219, 44 Atl. 298; Cooke v. State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Merchants' Loan & T. Co. v. Bank of Metropolis, 7 Daly, 137; Hoyt v. Baker, 15 Abb. Pr. N. S. 405; Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639; Selser v. Brock, 3 Ohio St. 302; Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 43 L.R.A. 777, 47 N. E. 249; Campbell v. Gowans, 35 Utah, 279, 23 L.R.A.(N.S.) 414, 100 Pac. 397, 19 Ann. Cas. 660; Noyes v. London, 59 Vt. 569, 10 Atl. 342; Sherman v. Shaver, 75 Va. 1; Nash v. Fugate, 24 Gratt. 202, 18 Am. Rep. 640; Frank v. Lilienfeld, 33 Gratt. 377; Coolidge v. Shering, 32 Wash. 557, 73 Pac. 682; R. v. Bank of Montreal, 10 Ont. L. Rep. 117; National Safe Deposit, Sav. & T. Co. v. Hibbs, 32 App. D. C. 459,—to same point; Vallett v. Parker, 6 Wend. 615, holding same doctrine may be laid down as broad general principle with exception of those cases in which statute has declared notes void; Mussey v. Beecher, 3 Cush. 511 (dissenting opinion), on foundation of the rule upon principles of law and not upon custom of merchants; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157, holding instruction "that where two innocent parties must suffer, that party who has been the cause of another's loss must lose" was properly refused; Goodman v. Eastman, 4 N. H. 455, holding that where one man reposes special confidence in another, and loss arises from abuse of that confidence, of the question, who shall bear the loss, arises between innocent third person and him who reposed the confidence, law will throw loss upon latter; Smith v. Mechanics' & T. Bank, 6 La. Ann. 610, holding where two parties are equally guilty of negligence he who suffers loss, must bear it, and neither can recover from the other; Halsted v. Colvin, 51 N. J. Eq. 387, 26 Atl. 928, holding where one of two innocent persons must lose in consequence of unauthorized act or fraud of a third, he must bear the loss who caused credit to be given which produced the loss; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, holding principal who authorizes agent to do an act for him, on condition of an extrinsic fact, knowing such fact must be peculiarly within the agent's knowledge, and that the agent cannot execute the power without, a res gestae representing that the fact exists, trusts the agent to

make the representation; Moore v. Hill, 38 Fed. 330 (dissenting opinion); Sullivan v. Williams, 43 S. C. 489, 21 S. E. 642,—on rule that whenever one or two persons must suffer by acts of third, he who has enabled third person to occasion the loss must sustain it; Devlin v. Pike, 5 Daly, 85, holding principal is estopped from denying authority of agent where his own negligence or wrongful act has enabled agent to cheat person who has acted with ordinary caution where question is as to who shall lose by agent's fraud; Robinson v. Board of School Trustees, 34 N. B. 503, holding that as between two innocent parties loss must fall upon him through whose fault or negligence loss occurred; Bank of England v. Vagliano Bros. [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695 (dissenting opinion), on principle that whenever one of two innocent parties must suffer by act of third person, he who has enabled such person to occasion the loss must sustain it; Re Ffrench, Ir. L. R. 21 Eq. 283, indorsing the same principle.

The first King's Bench decision is distinguished in Everett v. Saltus, 15 Wend. 474, where person alleged to have done so did not furnish means of committing fraud to third person; Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988, holding it is not true as a general rule that a man may not intrust his property to custody of his servant except at peril of losing his title thereto if servant steals and disposes of it to another.

The first King's Bench decision is explained in Arnold v. Cheque Bank, L. R. 1 C. P. Div. 578, 45 L. J. C. P. N. S. 562, 34 L. T. N. S. 729, 24 Week. Rep. 759, holding words "enabling a person to occasion a loss" mean some act, conduct, or default in every transaction in question.

— Issuing documents in blank or conducive to fraud.

Cited in Kelly v. Munster & L. Bank, Ir. L. R. 29 Eq. 19, holding where bank received blank transfer of certificate of stock, which certificate it left outstanding, and its transferor gave certificate and blank transfer to another party, latter had superior equity as against bank.

The first King's Bench decision is cited in Rainbolt v. Eddy, 34 Iowa, 440, 11 Am. Rep. 152, holding where defendant by executing note and delivering it with blank in it for insertion of interest, placed it in power of payee to insert it, he ought to suffer resulting loss as between himself and bona fide holder; McMurtrie v. Twitchell, 11 Phila. 351, 33 Phila. Leg. Int. 238, holding defendant estopped to gainsay truth of certificate of no set-off to mortgage by negligence in signing same in absence of notice or knowledge of alleged fraud on defendant brought to plaintiff before receipt of said certificate and payment to assignor of mortgage: Swan v. North British Australasian Co. 5 E. R. C. 140, 2 Hurlst. & C. 175, 32 L. J. Exch. N. S. 273, 10 Jur. N. S. 102 (dissenting opinion), on rule of loss between two innocent persons one of whom makes loss possible; Nash v. De Freville [1900] 2 Q. B. 72, 69 L. J. Q. B. N. S. 484, 82 L. T. N. S. 642, 48 Week. Rep. 434, 16 Times L. R. 268, holding one who left negotiable paper with another whereby such other was enabled to perpetrate fraud upon third parties, must bear the loss.

Estoppel in pais.

Cited in Commercial Nat. Bank v. Bemis, 177 Mass. 95, 58 N. E. 476, holding that owner of goods stored in bond who pledges warehouse receipt therefor as security for accommodation note given by pledgee, is not estopped from assenting title as against third person, who acting in good faith, takes such warehouse receipt as security for indebtedness of pledgee; Bank of Batavia v. New

York, L. E. & W. R. Co. 33 Hun, 589, holding that carrier is estopped from denying receipt of goods mentioned in bill of lading, as against transferee in good faith of name for value.

The first King's Bench decision is referred to as leading case in McMahon v. Sloan, 12 Pa. 229, 51 Am. Dec. 601, holding owner of chattel entitled to same where person to whom he had loaned it sold it to another.

The first King's Bench decision is cited in Kiefer v. Klinsick, 13 Ind. App. 253, 37 N. E. 1048, holding principle at basis of all estoppels in pais is, that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it; Steffens v. Nelson, 94 Minn. 365, 102 N. W. 871, to same effect; State use of Bothrick v. Potter, 63 Mo. 212, 21 Am. Rep. 440, holding estoppel in pais is said to arise when act is done or statement made by party, which cannot be contradicted without fraud on his part, and injury to others, whose conduct has been influenced by the act or omission: Peoples' Bank v. Estey, 34 Can. S. C. 429, holding doctrine of true owner's loss of title by estoppel is only an elaboration of doctrine that where one of two innocent persons must suffer by acts of a third he who enables such person to occasion the loss must sustain it.

The first King's Bench decision is limited in Rimmer v. Webster [1902] 2 Ch. 163, 71 L. J. Ch. N. S. 561, 86 L. T. N. S. 491, 58 Week. Rep. 517, 18 Times L. R. 548, holding it cannot be said, in the face of the various authorities, that in every case in which the act of one of two innocent persons has enabled a third person to occasion loss that the first mentioned person must bear the loss; also that certain cases of pure estoppel fall within general principles of cited case.

Effect of transfer of negotiable instrument.

The first King's Bench decision is cited in Bond v. Central Bank, 2 Ga. 92, holding proof of notice to purchaser of note that it was void in hands of person from whom he bought necessary to defeat recovery thereon.

The first King's Bench decision is limited in Hardy v. Waddell, 58 N. H. 460, holding purchaser of negotiable note, dishonored or overdue, takes it subject to all legal defences which might have been made to it in hands of original holder.

The last King's Bench decision is cited in Greneaux v. Wheeler, 6 Tex. 515, holding that holder of note indorsed in blank or payable to bearer, and transferred by special agent before maturity for valuable consideration and without notice of right of true owner has valid title.

Completing contract of sale and passing of title.

Cited in Audenreid v. Randall, 3 Cliff. 99, Fed. Cas. No. 644, holding that where actual delivery of goods purchased is impracticable or impossible, symbolical delivery will be equivalent in its legal effect; Davis v. Bradley, 24 Vt. 55, holding that execution of receipt as forwarding merchants, and its delivery, was constructive delivery of property represented by receipts; Dame v. Flint, 64 Vt. 533, 24 Atl. 1051, holding that endorsement of shipping receipts made to order of seller, by seller, and deposit of them in postoffice at Boston, directed to endorser in new Hampshire operated to pass title, and as delivery of goods to endorsee of receipts at Boston.

The first King's Bench decision is cited in Evans v. Harris, 19 Barb. 416, holding where delivery is to be at distant place, as between vendor and vendee, contract of sale is ambulatory until delivery; Ballard v. Ransom, 2 U. C. Q. B. O. S. 70, on necessity of certainty of price to effect change of property; Slater v. Gaillard, 3 Brev. 115, 1 Treadway Const. 248, as to whether contract as

between vendor and vendee, where delivery is to be at distant place, is ambulatory until delivery.

The decision of Exchequer Chamber is cited in Marston v. Baldwin, 17 Mass. 606, holding actual delivery of goods does not of itself transfer actual ownership in them, to perfect title of vendee there must be consummation of the contract of sale; Fuller v. Bean, 34 N. H. 290, holding express declaration that delivery is conditional is not necessary; Ludlow v. Bowne, 1 Johns. 1, 3 Am. Dec. 277, holding that as between vendor and vendee, title to property is not altered until delivery of goods; Lansing v. Turner, 2 Johns. 13, holding sale is not executed so as to vest property in vendee, without actual, or presumed delivery, and latter is to be inferred from circumstances; Furniss v. Hone, 8 Wend. 247 (dissenting opinion) on necessity of compliance with conditions of sale by buyer to pass property; Fitch v. Beach, 15 Wend. 221, holding that unless sale is expressly made upon credit, buyer can neither take nor sue for the goods, until he has either paid or tendered the price; Hunn v. Bowne, 2 Caines, 38, holding that delivery of goods sold may be presumed from circumstances so as to vest property in vendee; Parker v. Donaldson, 2 Watts & S. 9, holding if vendee or his agent selects goods property therein is changed; Smyth v. Craig, 3 Watts & S. 14, holding that separating of particular goods from larger quantity, preparatory to actual delivery, is constructive delivery in point of law.

Meaning of term "usage of trade."

The first King's Bench decision is cited in Kuhtman v. Brown, 4 Rich. L. 479, holding "usage of trade" refers to particular usage, to be established by evidence, distinct from general custom of merchants which is universal established law of the land collected from usual sources of common law.

Award of venire de novo.

Cited in Livingston v. Rogers, 1 Col. & Cai. Cas. 331; holding order that court below award venire de novo correct where court ordering award did not have record before them, but only a transcript of it; Garr v. Gomez, 9 Wend. 649, holding that on writ of error where one count appears bad and verdict is entered generally on all counts, court must reverse judgment in toto, and award new trial.

Rights of indorsee of bill of exchange.

Cited in McDougald v. Central Bank, 3 Ga. 185, on rights of transferee of bona fide holder of bill of exchange.

Limitation of title on sale to that possessed by vendor.

Cited in Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322, to the point no one can convey any better title than he owns unless sale is made in market overt or under circumstances which show that seller lawfully represented owner; Leigh Bros. v. Mobile & O. R. Co. 58 Ala. 165; Moore v. Robinson, 62 Ala. 537; Stillman v. Hurd, 10 Tex. 109,—holding that possession of personal chattel cannot transfer to another, greater right than he has himself.

4 E. R. C. 758, SEWELL v. BURDICK, L. R. 10 App. Cas. 74, 5 Asp. Mar. L. Cas. 376, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, reversing the decision of the Court of Appeal, reported in 53 L. J. Q. B. N. S. 399, L. R. 13 Q. B. Div. 159, which reverses the decision of Field, J., reported in 52 L. J. Q. B. N. S. 428, L. R. 10 Q. B. Div. 363.

Bills of lading — Effect of provisions.

Cited in The Arctic Bird, 109 Fed. 167, holding that terms of bill of lading received by shipper without reading does not affect a prior contract made for the carriage of the goods; Wilson v. Canadian Development Co. 9 B. C. 82, on bill of lading as being simply a receipt for the goods represented.

Cited in notes in 4 Eng. Rul. Cas. 843, as to how long bill of lading remains in force.

Cited in Benjamin Sales, 5th ed. 846, on effect of bill of lading; Benjamin Sales, 5th ed. 920, on defeat of seller's right of stoppage in transitu by buyer's pledge of document of title; Hollingsworth Contr. 377, on rights of parties under bill of lading; Porter Bills of L. 331, on negotiability of bill of lading; 13 E. R. C. 263, on insurable interest of consignee of factor.

Distinguished in The Caledonia, 43 Fed. 681, holding that where the original contract for the carriage of goods is a preliminary arrangement only, the bill of lading is binding upon the parties.

— Effect of terms of charter-party or ownership of vessel.

Cited in The Fri, 83 C. C. A. 205, 154 Fed. 333, holding that bill of lading given by master of vessel to charterer operates simply as a receipt for the goods and does not affect the terms of the charter party; Rodocanachi v. Milburn, 56 L. J. Q. B. N. S. 202, L. R. 18 Q. B. Div. 67, 56 L. T. N. S. 594, 35 Week. Rep. 241, 6 Asp. Mar. L. Cas. 100 (affirming L. R. 17 Q. B. Div. 316); The Chadwicke, 29 Fed. 521,—holding that as between conflicting provisions in the bill of lading and the charter party, the latter controls.

— Title of indorsee.

Cited in Washburn Crosby Co. v. Boston & A. R. Co. 180 Mass. 252, 62 N. E. 590; Trueman v. Bain, 25 N. B. 298,—on effect of transfer of bill of lading of goods in transit; Canadian P. R. Co. v. Forest City Paving & Constr. Co. 2 Sask. L. R. 413, holding that carrier could recover freight charge from consignee where goods were consigned in his name by seller; Burgos v. Nascimento [1908] W. N. 237, 100 L. T. N. S. 71, 53 Sol. Jo. 60, 11 Asp. Mar. L. Cas. 181, holding that effect of endorsement of bill of lading as to title to the property is to be determined from the intent with which the endorsement was made; Bristol Bank v. Midland R. Co. [1891] 2 Q. B. 653, 65 L. T. N. S. 234, 40 Week. Rep. 148, 61 L. J. Q. B. N. S. 115, 7 Asp. Mar. L. Cas. 69; Rew v. Payne, 53 L. T. N. S. 932, 5 Asp. Mar. L. Cas. 515,—holding that endorser of bill of lading as security for advances has such property in the goods shipped as to entitle him to possession as against consignee until payment is made; Allen v. Coltart, L. R. 11 Q. B. D. 782, 52 L. J. Q. B. N. S. 686, 48 L. T. N. S. 944, 31 Week. Rep. 841, 5 Asp. Mar. L. Cas. 104, on non liability of endorsee of bill of lading as security for advances, to ship owner for charges on the goods.

Cited in note in 4 E. R. C. 789, on rights of transferee of bill of lading.

Distinguished in Friendly v. Canada Transit Co. 10 Ont. Rep. 756, holding that where evidence shows an acceptance by consignee of goods consigned to him, an action for goods lost or damaged in transit should be brought by him.

Transfer of general property in goods sold.

Cited in Benjamin Sales, 5th ed. 2, on transfer of general property as essential to sale.

Receipt of goods by buyer.

Cited in Benjamin on Sales, 5th ed. 223, on effect on acceptance of goods of reservation of special interest to seller after delivery.

Force of obiter statements in opinions.

Cited in Boyle v. Victoria Yukon Trading Co. 9 B. C. 213, on expressions in judgments as being given force secundum subjectam materiam; Rimmer v. Webster, 71 L. J. Ch. N. S. 561, [1902] 2 Ch. 163, 86 L. T. N. S. 491, 50 Week. Rep. 517, 18 Times L. R. 548, on danger of inferring from strong words used in judgment on one subject, conclusions with reference to another subject which was not in the minds of the court at the time the expression was used.

4 E. R. C. 790, LEASK v. SCOTT, 3 Asp. Mar. L. Cas. 469, 46 L. J. Q. B. N. S. 576, 36 L. T. N. S. 784, L. R. 2 Q. B. Div. 376, 25 Week. Rep. 654.

Bills of lading — Rights of transferee.

Cited in First Nat. Bank v. Schmidt, 6 Colo. App. 216, 40 Pac. 479, holding that transferring a bill of lading as security for advances pursuant to an agreement to do so, defeats the vendor's right of stoppage in transitu; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61 (dissenting opinion), on transfer of bill of lading as defeating right of stoppage in transitu; St. Paul Roller-Mill Co. v. Great Western Despatch Co. 27 Fed. 434, holding that bill of lading to order of shipper, passes title to the goods when delivered to purchaser unindorsed but with intent that title shall so pass; Pollard v. Reardon, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 848, holding that advances made under stipulation that bill of lading shall be transferred when it arrives constitutes a present consideration for its transfer; Hurd v. Bickford, 85 Me. 217, 35 Am. St. Rep. 353, 27 Atl. 107, holding that delivery of bill of lading was delivery of property and worked executed sale, whereby right of stoppage in transitu became barred; Taussig v. Baldwin, Rap. Jud. Quebec 6 C. S. 119, holding that seller cannot recover goods from carrier where bill of lading has been sent to vendee and by him assigned to a bona fide purchaser for a valuable consideration; Clementson v. Grand Trunk R. Co. 42 U. C. Q. B. 263, holding that endorsement of bill of lading as collateral security for an antecedent debt, defeats the right of stoppage in transitu.

Cited in Benjamin Sales, 5th ed. 925, on defeat of seller's right of stoppage in transitu by transfer for antecedent debt; Hollingsworth Contr. 384, on rights of parties under bill of lading; 2 Mechem Sales, 1308, on effect of indorsement of bill of lading on right of stoppage in transitu; 2 Mechem Sales, 1309, on effect of transfer for value on right of stoppage in transitu.

Pre-existing debt as consideration.

Cited in Shepard & M. Lumber Co. v. Burroughs, 62 N. J. L. 469, 41 Atl. 695, holding that transfer of goods in payment of pre-existing debt is for good consideration and will defeat shipper's right of stoppage in transitu; Re First Nat. Bank, 84 C. C. A. 16, 155 Fed. 100, holding that making of present loan is sufficient consideration for transfer of collateral to secure not only such loan, but also prior indebtedness; Williams v. Leonard, 26 Can. S. C. 406, holding that one taking goods in discharge of a pre-existing debt is a bona fide purchaser for a valuable consideration under Bills of Sale act; Goodwin v. Massachusetts Loan & T. Co. 152 Mass. 189, 25 N. E. 100, holding that pledges of goods as security for a pre-existing debt is not a holder for value.

Cited in Hollingsworth Contr. 131, on actual forbearance upon request without promise to forbear as a good consideration.

Disapproved in Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147, holding that endorsee of warehouse receipt for goods as collateral security for antecedent

debt is not a purchaser for valuable consideration so as to defeat a vendor's lien on the goods.

4 E. R. C. 798, BARBER v. MEYERSTEIN, 39 L. J. C. P. N. S. 187, L. R. 4 H. L. 317, 22 L. T. N. S. 808, 18 Week. Rep. 1041, affirming the decision of the Exchequer Chamber, reported in 36 L. J. C. P. N. S. 289, L. R. 2 C. P. 661, which affirms the decision of the Court of Common Pleas, reported in 36 L. J. C. P. N. S. 48, L. R. 2 C. P. 38.

Bill of lading — Effect of indorsement of one of a set.

Cited in Garden Grove Bank v. Humeston & S. R. Co. 67 Iowa, 526, 25 N. W. 761, holding that bill of lading is both receipt and contract, and in its character as contract it is no more open to explanation by parol than any other written contract; Royal Canadian Bank v. Miller, 28 U. C. Q. B. 593, to the point that bill of lading may be given up and wharfinger's receipt taken for it, by assignee; Glyn v. East & West India Dock Co. L. R. 5 Q. B. Div. 129, L. R. 6 Q. B. Div. 475, L. R. 7 App. Cas. 591, 4 Eng. Rul. Cas. 818, 52 L. J. Q. B. N. S. 146, 47 L. T. N. S. 309, 31 Week. Rep. 201, 4 Asp. Mar. L. Cas. 580, holding dock company protected by delivery to endorsee of one of set of three bills of lading, though plaintiff was the endorsee of another of the set by a prior endorsement; First Nat. Bank v. Ege, 109 N. Y. 120, 4 Am. St. Rep. 431, 16 N. E. 317; The John Bellamy, L. R. 3 Adm. & Eccl. 129, 39 L. J. Prob. N. S. 28, 22 L. T. N. S. 244.—on holder of one of a set of bills of lading as having good title to the goods as against one who obtains another of the set subsequently.

Cited in note in 25 L. ed. U. S. 892, 893, on negotiability and transfer of bill of lading.

Cited in Benjamin Sales, 5th ed. 746, on usage of merchants as to drawing bills of lading in sets; Benjamin Sales, 5th ed. 849, on bill of lading as representing goods after being landed at wharf until replaced by wharfinger's warrant; Porter, Bills of L. 307, on bill of lading as evidence of insurable interest in cargo in prize courts of England; Porter Bills of L. 310, on duration of availability of bill of lading as a muniment of title; Porter Bills of L. 312, on duty of holder of bill of lading to give notice of his title; Porter, Bills of L. 342-344, 346, on negotiability of bill of lading.

The decision of the Court of Common Pleas was cited in Skilling v. Bollman, 6 Mo. App. 76, holding that person who first gets one of set of bills of lading has right to property; Royal Canadian Bank v. Carruthers, 28 U. C. Q. B. 578, holding that endorsee of one of a set of bills of lading has title to the goods as against a subsequent endorsee of another of the set though the latter has obtained possession.

— Title of indorsee.

Cited in New Haven Wire Co. v. Cases, 57 Conn. 352, 5 L.R.A. 300, 18 Atl. 266, holding that endorsement and delivery of bills of lading for money advanced thereon, confers upon endorsee title to the goods; Forbes v. Boston & L. R. Co. 133 Mass. 154, holding that transferee of bill of lading for a valuable consideration obtains title to the goods and may recover from the carrier if delivered to another; Landa v. Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48, holding that endorsee of bill of lading of goods shipped under contract of sale can enforce against the purchaser only such rights as were held by the shipper; Robinson v. Memphis & C. R. Co. 9 Fed. 129, holding that bona fide holder of fraudulent bill of lading issued by agent of carrier for goods not in

fact delivered to the carrier, can not recover thereon; Colgate v. Pennsylvania Co. 31 Hun, 297, on necessity of giving notice to carrier of transfer of bill of lading in order to complete title of transferees, and thereby protect them from interference with property by consignee; People's Nat. Bank v. Stewart, 19 N. B. 268, holding that assignee of bill of lading of goods in transit obtains title thereto and may recover from one to whom they have been wrongfully delivered; National Newark Banking Co. v. Delaware, L. & W. R. Co. 70 N. J. L. 774, 66 L.R.A. 595, 103 Am. St. Rep. 825, 58 Atl. 311, on same point; Trueman v. Bain, 25 N. B. 298, on bill of lading endorsed and delivered as not passing title to the property unless so intended by the parties; Todd v. Liverpool & L. G. Ins. Co. 20 U. C. C. P. 523 (dissenting opinion), on sufficiency of endorsement of bills of lading under statute to pass title.

Cited in note in 38 L.R.A. 362, as to whom may delivery be made under bill of lading.

Cited in Benjamin, Sales, 5th ed. 913, 914, on master's duty as between conflicting claims of buyer and seller of goods; Benjamin Sales, 5th ed. 915, on right of master without knowledge of prior dealing with other bills to deliver property under bill of lading first presented; 1 Mechem Sales, 158, on appearance of seller's title from possession of bill of lading or warehouse receipt; Porter, Bills of L. 353 on want of notice to carrier by true owner as not invalidating title of holder of bill of lading.

Distinguished in Sewell v. Burdick, L. R. 10 App. Cas. 74, 4 Eng. Rul. Cas. 758, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376 (reversing L. R. 13 Q. B. Div. 159, which reversed L. R. 10 Q. B. Div. 363), holding indorsee of bill of lading as security for loan, who has not interfered with the possession nor claimed delivery, not liable to ship owners for the freight on the goods.

The decision of the Exchequer Chamber was cited in Todd v. Liverpool & L. & G. Ins. Co. 20 U. C. C. P. 523, on method of endorsing bills of lading and warehouse receipts, and effect of endorsements as to passing title; Furness, W. & Co. v. W. N. White & Co. [1894] 1 Q. B. 483, as showing the purpose of the warehousing clause" of the Merchant Shipping act.

The decision of the Court of Common Pleas was cited in Clementson v. Grand Trunk R. Co. 42 U. C. Q. B. 263, holding that transfer of bill of lading is effective as transfer of the goods though they may have been landed but not delivered; Ratzer v. Burlington, C. R. & N. R. Co. 64 Minn. 245, 58 Am. St. Rep. 530, 66 N. W. 988, holding connecting carrier liable to pledgee of bill of lading, for value of goods delivered at intermediate point at request of the shipper but without surrender of bill of lading; First Nat. Bank v. Kelly, 57 N. Y. 34, holding that the endorsement and delivery of a bill of lading of goods in transit, to a bank as collateral security, operates as a delivery of the goods; Harrison, F. & Co. v. Mora Ona & Co. 23 Pittsb. L. J. N. S. 113, 24 Atl. 705, holding that delivery of the bill of lading transfers title to the goods: Douglas v. People's Bank, 86 Ky. 176, 7 Am. St. Rep. 276, 5 S. W. 420, on endorsement and delivery of bill of lading as being in effect a delivery of the goods.

— Laches of indorsee.

Cited in Midland Nat. Bank v. Missouri P. R. Co. 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521, on laches as not being attributable to endorsee of bill of lading though he fail to give notice of his rights.

— When title passes to consignee.

Cited in Vaughn v. New York, N. H. & H. R. Co. 27 R. I. 235, 61 Atl. 695, holding that where bill of lading with draft upon consignee, is sent to bank to be paid before delivery to him, title does not pass until draft is paid and bill of lading delivered.

The decision of the Court of Common Pleas was cited in Hieskell v. Farmers' & M. Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745, 7 W. N. C. 249, holding that where bill of lading with draft attached is sent to bank to be paid before delivery, title does not pass to consignee until payment, and the bank may recover the goods if delivered to consignee before draft is paid and bills of lading secured.

— When discharged.

The decision of the Court of Common Pleas was cited in Domville v. Kevan, 13 N. B. 33 (dissenting opinion), on bill of lading being effected though goods have been landed but not delivered.

Lien of master of vessel for charges.

Cited in Winchester v. Busby, 16 Can. S. C. 336 (affirming 27 N. B. 231), holding that master unloading and storing goods has no lien thereon for cost of storage, his lien being limited to freight charges only.

— After wharfing cargo.

Cited in Canadian Locomotive Co. v. Copeland, 14 Ont. Rep. 170, on right of master to wharf goods and still retain his lien for freight charges.

The decision of the Exchequer Chamber cited in Mors-le-Blanch v. Wilson, L. R. 8 C. P. 227, 42 L. J. C. P. N. S. 70, 28 L. T. N. S. 415, 1 Asp. Mar. L. Cas. 605, on right of master of vessel to land goods and still retain his lien thereon for freight charges.

Pledge of goods, possession and delivery.

Cited in Merchants' & M. Bank v. Hibbard, 48 Mich. 118, 42 Am. Rep. 465, 11 N. W. 834, holding that warehouseman may pledge grain which is part of a larger mass, by the issuing of a warehouse receipt therefor without further delivery; Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147, holding that a valid pledge may be based upon constructive delivery; Ex parte Fitz, 2 Low. Dec. 519, Fed. Cas. No. 4,837, holding constructive delivery sufficient to sustain title of pledgee of goods.

The decision of the Exchequer Chamber was cited in Hilton v. Tucker, L. R. 39 Ch. Div. 669, 57 L. J. Ch. N. S. 973, 59 L. T. N. S. 172, 36 Week. Rep. 762, on delivery as essential to a pledge of goods.

The decision of the Court of Common Pleas was cited in Young v. Kimball, 59 N. H. 446, holding delivery either actual or constructive necessary to a valid pledge of goods; Re Coleman, 36 U. C. Q. B. 559, on pledge of goods upon constructive delivery; Collins's Appeal, 107 Pa. 590, 52 Am. Rep. 479, 5 W. N. C. 5, 41 Phila. Leg. Int. 55, holding valid a pledge of subject not in existence at the time the contract of pledge is made.

Constructive delivery of goods or things.

Cited in State Bank v. Waterhouse, 70 Conn. 76, 66 Am. St. Rep. 82, 38 Atl. 964, holding that endorsement and delivery of warehouse receipt is in effect the delivery of the goods represented by it; Mills v. Charlesworth, L. R. 25 Q. B. Div. 421, on transfer of possession of goods by agreement, where the goods are in the hands of a third party.

The decision of the Court of Common Pleas was cited in Folsom v. Cornell, 150 Mass. 115, 22 N. E. 705, holding that where contract of sale was rescinded,

after delivery, by mutual agreement, the title revested in vendor without any re-delivery as between the parties; Hamilton v. National Loan Bank, 3 Dill. 230, Fed. Cas. No. 5,987, holding actual delivery of bonds at time of sale not essential to the passing of title thereto; Skilling v. Bollman, 73 Mo. 665, 39 Am. Rep. 537; Indiana Nat. Bank v. Colgate, 4 Daly, 41,—holding that when goods are afloat bill of lading represents them, and indorsement and delivery of it has same effect as delivery of goods themselves; Busby v. Winchester, 27 N. B. 231, holding that there can be no complete delivery until goods are placed under dominion and control of person who has to receive them.

The decision of the Court of Common Pleas was disapproved in Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433, holding transfer of warehouse receipt to be insufficient as delivery of the goods represented, as against a creditor attaching the goods before warehouseman has notice of the transfer.

4 E. R. C. 818, GLYN MILLS, C. & CO. v. EAST & WEST INDIA DOCK CO. L. R. 7 App. Cas. 591, 4 Asp. Mar. L. Cas. 580, 52 L. J. Q. B. N. S. 146, 47 L. T. N. S. 309, 31 Week. Rep. 201, affirming the decision of the Court of Appeal, reported in 50 L. J. Q. B. N. S. 62, L. R. 6 Q. B. Div. 475, which reverses the decision of Field, J., reported in 49 L. J. Q. B. N. S. 303, L. R. 5 Q. B. Div. 129.

Bill of lading — Title of indorsee.

Cited in Charavay & Bodvin v. York Silk Mfg. Co. 170 Fed. 819; to the point that bankers who advance money for purchase of goods and take bills of lading have legal title to property and right to possession, subject to shipowner's lien; Burdick v. Sewell, L. R. 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 76, 4 Eng. Rul. Cas. 758, 52 L. J. Q. B. N. S. 428, L. R. 10 Q. B. Div. 363, 48 L. T. N. S. 705, 31 Week. Rep. 796, 7 Asp. Mar. L. Cas. 79, holding that endorsee of bill of lading as security for advances does not obtain such property in the goods as to become personally liable to the carrier for the freight charges thereon.

Cited in note in 4 Eng. Rul. Cas. 789, on rights of transferee of bill of lading.

The decision of the Court of Appeal was cited in Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433, holding that indorsement of receipt for goods stored in private warehouse, in which bailee undertakes to deliver goods to bailor upon payment of charges, does not pass title in goods to endorsee as against attaching creditor of bailor who attaches before notice of endorsement is given to bailee; Robinson v. Memphis & C. R. Co. 9 Fed. 129, holding that where no goods are received, carrier is not liable to third person who advanced money on bill of lading issued by carrier's agent, without authority real or apparent, to sign bill of lading until actual delivery of goods.

— Title of holder of one of set of bills.

Cited in Midland Nat. Bank v. Missouri P. R. Co. 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521, holding railroad liable to endorsee for valuable consideration of original bill of lading, though the goods had been delivered to holder of duplicate bill issued by the railroad; First Nat. Bank v. Ege, 109 N. Y. 120, 4 Am. St. Rep. 431, 16 N. E. 317, holding that where bills of lading are drawn in duplicate, and one with draft attached is sent to a bank and discounted, the consignee does not obtain title to the goods though he obtains delivery by means of the duplicate; Sanders v. Maclean, L. R. 11 Q. B. Div. 327, 52 L. J. Q. B. N. S. 481, 49 L. T. N. S. 462, 31 Week. Rep. 698, 5 Asp. Mar. L. Cas. 160, holding that where bill of lading is made in a set of three,

the vendee cannot refuse to accept and pay upon the presentation of the bill on the ground that all three parts must be presented.

Cited in note in 38 L.R.A. 362, as to whom may delivery be made under duplicate bills of lading.

Cited in Benjamin, Sales, 5th ed. 746, on usage of merchants as to drawing bills of lading in sets; Benjamin Sales, 5th ed. 913, on master's duty as between conflicting claims of buyer and seller of goods; 4 Elliott Railr. 2d ed. 73, on duplicate bills of lading.

— Bill as contract of shipment.

Cited in The Caledonia, 43 Fed. 681, holding that bill of lading is the contract of carriage where given and accepted without objection or explanation; Leduc v. Ward, L. R. 20 Q. B. Div. 475, 57 L. J. Q. B. N. S. 379, 58 L. T. N. S. 908, 36 Week. Rep. 537, 6 Asp. Mar. L. Cas. 290, holding parol evidence inadmissible to vary terms of shipment in bill of lading in action by endorsee thereof against shipowner for nondelivery of the goods.

4 E. R. C. 845, RE WESTZINTHUS, 5 Barn & Ad. 817, 3 L. J. K. B. N. S. 56, 2 Nev. & M. 644.

Bills of lading — Rights of consignor.

Cited in Wilson v. Churchman, 4 La. Ann. 452 on rights of unpaid vendor as against endorsee of bill of lading; Sewell v. Burdick L. R. 10 App. Cas. 74, 54 L. J. Q. B. N. S. 156, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376, 4 Eng. Rul. Cas. 758, on right of shipper as to goods after endorsement and delivery of the bill of lading; Benedict v. Schaettle, 12 Ohio St. 515 (affirming 1 Disney, 445), holding that unpaid vendor has the right of stoppage in transitu and may recover the goods from officer who has seized them while in transit under attachment against insolvent consignee; Spalding v. Ruding, 12 L. J. Ch. N. S. 503, 6 Beav. 376; Kemp v. Falk, L. R. 7 App. Cas. 573, L. R. 14 Ch. Div. 457, 52 L. J. Ch. N. S. 167, 47 L. T. N. S. 454, 31 Week. Rep. 125, 5 Asp. Mar. L. Cas. 1, 23 Eng. Rul. Cas. 399,—holding that shipper may exercise the right of stoppage in transitu though the consignee has endorsed the bill of lading to secure advances, but such right is subject to the claim of the endorsee to re-imbursement; Meyerstein v. Barber, L. R. 2 C. P. 38, 36 L. J. C. P. N. S. 48, 15 L. T. N. S. 355, on delivery of bill of lading as pledge for money advanced as passing title to the pledgee.

Cited in notes in 4 E. R. C. 861, on effect of stoppage in transitu by unpaid vendor after indorsement of bill of lading; 23 E. R. C. 409, on lien of seller of goods.

Cited in 2 Mechem, Sales, 1311, on effect of transfer of bill of lading as security on right of stoppage in transitu; Porter Bills of L. 403, 408, 409, 410, on title and right of stoppage in transitu of holder of bill of lading after transfer of bill of lading for value to bona fide transferee.

Marshalling of assets.

Cited in Broadbent v. Barlow, 30 L. J. Ch. N. S. 569, 3 De. G. F. & J. 570, 7 Jur. N. S. 479, 4 L. T. N. S. 193, on marshalling as applicable where consignee disposes of goods in fraud of the shipper.

Cited in note in 18 Eng. Rul. Cas. 211, on marshalling assets of mortgagor.

4 E. R. C. 851, EX PARTE GOLDING D. & CO. L. R. 13 Ch. Div. 628, 42 L. T. N. S. 270, 28 Week. Rep. 481.

Rights under stoppage in transitu after resale.

Cited in Ex parte Falk, L. R. 14 Ch. Div. 446, 42 L. T. N. S. 780, 28 Week.

Rep. 785, 4 Asp. Mar. L. Cas. 280, holding shipper giving notice of stoppage in transitu after resale, entitled to receive the unpaid purchase money to the extent of his own unpaid purchase money claim; Kemp v. Falk, L. R. 7 App Cas. 573, 52 L. J. Ch. N. S. 167, 47 L. T. N. S. 454, 31 Week. Rep. 125, 5 Asp. Mar. Cas. 9, 23 Eng. Rul. Cas. 399, holding that where consignor exercises his right of stoppage in transitu after bill of lading has been endorsed for advances and the goods resold to subpurchasers, he is entitled to the proceeds after advances have been repaid; McLean v. Breithaupt, 12 Ont. App. Rep. 383, holding that right of stoppage in transitu is prevented by levy on goods by sheriff while in railway warehouse in accordance with terms of shipping bill.

Cited in note in 34 L.R.A.(N.S.) 31, on stoppage in transitu after reshipment.

Cited in 2 Mechem Sales, 1312, on effect of absolute sale of goods without payment of purchase price on right of stoppage in transitu; Porter Bills of L. 408, on holder of bill of lading having only such an interest as will protect his advances; Porter Bills of L. 410, on consignor's right of stoppage in transitu after resale.

Subcontractor's priority.

Cited in Bellamy v. Davey [1891] 3 Ch. 540, 60 L. J. Ch. N. S. 778, 65 L. T. N. S. 308, 40 Week. Rep. 118, holding subcontractor entitled to preference to the extent of his claim in money due insolvent contractor on tanks being erected on defendant's premises, as against the general creditors of the contractor.