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THE PRACTICE AND LAW OF BANKING

WITH THE TEXT OF THE *BILLS OF EXCHANGE ACT*, 1882; THE *BILLS OF EXCHANGE (CROSSED CHEQUES) ACT*, 1906; THE *BILLS OF EXCHANGE (TIME OF NOTING) ACT*, 1917; THE *BILLS OF EXCHANGE* (1882) *AMENDMENT ACT*, 1932; AND THE *AGRICULTURAL CREDITS ACT*, 1928

BY

H. P. SHELDON

CERTIFICATED ASSOCIATE OF THE INSTITUTE OF BANKERS

LONDON

MACDONALD AND EVANS

8, JOHN STREET, BEDFORD ROW, W.C. 1

1944

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PREFACE TO FIRST EDITION

THE object of this book is to provide, for the practical bank man and for the student of English banking law and practice, a manual sufficiently extensive in scope to meet present-day requirements.

The author wishes to acknowledge his indebtedness to the works of Sir John Paget and Dr. Heber Hart, to *Questions on Banking Practice*, the *Journal of the Institute of Bankers*, and numerous other books, a list of which is given in the appendix as a bibliography. *Questions on Banking Practice* (referred to in the text as *Q.B.P.*), and the *Journal of the Institute of Bankers* contain a mine of information not to be found elsewhere, and they have rendered great service to banking in co-ordinating and establishing uniformity of practice amongst bankers.

Grateful thanks are also due to those friends who have freely given the benefit of their experience, particularly to Mr. Ernest Sykes, and to the Publishers for the extra work entailed by the absence of the author on military service.

London, E.C. 3.
August, 1920.

PREFACE TO FOURTH EDITION

SINCE the third edition was published, numerous alterations have been rendered necessary by the passing of the Currency and Bank Notes Act, 1928, Agricultural Credits Act, 1928, and the Companies Act, 1929. A chapter on the Agricultural Credits Act has been added, and the text of the Act is given in the Appendix. Opportunity has been taken to revise the book to the date indicated below. The Edition of *Questions on Banking Practice* referred to in the text is the 8th Edition.

London, E.C. 3.
June, 1930.

PREFACE TO FIFTH EDITION

OPPORTUNITY has been taken to include the text of the Bills of Exchange (1882) Amendment Act, 1932, and the relevant Section and Rules of the Solicitors Act, 1933. This edition has been revised to the date indicated below.

August, 1935.

Further revision now conforms the text to the Law Reform (Married Women and Tortfeasors) Act, 1935, and the Land Registration Act, 1936 (County of Middlesex).

August, 1937.

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THE theoretical and practical side of foreign exchange is now amply covered (for example, "The Principles and Arithmetic of Foreign Exchange," by S. Evelyn Thomas, Ph.D., B.Com., etc., is a complete exposition of the whole subject that leaves nothing to be desired in this way). But until this book was issued in the month of August, 1934, the subject had not been fully treated from the practical and highly important aspect of accountancy.

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3. It is difficult to see how Professional Auditors whose business it is to audit the books of Bankers, Financial Houses, and Merchants dealing in foreign currencies can dispense with the guidance that this book provides.
4. The Foreign Notes business is critically considered, and it is safe to say that the chapter dealing with this subject will arouse much interest.

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THE PRACTICE AND LAW OF BANKING

PART I

CHEQUES

CHAPTER I

CHEQUES GENERALLY

1. **Definition and Form of Cheques.**—A cheque is defined (s. 73, Bills of Exchange Act, 1882) as "a bill of exchange drawn on a banker payable on demand." S. 3 (1) same Act defines a bill of exchange payable on demand as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand . . . a sum certain in money to or to the order of a specified person or to bearer." Combining these two definitions, Dr. Hart (*Law of Banking*, 4th edition, p. 327) defines a cheque as follows: "A cheque is an unconditional order in writing drawn on a banker signed by the drawer, requiring the banker to pay on demand a sum certain in money to or to the order of a specified person or to bearer, and which does not order any act to be done in addition to the payment of money." From this definition it will be seen that there are, primarily, three parties to a cheque: (1) the party by whom or by whose authority the cheque is signed, called the *drawer*; (2) the party authorised to pay out the money, *i. e.* the banker, called the *drawee*; (3) the party to whom or to whose order the money is to be paid, called the *payee*.

The definition also states various conditions which must be fulfilled if the document is to be rightly called a cheque:

(1) *The order to pay must be unconditional* so far as the banker is concerned. Accordingly, if a document in the form of a cheque orders a banker to pay on demand a sum certain to a specified person on *condition* that a form on the face of the cheque acknowledging receipt of the money is duly filled in, then the document is not a cheque. But if the instructions as to signing the receipt form are addressed not to the banker but to the payee, then the order to pay may be regarded as unconditional.

(2) *A cheque must be in writing.* The writing may be done by means of (*a*) printed characters, (*b*) a typewriter, (*c*) a pen or pencil. But, though legally admissible, if a cheque is written with an ordinary lead pencil the banker would be quite justified in returning it to the drawer for confirmation, for the reason that alterations unauthorised by the drawer are easy to make and difficult to detect. It does not appear, however, that a banker would be entitled to refuse payment upon presentation of a cheque written with an indelible pencil, especially after the experiences of the Great War, during which thousands of such cheques must have been written by persons serving in his Majesty's forces, and duly honoured. Notwithstanding this, the use of a copying pencil should be discouraged in all cases where a pen and ink are procurable.

(3) *The order to pay must be addressed by one person to another, and that other must be a banker.* Therefore, bankers' drafts drawn by one branch on the head office or on another branch are not cheques, because the head office and all the branches are considered to be one institution, whereas the drawer and drawee must be distinct parties.

(4) *The sum certain named in the cheque must be payable on demand.* A cheque is payable on demand when it is expressed to be so payable, or when it is drawn payable at sight, or on presentation, or when no time for payment is expressed (Bills of Exchange Act, 1882, s. 10). The last is the most common form.

(5) *A cheque must be payable to or to the order of a specified person or to bearer.* Hence where a cheque is not made "payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty" (*ibid.*, s. 7 (1)).

2. **Issue.**—The issue of a cheque means its "first delivery . . .

complete in form to a person who takes it as a holder " (*ibid.*, s. 2). That is to say, a cheque is issued when the drawer parts with it to another person with the intention that the proceeds of the cheque shall be paid to that person, or to his order, or to bearer, as the form of the instrument may determine. The sections of the Bills of Exchange Act, 1882, which govern the issue and delivery of bills of exchange (including cheques) are given on p. 99, *q.v.* From these it will be seen that " the drawer is not liable upon a cheque until he has issued it, or precluded himself from denying its issue " (Hart's *Law of Banking*, 4th edition, p. 354). A cheque is duly issued even though the drawer was induced by fraud to issue it. But suppose the drawer writes out a cheque which he leaves in a drawer, and it is stolen and negotiated to a holder for value. Can the latter, if it is a bearer cheque and there is, therefore, no question of a forged indorsement, enforce or retain payment, and is the paying banker protected should he pay the cheque in good faith and in the ordinary course of business? The decided cases bearing on these points are not conclusive, but it would appear that a holder for value cannot sue on a cheque not duly issued, *e. g.* stolen before issue. In the case of the banker, however, it is possible that the position may be a little different, though it is doubtful whether a banker who pays a cheque not duly issued would be able to debit it to the drawer's account unless the drawer had clearly been guilty of contributory negligence.

3. **Drawer's Signature.**—In order to be valid, the cheque must either bear the drawer's signature, or a signature put on by the authority of the drawer. If the drawer's signature or the signature authorised by him be forged, then the banker, should he pay the cheque, cannot usually debit the drawer with the amount. But if the drawer does not disclaim a forged signature as soon as the forgery comes to his knowledge, so that he thereby prevents or prejudices the banker's chances of recovering the money from the forger, then the banker may be entitled to debit the drawer with the amount.

When a customer opens an account with a banker, he gives the banker a specimen of the form of signature which is to appear on all his cheques. If the banker has reason to doubt the genuineness of a signature, he should, to protect himself, either get it confirmed, or return the cheque, marking it " Signature

differs." (See Note, p. 68.) It is not necessary that the drawer should sign his own name. For example, he may be trading under such a name as "The Sahara Cycle Company," and in that case could arrange so to sign his cheques, without the addition of his personal signature. But such a form of signature has drawbacks, and should generally be discouraged.

If a customer cannot write, he may sign by a mark, but his mark should be witnessed in the presence of the banker by a person known to the banker. The witness should also write his or her address. The paying cashier is not a desirable witness, and an outside witness is preferable to a bank official. Where no outside witness is available, some bankers insist upon two bank officials acting as witnesses. A person too ill to sign his name may have his mark witnessed by his medical attendant and another person. In such cases the banker would require the doctor's certificate that the form of signature was due to the customer's inability to sign otherwise, and that the customer was in full possession of his faculties at the time of signing. When a customer, so drunk as not to know what he is doing, presents a cheque over the counter and demands cash for it, it is well not to pay the money over except in the presence of a witness.

Pencil signatures, though legally valid, should be discouraged, and facsimile signatures impressed on the cheque by means of a rubber or other stamp should not be permitted. S. 91, Bills of Exchange Act, 1882, declares that it is not necessary that the drawer should sign the cheque with his own hand, but if otherwise signed, it must be done by or under the drawer's authority. Obviously, where a stamp is used, the banker has no means of knowing whether the stamp has been impressed by the drawer's authority. The banker, therefore, is entitled to satisfactory proof of authority on each occasion when such a stamp is used for signing. While any form of cheque other than the usual printed form should be discouraged, a cheque, for example, drawn, "I, James Smith, request you to pay," would be valid, if written by or under the authority of James Smith. Such variations from the normal form are very undesirable, and bankers would be justified in returning them, marked "Irregularly drawn." (See also Note A, p. 16.)

4. Date.—By s. 13 (2), Bills of Exchange Act, 1882, a cheque "is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday." An ante-dated cheque is

one that bears a date before the date of issue; a post-dated cheque is one dated later than the date of issue. A cheque not dated at all is quite valid, and it appears probable that any holder may insert the date under the provisions of s. 20 (1), Bills of Exchange Act, 1882. The expression " the person in possession " used in this section is probably sufficient to give the banker to whom an undated cheque is presented for payment, a *prima facie* authority to fill in the date, but, as a matter of practice, bankers usually return undated cheques. A cheque dated on a Sunday should not be paid until the following business day. If presented for payment on the Saturday previous it should be returned, marked " Post-dated." In this respect a cheque differs from a bill of exchange maturing on a Sunday, as such a bill is payable on the preceding day. A cheque which bears a date not in the calendar, *e. g.* November 31st, should be paid on or after November 30th. If a cheque dated, say, September 8th, 1919, has written across its face such expressions as, " Payable 1st October, 1919," or " Postpone payment 10 days," it should be returned, marked " Irregularly drawn." A cheque must be payable on demand (but see *post*). Where payment is postponed, the document becomes a bill of exchange not payable on demand, and should, therefore, be stamped with an *ad valorem* stamp.

5. *Post-dated Cheques.*—A post-dated cheque is an exceptional instrument, though, as stated in the previous section, a cheque so dated is made valid by s. 13 (2), Bills of Exchange Act, 1882. But though a valid instrument, there is a difficulty about the stamp required. Being equivalent to a bill of exchange not payable on demand, it should, strictly speaking, bear an *ad valorem* stamp. Hence, though legally it is insufficiently stamped on the date of issue, no objections on this ground could be maintained, because no cause of action could arise until the due date, when the instrument would be sufficiently stamped. And its negotiability is not impaired because it is post-dated. For example, A gives B a post-dated cheque and B, before the due date, gives it to C in payment of a debt. C takes the cheque without notice of any dispute between A and B. A stops payment because B has not fulfilled his contract. Nevertheless, C acquires a good title to the cheque, and when the due date arrives, can sue A for the amount of the cheque.

There is another point. Seeing that a post-dated cheque is, strictly speaking, not a cheque, but a bill of exchange, it would

appear that a partner in a non-trading firm has no implied authority to bind his co-partners by issuing such a cheque in the firm's name (Hart's *Law of Banking*, 4th edition, p. 366).

As regards the banker, he will lose his statutory protection if he pays a post-dated cheque before it is due for payment, and must bear any loss that arises out of his action. For example, if a person found a post-dated cheque, and was able to get it cashed by the drawee-banker before the date written on the cheque, the banker would be liable to the drawer for the amount. Moreover, if a banker pays a post-dated cheque, and dishonours other cheques, which would otherwise have been paid, he will be liable to his customer for damage to his credit. If he holds such a cheque pending the arrival of the due date, the customer may fail in the meantime. And the banker cannot debit his customer's account with a post-dated cheque on arrival of its due date if the customer stops payment of it before such date. In the *Gilbart Lectures*, 1917, Sir John Paget expressed the opinion "that a banker who pays a post-dated cheque before the ostensible date, stands a very poor chance of being able to debit his customer with it in any conceivable circumstances if the customer chooses to object to be so debited." The banker has disobeyed his customer's mandate and authority.

6. *Stale Cheques.*—By s. 36 (3), Bills of Exchange Act, 1882, a cheque is overdue, or, as it is called, "stale," when it appears on the face of it to have been in circulation for an unreasonable length of time. But what is "an unreasonable time" has never been legally defined. The question is an important one, for if a stale cheque is negotiated it can only be negotiated subject to any defect of title affecting it when it was due. The transferee of such a cheque, therefore, takes it subject to equities, *i. e.* he cannot "acquire or give a better title than that which the person from whom he took it had" (*ibid.* s. 36 (2)). Sir John Paget considers that "in the absence of special circumstances," a cheque would probably be deemed stale, so far as its negotiability was concerned, if it had been issued "ten days or so" before negotiation. The question is one of fact, and each case depends upon its circumstances. An indorser is not liable on a cheque unless it is presented for payment within a reasonable time after his indorsement (*ibid.* s. 45).

It is necessary to distinguish between cheques deemed "stale" in law for purposes of negotiation and those termed "stale" by

bankers' custom. As regards the latter, most bankers return cheques presented six or more months after date, marked "Stale" or "Out of date," and require the drawer's confirmation before payment. Some banks fix the limit at twelve months. But this practice does not affect the drawer's liability to the holder of the cheque, which remains alive until barred by the Statute of Limitations, *i. e.* the holder can sue the drawer any time within six years of the date of the cheque, unless the drawer has suffered actual damage through the delay in presentment, or unless the person in possession of the cheque, negotiated when overdue, is unable to acquire a title owing to a defect in the title of the person for whom he negotiated it. For example, if, between the date of issue and the latest date deemed reasonable for presentment, the banker failed, and the drawer lost the money standing to his credit, it is obvious that he would lose more than he would have done if the holder had presented the cheque promptly. Hence, if the drawer had a sufficient balance to meet the cheque, he is entirely free from any claim by the holder, who must look to the banker's assets.

7. **Amount.**—A cheque may be drawn for any sum of money, large or small, but fractions of a penny, if expressed, are not paid by the banker. The amount should be stated both in words and in figures on the face of the instrument. If the amount expressed in words differs from that expressed in the figures, then the former is the sum legally payable (Bills of Exchange Act, 1882, s. 9 (2)). But when such a discrepancy occurs, the banker usually returns the cheque, marking it, "Words and figures differ," though in some instances he might pay the smaller amount. If the amount is in words only, the banker must pay the cheque, for if he refused payment he probably would be liable to his customer for any loss or damage incurred through the refusal. But if the amount is in figures only, it is the custom to return the cheque, marking it "Amount required in words." If the cheque is again presented with the words written, but not in the drawer's handwriting, or not initialled by him, the banker would be justified in again returning the cheque, marking it, "Amount in words requires drawer's confirmation." But some discretion is exercised in such cases. To prevent fraud, some drawers are accustomed to mark their cheques as, *e. g.*, "Under Twenty pounds," "Not exceeding Twenty pounds." Such a marking is a direction to the paying

banker, and he might be held liable if he paid a cheque for an amount greater than the limit prescribed by the marking.

By s. 64 (2), Bills of Exchange Act, 1882, any alteration of the sum payable is a "material alteration," and therefore should be verified by the drawer, but in practice a cheque altered from a larger to a smaller amount is sometimes paid without such verification, if the alteration in amount is unimportant. By the same Section, if the material alteration made is not apparent, and the cheque is in the hands of a holder in due course, he can enforce payment of it against the drawer for the original sum payable. If the words express the sum payable intelligibly though inaccurately, it is not the practice to return the cheque. Thus, such a wording as "Sixteen four shillings and threepence" would be taken to mean £16 4*s*. 3*d*., and that amount would be paid; but a cheque reading "Twenty four shillings and threepence" would be ambiguous, and would probably be returned for verification unless the figures read £1 4*s*. 3*d*. and this was all the payee claimed.

When a cheque is drawn out of but payable in the United Kingdom, and expressed in a foreign currency, the amount, in the absence of a stipulation to the contrary, must be converted into sterling according to the rate of exchange for sight drafts at the place of payment on the day of payment (see Bills of Exchange Act, 1882, s. 72 (4)). (See also Note B, p. 16.)

8. **Payee.**—Where a cheque is not payable to bearer the payee must be named or otherwise indicated with reasonable certainty (*ibid*., s. 7 (1)). A cheque may be drawn payable to, or to the order of the drawer (*ibid*., s. 5 (1)), as "Pay self or order." If it is drawn "Pay to —— order," this wording is to be construed as equivalent to "Pay to my order," and the cheque, therefore, requires the drawer's indorsement. But if the cheque is presented payable to "—— *or* order," the payee is not indicated with reasonable certainty, and the banker, therefore, should return the cheque, marking it, "Payee's name omitted." He should also refuse payment of a cheque made in the following form: "Pay Five pounds 10/- or order," marking it in the same way.

When a cheque is presented for payment without any payee's name upon it, the banker is not safe in asking the holder to insert his own name, but if the holder inserts his own name before presentment, the banker would probably be protected

on the ground that the drawer had misled him, and therefore would be precluded from denying that the cheque was not filled up by his authority (see Paget's *Law of Banking*, 4th edition, p. 124). The instrument cannot be treated as payable to bearer: indeed, it would appear that the absence of a payee's name prevents it being looked upon as a cheque at all.

A cheque may be made payable to two or more payees jointly, or in the alternative to one of two, or one or some of several payees, or to the holder of an office for the time being (*ibid.*, s. 7 (2)). A payee is not liable on a cheque until he has indorsed it, and in the case of alternative payees, only those who indorse incur the liabilities of an indorser. A person cannot be sued on a bearer cheque unless he has indorsed it, but he would be liable in the event of forgery prior to the transfer, because, being a " transferor by delivery," he is held to warrant that the document is what it purports to be (*ibid.*, s. 58 (3)). Any alteration in the payee's name requires the drawer's confirmation. The indorsements of payees are considered in the next chapter.

9. **Alterations.**—All material alterations in a cheque must be made with the drawer's assent, evidenced by his signature or initials. Any material alterations made without his assent render the cheque void. If there are two or more signatories to the cheque all must join in the confirmation. Alterations in cheques drawn by limited companies and other corporate bodies must be confirmed not only by the secretary or similar official but by all the signatories. Material alterations include all those of the date, crossing, place of payment, amount and name of payee (*ibid.* s. 64 (2)). An order cheque may be turned into a bearer cheque by the drawer substituting the word " Bearer " for " Order," and initialling the alteration. No other person has power to make the alteration. But any holder may alter a bearer cheque to an order cheque without the drawer's verification.

Whenever a material alteration is made, the full signature is preferable to initials, for the reason that initials are easier to forge than the full signature. But even in the latter case, careful scrutiny is necessary, as a genuine signature is already on the cheque and may be copied. The opening of a crossing is dealt with on p. 77.

If the banker pays a cheque which has been materially altered without the drawer's consent, he does so at his own risk, for he cannot, generally, debit his customer with money which he

has paid out without his customer's authority. But if the drawer by his own act has facilitated or given opportunity for the material alteration to be made, he may be precluded from denying that the alteration was made without his authority. Where the material alteration is one of amount this has been finally decided in *Macmillan & Arthur* v. *London Joint Stock Bank, Ltd.*, 1918 (see p. 66).

10. **Mutilation.**—If a drawer tears a cheque across in such a way that its condition affords sufficient evidence that he intended to cancel it, the banker must suffer any loss that may be incurred by his paying it to a person who has pasted the pieces together and presented the cheque. If the payee accidentally tears it in two before presentation, he must get the drawer's confirmation, or the collecting banker's guarantee, before the drawee-banker will pay it. The general form is "Accidentally torn by us," followed by the banker's signature. If the drawer's confirmation or the collecting banker's guarantee is not obtainable, the cheque should be returned by the banker on whom it is drawn, marked "Mutilated Cheque." A cheque torn, but not quite in two, would usually be paid, but the banker would be quite justified in returning it, marked as above; and in all cases of doubt this is the safer course to follow.

A bill of exchange other than a cheque is sometimes divided into two parts for safe transmission. When received, the two parts are pasted together, and the complete bill presented for payment. It is the custom of bankers to pay such bills without question, provided that the purpose of the division is clear, and shows no intention of cancellation. If there is any doubt on this point, the bill should be referred back to the acceptor before payment.

11. **Stamp.**—The duty on a cheque, no matter what the sum payable may be, is twopence, and the stamp may be impressed or adhesive. If adhesive, a twopenny stamp, or stamps equivalent in value, can be affixed. If impressed, the ordinary impressed 2*d.* stamp may be used, but probably not the 2*d.* "Bill or Note" stamp (*J. Inst. Bankers*, May 1920, p. 156). By s. 34 (1), Stamp Act, 1891, if an adhesive stamp is used, it "is to be cancelled by the person by whom the bill [includes cheque] is signed before he delivers it out of his hands, custody, or power." By s. 8 (3) of the same Act, "Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and

effectually to do so . . . shall incur a fine of £10." If more than one adhesive stamp is used, all must be cancelled (s. 8 (2)). If a cheque is presented to a banker unstamped, he may (s. 38 (2)) affix and cancel an adhesive twopenny stamp or its equivalent, and either charge the duty in account against the drawer, or deduct it from the sum to be paid. It should be noted that, as regards *inland* cheques, the only other person authorised to stamp the cheque is the drawer. In *Hobbs* v. *Cathie*, 1890, it was held that an intermediate holder could not effectively stamp a cheque which came into his possession unstamped, and moreover that a transferee who gave value for a cheque stamped by some one not entitled to do so, could not recover on it, even though he had no knowledge of the defect.

Every person who issues, indorses, transfers, negotiates or presents for payment any cheque not being duly stamped, and any person who takes or receives such a cheque shall not be entitled to recover upon it (s. 38 (1), Stamp Act, 1891).

When a cheque is drawn or made out of the United Kingdom, the first person in the United Kingdom into whose hands it comes must, before he negotiates it, affix and cancel the necessary stamp, and any *bona fide* holder of such a cheque may cancel the stamp already affixed, and can recover on the cheque, even though it appears that the stamp was not affixed by the proper person (Stamp Act, 1891, s. 35). For the purpose of the Stamp Act (but not for the purposes of the Bills of Exchange Act, 1882), cheques drawn in the Channel Islands and the Isle of Man are foreign cheques, whilst those drawn in the Irish Free State are inland for stamping but foreign for other purposes (see p. 504).

12. *Exemptions from Stamp Duty.*—Some cheques are by statute exempt from stamp duty. Such are the cheques drawn by officials in Government Departments, when disbursing public money, and the cheques of other public officials, such as Trustees in Bankruptcy, Registrars of County Courts, when drawn in the discharge of their public duties. Cheques drawn by Registered Friendly Societies are also exempt. Hence cheques issued by treasurers of Oddfellows' Lodges (which are registered as Friendly Societies) are exempt, while the cheques of Masonic Lodges are not. But cheques drawn by Local Authorities, such as Municipal Corporations, Urban District Councils, etc., must be stamped as usual. And so must the cheques of County Councils drawn for all purposes, including those of Poor Law.

A customer's order to transfer money from one account to another account, whether at the same or different branches of the same bank, does not require stamping. But if he transfers money from his own account to the account of another person, whether at the same branch or at another, the order must be duly stamped. A stamp is also required on the order if he gives written authority to debit his account periodically with a stated sum to be transferred to another person's account, but the banker's periodical debits need not be stamped unless they are signed by the person who receives the money and are liable to the receipt duty. Cheques drawn on the Isle of Man and the Channel Islands require stamping if negotiated in the United Kingdom.

13. *Receipt on Cheque.*—A form of receipt on a duly stamped cheque for an amount of £2 and upwards requires the usual receipt stamp. And if the cheque is indorsed in some such terms as, "Received without prejudice," or "Received Cash," a receipt stamp is also required if for £2 or over (*Q. B. P.*, Nos. 768–9). A receipt given by a banker on a bill or cheque is exempt, provided it is given "in the ordinary course of his business as banker" (Finance Act, 1895, s. 9). Receipts given by the treasurer for moneys paid to him for the credit of the Poor Law accounts are also exempt from stamp duty (*Q. B. P.*, No. 1367). A receipt given for a donation or subscription to an institution or society wholly devoted to charitable purposes need not be stamped, as the Board of Inland Revenue do not exact a penalty if unstamped. Receipts for salaries and wages are also exempt.

14. **Cheques Lost and Destroyed.**—In the event of a cheque being lost, the holder, on giving security to the drawer, can demand from him a duplicate cheque (Bills of Exchange Act, s. 69). And in any action or proceeding upon a cheque, the Court or a judge may order that its loss shall not be set up, provided an indemnity be given to the satisfaction of the Court or a judge against the claims of any other person upon the instrument (*ibid.*, s. 70). The drawer of a lost cheque should not issue a duplicate without proper indemnity, for, if the cheque (whether crossed or uncrossed) is a negotiable one, *i. e.* a bearer cheque, or an order cheque duly indorsed (not crossed "not negotiable") and the finder transfers it to a person who takes it honestly and for value, such transferee can compel payment from the drawer. Hence, the drawer would have to honour both

original and duplicate and so requires an indemnity, on which he can recover if necessary, the loser of the cheque bearing the loss. Where an order cheque, crossed or uncrossed, is lost and, getting into wrong hands, an indorsement is forged, the person in possession cannot recover on it against the drawer even if he has innocently given value for it. And if the cheque, whether to bearer or to order, and in the latter case, whether or not duly indorsed, is crossed "not negotiable," a *bona fide* transferee for value cannot enforce payment from the drawer. So far as an innocent transferee for value is concerned, his right to enforce payment depends on there being no forgery of a necessary indorsement, and on the cheque not being a "not negotiable" crossed cheque; and if he has received payment under a forged indorsement, or of a "not negotiable" crossed cheque, he will be liable to the true owner. Immediately a cheque is lost, the loser should notify all parties to the cheque, and request the drawer to give notice to the drawee-banker to stop payment.

15. *Liability for Loss of Cheques, etc., in the Post.*—When a cheque or other negotiable instrument is lost or stolen during transit, and is presented and paid, the question arises—Who is liable for any loss? Clearly not the Postmaster-General, for, according to the *P. O. Guide*, he "is not legally liable for any loss or inconvenience which may arise from the loss, damage, delay, non-delivery, or mis-delivery of anything sent by post, and he does not, in any circumstances, pay compensation in respect of unregistered letters. . . ." Hence, the responsibility rests between the sender and the person to whom the cheque is sent. And the fixing of this responsibility largely depends on which party has made the Post Office his agent. *Prima facie*, the Post Office is the agent of the sender. If that is so, it follows that the sender must take the risk of his remittance not arriving safely. But if the creditor says definitely "Please send me a cheque by post," then the Post Office becomes the agent of the creditor. Delivery to the Post Office is constructive delivery to him, and as the property in the cheque passes to him as soon as it is posted, he cannot evade his liability for any loss that may ensue. If a creditor in one town sent a request to a debtor in another town, "Please send me a cheque," it would be taken to mean that the cheque was to be sent by post. Even between parties in the same town the post is now the recognised means of transmission. It must not be supposed that the mere fact that as between the

debtor and creditor one has habitually sent cheques by post to the other, which that other has duly acknowledged on receipt, does *of itself* imply a request from the creditor to the debtor to use the post, neither does it amount to an agreement between the two parties that the creditor should regard the cheque as received when posted. The debtor must, in law, seek out his creditor, and the Courts, apart from the evidence of a definite request, have not shown themselves sympathetic towards any attempt to fix the creditor with having constituted the Post Office his agent, and thus make him bear any loss that may ensue through wrong delivery or non-delivery by the agent.

But even if it be proved that the Post Office was the agent of the creditor, it must also be shown, in order to fix the liability for any loss upon his shoulders, that the cheque sent to him by post was sent in accordance with the conditions (if any) that accompanied his request for a remittance, and these conditions may be express, or implied from previous dealings between the parties. For example, the creditor may have said : " Please cross all cheques ' Barclays Bank, Ltd., Payee's a/c only.' " If, in the face of such instructions, the debtor were to send a cheque crossed in any other way, or not crossed at all, or even were to send the cheque by hand when asked to send it by post, he would be unable to fix the liability on the creditor should the cheque be lost in transit. But if the Post Office is the agent of the creditor, and the debtor carries out in their entirety the conditions, then if the cheque is lost and paid, the debtor is discharged both on the cheque and on the consideration. (See the *Gilbart Lectures*, 1913, J. of Inst. of Bankers, for a most interesting discussion on the whole subject.)

16. Payment by Cheque.—A creditor can legally refuse to accept anything but legal tender in discharge of a debt. Since neither a bill of exchange nor a cheque is legal tender, he is not bound to accept either of these instruments as a means of payment, unless it is part of the contract that this method of payment shall be employed. But if a bill or note is tendered to him as payment, and he does not at the time raise any objection, then this method of payment will, if the instrument be duly honoured, operate as an effectual discharge of the debt. Generally speaking, any payment, except in legal tender, is a conditional payment, *i. e.* the discharge from the debt is conditional upon the instrument being duly honoured upon presentation.

It is a general rule of law that a right of action once suspended by any act of the parties cannot be revived. But there are exceptions. For example, if a bill or promissory note due at a future date is accepted on account of a debt, and there is not sufficient evidence to show that the instrument was taken in absolute payment, then the creditor loses his immediate right of action on the debt, *i. e.* he cannot sue the debtor until the instrument is due for payment, but the debt is not extinguished. But if the debtor becomes bankrupt before the maturity of the instrument, the original debt revives at once, and the creditor is entitled to prove for the debt even though the instrument is not due for payment. In regard to a cheque accepted in payment of a debt, the creditor's remedy is suspended until he has actually presented the cheque, and failed to obtain payment.

If a creditor who has accepted a negotiable instrument in payment of a debt fails, through his own negligence, in obtaining payment of the instrument, then the debtor is discharged from his debt, as, for instance, when a debtor indorses a bill to his creditor, and the creditor does not present the bill on the due date, or, after presenting it, omits to give the requisite notices of dishonour to the drawer and all indorsers. To preserve his remedy on the original consideration, the creditor must present a cheque for payment within a reasonable time, but delay in presentment does not discharge the drawer, who is liable on the cheque for six years from its date, except to the extent of any damage he may have suffered through the delay. If the instrument is accepted as absolute payment the creditor loses his right to sue for the original debt and can only sue on the bill or cheque.

When once a cheque sent by a debtor in payment of a debt has been in possession of a creditor, and has been paid by the drawee-banker "in due course," then the debtor is fully discharged from his debt. And this is true, even if the creditor himself has lost the cheque, and even if payment has been made to a person other than the creditor. But the drawee-banker must have paid the cheque "in due course," or he will not be able to debit the debtor with the cheque, and is liable to the true owner, *i. e.* the creditor. "Payment in due course" of a cheque means payment to the holder thereof in good faith and without notice that his title to the cheque is defective (Bills of Exchange Act, 1882, s. 59 (1)).

A cheque remains the property of the holder until it is paid, when the property in it reverts to the drawer. The banker, however, is entitled to the possession of a paid cheque as a voucher, until such time as the account between him and his customer is a settled account. After this, the drawer is entitled to the cheque as a voucher between him and the payee.

NOTE A (See p. 4)—If a person, who has signed a cheque as drawer or indorser in the belief that he was signing a completely different document or was giving his signature for a purpose altogether different, can prove that he has not been guilty of negligence, his signature will be null and void and he will not be liable on the cheque. Thus, in one case where an old man with poor sight was induced by fraud to sign a bill of exchange under the impression that he was signing a railway guarantee, it was held that he was not bound by his signature.

NOTE B (See p. 8)—If the payee objects to the rate of exchange, it is the practice to offer him a draft in the foreign currency for the face amount of the cheque, drawn on the country concerned. The sterling equivalent is then debited to the drawer's account.

CHAPTER II

INDORSEMENTS [1]

1. **Bills of Exchange Act, 1882, as regards Indorsements.**—A bill or cheque [2] drawn payable to order must be indorsed by the payee or indorsee before it can be negotiated, *i. e.* " transferred from one person to another in such a manner as to constitute the transferee the holder of the bill " (s. 31 (1)). And the indorsement must be " completed by delivery " of the instrument (s. 31 (3)). If the holder of an order cheque transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the cheque, and, in addition, the right to have the indorsement of the transferor (s. 31 (4)).

2. *The Requisites of a Valid Indorsement.*—S. 32 gives these as follows—

" 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. 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."

An *allonge* is a slip of paper gummed or pasted on a bill to provide space for any indorsements that will not go on the bill itself. Sometimes a " copy " of the bill is used for such a purpose. *Allonges* are not common in this country. Indorsement comes from the Latin *in*, upon, and *dorsum*, the back, and, as the derivation suggests, the usual place for an indorsement is upon the back of the instrument, and it is expedient that all instruments should be so indorsed, but there is no legal

[1] This may be spelt either indorsement or endorsement.

[2] Bill or cheque for the purposes of this chapter can be regarded as interchangeable, except where the contrary is stated.

prohibition against the validity of an indorsement on the face of the instrument.

S. 32 further says—

(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 [*i. e.* separately], does not operate as a negotiation of the bill.

(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.

(4) " Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, 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."

3. *Classification of Indorsements.*—There are five kinds of indorsements: conditional indorsements, indorsements in blank, special indorsements, restrictive indorsements and partial indorsements. These are all governed by ss. 32, 33, 34 and 35. Partial indorsements are treated in s. 32 (2) which has been given above.

4. *Conditional Indorsements.*—A conditional indorsement is one which makes the transfer of the property in a bill from the indorser to the indorsee dependent on the fulfilment of a stated condition. " 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 " (s. 33). But as between the indorser and the indorsee, the latter holds the money in trust for the former until the condition is fulfilled.

5. *Indorsements in Blank and Special Indorsements.*—S. 34 runs as follows—

(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.

(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."

Thus, if an order cheque be payable to John Smith and he simply writes his name on the back of it, his indorsement is an indorsement in blank, and the cheque thereupon becomes payable to bearer and is then transferable without any further indorsement. But if John Smith were to write above his indorsement the words " Pay Henry Jones," his indorsement is a special indorsement, Jones being indorsee. Jones's indorsement is now necessary to complete the discharge of the instrument. The holder of an order cheque (not payable to himself) may convert a blank indorsement into a special indorsement by writing his transferee's name above the indorser's signature, and thus make the cheque payable to his transferee without incurring himself the liabilities of an indorser.

6. *Restrictive Indorsements.*—S. 35 is as follows—

(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.'

(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 authorises him to do so.

(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."

7. *Liabilities of Indorser.*—An indorser is not liable on a bill until he has indorsed it, but when he has done so he is subject to the liabilities defined by s. 55 (2), which states—

"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;

(*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;

(*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."

S. 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."

Where a person indorses a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name. If a cheque is indorsed by a firm, the signature of the name of the firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm (s. 23). Where a cheque is indorsed by a minor or corporation having no capacity or power to incur liability on a cheque, the indorsement will entitle the holder to receive payment of the instrument and to enforce it against any other party thereto (s. 22).

S. 16 gives an indorser the right to insert any express stipulation negativing or limiting his liability to the holder. Thus, if an indorser wants to get rid of his liability in the event of the cheque being dishonoured, he can do so by writing the words "*Sans recours*," or "Without recourse to me," after his indorsement. But this will not save him from liability should there have been a forgery in the instrument prior to his indorsement. This section is the banker's authority for paying cheques indorsed "*Sans recours*." By the same section an indorser may also insert a stipulation "waiving as regards himself some or all of the holder's duties." And by s. 31 (5), where any person is under obligation to indorse a bill or cheque in a representative capacity, he may indorse the instrument in such terms as to negative personal liability. Any holder may strike out any indorsements. If he does so of set purpose and not by mistake, the indorser whose signature is struck out, and all subsequent

indorsers, are discharged from all their liabilities on the instrument.

8. **The Significance of an Indorsement.**—It has already been stated that a cheque payable to order must be indorsed by the payee or indorsee before it can be transferred to another person. The transferor, by his act of indorsing the cheque, warrants to his immediate transferee and to any subsequent holder, that when the cheque left his hands he had a good title to it, that it was a genuine one in every particular at the time of his indorsement, and that any indorsements on it previous to his own were genuine indorsements. He also engages to compensate any subsequent holder if the cheque should be dishonoured, provided that the procedure necessary on dishonour is duly followed by that holder. Moreover, when a banker pays an order cheque, the indorsement supplies the necessary evidence that he has fulfilled his customer's instructions, and he can then look upon the cheque as a voucher of discharge in the account between him and his customer. S. 24 declares that a forged or unauthorised signature on a bill (which includes a cheque) is wholly inoperative, and that no right to give a discharge therefor or to enforce payment against any party thereto can be acquired through or under the forged signature. Hence, the banker is vitally concerned with the genuineness of the indorsements on a cheque (unless payable to bearer) whether he be the paying banker, *i. e.* the banker who pays the money, or the collecting banker, *i. e.* the banker to whom the money is paid.

As we have seen, the paying banker is bound to know whether the drawer's signature is genuine or not, but he cannot be expected to know the signatures of the indorsers of his customer's cheques. If, therefore, a banker innocently pays a cheque bearing a forged or unauthorised indorsement, he is entitled to some protection. This protection (which applies to a cheque only) is afforded him by s. 60, provided that he pays the cheque in good faith and in the ordinary course of his business, and that the indorsement purports to be the indorsement of the payee or indorsee. But to be a good discharge for the banker the payment must be made through or under an indorsement which purports to be in order, even though it is, in fact, a forgery or made without authority.

And here comes the question: What is an indorsement? The answer is, unfortunately, not to be found in the Bills of

Exchange Act. S. 32 (1) declares that the simple signature is a sufficient indorsement, but it does not define what a signature is. In the absence of definition, the banker himself must decide whether a particular indorsement " purports to be " an indorsement by or with the authority of the payee or indorsee. There are a few decided cases to help him, but in the main he has to rely upon banking and mercantile custom.

Since the paying banker has not what is called " privity of contract " with the presenter of the cheque, but is responsible solely to his customer, the drawer, it follows that in all cases of reasonable doubt the banker is quite justified in returning the cheque for verification of the indorsement, rather than pay the cheque, and stand to lose his statutory protection. But when returning the cheque he must be careful to mark it so as not to damage the drawer's credit. It must not be forgotten that the banker's statutory protection is only applicable to cheques, and, therefore, if he pays a bill of exchange domiciled with him on a forged indorsement, he must bear any loss that may ensue.

The paying banker is protected by s. 60, and the collecting banker is protected by s. 82. By the latter section, if the collecting banker receives payment of a crossed cheque for a customer in good faith and without negligence, he is not liable to the true owner, even though it should turn out that the customer has no title to the cheque, or a defective title. It must be noted, however, that the collection must be made in good faith and without negligence. It has been held that a banker would be guilty of negligence if he failed to detect that an indorsement did not correspond with the name of the payee on the face of the cheque (*Bavins Jr. & Sims* v. *London & South-Western Bank*, 1900), and if the cheque is indorsed *per pro.*, it behoves him to see that the person so signing has not exceeded the scope of his authority. But apart from any question of liability for negligence, the collecting banker should make it his business to check all indorsements, as by so doing he may save the trouble and delay in payment caused by the return of cheques bearing irregular indorsements.

9. **General Considerations.**—In order that the banker may obtain statutory protection, an indorsement must purport to be written by the payee or indorsee, or to be put on by his delegated authority. The literal contents of the indorsement, moreover, must, as far as possible, exactly interpret the name or designa-

tion of the payee or indorsee as it is written on the face of the cheque, or in the special indorsement on the back. If the name of the payee or indorsee is wrongly spelt, the indorsement must literally follow the wrong spelling, but the payee or indorsee may, if he so wishes, add his correct signature underneath. He need not sign his full name; his Christian name or names may be indicated by initials, but if he signs his full name, it must be spelt exactly in the same way as the name on the face of a cheque. If a cheque is made payable, *e. g.*, to Mr. Smith, he must add his Christian name or names, or initials representing them, to his surname. The surname alone is not a sufficient signature in this country, unless the signer is a peer of the realm.

Reasonable interpretation of an anomalous description is permissible. For example, if a cheque is made payable to "Messrs. S. J. Smith," a designation which suggests two or more persons named S. J. Smith, the cheque would be correctly indorsed as "S. J. and S. J. Smith" in one handwriting, or "S. J. Smith" and "S. J. Smith" in two handwritings. If an agent indorses, he must state his authority in his indorsement. All alterations in an indorsement should be confirmed to the satisfaction of the paying banker.

If a cheque is presented indorsed in characters other than Latin characters, *e. g.* Russian or Arabic, Sir John Paget considers that the paying banker is entitled to return the cheque with the answer "Indorsement illegible," or "Indorsement requires confirmation," unless he is satisfied "that the Oriental characters represent the equivalent of the name of the person whose indorsement is necessary." An indorsement in Latin characters underneath the indorsement in Arabic, etc., should only be accepted when confirmed by a banker, or properly verified by a notary.

The indorsement of a payee need not be first in order of place on a cheque bearing more than one indorsement. It is sufficient if the indorsement is there. A cheque payable to a fictitious or non-existing person may be treated as payable to bearer (s. 7 (3), Bill of Exchange Act, 1882). (See also under *Payee*, p. 8.)

No hard and fast rules can be laid down which will meet all cases. The banker must use his own judgment and his knowledge of the general practice of bankers. By such means, he

should have no difficulty in satisfying the canon laid down in the Bills of Exchange Act that the cheque must "purport to be" indorsed "by or under the authority" of the proper person. And, as already stated, if he is not satisfied that a particular indorsement is a proper indorsement, he is always entitled to demand confirmation of it.

10. *Additions to Payee's Name.*—If a cheque is made payable to "The Blanktown Colliery, per J. Smith," the indorsement "J. Smith" is not sufficient. His indorsement must state that he signs on behalf of the company. And a cheque made payable to "J. Smith, per H. Brown," and indorsed "J. Smith," should not be accepted without confirmation. And the indorsement on a cheque made payable to "J. Smith, a/c H. Brown," or "J. Smith, for H. Brown," should in each case follow exactly the wording on the face of the cheque. In these cases, Smith appears to be Brown's agent, and Brown's name, therefore, must not be omitted from the indorsement. Moreover, Smith, being an agent, must not be permitted to delegate his authority. A cheque drawn "Pay a/c of J. Smith" is irregularly drawn, but would be paid if indorsed by the collecting banker to the effect that it had been credited to J. Smith's account. A cheque drawn in favour of "The bearer, my wife," or "The bearer, my wife, or order," should be indorsed by the wife. A cheque made payable to "Bearer (J. Smith) or order" should be indorsed by J. Smith.

If a cheque is made payable to "J. Smith only," it must be paid to the specified payee only, and to no other, as the cheque is no longer a transferable one. If presented over the counter the paying banker would require verification that the person presenting it was the person intended by the drawer to receive the money. And if such a cheque is presented through another bank the paying banker would require confirmation of the indorsement so as to make certain that the money is going to be paid into the rightful person's account.

11. *Impersonal and Anomalous Payees.*—It is very doubtful whether such cheques as those made payable to "Wages or order," "Cash or order," come under s. 7 (3), *ibid.*, which declares that a cheque made payable to "a fictitious or non-existing person may be treated as payable to bearer." In fact, they may not be "cheques" at all. Bankers usually require the drawer's indorsement before cashing them, or only pay them to the

drawer or to his known agent. If, however, a banker has been accustomed to treat such cheques as payable to bearer, he cannot, except after due notice, refuse to cash them, without incurring liability to his customer.

Cheques drawn payable to impersonal payees such as (*a*) "Income Tax or order," (*b*) "Borough Rates or order," (*c*) "Canadian Government 4 % Loan or order," must on no account be treated as payable to bearer. The banker would require in example (*a*) the official indorsement of a Collector of Inland Revenue; in (*b*) that of the Borough Treasurer or Chief Rate Collector; in (*c*) that of some official authorised to give a discharge on behalf of the Canadian Government Loan.

12. *Cheques Presented by Payee.*—An open cheque, payable to "John Smith or order," is payable either to John Smith or to his order. That is to say, he can get the money himself by presenting it to the drawee-banker, or he can transfer the cheque to another person by indorsing it. If he elect to cash it himself, it appears that legally the cheque does not require an indorsement. But, nevertheless, bankers usually require the payee's indorsement before handing over the money. If the payee insists on his legal right to payment of the cheque without his indorsement, the best course for the banker to pursue would be to demand from him a receipt for the money, stamped if for £2 or over. A person who refuses to give a receipt requiring stamp duty renders himself liable to a penalty of £10.

13. *Indorsement not in Payee's Handwriting.*—If the banker is aware that the indorsement on a cheque is not in the payee's handwriting he is entitled to verification, but he cannot insist on the indorsement being in the handwriting of the payee (Bills of Exchange Act, 1882, s. 91 (1)). Where bills of exchange are drawn by a firm and made payable to their own order, it is a common occurrence for one partner to draw the instrument, and another partner to indorse it. But, though the handwriting differs, the banker would not on that account refuse payment of the bill, unless he had good reason to doubt the genuineness of the signatures.

14. *Indorsement in Pencil.*—Legally, an indorsement may be either in pencil or in ink, but a pencil indorsement is undesirable, owing to its "liability to obliteration and the impossibility of proving it when so obliterated" (*Geary* v. *Physic*, 1826). Some bankers insist on an indorsement in ink; others raise no objection

to a pencil indorsement. Where a pencil indorsement is followed by other indorsements in ink, showing that the cheque has since been negotiated, the paying banker should not refuse payment of the cheque. (See *Q. B. P.* for information on this and other points raised in this chapter.)

15. *Indorsement Wholly by Impressed Stamp.*—An indorsement made wholly by means of an impressed stamp, purporting to be a *facsimile* of the payee's signature, is legally valid if put on by or under the authority of the payee. Since, however, the paying banker cannot be expected to know whether the stamp has been impressed by the proper person or not, the Council of the Institute of Bankers state that they think it desirable that such a method of indorsement "should be discouraged as far as possible, on account of the facilities which the method offers to fraud, and the difficulty of obtaining satisfactory proof—which a banker is fairly entitled to demand in such cases—that the stamp has been impressed by authority." Payment without confirmation of an indorsement of this kind would probably, if such a case came before the Courts, be held to be a payment out of "the ordinary course of business" within the meaning of s. 60, and so would deprive the banker of his statutory protection.

16. *Indorsements with Courtesy Titles.*—Indorsements that include a courtesy title, though legally valid, are not usually accepted in this country. Such a form of signature is unusual, and therefore undesirable, and a banker would be quite justified in returning a cheque so indorsed for confirmation. Indeed, it is possible that he would incur liability if he paid it without confirmation. Thus, indorsements such as "Mr. J. Smith," "J. Smith, Esq.," "Capt. J. Smith," "Dr. J. Smith," should not be accepted, but such indorsements as "J. Smith, Capt.," or "J. Smith, M.D.," would be quite in order, as the expressions added in these cases are merely descriptive. The plain indorsement "J. Smith" by the officer or the doctor would suffice. Generally speaking, foreign indorsements that included a courtesy title would be in order, as such indorsements are quite regular in many foreign countries. An agent signing *per pro.* sometimes attaches a courtesy title to his principal's name, and such indorsements are usually passed. Thus "*per pro.* Mr. John Smith, H. Brown" would be a good discharge.

17. *Indorsements of married women.*—Cheques drawn payable,

say, to " Mrs. John Smith " require Mrs. Smith's usual signature, followed by an expression showing that she is Mrs. John Smith Thus " Alice Smith, wife of John Smith," or " Alice Smith, widow of the late John Smith," would be quite in order. If the cheque is made payable to " Mrs. Smith " it should be indorsed preferably, say, " Alice Smith," but " A. Smith " is quite in order. If the cheque is drawn payable to a married woman in her maiden name, she should indorse, say, " Alice Smith (*née* Jones)."

18. *Indorsements of Official Payees.*—When the payee is so described as to indicate that the money is paid to him in his official or fiduciary capacity, his indorsement must include a statement of that capacity. Thus a cheque made payable to " John Smith, Treasurer of the Blanktown Union," is not correctly indorsed " John Smith." Similarly, a cheque payable to " John Smith, Trustee," must be indorsed " John Smith, Trustee." But if the cheque were payable to " John Smith," who happens to be the Secretary of the Blanktown Gas Company, he must not indorse it " *per pro.* The Blanktown Gas Company, John Smith, Secretary." The cheque purports to be payable to John Smith in his private capacity, and the indorsement " John Smith " is all that is required.

19. *Indorsements of Agents.*—S. 91 (1), Bills of Exchange Act, 1882, provides that " when, 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." An agent is considered as the mere instrument of his principal. A paying banker runs no risk if he pays a cheque *purporting* to be indorsed by a duly authorised agent of the payee, and he will not be liable if it turns out that the person so indorsing had gone beyond the scope of his authority. But the indorsement of the agent must contain an implication that he is signing on behalf of his principal. The usual form is a *per procurationem* signature. An indorsement *per procuration* (abbreviated *per pro.* or *p.p.*) indicates that the person signing is acting with authority—" limited authority," it is true (s. 25, Bills of Exchange Act, 1882), but sufficient to warrant the paying banker's acceptance of the indorsement without inquiry. But if the paying banker has reason to doubt the authority of a person signing *per procuration*, he is entitled

to postpone payment until he has satisfied himself that the authority is in order.

Generally, an indorser having an agent's powers would sign thus: "*per pro.* John Smith, H. Jones"—Smith being the principal and Jones the agent, but the less common form "H. Jones *per pro.* John Smith" appears to be legally correct, but as this form is not customary in England, it is considered that a banker would be justified in asking for confirmation. (See *Journal of the Institute of Bankers*, 1917, p. 176, for a discussion on this point.)

There are other forms of agents' indorsements besides the usual *per pro.* form. For example, the following indorsements on a cheque payable to "John Smith" would be accepted: "John Smith, *per* Henry Jones, Agent"; "John Smith, by Henry Jones, Attorney"; "For John Smith, Henry Jones, Agent." These all contain sufficient implication of authority to secure to the banker his statutory protection. But such forms as: "John Smith per Henry Jones," "John Smith by Henry Jones," "For John Smith, Henry Jones," are not explicit enough. These are good indorsements if the indorser is really an agent of the payee, but how is the paying banker to know whether this is so or not? He is, therefore, entitled before paying a cheque indorsed in this manner to have the authority for signing added to the indorsement, or to get a confirmation of the signature. And in practice this is what he would insist upon having.

A firm may sign as agent for another firm or for an individual, and, in exceptional cases, an agent may have power to sign his principal's name without indicating that he signs as an agent. Every agent must sign as he usually signs. Initials should not be accepted without confirmation.

It is not necessary on a *per pro.* indorsement that the indorser should state his official position, but if he does so, it must be a position fitting to be occupied by a person having power to sign on behalf of his principal. If the position as stated by the indorser is one not usually associated with such powers, the banker is entitled to ask for confirmation of the indorsement. This confirmation would, generally speaking, be necessary where, in a *per pro.* indorsement, the signer described himself as "Cashier" or "Ledger Clerk." An agent must act personally, and, as a general rule, has no power to delegate his authority.

Indorsements, therefore, bearing evidence of delegated authority need confirmation.

In regard to agents' indorsements the difference in position between a collecting banker and a paying banker can be shortly stated thus: An indorsement by an agent for his principal may, though not necessarily, put the collecting banker on inquiry as to the authority of an agent, but not, as a general rule, the paying banker. S. 25, Bills of Exchange Act, 1882, provides that "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." Since the agent's authority is here defined as "limited," and since the collecting banker is in a position easily to make inquiries whether the person so signing has the powers of an agent or not, the collecting banker who disregards such an indorsement may, when the circumstances are taken into consideration, find himself deprived of his statutory protection on the grounds of negligence. This ruling applies to all indorsements by agents, whether *per procuration*, or in any other form.

20. *Indorsements of Firms and Joint Persons.*—The indorsements of firms must literally follow the description given on the face of the cheque. Thus a cheque payable to "Messrs. Smith & Co." should be indorsed "Smith & Co.," not, *e. g.*, "J. Smith & Co.," because "J. Smith & Co." is presumably the title of another firm distinct from "Smith & Co." Drawers of cheques often carelessly write the names of firms in abbreviated form, as, *e. g.*, "Messrs. Smith." This form of address seems to suggest that the payee so named is a firm consisting of at least two persons named Smith, and should, therefore, be indorsed in one of the following ways: "Smiths," "Smith & Smith," "Smith & Son," "J. Smith & Sons," "J. & J. Smith," "J. Smith, S. Smith," "Smith Bros.," but not "Smith & Co.," because a firm of this name may include persons with names other than Smith. A cheque payable to "Smith Bros." should be so indorsed, but not, *e. g.*, "J. & S. Smith," or "J. Smith, S. Smith," because these indorsements do not show that J. Smith and S. Smith are brothers. A cheque payable to "Messrs. Smith & Jones" may be indorsed "Smith & Jones," or in two handwritings "John Smith, H. Jones." A cheque payable to "Smith, Jones & Co." may be indorsed "Smith, Jones & Co.," or "Smith, Jones & Co., H. Brown, Partner." The last indorsement would

generally be accepted, because partners have implied authority to indorse by the name of the firm only, but if the word "Partner" is omitted, the indorsement would require confirmation, as the indorsement contains no indication that Brown has authority to sign.

Joint payees, when named individually, must indorse individually, unless one has authority to sign for and on behalf of the others. Thus a cheque payable to "J. Smith, Esq., H. Jones, Esq.," or "Messrs. J. Smith and H. Jones," should be indorsed by J. Smith and H. Jones separately. An indorsement in one handwriting, "J. Smith & H. Jones," would usually require confirmation, as there is nothing to show that the two are partners, or that one has authority to sign for the other. A cheque payable to "J. Smith & another" may be indorsed "For Self & another, J. Smith." The indorsements "J. Smith," or "J. Smith, H. Brown" (the other referred to), should not be accepted without confirmation. If a cheque is payable to two payees jointly, and one of them dies before presentment, the cheque is payable to the survivor on his indorsement, provided that he can produce satisfactory evidence of the death of the other party.

21. *Indorsements of Joint Stock Companies.*—Section 30 of the Companies Act, 1929, provides that "a bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority." Accordingly, both (*a*) an indorsement in the name of the company, as, *e. g.*, "John Smith & Co., Ltd.," and (*b*) one "on behalf of the company," as, *e. g.*, "*per pro.* John Smith & Co., Ltd., H. Jones, Secretary," are good discharges, if put on by authority. But in practice (*a*) would not be accepted without confirmation, unless the banker were in a position to know that the indorsement was put on by a duly authorised official of the company. The following are variants of the second form of indorsement—

(1) "*per pro.* John Smith & Co., Ltd., H. Jones." The omission of "Secretary" does not make the indorsement invalid.

(2) "John Smith & Co., Ltd., H. Jones, Secretary." This is legally correct and is generally passed, but insertion of *per pro.* is preferable.

(3) "John Smith & Co., Ltd., H. Jones." This form is not accepted without confirmation, as there is nothing to show that Jones has power to sign.

(4) "H. Jones, Secretary, John Smith & Co., Ltd." This form should not be accepted without confirmation; the form suggests the indorsement of an individual rather than that of the company.

The indorsement of a company must follow the description on the face of the cheque, even if the description is inaccurate. For example, an indorsement "John Smith & Co., Ltd." would not be accepted if the firm was described as "J. Smith & Co., Ltd.", since the name of a joint stock company is fixed by its memorandum of association, and cannot be varied unless certain formalities are complied with. The proper course is for the indorser to follow the procedure indicated in s. 32 (4), Bills of Exchange Act, 1882, and indorse "J. Smith & Co., Ltd.," being the name of the company "as therein described," adding underneath, if he chooses, the correct name of the company.

The officials who usually have authority to sign for limited companies are the directors, secretaries and managers. An indorsement by a cashier would not, as a general rule, be accepted without verification. The officials, being agents of the company, are not, generally, allowed to delegate their authority. The liquidator of a company can give a valid discharge, and it is usually accepted, but a banker is quite justified in asking for evidence of his appointment. An indorsement bearing evidence of delegation of authority by a liquidator should be verified before being accepted. If there is more than one liquidator all should join in the indorsement.

22. *Indorsements and Receipts.*—The payee's signature to a receipt form does not constitute an indorsement within the meaning of the Bills of Exchange Act, even though the cheque bears on it a statement that the signature will be accepted as an indorsement or that no further indorsement is required. In Sir John Paget's opinion, the paying and collecting bankers lose the benefit of their statutory protection when the payee's only discharge consists of a signature to a receipt. If, however, the document is unconditional and a cheque and there is a separate and plain indorsement in addition to the receipt, then the banker would be protected should the indorsement prove to be forged.

The fact that the instrument bears a statement that the payee's signature to the receipt is to operate as an indorsement does not help the banker. (See also p. 173.)

23. *Indorsements of Executors and Administrators.*—Executors may delegate their authority among themselves, but not outside themselves, and therefore a cheque made payable to the "Executors of the late John Smith" would be correctly indorsed "For Self & Co-executor[s] of the late John Smith, H. Jones," but the indorsement, "H. Jones, Executor of the late John Smith," would not be correct, for Jones should sign on behalf of himself and the other executor or executors. Every indorsement by an executor should contain an implication of his authority as executor. In the example quoted, the indorsement "*per pro.* the Executors of the late John Smith, H. Jones" would not be correct, as there is no evidence that Jones is signing as an executor, and executors have no implied power to delegate their authority. If "Executor" is added to his signature the indorsement would be in order. A cheque in favour of "John Smith," who had died, would be correctly indorsed, "H. Jones, A. Brown, Executors of the late John Smith," and would be paid by the banker, unless he had reason to doubt the *bona fides* of the signatories, in which case he would be quite justified in asking for some evidence of their appointment as executors. If the cheque were an open one, presented for payment over the counter, the banker, unless the executors were personally known to him, would probably require the probate to be shown to him, before paying the cheque. If such a cheque were indorsed, *e. g.*, "Mary Smith, widow of John Smith," it would not be accepted. The deceased's executors, or, in the event of his dying intestate, his administrators, are the only persons competent to deal with his property. All that has been said in this section applies to administrators as well as to executors.

24. *Indorsements of Trustees.*—Trustees must act personally, and cannot delegate their authority, save in exceptional circumstances, even to one of themselves. If there is more than one, they must all join in the doing of any act connected with the trust. Accordingly, all must join in an indorsement, and a cheque drawn payable to the "Trustees of John Smith" would be correctly indorsed "H. Jones, A. Brown, Trustees of John Smith." If a cheque payable to "John Smith" is pre-

sented indorsed "For John Smith, H. Jones, Trustee," the banker, before paying it, would require some evidence that Jones had been appointed trustee to Smith's estate.

25. *Indorsement by a Mark.*—A payee unable to write may indorse by means of a mark. The mark should be followed or preceded by the name of the payee as described on the face of the cheque, together with the words "his mark." Such a form as "X John Smith," without the addition of "his mark," would be irregular. The mark should be attested by a witness. The witness should sign as a witness, and should give his address. Such forms as "X John Smith, his mark, in the presence of H. Jones, High St., Blanktown," are incorrect. Jones should sign his name and address under the word "Witness." In cases of doubt the banker is entitled to ask for confirmation. The paying cashier is not a desirable witness, neither is any bank official, if the illiterate payee is personally unknown to him

26. *Special Indorsements.*—Such indorsements are defined by s. 34, Bills of Exchange Act, 1882 (see p. 19). A cheque originally drawn payable to bearer does not require an indorsement, and if there should be a special indorsement on it, the banker need not trouble to examine it, neither is there any necessity for the special indorsee to indorse; if he does indorse, the banker need not concern himself with the indorsement. But the position is different with order cheques. If these are indorsed in blank they become payable to bearer, but if subsequently specially indorsed, they cannot be discharged unless they bear the indorsement of the special indorsee. An order cheque only becomes payable to bearer when the "only or last indorsement is an indorsement in blank" (s. 8 (3), Bills of Exchange Act, 1882). Hence the banker must examine all the indorsements on an order cheque. If, after the blank indorsement a special indorsement follows, and the special indorsee fails to indorse, the cheque should be returned, marked "Requires third indorsement," or "Requires indorsement of J. Smith," the indorsee who has failed to indorse. Any holder may convert a blank indorsement into a special indorsement (*ibid.*, s. 34 (4)). He need not write his own signature, but simply indorse it to another person by writing that person's name above the blank indorsement. Cheques are usually specially indorsed in some such form as the following: "Pay to the order of H. Jones,

J. Smith," Smith being the payee. But other less stereotyped forms are used. If these show an intention on the part of the payee to indorse the cheque specially, they should be treated by the banker as special indorsements. For example, " J. Smith or order, H. Jones "; " J. Smith to the order of H. Jones "; " Transferred to H. Jones, J. Smith "; " J. Smith in favour of H. Jones." In all these forms Jones's indorsement should be obtained. A special indorsement must not be altered without confirmation.

27. *Additions to Indorsements.*—Additions are sometimes made to indorsements making them restrictive (see s. 35, Bills of Exchange Act, 1882, p. 19). Thus J. Smith may indorse a cheque payable to him as follows: " To be placed to the credit of my a/c with the A. Bank, J. Smith "; " Pay to H. Jones's a/c, J. Smith," or " To the credit of H. Jones, J. Smith." These are not special indorsements, but memoranda addressed to the collecting banker. They do not concern the paying banker, and it is not his duty to see that the instructions are carried out. But additions to the signature, as, " Credit J. Smith," or " B. Bank a/c, J. Smith," are irregular and invalidate the indorsement as a good discharge, since they do not purport to be indorsements. The cheque should be returned, marked " Indorsement required." A cheque indorsed " Pay Cash J. Smith," or " Received Cash, J. Smith," is quite in order, but the latter is a form of receipt, and must be stamped, if for £2 or over. J. Smith may also add to his indorsement, " *Sans recours,*" or " Without recourse to me."

Additions are sometimes made to indorsements defining the terms on which the payee accepts the cheque. For example, the drawer may state on the face of the cheque that the amount to be paid is " in full settlement," and the payee may indorse such a cheque with the words " in part settlement," added to his signature. In such a case, what is the banker's position? Clearly, the memorandum on the face is addressed, not to the paying banker, but to the payee, and, as regards the addition to the indorsement, the paying banker may ignore it, either on the ground that it does not form part of the indorsement, or that s. 33. Bills of Exchange Act, 1882, states that " where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer." But as the banker should always act in the best interests of his customer, to whom alone he is

responsible, it is probable that the banker in most cases would feel justified in returning a cheque so indorsed. (See *Q. B. P.*, No. 767.) The same considerations apply if the payee strikes out a memorandum of this kind written on the face of the cheque, and in such circumstances also the paying banker would probably require the drawer's confirmation of the alteration before paying the cheque.

28. *Confirmation of Indorsements.*—An indorsement not quite in order is often confirmed by the collecting banker before presenting the cheque. The usual formula is "Indorsement confirmed," followed by the banker's signature. Order cheques not indorsed by the payee are sometimes presented marked "Placed to the credit of payee's a/c," followed by the banker's signature. Since this form cannot in any sense purport to be an indorsement of the cheque, the paying banker, if he pays the cheque, loses his statutory protection, and the drawer might refuse to allow his account to be debited with the cheque. Cheques so marked are, however, usually accepted out of courtesy to the presenting banker, who could not very well repudiate any liability that might be incurred through his indorsing of the cheque in this manner. It sometimes happens that a banker is authorised to indorse cheques for his customer. In such cases the usual formula is: "Indorsed on behalf of and by the authority of John Smith," followed by the banker's signature.

29. *Discharge of Dividend and Interest Warrants.*—It is a well-established custom for bankers to pay a dividend warrant payable to two or more persons on the indorsement of any one of them, and "the validity of any usage relating to dividend warrants, or the indorsements thereof," has been expressly confirmed (s. 97 (3), Bills of Exchange Act, 1882). It does not appear that this practice extends to interest warrants, so that these documents should be signed by all the proprietors. Dividend and interest warrants must bear the personal signatures of the proprietors of the stocks or shares, unless the company or corporation issuing the warrants has sanctioned the use of *per procuration* signatures. Should a dividend warrant be presented for payment bearing a *per pro* signature, concerning the validity of which there is any doubt in the mind of the paying banker, it should be returned, marked "Shareholder's discharge required." In the event of a limited company being

the payee of a dividend warrant, it is obvious that it must sign by procuration in all normal cases, and such a signature can, therefore, be accepted. If the dividend warrant is to be signed on the face of the document no indorsement on the back is necessary. As a general rule, the paying banker should see that the instructions of the issuers of the warrants as to the kind of discharge required (*e. g.* signing in the particular place indicated) are observed, and should submit all irregularities to the issuers before payment of the warrants.

30. **Specimen Indorsements.**—The numbers given in the remarks column refer to the subheadings of this chapter, and are given to facilitate reference should it be desired to know why a particular indorsement is considered correct or incorrect. The specimen indorsements are arranged in convenient groups, but analogous examples may be found under headings other than those directly in point.

Of Individuals.

PAYEE.	HOW INDORSED.	REMARKS.
John Smith	John Smith John Smithe (Both in same writing)	Correct. 2. [Bills of Exchange Act, 1882, s. 32 (4)].
,,	J. Smith	Correct. 9.
,,	Smith	Incorrect. 9.
,,	John E. Smith	Incorrect. 9.
,,	Mr. John Smith	Incorrect. 16.
John Smith, Esq.	John Smith, Esq.	Incorrect. 16.
Smith	J. Smith	Correct. 9.
J. Smith	p.p. Trading Co., Ltd., J. Smith, Secretary	Incorrect. 18.
Mr. J. Smith	J. Smith, Junior	Incorrect. (*Prima facie* J. Smith is J. Smith, Senior.)
Mr. J. Smith, Senior	J. Smith	Correct. (See above.)
Mr. J. Smith, Junior	J. Smith	Incorrect. (See above.)
,,	J. Smith, Junior	Correct.
Anne Smith	Ann Smith	Incorrect. 9.
J. Mc. Intosh	J. MacIntosh	Incorrect. 9.
Dr. J. Smith	Dr. J. Smith	Incorrect. 16.
,,	J. Smith, M.D.	Correct. 16.
,,	J. Smith	Correct. 16.
Major J. Smith	Major J. Smith	Incorrect. 16.
,,	J. Smith, Major	Correct. 16.
,,	J. Smith	Correct. 16.
Sister Mary	Sister Mary	This is considered to be in order

Of Agents.

PAYEE.	HOW INDORSED.	REMARKS.
J. Smith	per pro. J. Smith, Henry Jones	Correct. 19.
,,	per pro. Mr. J. Smith Henry Jones	Correct. 19.
,,	Henry Jones per pro. J. Smith	Correct. 19.
,,	J. Smith per pro. Henry Jones	Incorrect. 19.
,,	p.p. J. Smith H. Jones & Sons	Correct. 19.
,,	p.p. J. Smith H. J.	Incorrect. 19.
,,	For J. Smith Henry Jones	Incorrect. 19.
,,	For J. Smith Henry Jones, Agent	Correct. 19.
,,	pro J. Smith Henry Jones	Incorrect. 19.
,,	J. Smith pro Henry Jones	Incorrect. 19.
,,	J. Smith per Henry Jones	Incorrect. 19.
,,	J. Smith per Henry Jones, Agent	Correct. 19.
,,	Henry Jones Agent to J. Smith	Incorrect. 19.
,,	J. Smith by Henry Jones, (His) Attorney	Correct. 19.
J. Smith for H. Brown	per pro. J. Smith Henry Jones	Incorrect. 10.
,,	J. Smith for H. Brown	Correct. 10.

Of Agents (*continued*).

PAYEE.	HOW INDORSED.	REMARKS.
J. Smith A/C H. Brown	J. Smith	Incorrect. 10.
Mr. J. Smith per Mr. H. Brown	Mr. J. Smith per H. Brown	Correct. 10.
,,	J. Smith	Incorrect. 10.
Anglian Company	p.p. J. Smith, Agent for the Anglian Company, Henry Jones	Incorrect. 19.
Virginia Estate per J. Smith	J. Smith	Incorrect. 10.

Of Firms and Joint Persons.

PAYEE.	HOW INDORSED.	REMARKS.
Messrs. Smith Jones & Co.	Smith Jones & Co.	Correct. 20.
,,	Smith Jones & Co., H. Brown, Partner	Generally accepted. 20.
,,	Smith Jones & Co. H. Brown (All in same writing)	Incorrect. 20.
Smith & Co.	John Smith & Co.	Incorrect. 20.
John Smith and Co.	Smith & Co.	Incorrect. 20.
Smith Bros.	J. Smith & Bros.	Incorrect. 20.
,,	J. and S. Smith	Incorrect. 20.
,,	J. Smith S. Smith	Incorrect. 20.
,,	Smith Bros.	Correct. 20.
Messrs. Smith	Smith & Co.	Incorrect. 20.
,,	J. and S. Smith	Correct. 20.
,,	J. Smith & Sons	Correct. 20.
,,	Smith Bros.	Correct. 20.

Of Firms and Joint Persons (*continued*).

PAYEE.	HOW INDORSED.	REMARKS.
Messrs. Smith	Smiths	Correct. 20.
,,	Smith and Smith	Correct. 20.
,,	J. Smith S. Smith	Correct. 20.
,,	Smith	Incorrect. 20.
,,	For Self and S. Smith J. Smith	Incorrect. 20.
Messrs. Smiths	Smith and Co.	Incorrect. 20.
,,	Smiths	Correct. 20.
,,	Messrs. Smiths	Incorrect. 20.
,,	p.p. Messrs. Smiths H. Brown	Correct. 20.
Messrs. P. J. Smith	P. J. and P. J. Smith	Correct. 20 and 9.
,,	P. J. Smith	Incorrect. 20 and 9.
Misses Smith	Smith Sisters	Correct. 20.
Messrs. Smith and Jones	John Smith A. B. Jones	Correct. 20.
,,	Smith and Jones	Correct. 20.
Messrs. J. Smith and A. B. Jones	J. Smith and A. B. Jones } In same handwriting	Requires Confirmation. 20.
,,	Smith and Jones	Incorrect. 20.
,,	J. Smith A. B. Jones	Correct. 20.
Mr. J. and Mrs. M. Smith	J. and M. Smith (In same handwriting)	Incorrect. 20.
J. Smith and others	J. Smith	Incorrect, except on a dividend warrant. 20.
,,	For self and others J. Smith	Correct. 20.
J. Smith or H. Brown	H. Brown	Correct. (See Chapter I, Payee.)

Of Joint Stock Companies.

PAYEE.	HOW INDORSED.	REMARKS.
Trading Co., Ltd.	per pro. Trading Co., Ltd., J. Smith, Secretary	Correct. 21.
,,	per pro. Trading Co., Ltd., J. Smith	Correct. 21.
,,	pro Trading Co., Ltd., J. Smith, Director	Correct. 21.
,,	Trading Co., Ltd., per J. Smith, Secretary	Correct. 21.
,,	For Trading Co., Ltd., J. Smith, Manager	Correct. 21.
,,	For Trading Co., Ltd., J. Smith	Incorrect. 21.
,,	Trading Co., Ltd., J. Smith, Director	Correct. 21.
,,	For Trading Co., Ltd., H. Jones, pro Secretary	Incorrect. 21.
,,	For Trading Co., Ltd., T. Brown, Cashier	Not usually accepted without verification. 21.
,,	p.p. Trading Co., Ltd., Brown, Smith & Co.	Correct. 21.
,,	Trading Co., Ltd.	Should be confirmed. 21.
,,	p.p. Trading Co., J. Smith, Secretary	Incorrect. 21.
,,	For Trading Co., Ltd. For Universal Trading Co., Ltd., J. Smith, Secretary	Correct. 21.

Of Joint Stock Companies (*continued*).

PAYEE.	HOW INDORSED.	REMARKS.
Trading Co., Ltd.	Trading Co., Ltd. For Universal Trading Co., Ltd., J. Smith, Secretary	Generally accepted, but the more correct method is for the "for" or "per pro." to be placed against both names (as above).
"	J. Smith, Secretary, Trading Co., Ltd.,	Incorrect. 21.
"	For Trading Co., Ltd., In Liquidation J. Smith \ Liqui- H. Brown / dators	Correct. 21.
"	For Trading Co., Ltd. In Liquidation For J. Smith \ Liqui- H. Brown / dators T. Jones	Incorrect. 21.
Trading Co., Ltd., per J. Smith	J. Smith	Incorrect. 18.
J. Smith Secretary, Trading Co., Ltd.	J. Smith, Secretary, Trading Co., Ltd.	Correct. 18.
J. Smith Liquidator of the Trading Co., Ltd.	J. Smith	Incorrect. 18.
Trading Co.	Per pro. Trading Co., Ltd., J. Smith, Secretary	Incorrect. 9.
Trading Co., J. Jones & Co., Agents	per pro. Trading Co., J. Jones & Co., Agents	Correct. 19.
"	Trading Co., per pro. J. Jones & Co., Agents J. Smith	Incorrect. 19.

Of Executors and Administrators.

PAYEE.	HOW INDORSED.	REMARKS.
J. Smith (now deceased)	H. Brown F. Smith Executors of the late J. Smith	Correct. 23.
,,	For Self and Co-Executor of the late J. Smith H. Brown	Correct. 23.
,,	For Self and Co-Administrator of the late J. Smith H. Brown	Correct. 23.
,,	Mary Smith, Widow of J. Smith	Incorrect. 23.
H. Brown and T. Smith Executors of the late J. Smith	For Self and Co-Executor of the late J. Smith H. Brown	Correct. 23.
H. Brown and another Executors of the late J. Smith	For Self and Co-Executor of the late J. Smith Thos. Smith	Correct. 23.
Executors of the late J. Smith	For Self and Co-Executors H. Brown	Incorrect. 23.
,,	H. Brown Executor of late J. Smith	Incorrect. 23.
,,	per pro. Executors of the late J. Smith H. Brown	Incorrect. 23.
Representatives of the late J.Smith	For Self and Co-Executors of the late J. Smith H. Brown	Correct. 23.
J. Smith, Executor (or Trustee)	J. Smith	Incorrect. 18.

Of Trustees.

PAYEE.	HOW INDORSED.	REMARKS.
The trustees of the late J. Smith	For Self and Co-Trustees of the late J. Smith H. Brown	Incorrect. 24.
,,	H. Brown, J. Jones } Trustees of the late J. Smith	Correct. 24.
J. Smith	For J. Smith H. Brown, Trustee	Incorrect. 24.
Trustee of J. Smith	per pro. Trustee of J. Smith, J. Jones	Incorrect. 24.
H. Brown and J. Jones, Trustees of J. Smith	H. Brown J. Jones	Incorrect. 18.
,,	H. Brown, J. Jones } Trustees of J. Smith	Correct. 18.

Of Married Women.

PAYEE.	HOW INDORSED.	REMARKS.
Mrs. Smith	A. Smith	Correct. 17.
,,	(Mrs.) A. Smith	Correct. 17.
,,	Mrs. A. Smith	Incorrect. 17.
Mrs. John Smith	M. A. Smith	Incorrect. 17.
,,	Mrs. John Smith	Incorrect. 17.
,,	M. A. Smith Wife (or widow) of John Smith	Correct. 17.
,,	M. A. Smith (Mrs. John Smith)	Correct. 17.
,,	John Smith	Incorrect. 17.
Mrs. J. Smith	Emma Smith Mrs. J. Smith	Correct. 17.
Miss Ann Smith	Ann Jones *n/e* Smith	Correct. 17.

Of Official Payees.

PAYEE.	HOW INDORSED.	REMARKS.
J. Smith, Treasurer Blanktown Urban District Council	J. Smith	Incorrect. 18.
Blanktown U.D.C.	For Blanktown U.D.C. J. Smith, Treasurer	Correct. 18.
,,	For (or p.p.) Blanktown U.D.C., H. Brown, Rate Collector	Not usually accepted without confirmation. 19.
Overseers of Blanktown	J. Smith H. Brown	Incorrect. 18.
,,	J. Smith, H. Brown } Overseers of Blanktown	Correct. 18.
,,	For the Overseers of Blanktown John Jones, Assistant Overseer	Generally accepted. 19.
Mayor of Blanktown	J. Smith Mayor of Blanktown	Correct. 18.
,,	per pro. Mayor of Blanktown H. Brown	Correct. 19.
Managers of Blanktown Schools	For the Managers of Blanktown Schools J. Smith, Chairman	Correct. 19.
,,	J. Smith, H. Brown } Managers of Blanktown Schools	Correct. 18.
Blanktown Vestry	J. Smith, Clerk to the Blanktown Vestry	Incorrect. 19.
,,	p.p. Blanktown Vestry J. Smith, Clerk	Correct. 19.
Collector of Customs and Excise	per pro. J. Smith Collector of Customs and Excise H. Brown	Incorrect. 11 and 19.

Of Official Payees (*continued*).

PAYEE.	HOW INDORSED.	REMARKS.
Official Receiver of J. Smith & Co.	H. Brown, Official Receiver of J. Smith & Co.	Correct. 18.
"	per pro. H. Brown, Official Receiver of J. Smith & Co. J. Jones	Incorrect. 19.

By a Mark.

PAYEE.	HOW INDORSED.	REMARKS.
John Smith	John Smith ×	Incorrect. 25.
"	His John × Smith Mark In the presence of H. Brown	Incorrect. 25.
"	His John × Smith Mark Witness H. Brown, 15, Slade Rd., Bristol	Correct. 25.

Miscellaneous.

PAYEE.	HOW INDORSED.	REMARKS.
J. Smith or Bearer	pay H. Brown, J. Smith	Correct. 26.
J. Smith or Order	J. Smith pay H. Brown or order J. Jones	Incorrect. Requires indorsement of H. Brown. 26.

Miscellaneous (*continued*).

PAYEE.	HOW INDORSED.	REMARKS.
J. Smith or Order	J. Smith ~~pay H. Brown~~ ~~J. Jones~~ W. Adams	Should be returned for confirmation. 26.
J. Smith only	J. Smith	Requires confirmation. 10.
J. Smith or order of H. Brown	J. Smith	Correct. May be duly discharged by either.
Bearer or Order	No indorsement	Correct. (See Paying Bearer Cheques, Chapter III.)
Bearer (J. Smith) or Order	No indorsement	Incorrect. 10.
Bearer, my wife	No indorsement	It would be desirable to obtain the wife's indorsement. 10.
J. Smith or ~~Bearer~~	No indorsement	Requires indorsement, being equivalent to an order cheque.
J. Smith or ~~Order~~ " H. B.	No indorsement	Generally considered a bearer cheque, but see Chapter III, Paying Order Cheques.
J. Smith or	No indorsement	Incorrect. Requires indorsement. (See Chapter III, Paying Order Cheques.)
..... or Order	No indorsement	Should be returned as it does not specify a payee. (See Chapter I, Payee.)
Self or Order (drawn by J. Smith)	No indorsement	Legally correct if presented by payee (J. Smith). 12.
"	p.p. J. Smith H. Brown	Would not generally be accepted without confirmation. 13.

Impersonal and Anomalous Payees.

PAYEE.	HOW INDORSED.	REMARKS.
Wages or order	No indorsement	Incorrect. 11.
Cash or order	No indorsement	Incorrect. 11
Income Tax or order	No indorsement	Incorrect. Generally paid on the indorsement of the Collector of Inland Revenue for the district. 11.
Borough Rates or order	No indorsement	Incorrect. The usual practice is to obtain the discharge of the Borough Treasurer. 11.
S. S. Marguerite or order	No indorsement	Incorrect. Should be indorsed by a responsible party on behalf of the steamship. 11.
Robinson Crusoe or order	No indorsement	Correct. May be treated as a bearer cheque. 11.
Wages or bearer	No indorsement	Correct.
% Smith or order	No indorsement	Incorrect. Should be indorsed "Placed to the credit of payee's account," followed by the signature of Smith's bankers. 10 and 28.
J. Smith	To my account J Smith	Correct. Banker's indorsement not required 27.
"	Pay to H. Brown's account J. Smith	Correct. Second indorsement not required. 27.
J. Smith in full settlement	J. Smith in part payment	Advisable to return. 27.
J. Smith	Received cash J. Smith	Correct. But requires a receipt stamp if for £2 or over. 27.
"	J. Smith Without recourse	Correct. 27.
Macmahon's Family Journal	Macmahon's Family Journal	Incorrect. 11.

Impersonal and Anomalous Payees (*continued*).

PAYEE.	HOW INDORSED.	REMARKS.
Macmahon's Family Journal	Macmahon's Family Journal Charles Macmahon Proprietor	Correct. 11.
"	Macmahon's Family Journal James and Smith Wholesale Agents [*or* Publishers]	Correct. 19.

Of Dividend Warrants.

PAYEE.	HOW INDORSED.	REMARKS.
John Smith and H. Brown	H. Brown	Correct. 29.
John Smith or Bearer Proprietor's Signature	No indorsement Proprietor's Signature	Incorrect. Payee's discharge is necessary and should be obtained in the space indicated. 29.
John Smith or Order Proprietor's Signature	 Proprietor's Signature .... John Smith	Correct. No further discharge is necessary. 29.
John Smith and another	John Smith	Correct. 29.
"	H. Brown (the other referred to)	Incorrect. 29.
John Smith	per pro. John Smith H. Brown	Incorrect. 29.

Of Interest Warrants.

PAYEE.	HOW INDORSED.	REMARKS.
John Smith and H. Brown	John Smith	Probably incorrect. 29.

CHAPTER III

PAYMENT OF CHEQUES

1. Paying Banker.—The paying banker is the banker to whom the order to pay, where the order takes the form of a cheque, is addressed. It is the duty of a banker to honour his customer's cheques provided—

(*a*) That the balance standing to the credit of his customer is sufficient to pay them.

(*b*) That the cheques are drawn in the proper form.

(*c*) That there is no legal bar prohibiting payment.

This duty to honour his customer's cheques is an implied term of the contract entered into by the banker and his customer when the account is opened.

The conditions which must be fulfilled before a banker is justified in honouring his customer's cheques are given below in detail—

(*a*) *Sufficiency of Funds.*—This does not require any elaboration.

(*b*) *Proper Form.*—The cheque as drawn must—

(1) Be signed by the drawer himself or by his authority, and be duly stamped.

(2) Be due for payment, *i. e.* not stale or post-dated.

(3) Have the sum to be paid expressed in words, or in words and figures, which should agree.

(4) Purport to be properly indorsed, if an order cheque.

(5) Bear the drawer's confirmation of any alterations.

(*c*) *No Legal Bar.*—The following are sufficient causes to justify a banker in not paying a cheque—

(1) Notice from the customer to stop payment.

(2) Knowledge of any defect in the title of the person presenting the cheque.

(3) Notice of an available act of bankruptcy by his customer, or of his death or insanity, or in the case of a company, notice of its winding up.

(4) Notice of an assignment by his customer of the available credit balance.

(5) Knowledge that the customer contemplates a breach of

trust in cases where it is known that funds credited to the account are trust funds.

(6) Notice of a garnishee, injunction, or other order restraining his customer from operating on the account.

2. *Countermand of Payment.*—By s. 75 (1) Bills of Exchange Act 1882, the duty and authority of a banker to pay a cheque drawn on him are determined by effective countermand of payment. This right of stopping payment exists up to the moment when the banker is about to pay or to bind himself to pay the cheque. In the case of a cheque, where the banker has until the close of business either to pay or return it, the drawer's right to countermand payment exists up to the close of business, even though the cheque may, in the meantime, have been cancelled by the banker, and debited to the drawer's account. To be effective, the notice of countermand must reach the banker either by word of mouth or in writing. The banker should get the drawer's written authority to stop a cheque. The authority should contain a full description of the cheque, including the number. Immediately on receiving notice the banker should attach full particulars of the stop to the customer's ledger account, and add the notice to the general list of such orders. Notice of the stop should also be sent, when necessary, to each branch or bank where a standing order to cash the customer's cheques exists. If the drawer sends notice of a stop which is duly received, then the banker will have to bear any loss that may ensue should he pay the stopped cheque. The best answer on stopped cheques is "Orders not to pay." If the customer wires to his banker to stop payment of a cheque, the banker should at once communicate with his customer, requesting confirmation. If the cheque is presented before such confirmation is received, the banker should postpone payment, taking care not to say or do anything that could be construed as damage to his customer's credit. A suitable answer would be "Payment countermanded by telegram—payment postponed pending confirmation; present again." A stop by telephone would justify the same cautious attitude, unless the banker were satisfied that the telephone message was actually delivered by the customer himself, or by some one acting with his authority.

Countermand of payment can only be effectively made by the drawer, so that when a banker is advised by a holder that he has lost a cheque, he should request the holder at once to communicate with the drawer, and obtain the latter's written instruc-

tions. Should the cheque be presented in the meantime, the banker should make careful inquiries into the title of the presenter before paying the cheque, or, alternately, he may postpone payment as in the case of a stop by telegram. If the cheque requires an indorsement before payment, and the holder, having lost it, informs the banker that he has not indorsed it, and that, therefore, any indorsement purporting to be his must be a forgery, the banker, if he pays the cheque to a party other than the alleged holder, might not be entitled to debit his customer's account with it, on the ground that the cheque had not been paid in good faith and in the ordinary course of business. Any one of several partners, trustees, executors, or joint account holders, may countermand the payment of a cheque drawn by any or all of them.

3. *Customer's Balance.*—The banker, before taking such a serious step as dishonouring a cheque for lack of funds, must make absolutely certain that the state of the account justifies him in so doing. Substantial damages would usually be awarded against a banker who had improperly dishonoured a cheque and thereby injured the credit of a business man. In the case of a non-trading customer, only nominal damages would probably be awarded unless special damage were proved.

When computing the customer's balance available for drawing, the banker need not take cognisance of any *credit* balance the customer may have at some other branch of the same bank, and would not be liable if he dishonoured a cheque for the reason that there were not sufficient funds to pay the cheque at the branch on which drawn. But if the customer has a *debit* balance at another branch, the banker, unless there is an agreement, express or implied, to the contrary, may combine the two accounts, and dishonour a cheque drawn on the branch with the credit balance, should the combined accounts show a debit or an insufficient credit balance. As, however, his right depends on there being no *implied* agreement or course of business to keep the accounts separate, it is desirable to give notice to the customer before combining the accounts and dishonouring cheques, or, better still, to take a definite agreement permitting combination without notice. And if a customer has an account with a banker at one branch, and usually pays his credits into another branch, the banker is not bound, before dishonouring a cheque, to take cognisance of any credits which may have been paid in at the other branch, but not actually received by

him. Neither is the banker bound to take into account money placed on deposit by a customer when deciding whether or not to honour a cheque drawn on the current account, but naturally the banker would usually do so.

In computing the balance available for drawing against, the banker is justified in setting aside sufficient money to meet any cheques marked at the customer's request, or for clearing purposes, but he is not justified in reserving money to meet bank charges accruing, but not actually debited, or (except in the event of the customer's bankruptcy) to meet a possible liability on bills discounted by him for the customer and not yet matured.

If the customer directs that certain moneys being or to be paid in are to be allocated to meet a particular cheque, the banker must obey his customer's instructions, irrespective of the state of the account between him and his customer. If the customer's balance is not sufficient to meet a cheque, the banker may nevertheless elect to pay the cheque, and can debit his customer with the amount. The drawing of a cheque when the funds are insufficient to meet it is equivalent to asking the banker for an overdraft.

If the banker has followed the usual practice of crediting cheques as cash before clearance, he can, nevertheless, return cheques drawn against such uncleared credits, marked "Effects not cleared," unless there is an agreement, express or implied, permitting the customer to draw against such items (*Underwood* v. *Barclays Bank Ltd.*, 1924). Some banks have a notice printed in their pass books and on their paying-in slips reserving the right not to honour cheques drawn against uncleared items to credit. In the case of a weak customer the safer course is to put the matter beyond dispute by advising him that cheques must not be drawn against until cleared. If the banker has agreed to allow his customer an overdraft, with or without security, he cannot, without due notice to his customer, refuse cheques within the limit of the overdraft, and issued prior to receipt of his notice. (But see also p. 201.)

4. *Cheque not an Assignment of Funds.*—By s. 53, Bills of Exchange Act, 1882, a cheque does not, except in Scotland, operate as an assignment of the drawer's funds in favour of the payee. This means that the credit balance cannot be earmarked for the holder of any particular cheque. If, therefore, a cheque is presented and dishonoured because of insufficient funds, the banker must not, on that account, refuse a subsequent cheque

which is within the available balance. And he is not bound to pay part of a cheque when the balance available is not sufficient to meet the whole. It is for this reason that the holder of a cheque has no equitable claim against the drawee-banker, there being no privity of contract between the two parties. The recognition of this principle is very important, as it enables the banker, in the general way, to ignore the claims of third parties, and to consider solely the best interests of his customer, to whom alone he is responsible. But though privity, *i. e.* participation in interest, does not usually exist between the holder and the banker, it may be created. For example, if the banker, contrary to the usual practice, were in any way expressly or impliedly to bind himself to the holder to pay the cheque, and failed to do so, he would become directly liable to the holder. And if the banker has been guilty of negligence and has lost his statutory protection, the holder of a cheque may get a right of action against him.

5. *Payment in Due Course.*—A cheque is discharged by payment to the holder, in good faith, in the ordinary course of business, and without notice that his title to the cheque is defective. Such a payment is a payment in due course (ss. 59, 60, Bills of Exchange Act, 1882), and will justify the banker in charging his customer with the amount. The holder to whom payment is made may be the payee, an indorsee, or the bearer, according to the nature of the instrument, or the way in which it has been indorsed. It is not "in the ordinary course of business" for a banker to pay a cheque out of office hours, except where the cheque is presented through a Clearing House or Local Exchange, in accordance with the rules of the Clearing House, or the customs of the Exchange. Otherwise, if he does so pay it, he loses his statutory protection, and moreover has to face the possibility that the drawer may stop payment of the cheque before the bank opens on the next business day.

A banker is bound to cash open, *i. e.* uncrossed cheques, over the counter, but he is under no obligation to send notes or cash in payment by post. In such a case s. 45 (8), Bills of Exchange Act, 1882, does not apply. This section reads: "Where authorised by agreement or usage a presentment through the post office is sufficient." Cheques presented for payment in this way by persons unknown to the banker should therefore be returned for presentment in the usual way. The position would naturally

be different if the customer himself sent a cheque by post asking for cash to be remitted to him. The particular duties attaching to order cheques and crossed cheques which a banker must carry out in order to be able to charge his customer are dealt with later.

In ordinary circumstances, a cheque drawn in proper form and complete in every particular, must be paid or refused payment as soon as it is presented. But if the circumstances connected with its presentation are such as to raise reasonable suspicions in the banker's mind, he is entitled to use discretion in the matter of immediate payment. As Lord Halsbury said in *Vagliano Bros.* v. *Bank of England*, 1891: "I can well imagine that on a person presenting himself whose appearance and demeanour was calculated to raise a suspicion that he was not likely to be entrusted with a valuable document for which he was to receive payment in cash, I should think it would be extremely probable that . . . the counter clerk and banker alike would hesitate very much before making payment." It seems reasonable to suppose that the banker would also be entitled to postpone payment if the cheque were drawn in an unusual manner, or bore upon its face peculiarities that would raise doubts in an ordinary person's mind as to the genuineness of the order. So also if a cheque were stopped by an unconfirmed telegram, or if a person professing to be the payee were to state that he had lost the cheque, it would appear that the banker could reasonably make inquiries about such matters before paying the cheque. In *Macmillan & Arthur* v. *L. J. Stock Bank, Ltd.*, 1918, Lord Shaw stated that a banker is justified in delaying payment of a cheque pending satisfactory references, if there be on the face of it any reasonable ground for suspecting that it has been tampered with. "Always granted that the doubt was reasonable, the refusal to pay is warranted."

When money is placed on the bank counter with the intention that the presenter shall pick it up, the money, as soon as the presenter puts his hand upon it, ceases to belong to the banker, and becomes the property of the presenter of the cheque. And this is so, even if the banker, after the money has passed, and before the presenter has left the bank, discovers that the drawer's account is overdrawn, and that the cheque ought not to have been paid. Here again is an example of the fact that there is no privity of contract between the holder and the banker.

The holder is entitled to be paid in legal tender. Legal tender is a tender of money of such kind as is required by law, and which a person entitled to receive it is bound to accept in discharge of a debt expressed to be payable in coin of the realm. The tender must be exact in amount and unconditional; the creditor is not bound to give change. The refusal of legal tender by a creditor does not wipe out the debt, but it is a good defence to an action, and renders the creditor liable to pay the debtor's costs. Gold coins of full legal weight—except pre-Victorian coins—are legal tender for any amount; so also in England and Wales are all the notes of the Bank of England. Silver and bronze coins are legal tender for amounts not exceeding forty shillings and one shilling respectively. By the Coinage Offences Act, 1861, s. 17, no tender made in gold, silver, or copper coin, defaced by being stamped with any name, whether such coin is or is not thereby diminished or lightened, is allowed to be a legal tender. S. 26 of the same Act make it lawful for any person to cut, break, bend, or deface a base or counterfeit coin, the loss falling upon the person tendering the coin. A banker should, therefore, deface all such coins tendered to him. Bank of England notes of £1 and 10*s*. are also a legal tender in Scotland and Northern Ireland. They are likewise a legal tender by the Bank of England itself, including the payment of its larger notes. It should be noted that although bankers, when paying cheques, usually ask the presenter in what form he would like to be paid, this custom is merely a matter of courtesy, and is not obligatory upon them. All that the law requires is that they should pay in legal tender.

Very few, comparatively speaking, of the cheques issued are presented at the bank counter, and cash demanded for them. Most of them are paid, directly or indirectly, through the Clearing Houses in London and certain provincial towns, and by the local clearings. (See *Clearing System*, p. 190.)

When charging interest the banker should reckon it from the dates of payment by the drawee-banker (or his agent if cashed under standing orders) of the cheques, not from the dates upon which the cheques were drawn.

6. *Paying Bearer Cheques.*—S. 2, Bills of Exchange Act, 1882, defines " bearer " as the person in possession of a cheque which is payable to bearer; and by s. 8 (3) a cheque is payable to bearer which is expressed to be so payable, or on which the only or

last indorsement is an indorsement in blank; and by s. 7 (3) a cheque made payable to a fictitious or non-existing person may be treated as payable to bearer. A cheque originally drawn payable to bearer need not be indorsed, and the banker cannot demand an indorsement before paying the cheque on presentation. If any indorsements do appear on the back of the cheque, the banker may ignore them. Any holder may alter a bearer cheque to an order cheque by striking out the word "Bearer." He may, or may not, as he chooses, also write the word "Order" for "Bearer." Any such alteration need not be initialled, and the banker must regard the instrument as an order cheque requiring indorsement.

If a cheque is drawn payable to "Bearer —— *or Order*," the written word "Bearer" would be considered to override the printed words "*or Order*," and the cheque should be treated as payable to bearer. If, as in some forms of cheques, the space after the printed word "or" is left blank, and the drawer had made the cheque payable to bearer, and had also written in the word "Order" after "or," possibly the banker, if the cheque were presented without being indorsed, would be justified in returning it as an embarrassing document. By paying "in due course" an uncrossed cheque payable to bearer to any one tendering it over the counter, the banker obeys the mandate of his customer, and accordingly can debit him with the cheque, and this is so even if the bearer had no property in the cheque, or was himself the thief who had stolen it.

7. *Paying Order Cheques.*—Cheques are usually drawn payable either to bearer or order. If either of these words is omitted the cheque is payable to order, unless there are "words prohibiting transfer or indicating an intention that it should not be transferable" (Bills of Exchange Act, s. 8 (4)). "Where a bill [which includes a cheque], 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" (*ibid.*, s. 8 (5)). Therefore, when a cheque is drawn "Pay J. Jones or ——," it must be indorsed by J. Jones, who may also indorse it to another person. If, however, the mandate of the drawer is "Pay J. Jones only," then the banker must pay J. Jones and no other person, *i. e.* the cheque is not transferable. Payment over the counter of such a cheque should only be made after identification of the payee, and payment through a bank

only after the confirmation of the collecting banker. If the cheque is drawn payable to "J. Jones or ~~Bearer~~," it must bear J. Jones's indorsement, as it is in effect an order cheque. The striking out of the word "Order," and initialling the alteration, would apparently make a cheque so altered payable to bearer. But some banks prefer to return a cheque so drawn, marking it "Alteration requires completion," or would treat it as an order cheque requiring indorsement.

If a banker pays an order cheque bearing a forged indorsement, he is protected by s. 60 Bills of Exchange Act, 1882. This section runs as follows: "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 his 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." The word "bill" in this section is limited to a cheque, defined by s. 73 as "a bill of exchange drawn on a banker payable on demand." But drafts and other orders to pay which do not come within this definition of a cheque are not protected by s. 60. Moreover, the banker, to gain protection, must not only see that the cheque is a cheque in the defined sense of the word, but (*a*) he must pay it in good faith and in the ordinary course of his business, and (*b*) the cheque must *purport* to be indorsed by or under the authority of the proper indorser. In regard to (*a*) "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" (Bills of Exchange Act, 1882, s. 90); in regard to (*b*), see pp. 17–49, where indorsements that fulfil the necessary requirements are fully dealt with. Payment made by crediting the cheque to the account of another customer is a good payment and is protected by s. 60.

Under s. 24 of the same Act a forged indorsement on a bill or cheque is wholly inoperative, and does not give any person claiming through the forged indorsement any right to sue on the cheque, or to retain the instrument, or to give a valid discharge therefor. Accordingly, if a banker pays a cheque with a forged indorsement in such a way as to forfeit his protection under s. 60, he will be unable to debit his customer with the amount

of the cheque. And, furthermore, as such a cheque would be wrongfully converted, *i. e.* the true owner is deprived of its possession, the true owner could bring an action of trover against the banker, *i. e.* an action to recover the value of the document of which he has been wrongfully deprived.

8. *Paying Crossed Cheques.*—The sections of the Bills of Exchange Act, 1882, which define a crossing, and the duties and liabilities of the paying banker in respect of crossed cheques, are given on pp. 69–79, together with a full explanation.

9. *Paying Cheque with Bill or Document Attached.*—When a cheque is drawn payable to "Bill attached or bearer," the banker should, in the interests of his customer, see that the bill is actually attached before paying the cheque, though whether he is legally bound to do so is open to question. If the bill is not attached, the cheque should be returned marked "Re-present with bill attached." Unless particulars of the bill are written on the cheque the banker has no means of knowing whether the bill is in order or not. If the cheque is drawn payable to "Documents attached," without defining them, the banker can do no more than see that there is more than one document attached. Where a cheque is presented with a document or documents attached, but makes no reference to the attached documents, the banker need not examine the documents to see if they are in order. In these and in similar cases, the banker should act in a manner most conducive to his customer's interests.

10. **Advising Fate by Telegram.**—The collecting banker sometimes wires to the paying banker asking whether a particular cheque will be paid. Even though the paying banker's customer has sufficient funds to his credit to justify the cheque being paid, the banker's answer should be so worded as not to commit him to the payment of the cheque in any event. "Would be paid if presented now and in order," is a suitable wording. If the paying banker wires "Yes, if in order," he is bound to honour the cheque on presentment, if complete and regular on the face of it, though in the meantime the drawer may have died, become insane or bankrupt, or stopped payment of the cheque, or had a garnishee order served attaching his balance. Since advice of fate in this manner before presentation is not a legal payment, the banker cannot debit the drawer's account in any of these circumstances, and may, therefore, find himself without means of recovering his money. And, for the same reason, he is not

entitled to retain, pending actual presentation, sufficient of the drawer's balance to meet the wired cheque. If he did so, and other cheques were dishonoured through such retention, he would be liable to his customer in damages. Similarly, when a dishonoured cheque is recalled by wire, the answer should be "Cheque so-and-so would be paid if re-presented now and in order." This answer would justify the banker in refusing payment if any event occurs in the meantime, preventing any operations on the customer's account. Of course, where the telegram is sent with the customer's consent or on his instructions, the position is quite different, and the banker is entitled to retain an amount sufficient to meet the wired cheque. Cheques are sometimes presented direct with a request to wire fate. When once the telegram has been sent, the customer cannot stop the cheque, and the banker can debit it to his account in any circumstances.

11. Marking Cheques.—Cheques are sometimes "marked" as good for payment at the request of the drawer, or as between banker and banker. When the drawer requests his banker to mark a cheque, the banker is entitled to retain money to meet the cheque, and therefore to dishonour any other cheques where the balance remaining after providing for the marked cheque is insufficient to cover them.

It has been argued that by marking a cheque the banker virtually accepts "a bill payable on demand," which he is forbidden to do by the Bank Charter Act, 1844, s. 11, but the better opinion seems to be that "the only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn." This excerpt is part of a judgment of the Privy Council in an Appeal case, *Gaden* v. *Newfoundland Savings Bank*, 1899, and it should be noted that this was a Colonial case, and that in Canada and the United States, and presumably also in Newfoundland, the practice of certifying cheques is more common than in this country. At any rate, "it is conceived that in this country such marking, in the absence of any consideration, does not involve any liability on the part of the bankers to the holder of a cheque so marked, nor is it customary in this country for bankers to mark cheques at the instance of the payee or holder, but only at the instance of the drawer."

(*Byles on Bills*, 17th edition, pp. 25–6. See also Paget's *Law of Banking*, 4th edition, pp. 164–69.) When a cheque marked at the instance of the drawer is presented it must be paid, and the banker may debit the drawer's account, notwithstanding any event, such as death or bankruptcy, that may have happened to the drawer in the interval between the marking of the cheque and presentment for payment. But this practice of marking cheques is falling into desuetude. Bankers now usually prefer to issue their own draft in exchange for the cheque.

In regard to the marking of cheques as between banker and banker, Cockburn, C.J., in *Goodwin* v. *Robarts*, 1875, judicially recognised the fact that " a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another." For instance, it is a rule among London Clearing Bankers that all Town Clearing cheques must be presented through the Clearing House. In London, when a cheque from a customer is received too late for presentation, and the collecting banker for any reason desires to know its fate as early as possible, it is the practice for him to send the cheque direct to the drawee-banker after closing hours, with a request to mark the cheque. Cheques so marked are presented next morning through the Clearing House in the usual way. In provincial towns the procedure is similar. Sir John Paget (*Q. B. P.* No. 510) says that this marking, as between banker and banker, " constitutes a constructive payment or appropriation to a specific person, though not directly indicated by the customer." Since this marking is an appropriation of funds in the banker's hands for a specific purpose, he is entitled to deduct the amount of the marked cheque when estimating the balance available for meeting other cheques presented after the marked cheque, and he may debit the drawer's account with the marked cheque when it is actually presented for payment, notwithstanding that the drawer may have died or become bankrupt, or that a garnishee order may have been served on the banker in the meantime. The drawer has no power to countermand payment of a cheque marked for this purpose.

Whenever a cheque is marked by a banker, a note of it should be made in the relative account in the ledger, so that it may be taken into consideration when estimating the balance available for meeting any other cheques that may be presented.

12. **Dishonour of Cheques.**—Whenever possible, cheques

should be paid in the strict order of presentment, but if a banker dishonours a cheque for the reason that the funds of the drawer in his hands are insufficient to meet it, he is not entitled to dishonour a cheque presented afterwards, which is within the available balance. This is not so, however, in Scotland, in which country, by virtue of s. 53 (2), Bills of Exchange Act, 1882, a cheque operates as an assignment of the funds available in favour of the holder. The banker, therefore, in Scotland, where there is an insufficient balance to pay the whole of a cheque, would have to retain the balance as a discharge *pro tanto* for that particular cheque, and dishonour all cheques subsequently presented, even though the available balance was sufficient to meet them all, except the one first presented.

When it is necessary to return a cheque for the correction of a clerical error, the reason of the return should be clearly stated, so as not to cast any aspersion on the drawer's credit. Where possible, a cheque in which there is such a mistake should be sent direct to the drawer for correction, so as to avoid returning it.

In *London Joint Stock Bank* v. *Macmillan and Arthur*, 1918, there were some very significant statements in reference to the return of cheques. One learned judge said that "The customer contracts reciprocally that in drawing his cheques he will draw them in such a form as will enable the banker to fulfil his obligation, and therefore in a form which is clear and free from ambiguity." Elsewhere the same judge stated that a banker has a right to insist on having his mandate (*i. e.* the cheque) in a form which does not entail doubt as to what he is called on to do. Another judge said that "If there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with," the banker is justified in returning the cheque and delaying payment until reference has cleared up the doubt. "Always granted that the doubt was reasonable, the refusal to pay is warranted." Accordingly, in all cases where cheques drawn in an unusual or ambiguous manner, or which bear evidence of having been tampered with, are presented for payment, they should be refused. The best answer is one which cannot be construed as casting any reflection on the drawers' credit, such as "Irregularly drawn: requires confirmation." (See also *Gilbart Lectures*, 1919.)

Where, owing to an insufficient balance, the return of a cheque is unavoidable, it is usually better to mark it "Refer to Drawer"

than "Not sufficient" (see Note C, p. 68). If the circumstances of the case seem, in the banker's opinion, to justify the latter marking, the banker should be careful not to say or write anything that would indicate how far the available balance falls short of the amount of the cheque, for the payee might tender the shortage, and then demand payment of the cheque, constituting a fraudulent preference over the customer's other creditors. Once a cheque has been presented and payment refused, the holder is entitled to treat the cheque as dishonoured, even though he has been requested to re-present the cheque at a later date.

With regard to the return of unpaid cheques, the rules are based on the undoubted right of the payee or holder to know as soon as possible whether the cheque has been honoured or not. If both the collecting and the paying banker are in the same town, the cheque, unless the local rule is to the contrary, must be paid or returned on the day it is received. If a collecting banker in one town remits by post a cheque to the drawee-banker of another town, the drawee-banker need not return the cheque, if unpaid, until the day after receipt, though in this case the drawee-banker should, as a matter of courtesy, advise the collecting banker that he is holding the cheque over until the next day. If a customer pays in a cheque drawn by another customer of the same branch, the banker is not legally bound to return it until the next day, and he need not give any information about the cheque to the customer paying it in. Bankers, however, usually return such cheques on the day of receipt. If a Metropolitan or a Country cheque is presented through the London Clearing House, the Rules provide that the banker who dishonours the cheque must send it back by return post direct to the bank into which it was paid. (See also Note C, p. 68.)

When a banker dishonours a cheque it would appear that since a cheque is a bill of exchange payable on demand, s. 48, Bills of Exchange Act, 1882, applies, and the drawer is entitled to notice of dishonour. Notice, however, is excused when the drawer has not sufficient funds to his credit to meet the cheque (s. 50, 2(c)). Since in almost every instance a cheque is dishonoured through lack of funds, the holder is usually excused from sending notice of dishonour to the drawer, but if the drawer is entitled to notice, and the holder does not give it, the drawer is discharged from liability on the cheque.

13. *Cancelled in Error.*—If a banker inadvertently cancels a cheque, he should write, "Cancelled in error," and add his initials. The cancellation is then revoked.

14. **Paid Cheques.**—All cheques should be effectively cancelled as soon as they are paid. For the property in paid cheques, see p. 16.

15. **Forgery.**—Forgery is the act of falsely making or altering any writing for the purpose of doing injury to another person. Any alteration of a writing made with intent to defraud is a forgery. By s. 24, Bills of Exchange Act, 1882, "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. Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery." An example of "ratification of an unauthorised signature" would occur when a partner signed his name to a document purporting to bind the firm, though he had no power to do so, and the other partners afterwards recognise his unauthorized signature as binding on them. If a person's signature is forged, the law will not permit him to adopt that forged signature as his own, for that would be compounding a felony, but, nevertheless, though his signature has been forged, he may, by his conduct, be precluded from denying its genuineness.

S. 24 taken by itself affords little or no protection to a paying or collecting banker who has handled a forged cheque, but its provisions are subject to other provisions of the same Act. S. 60 protects a banker who pays a cheque bearing a forged or unauthorised indorsement, and s. 80 the banker who pays a crossed cheque in conformity with the crossing, while s. 82 protects a banker who collects crossed cheques for a customer who has no title, or a defective title thereto. But these sections notwithstanding, both the collecting and the paying banker incur certain risks if they handle a cheque bearing a forged signature. The position of the banker as a collector of cheques is dealt with on pp. 80–6.

16. *The chief Risks of Paying Banker.*—As regards the risks of forgery which the banker's statutory protection does not cover, the chief of these in the case of cheques are: (1) the forgery of the drawer's signature, and (2) fraudulent alterations, such as alterations of amount. Now where a banker pays a cheque bearing a forged signature of the drawer, or a fraudulent alteration, such a payment to a person who is not aware of the forgery is a mistake of fact, and the money therefore may be recovered from the party who has received it, provided the position of such party has not been altered before he was notified of the mistake. For instance, notice of the mistake must come to the party in sufficient time for him to give notice of dishonour to any other parties liable on the instrument. But if the money has been received in bad faith it can be recovered in any case. See also p. 67.

17. *Forgery of Customer's Signature.*—If the signature of the drawer is forged, and the banker pays out the customer's money on the authority of the forged signature, the banker cannot usually debit his customer with the money paid out. The mandate on which the banker has acted is not his customer's mandate. But there may be exceptional circumstances which will enable the banker to debit his customer with a cheque bearing a forged signature. The customer by his conduct may have misled the banker, causing him to pay the cheque when otherwise it might have been refused. For example, if he does not repudiate the signature as soon as the forgery comes to his notice, and the banker pays it when otherwise he would have returned it, or if the banker is thereby prejudiced in any action he may take against the forger, or if by some act of his or by his conduct the customer has induced the banker to believe that the signature was a genuine one. What particular act or line of conduct precludes the drawer from denying the banker's right to debit him with a forged cheque is a question of fact. To enable the banker to return a cheque by reason of its forgery, he must discover the forgery and return the cheque within the usual time allowed for payment.

18. *Fraudulent Alteration of Amount.*—When a customer draws a cheque in such a careful way that no palpable opportunity is given to any one into whose hands the cheque may come to raise the amount with intent to defraud, and the amount is, nevertheless, fraudulently increased and the cheque paid, the

banker cannot charge the customer with anything more than the original amount of the cheque. But where the customer, innocently but negligently, draws the cheque in a manner which facilitates fraudulent alteration of the amount, or where the customer signs a blank cheque, and the person who has authority to fill in the body of the cheque does so with a like carelessness, the position is different. In *London Joint Stock Bank, Ltd.*, v. *Macmillan & Arthur*, 1918, the principle enunciated in the old case of *Young* v. *Grote*, 1827, was expressly approved by the House of Lords. In the course of his judgment, the Lord Chancellor said that "The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker from being misled. If he draws the cheque in a manner which facilitates fraud he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss suffered by the banker as a natural and direct consequence of this breach of duty." (*Times Law Reports, July* 5, 1918.) (See also Note, p. 68.)

The facts of *Young* v. *Grote* were briefly these: Young gave his wife five cheques signed in blank to be used by her for his business as and when necessary. One cheque for wages was given by Mrs. Young to a clerk to be filled up for £50 2*s*. 3*d*. The latter filled up the cheque for this amount, and showed it to Mrs. Young, but it was filled up in such a manner that he was able afterwards to raise the words and figures to £350 2*s*. 3*d*. The alterations were so made that they could not have been detected by any ordinary diligence. In the new case the cheque was fraudulently raised from £2 to £120, and was signed with the space for the amount in words left blank, and with a convenient space each side of the figure 2. The Lord Chancellor stated that "it was well settled law that if a customer signed a cheque in blank, and left it to a clerk or other person to fill it up, he was bound by the instrument as filled up by his agent."

19. *Other Fraudulent Alterations.*—Any material alteration unauthorised by the drawer renders a cheque void. The following alterations made without the drawer's consent would be material:

"any alteration of the date, the sum payable, the time of payment, the place of payment" (Bills of Exchange Act, 1882, s. 64 (2)). So also the alteration of "Order" to "Bearer" (but not the mere striking out of the word "Bearer"), and any alteration in or obliteration of the crossing. Where the alteration, however, is for the purpose of correcting an obvious mistake, such an alteration may not avoid the instrument, but the onus lies on the person making the alteration to prove that it was made under such circumstances as not to avoid the instrument.

20. **Recovery of Money Paid by Mistake.**—A banker sometimes pays away money by mistake, and naturally desires to rectify the error and recover the money. If the mistake lies between the banker paying the money and the person receiving the money, and if the recovery of the money would be equitable, the banker has the right of recovery in certain circumstances. What circumstances permit and what circumstances preclude the right of recovery is not at all clear from the judgments given in the decided cases. If the person receiving the money acted *mala fide*, i. e. was aware that he was not entitled to the money, the banker's right of recovery is indisputable, but if the recipient acted *bona fide*, and the banker does not find out the mistake until the recipient's position may have been—not necessarily has been—altered, it would appear that the banker cannot recover. Examples of alteration of position would be (1) where the recipient was an agent and had handed the money to his principal; (2) where postponement of notice of the mistake to the recipient prevented him from giving due notice of dishonour to persons liable on the instrument. With regard to the question of notice it would appear that if the drawer's signature were forged, but there was a genuine indorsement on the cheque, the banker could apparently recover the money paid to an innocent holder who claimed under the genuine indorsement, provided that the mistake was pointed out to the holder in time for him to give notice of dishonour to the genuine indorser. But if the drawer's purported signature was quite unlike his genuine signature it might possibly be held that the banker was guilty of negligence in paying the money to an innocent holder, and therefore that he could not recover.

Where the mistake of fact lies between the banker and the drawer of the cheque it would appear that the banker cannot recover money paid in mistake to an innocent holder. For

example, if a banker pays a cheque, and afterwards finds that the customer's balance is insufficient to meet the cheque, he cannot recover the money from the recipient, even though the mistake is discovered immediately after the money is handed over and before the recipient has left the bank.

NOTE C (see p. 63).—The Rules of the London Clearing House provide that answers on dishonoured articles must be written on such articles themselves, but where these Rules do not apply, it is probable that a written answer cannot legally be demanded. The Rules also provide that answers must in every case be written in words without abbreviation, and not indicated by initials.

NOTE to pp. 4 and 66.—In the Appeal Case of *Greenwood* v. *Martins Bank*, reference was made to the *Macmillan Case*, and the customer's duty in regard to the drawing of cheques. Whilst approving the principle, Scrutton L. J. stated that there was a continuing duty on either side to act with reasonable care to ensure the proper working of the account; that the banker, if a cheque were presented to him which he rejected as forged, would be under a duty to report to the customer to enable him to inquire into and protect himself against the circumstances of the forgery; and that this involved a corresponding duty on the customer if he became aware of forged cheques to inform the banker for the latter's protection. In practice, cheques bearing a signature other than the customary one would be returned marked "Signature differs," but the dictum given above lays a duty on the banker to inform his customer in all cases where a cheque is so returned because of a suspicion of forgery.

In regard to alterations due to loose drawing, in *Slingsby* v. *District Bank*, 1931, the Court refused to accept the plea that the customer had facilitated the fraud by leaving a space between the name of the payee and "or Order," on the ground that no custom to draw a line after the payee's name had been established.

CHAPTER IV

CROSSED CHEQUES

1. **Definition.**—The legal definition of a crossed cheque as given in the Bills of Exchange Act, 1882, is as follows:—

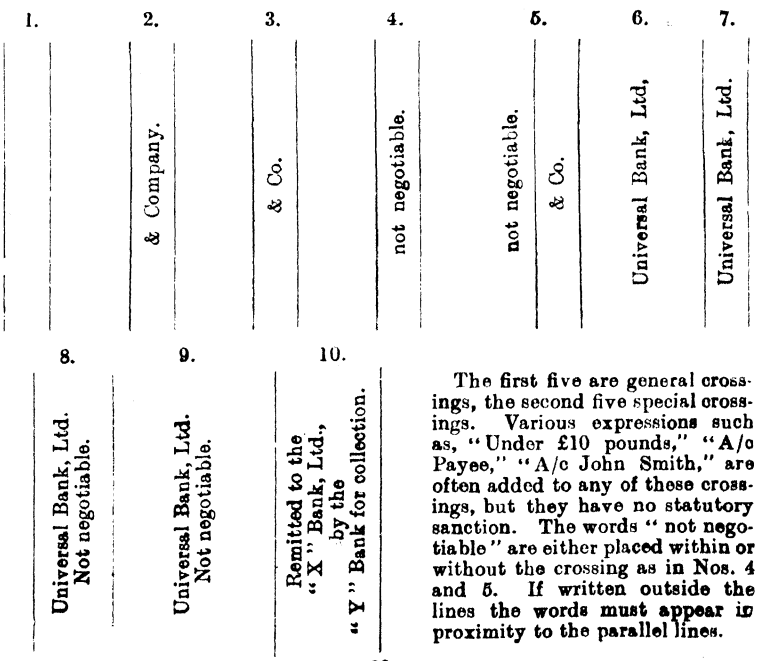
Section 76 (1) "Where a cheque bears across its face an addition of—

(*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.

(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."

FORMS OF CROSSING.



The first five are general crossings, the second five special crossings. Various expressions such as, "Under £10 pounds," "A/c Payee," "A/c John Smith," are often added to any of these crossings, but they have no statutory sanction. The words "not negotiable" are either placed within or without the crossing as in Nos. 4 and 5. If written outside the lines the words must appear in proximity to the parallel lines.

There are two kinds of crossing, general and special. The name of a banker, without any lines at all, is sufficient to constitute a special crossing. Two transverse lines are the essential part of a general crossing, so that one line, or the phrases "not negotiable," "account payee" or "under . . . pounds" without any lines, do not constitute a crossing. A crossing must be on the face of a cheque and should be across the middle, though it is found in a variety of positions. A perforated crossing is apparently in order.

2. **Persons Authorised to Cross.**—Section 77 defines the powers of the drawer and holder as follows—

(1) "A cheque may be crossed generally or specially by the drawer.

(2) "Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) "Where a cheque is crossed generally the holder may cross it specially.

(4) "Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable.'

(5) "Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

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

3. **Crossing a Material Part of Cheque.**—Section 78 runs—

"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."

Where the crossing has been materially altered—as, for instance, the words "not negotiable" ruled through and not confirmed by the drawer—the banker on whom the cheque is drawn should refuse payment pending confirmation.

4. **Duties of Paying Banker as to Crossed Cheques.**—Section 79 sets forth the duties of the paying banker—

(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."

Where there is a double crossing the banker, before paying the cheque, should make certain that the first banker is the agent of the second. A cheque crossed by two branches of the same bank is not crossed to two bankers.

(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."

A banker is not justified in paying a cheque in a manner inconsistent with the directions contained in the crossing. If he does do so, and any loss ensue, he cannot debit the drawer's account with the cheque, because of his negligence. The liability of the banker to a third party, *i. e.* the true owner, is an exception to the general rule that the banker is accountable only to his customer.

Since a banker must not pay a cheque contrary to the crossing, it follows that if the crossing is such that the banker is left in doubt what to do he should return the cheque. If the cheque is crossed to two bankers, one of which is not the agent of the other, it is the practice to pay the cheque provided that the banker who receives the proceeds will give an indemnity to the paying banker. The crossing of a cheque is not nullified by its being returned unpaid, and, if re-presented, it should be paid to the banker to whom it is crossed. Where a cheque is received through the Clearing crossed by the collecting banker to his London agents, and is returned by the paying banker unpaid, the paying banker is justified in paying the cheque on re-presentation direct to the collecting banker, without the mediation of the London agents (*Q. B. P.*, No. 251). A crossed cheque drawn by one customer in favour of another customer should be passed through the payee's account. The banker is not legally justified in paying the money over the counter to his payee-customer. If he gives cash for a crossed cheque to a payee well known to him, he does so at his own risk; and if the payee had received the cheque as agent or as trustee and misappropriated the money, the banker, having paid contrary to the crossing, could not debit the drawer's account.

The remainder of the foregoing subsection runs: "Provided

that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, 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."

5. Protection Afforded to Paying Banker.—Section 80 provides that "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 banker, in order to gain the protection of this section, must pay the cheque in good faith and without negligence. But "pay" here excludes payment over the counter (except to another banker), and if a crossed cheque drawn on the banker is paid in by a customer, the banker must place it to the customer's account, and not cash or exchange it. This section refers only to cheques proper, but s. 17, Revenue Act, 1883, expressly extends the protection of the crossed cheques sections 76–82 to crossed documents analogous to, but not, strictly speaking, cheques at all (see p. 76 *post*). Bankers' drafts are also included by the Bills of Exchange (1882) Amendment Act, 1932. (See p. 154 *post*.)

6. Protection Afforded to Collecting Banker.—Section 82 provides that "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."

This section is amplified by the Bills of Exchange (Crossed Cheques) Act, 1906, which enacts that a banker receives pay-

ment of a crossed cheque for a customer within the meaning of the above section, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

By virtue of s. 77 (5) and (6) a banker is entitled to cross cheques sent uncrossed to him for collection, but if he does cross them he does not gain the protection of s. 82, which is only applicable to cheques which are crossed before they reach the banker's hands. To safeguard themselves, some bankers print a notice on their paying-in slip books requesting customers to cross all cheques before paying them in. Formerly, if bankers credited crossed cheques as cash before they were cleared, they lost the protection of s. 82, being considered not as collectors of the cheques but as holders for value. Now, however, by the Act of 1906 above mentioned, the banker does not lose the protection of s. 82 merely because he has credited as cash (see also p. 84, "Effect of crediting as cash"). Here again the protection is dependent upon the banker receiving payment "in good faith and without negligence." He would be guilty of negligence if he did not notice that an indorsement on an order cheque did not purport to be in order. He would also lose protection under this section if he permitted agents or employees to pay in to the credit of their private accounts cheques made payable to their principals, and, again, if he collected a cheque marked "account payee" for a customer other than the named payee. Whilst a cheque bearing a *per pro* indorsement does not, of itself, put the collecting banker on inquiry as to the authority of the person indorsing, and failure to make inquiries does not necessarily make the banker guilty of negligence, the circumstances may be such that the banker's omission to make inquiries will be evidence sufficient to deprive him of the protection of s. 82. The danger of allowing agents to put to their own private accounts cheques indorsed by them on behalf of their principals has been emphasised in a number of cases. Similarly, difficult positions arise when directors or other agents pay into their own accounts cheques drawn by them on behalf of their principals. This applies with particular emphasis to the so-called "one-man companies," where the control is for practical purposes vested entirely in one individual, though the company has a legal entity quite apart from himself.

With regard to negligence, in *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Ltd.*, a case which

depended upon the interpretation of s. 82, the Privy Council stated that the test of negligence within the meaning of this section is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the bank's mind and caused them to make inquiries. (*Times Law Reports*, March, 1920.) (See also pp. 224–25.)

To obtain protection, another condition must also be fulfilled, viz. that the collecting banker receives payment *for a customer*. The Act does not define the term "customer," but it would seem that any person keeping an account—current or deposit—is entitled to the description. It would appear from the judicial decisions that if a banker renders to a person services incidental to, but not peculiar to, the business of banking, he does not thereby constitute that person a customer. The question whether a first transaction with a person is sufficient to constitute that person a customer is discussed in another part of this book (see p. 225). A banker should not collect crossed cheques for a stranger, for if he does so, he has no right to the protection of s. 82, and will be liable to the true owner should it turn out that the stranger had no title. A banker collecting for a customer a cheque drawn by another customer comes within the section; so also does banker A, employed by banker B. to collect crossed cheques—banker A in this kind of transaction being the agent of his principal, banker B. The protection afforded by this section applies only to cheques as defined by the Bills of Exchange Act, and certain documents described in ss. 7 to 11 of the next chapter, which should be read in conjunction with this section.

7. **"Not Negotiable" Crossing.**—Section 81 runs: "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 transferability of a cheque is in no way restricted by the "Not Negotiable" crossing. The distinctive feature of negotiability is that a holder in good faith and for value takes the document free from any defect in the title of his transferor, and is therefore enabled to sue on the instrument in his own name. Now a party who takes a cheque bearing a "Not Negotiable" crossing, notwithstanding that he became the holder in an absolutely honest manner, has not and cannot give a better title

than his transferor had. He thus becomes the holder of a cheque bearing a crossing which, while not destroying the quality of transferability possessed by the document, yet affects its negotiability. Such cheques may circulate quite freely, and provided that the title does not, while the cheque is passing from hand to hand, become defective, each successive transferee acquires a good title. When, for example, a bearer cheque crossed "Not Negotiable" is stolen, and the thief induces a person to cash it, the person cashing it has no title to the cheque, and is liable to refund the money to the true owner, and this liability exists for the statutory period of six years. Since he has no title to the cheque he cannot sue the drawer if the cheque has been stopped.

The effect of crossing a cheque "not negotiable" must be carefully distinguished from the effect of making the cheque not transferable. Every cheque is transferable unless it contains "words prohibiting transfer or indicating an intention that it shall not be transferable" (see Bills of Exchange Act, 1882, s. 8 (4)). If the drawer wishes to make the cheque a non-transferable one, he should indicate the fact by the way he draws the cheque, as, *e. g.*, "Pay A. B. only," the words "order" or "bearer" being struck out and the alteration initialled by the drawer, and, further, the words "Not Transferable," or their equivalent, should be plainly written horizontally on the face of the cheque.

Both the paying and the collecting banker retain the protection of the respective sections (ss. 80 and 82) when paying or collecting "not negotiable" cheques for their customers. The collecting banker does not lose his protection, unless guilty of negligence, even if he collects a "not negotiable" cheque for a customer who is not the payee. But if a banker exchanges a "not negotiable" cheque drawn on another banker, he loses the protection of s. 82, and will be liable to the true owner should any previous holder have had a defective or no title, on the ground that being a holder for value he must stand or fall by his transferor's title.

The words "not negotiable" have no significance apart from the recognised crossings, and if the words appear on the cheque without the parallel transverse lines, or without the name of the banker written across the cheque, the words "not negotiable" alone do not make the document a crossed cheque, and the banker, therefore, who pays or collects such a cheque is outside the protection of the crossed cheques sections. It would appear that a banker could treat such a document as an open cheque and pay

it over the counter, but the better course would be to return it on the ground that it is an embarrassing document. The words "not negotiable" need not be between the parallel lines—they may be written either above or below the lines—but, to be effective, the words must be so placed as to show that they are connected with the statutory crossing.

8. Documents other than Cheques which can be Effectively Crossed.—Section 95 enacts that "The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend." (See pp. 174–76.) Bankers' drafts may also be crossed. (See p. 154.)

Section 17 of the Revenue Act, 1883, provides that "Sections 76 to 82, both inclusive, of the Bills of Exchange Act, and Section 25 of the Forgery Act, 1861, shall extend 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, and shall so extend in like manner as if the said document were a cheque: Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument."

The documents referred to in this section, though not cheques, are somewhat similar in form, as, *e. g.*, an order from a customer to his banker authorising payment of a sum of money provided that the payee signs a form of receipt at the foot of the instrument. Documents issued by local authorities, drawn on their treasurers (unless the treasurer is a banker, see p. 279), are not within the section, because they are not issued by "a customer of any banker and intended to enable the payee to obtain payment from such banker." To come within this section, the document must be drawn on a banker.

The Act specially provides that it does not render any document crossed by virtue of this section a negotiable instrument, and it would appear that these documents are not even legally transferable. Accordingly, if a banker pays one of these documents which bears evidence of having been transferred, *e. g.*, an indorsement other than that of the payee, the banker might lose the protection of Section 80 on the ground of negligence, although paying in accordance with the crossing.

As mentioned above, these documents are probably not transferable, and in order to obtain protection the collecting banker should collect them for the named payees only. Further, Sir John Paget considers that the Bills of Exchange (Crossed Cheques)

Act, 1906, does not apply to the documents covered by this section and, therefore, if the collecting banker credits them at once as cash he loses any possible protection he may have under Section 82. (See also Conditional Orders to pay, p. 172.)

9. **"Account Payee."**—These words and variants such as "Payee's a/c," "Account A. B." etc., are often added to the crossing of a cheque. Such expressions have no statutory significance, since they are not sanctioned by the Bills of Exchange Act, 1882; and if added, as they frequently are in practice, to order or bearer cheques, they do not in any way affect their negotiability.

With regard to the paying banker it is obvious that, after fulfilling his duty of paying the cheque in good faith and without negligence, his responsibility ceases, and he cannot be expected to follow the money after it has reached the collecting banker, and insist upon the collecting banker paying it into the proper account. But the collecting banker is in a different position. These words are in the nature of a direction to him, and, if he places the money received to an account other than that of the specified payee, he stands to lose the protection of s. 82 on the ground of negligence. Hence the collecting banker should not collect cheques so marked except for the named payees.

Another variant is "A/c Payee only," sometimes strengthened by "Not Transferable." Both these forms are objectionable If unaccompanied by transverse lines, and presented over the counter, the paying banker would be justified in refusing payment, with the answer, "Form of cheque irregular," or something similar. If the additions were on a crossed cheque payable to order, which bore evidence of having been credited to another account, the banker would be entitled to return it, marked "Crossing irregular: requires drawer's authority" (*Q. B. P.*, No. 229).

10. **Opening Crossed Cheques.**—It has become a practice, mainly amongst those customers whose cheque books bear a printed crossing, to cancel the crossing by writing "Please pay Cash" within the printed lines, and adding their signature or initials. In other cases, the drawer cancels a written crossing at the request of a payee who has no banking account. The cheque then becomes an open one, payable over the counter. The alteration, being material, should be confirmed, but it should be noted that the drawer's signature may serve as a copy for a forged

opening. In regard to the larger question whether such an alteration of the crossing should be permitted at all, there has been a great deal of discussion; and rightly so, for this method of cancelling a crossing has no legal authority behind it, and is dependent upon the sanction of a mercantile custom. The practice exposes the banker to several dangers. If the drawer himself opens the cheque and the payee himself presents it for payment, the banker is safe. But suppose that, for example, the drawer posts a cheque to a payee, which is intercepted before it reaches the payee, and the thief forges the payee's indorsement, takes the cheque to the drawer, and fraudulently induces him to open the crossing. The banker paying such a cheque is liable to the true owner for any loss that may ensue, no matter whether the cheque was originally a crossed cheque or the crossing was put on by the payee. In both cases the banker would have paid the cheque in contravention of the crossing. It must be noted, however, that if the drawer was fraudulently induced to open the crossing, the banker might claim to be indemnified against the true owner, on the ground that he had obeyed the drawer's mandate to pay the cheque over the counter. If the drawer's opening and signature or initials were forged, and the forger succeeded in cashing the cheque, the banker undoubtedly would be unable to debit his customer, and would also be liable to the true owner. Sir John Paget in his Gilbart Lectures, 1912, points out another possible danger. The Stamp Acts permit only two kinds of material alteration of a bill or cheque without exacting the penalty for insufficient stamping. The first kind is alteration before issue, and the second, alteration to rectify something appearing on the cheque, which obviously does not express the intention of the parties at the time of issue (Chalmers' *Bills of Exchange*, 8th edition, p. 247). Any other kind of alteration makes the document a new bill or cheque, and, therefore, invalid without a fresh stamp. If this is so, the drawer who opens a cheque *after* issue, renders himself liable to a fine of £10 for issuing a cheque unstamped, and, further, the banker, for his own protection, should stamp the cheque before paying it. This point does not arise in those cases where the drawer opens a crossed cheque *before* issue, but how is the banker to know whether the operation has been performed before or after issue? S. 82 does not protect a banker who collects a cheque bearing a special crossing to another banker and since opened, and, in such circum-

stances, the collecting banker may make himself liable to the true owner.

In view of the numerous forgeries which had taken place from time to time the London Clearing Bankers in 1912, passed the following resolution : " That no opening of cheques be recognised unless the full signature be appended to the alteration and then only when presented for payment by the drawer or by his known agent." It may be added that there is need for special caution regarding this class of forgery, as thefts of cheques from letters, followed by the forgery of the drawer's signature to a cancellation of the crossing, so as to avoid the risk of passing the stolen cheques through a banking account, are still not infrequent.

CHAPTER V

COLLECTION OF CHEQUES

1. Collecting Banker.—One of the principal functions of a banker is to receive instruments from his customer, in order to collect the proceeds and credit them to his customer's account. When acting in this capacity he is called a " collecting banker." In the collection of some instruments he has statutory protection against the true owner; in the collection of others, he is liable to the true owner for conversion. When considering this matter, a distinction must be made between the position of a banker when a mere agent for collection and when collecting a cheque for which he has already given cash, or against which he has permitted his customer to draw before clearance. The necessity for this arises when the banker has handled a cheque to which his customer has a defective or no title. Hence, when reference is made in this context to a banker as a " holder for value " or " holder in due course," it means a banker who is collecting the proceeds of cheques for which he himself has given value. It may be added that a banker is a " holder," within the meaning of the Bills of Exchange Act, of articles received for collection, even though acting strictly as a mere agent for collection.

2. *Duties of Collecting Banker.*—" As his customer's agent in the matter, the banker is bound to use reasonable skill, care, and diligence in presenting and securing payment of the drafts entrusted to him for collection and placing the proceeds to his customer's account, or in taking such other steps as may be proper to secure the customer's interests " (Hart's *Law of Banking*, 4th edition, p. 532). If the customer suffers any loss through the negligence of the banker in any of these matters, the banker will be liable to the customer to the extent of the loss.

3. *Examination of Indorsements.*—The collecting banker is bound to examine the indorsements on all instruments to see that they purport to be in order, and, except where the instrument

is a crossed cheque, he is liable if the indorsements are forged. Failure to notice that the indorsement on a crossed cheque sent to him for collection was not a correct indorsement has been held to be negligence sufficient to deprive him of his statutory protection (*Bavins, Junr. & Sims* v. *London and S.W. Bank*, 1900). If the indorsement is a *per pro.* indorsement, or an indorsement put on by delegated authority, the banker may be put on inquiry as to the agent's power to sign, and collection of a cheque so indorsed without authority may involve the banker in liability for any loss that ensues. Hence, in all cases where indorsements by agents are employed, the collecting banker should get a proper written authority, even where the instruments so indorsed are credited to the payees' accounts. Not only is the examination of indorsements and other signatures and particulars on instruments necessary for the collecting banker's own protection, but the practice is desirable in the interests of banking business generally. For the discovery of irregularities before presentation minimises any risk of loss that may be occasioned through delay in payment, a loss for which the collecting banker might be held responsible if he had omitted to notice the irregularity in the first instance.

4. *Collection of Drafts on Other Bankers.*—The collecting banker must present with all diligence cheques sent to him for collection. Legally, he has until the day following receipt to present cheques payable at another banker in the same town, and where the cheque is drawn on another town, he need not send it off until the day following receipt, and if presentment is made through an agent, that agent can legally hold the cheque until the day following receipt by him. But it is the practice of bankers to forward on the day of receipt cheques required to be sent by post, and also to present cheques through the local clearing on the day of receipt if received in time, and, if not, on the day after receipt. Cheques on other towns are usually presented through the London Clearing House. Cheques payable alternatively, either at a country branch or in London, should be treated as London cheques unless time is saved by presenting them at the country branch. When, for any reason, knowledge of the fate of a cheque is urgently required, it is sent direct to the drawee-bank with the request to advise fate by return of post or to wire fate. If a telegram is asked for, the cost of it should be enclosed with the cheque. As already stated, cheques received by post in this way may legally be held until the day after receipt, but, as a matter

of courtesy, it is usual for the receiving banker to advise the presenting banker if he is holding the cheque over.

5. *Collection of Drafts on Himself.*—When the drawer of a cheque and the person paying it in are both customers of the same banker, the banker is considered to be the collecting agent of the customer who pays in the cheque. He is, therefore, entitled to receive it without comment, although he may know that the drawer has not funds sufficient to meet it, and he may legally hold the cheque until next day before returning it unpaid to the customer who has paid it in. If the banker acknowledges the receipt of such a cheque the acknowledgment cannot be taken by the customer to mean that the cheque has been paid. But the usual practice of bankers is to return unpaid cheques drawn on themselves on the day of receipt, or to send an advice that they are being held over. Crossed cheques drawn by one customer, and paid in by another customer, are within the scope of s. 82, and the banker, therefore, does not lose his statutory protection when dealing with such cheques. In the matter of presentation or of giving notice of dishonour the branches of a bank are entitled to the same time as if they were separate banks.

6. *Notice of Dishonour.*—This matter is treated on pp. 115–18. The banker is entitled, on the ground of banking custom, to debit a dishonoured cheque to his customer's account, despite the fact that he may have allowed the customer to draw against the cheque before clearance, and even although the cheque may not bear the customer's indorsement. The position is different as regards a bill discounted by the banker for his customer. Unless the customer has indorsed the bill, he is not liable should it be dishonoured on maturity. It is imperative, therefore, that all bills tendered for discount should bear the customer's indorsement. If a bill or cheque is dishonoured on presentation, but, before the presenting banker has had time to return it to his customer, it is reclaimed and paid, the banker should, nevertheless, inform his customer what has happened. It is to the customer's interest that he should know that the drawer or acceptor is not perhaps so strong financially as he was supposed to be.

7. **Defect in Customer's Title.**—Unless the banker has statutory protection, as with crossed cheques, or unless he is a holder in due course, as, for example, when a holder of a discounted bill, his right to retain the proceeds of instruments paid in by his customer depends on the customer's title. If the

customer's title is defective, the banker (except as above) is liable to the true owner of the instrument for conversion, or for money had and received to his use. Conversion is the " wrongful intermeddling with the goods of another for the purpose of taking them away from the party entitled to them " (Hart's *Law of Banking*, 4th edition, p. 609). It must be " an unauthorised act which deprives another of his property permanently or for an indefinite time " (*Hiort* v. *Bott*, 1874). A person who is innocently in possession of the goods, and has acted throughout without negligence, is yet liable to an action for conversion. Moreover, it is no defence to maintain that the party charged did not benefit by the transaction. The banker's liability exists for the statutory period of six years, and the plaintiff can claim as damages the value of the goods at the moment of conversion. In the case of a negotiable instrument this would be the sum stated on the face of the instrument. But though the banker may be sued for conversion, yet, being his customer's agent, he can claim to be indemnified by his customer, and is entitled to debit him with the amount he has had to pay the true owner.

But though the banker may have received money on his customer's behalf to which the customer is not entitled, the true owner has often no cause of action against the banker. For example, if the banker is a holder in due course (see " Effects of crediting as cash," *post*) of a negotiable instrument he acquires a good title to it against the true owner. Again, the banker may have a lien on the instrument, in which case, by s. 27 (3), Bills of Exchange Act, 1882, he is deemed to be a holder for value to the extent of his lien, and he is, therefore, protected against the rights of the true owner, and is entitled to sue all parties to the instrument, notwithstanding his customer's defective title, provided that the banker took the instrument in good faith and without negligence, and that, where the instrument was a cheque, that it was not crossed " not negotiable." (But when a banker is within the terms of s. 82, he is protected when dealing with " not negotiable " crossed cheques.)

The banker also has statutory protection against the true owner, through s. 82, for crossed cheques; and through the Amendment Act of 1932, for crossed bankers' drafts; s. 95 for dividend warrants; and s. 17, Revenue Act, 1883, for certain orders for payment similar in form to cheques. Unless he is covered by these protective sections, the banker is liable to the true owner

if he takes a document bearing a forged or unauthorised indorsement, as no title can be acquired through a forgery (Bills of Exchange Act, 1882, s. 24).

8. *Collection of Uncrossed Cheques.*—The statutory protection of s. 82 only applies to cheques crossed *before they reach the banker's hands.* If, therefore, a banker credits or pays the proceeds of an *uncrossed* cheque, made payable to bearer or order, which he *collects* for a customer or a stranger, he is liable to the true owner in a suit for conversion if the person who receives the money has no title to it. The banker's position when holder for value is dealt with under " Effects of crediting as cash," *post.*

9. *Collection of Crossed Cheques for Strangers.*—The statutory protection of the crossed cheques sections only applies to crossed cheques collected for a customer. Accordingly, if the banker receives a crossed cheque for a stranger, crediting a " Sundry Persons " account, and paying over the proceeds when cleared, he is liable to the true owner in a suit for conversion. Being simply an agent of the person who receives the money, he cannot contend that he is a holder for value.

10. **Effects of Crediting as Cash. Banker Holder for Value.**—Considerable difficulty has arisen from time to time owing to the practice of crediting at once to a customer's account cheques paid in by him, irrespective of the fact that the banker will not receive payment of the amounts until the cheques have been cleared. In *Capital & Counties Bank* v. *Gordon*, 1903, it was held that this practice deprived the bank of the protection of s. 82 (quoted on p. 72), and in 1906 the Bills of Exchange (Crossed Cheques) Act was passed, which declares that the banker receives payment of a crossed cheque within the meaning of s. 82 notwithstanding that he credits his customer's account with the amount thereof before clearance. This Act undoubtedly protects the collecting banker against the true owner of the cheque, when, in the ordinary course of business, he credits crossed cheques as cash to his customer's account. It seems quite logical to assume that " credits his customer's account " should mean an effective credit, *i.e.*, one entered in the pass-book and communicated to the customer. (See *Gilbart Lecture*, No 3, 1925.) As to whether the protection of the Act would still apply if the customer has the right to draw against the cheques before clearance is a matter on which it is difficult to express an opinion. There have been so many conflicting judgments since the Gordon case startled the banking world, that it does not seem possible to write with any degree of confidence on this subject.

In regard to uncrossed cheques, as the banker has no statutory protection, he must stand or fall by his customer's title to the cheques, unless the banker can sustain the position of a holder for value with its resultant advantages. The mere crediting as cash is not sufficient; there must be, in addition, some definite agreement, expressed or implied, that the customer may draw against such cheques before clearance (*Underwood* v. *Barclays Bank Limited*, 1924). The practice of some banks of printing a notice in their pass-books, or on their credit slips, reserving the right to postpone payment of cheques drawn against uncleared effects, would naturally militate against such a contention.

Prior to the Underwood case, it was considered that the crediting as cash gave the customer an immediate right to draw against the items, and that the banker became a holder for value. Now, however, it would appear that the customer has not the right to draw, and that the banker is not a holder for value, unless there is an agreement that the customer may draw against the cheques before clearance. Accordingly, in the absence of such an agreement, the answer, "Effects not cleared," is apparently quite justified. The rights of a holder for value are substantial, for the banker, as such, has the rights of a holder in due course against all prior parties except where the cheque or bill is overdue. In such a case the banker takes it subject to any defects of title affecting it at maturity (s. 36 (2)), *i.e.*, he is in the same position as he would be if he were the holder for value of a "not negotiable" cheque. There are occasions when the banker is undoubtedly a holder for value, as, for example: (1) when he gives cash in exchange for a cheque drawn on another banker, (2) when he credits his customer with the amount of the cheque as soon as it is paid in, and allows him to draw at once against the amount, and (3) when the cheque is expressly paid in to reduce the amount of an overdraft. When the banker is a holder for value it is considered that he collects the proceeds of a cheque for himself, and not as agent for his customer. (See Note, p. 135.)

To sum up, a collecting banker cannot claim to be in the position of a holder for value, and, therefore, become entitled to whatever advantages may, for the time being, attach to him in that capacity, unless he deals with the cheque in a way which implies something different from merely collecting the proceeds for his customer; if, when dealing with the cheque, he acts strictly as his customer's agent, he is, apart from statutory protection, entirely dependent upon his customer's title.

It should be noted that where the instrument bears a forged or unauthorised indorsement, no rights can be obtained through or under such indorsement, and no party can become a "holder." In such a case, therefore, a banker who has given value for the instrument is liable to the true owner, and has no right of recourse against any parties, except parties who indorsed the instrument after the forgery was committed.

11. Cashing or Exchanging Cheques.—A banker, if he cares to do so, is quite justified in cashing or exchanging cheques drawn on another banker, but in any transaction of the kind he is quite outside the protection of s. 82. His chief danger lies in his liability to the true owner, who is entitled to sue him should the indorsement prove to be forged or unauthorised, as in such cases the banker cannot get a good title. And, if the cheque is a "not negotiable" crossed cheque, a defect in the title of any previous holder would render the banker liable to the true owner. Provided there is no question of a forged or unauthorised indorsement, or of the cheque being overdue, or of a "not negotiable" crossing, the position of a banker who has taken the instrument in good faith is that of a holder in due course. To sum up, unless a cheque is a "not negotiable" crossed cheque, it makes no difference to the banker's risk whether the cheque is crossed or uncrossed. If the cheque is a bearer one, the risk is less, since no question of a forged or unauthorised indorsement can arise.

It is immaterial whether the cashing is done for a customer or a stranger. In either case, the banker is outside the protection of s. 82, and must fall back on his rights as a holder in due course. If the cashed or exchanged cheque bears the indorsement of the person who received the money, or if the banker holds the receiver's written request for its encashment, then the banker has recourse against him; otherwise, the receiver would probably not be liable on the instrument except in the case of a forgery. But the banker's rights against the receiver of the money do not affect his liability to the true owner. Moreover, there is the further risk that the cheque may be dishonoured for lack of funds, or the drawer may stop payment. In both cases, provided the indorsements are genuine, the banker could sue the drawer. He would, however, lose his right of suit against the drawer if the cheque was crossed "not negotiable," and he had cashed it for a person whose title was defective or non-existent.

PART II

BILLS OF EXCHANGE AND PROMISSORY NOTES

CHAPTER I

BILLS OF EXCHANGE

NOTE.—Throughout this and the next two chapters the references refer to the sections of the Bills of Exchange Act, 1882, which is given in full in the Appendix.

1. **Introductory.**—Owing to the great development of banking in this country, the cheque has become the most popular instrument of payment. The bill of exchange, however, still plays an important part in financing the internal trade of the country. For trade purposes the bill of exchange has several important advantages over the cheque. The wholesale trader or manufacturer wants to get payment for his goods as soon as possible, in order that he may use the money to finance further transactions. On the other hand, the retailer, in many instances, does not want to pay for the goods until he has sold them. The bill of exchange possesses the qualities necessary to satisfy, in certain circumstances, both of these requirements. The wholesale trader draws a bill of exchange on his debtor, the retail trader, who "accepts" it, thereby engaging to pay it at a fixed future time. The bill is then returned to the wholesale trader, who has a document which he can discount with his banker, provided that both parties are of good financial standing. And the retailer has the term for which the bill is to run to sell his goods and thus provide himself with the requisite funds to meet his acceptance.

Bills of exchange offer further advantages to the business community. The creditor who takes a bill from his debtor has an instrument which (1) fixes definitely the date at which he is to receive payment, (2) affords written evidence of his debt in a convenient form, and (3) the creditor has an immediate

right of recourse against the parties liable on the bill if it is dishonoured on its maturity.

2. **Definition.**—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 (*a*). 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 (*b*).

SPECIMEN FORMS.

Stamp.

London,
£10 *1st January*, 1935.

On demand pay Mr. John Brown or order the sum of Ten pounds for value received.

CHARLES SMITH.

To Mr. A. S. Robinson,
3, East Street, Portlea.

Stamp.

Bristol,
£50. *1st May*, 1935.

On presentation pay Bearer the sum of Fifty pounds.

JOHN JONES.

To A. C. Davis, Esq.,
Newport.

Stamp.

Manchester,
£20. *10th April*, 1935.

Pay Messrs. A. Dunn and C. Newton or order the sum of Twenty pounds value received.

JAMES FREDERICK.

To Mr. G. Pearce,
Midland Street, Liverpool.

(*a*) Section 3 (1). (*b*) Section 3 (2).

Stamp.

£100. *London,*
1st April, 1935.

One month after date pay to the order of The Southland Cycle Co., Ltd., the sum of One Hundred pounds for value received.

JOHN TAYLOR & Co.

To Mr. John Stevens,
Gravesend.

Stamp.

£50. *Hull,*
15th June, 1935.

On 31st December, 1935, pay Mr. C. Harcourt or bearer Fifty pounds.

HENRY GEORGE.

To Maxton and Co., Ltd.,
Leeds.

Stamp.

£100. *Dublin,*
1st August, 1935.

One month after sight pay to me or my order One Hundred pounds for value received.

JAMES PHILLIPS.

To John Pritchard, Esq.,
The Elms, Port Newton.

The person giving the order in a bill is called the "drawer," who is said to "draw" the bill. The person to whom the order is addressed is called the "drawee," and the person to whom, or to whose order, the money is to be paid, is called the "payee." The drawer, having written the order and signed it, sends the instrument to the drawee, who expresses his assent to the order by writing his name across it. By so doing the drawee is said to accept the bill, and thereupon becomes the "acceptor." If the drawee refuses to accept the bill he is said to dishonour it by non-acceptance. The acceptor returns the accepted bill to the drawer, who sends it to the payee, who negotiates the bill or presents the bill on its maturity. If the acceptor refuses to pay on presentment he is said to dishonour the bill by non-

payment. If the payee himself wished to negotiate the bill to another person he would write his name on the back of it: that is to say, he would "indorse" the bill. A "holder" of a bill is the payee or indorsee who is in possession of it, or the bearer thereof (*a*)*: "He is," says Mr. Justice Byles, "the person in actual or constructive possession of the bill and entitled at law to recover its contents from the parties to it." A "holder in due course" is a holder who has taken a bill, complete and regular on the face of it, (1) before it was overdue and without notice of previous dishonour, and (2) in good faith and for value, and without notice when the bill was negotiated to him of any defect in the title of the person who negotiated it (*b*). † A "transferor by delivery" is the holder of a bill payable to bearer who negotiates it by delivery without indorsing it (*c*). A "referee in case of need" is a person whose name has been written on the bill by the drawer or an indorser and to whom the holder may resort in case of dishonour by non-acceptance or non-payment (*d*). A person who signs a bill without receiving value therefor, and for the purpose of lending his name to some other person, is called an "accommodation party" (*e*). A person not already liable on the bill who, with the holder's consent, accepts it after protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn, is called an "acceptor for honour" (*f*). A person who pays a bill after protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn, is called a "payer for honour" (*g*).

The first observation to be made about the legal definition of a bill of exchange is that the order to pay, issuing from the drawer and addressed to the drawee, must be unconditional. This does not mean that the drawee may not make his acceptance conditional, or that there may not be conditional indorsements: such conditions do not invalidate the instrument or take away from it its negotiable character. It is only the order to pay that must be unconditional. An order to pay out of a particular fund (such as "Pay A.B. or order One Hundred pounds out of proceeds of 50 bales of Cotton shipped per s.s. *Swallow*") is not unconditional; but an unqualified order to pay, coupled with (1) an indication of a particular fund out of which the

(*a*) Section 2. (*b*) Section 29 (1). (*c*) Section 58 (1). (*d*) Section 15.
(*e*) Section 28 (1). (*f*) Section 65 (1). (*g*) Section 68 (1).

* See Note D, p. 102. † See Note, p. 135.

drawee is to reimburse himself, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the bill is unconditional (*a*). For example, the following order to pay has been held to be a valid bill: "Please pay to Messrs. X or order £600 on account of moneys advanced by me for the S. and F. Co." (*Byles on Bills*, 17th edition, p. 117). If the example of an invalid bill quoted above had been worded as follows: "Pay A.B. or order One Hundred pounds against 50 bales of Cotton shipped per s.s. *Swallow*"—it would have been a valid bill.

The definition states that a bill of exchange must be in writing, but writing includes print and typewriting. The writing may apparently be done by a pencil. The written order must be addressed by one person, the drawer, to another person, the drawee, and it must be signed by the drawer, or by some one authorised to sign on his behalf. The order must require the person to whom it is addressed to pay the amount either on demand, or at a fixed time or determinable future time, to, or to the order of, a specified person or to bearer. The sum payable must be a sum certain. A bill need not specify the value given or the place where it was drawn or is payable (*b*).

3. **Inland and Foreign Bills.**—An inland bill is one both drawn and payable within the British Islands, or drawn within the British Islands upon some person resident therein. The British Islands include the United Kingdom of Great Britain and Northern Ireland,* the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to them forming part of the dominions of His Majesty (*c*). Unless the contrary appear on the face of a bill the holder may treat it as an inland bill (*d*). An inland bill is generally a *sola* bill, that is to say, it appears on one piece of paper only. Foreign bills are generally drawn in "sets" of two or three.

4. **Payee.**—Where a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty (*e*). 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 to one or some of several payees. A bill may also be made payable to the holder of an office for the time being (*f*). Where the payee is a fictitious or non-existing person the bill

(*a*) Section 3 (3). (*b*) Section 3 (4). (*c*) Section 4 (1).
(*d*) Section 4 (2). (*e*) Section 7 (1). (*f*) Section 7 (2).

* But exclusive of the Irish Free State (see p. 504).

may be treated as payable to bearer (*a*). 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 (*b*).

5. **Drawee and his Acceptance.**—The drawee must be named or otherwise indicated in a bill with reasonable certainty (*c*), but it is thought that a banker would be justified in paying a bill domiciled with him, and duly accepted, if the drawee's name is omitted. 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 (*d*). 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 (*e*).

The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer (*f*). An acceptance must be written on the bill and be signed by the drawee: the mere signature of the drawee is sufficient. It must not express that the drawee will perform his promise by any other means than the payment of money (*g*). A bill may be accepted before it is signed by the drawer, or while otherwise incomplete (*h*), or when it is overdue or after dishonour by non-acceptance or non-payment (*i*). 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 (*j*). An acceptance may be either "general," that is, an unqualified assent to the order of the drawer, or "qualified," that is, one which varies the effect of the bill as drawn (*k*). An acceptance is qualified which is "conditional," payment by the acceptor being then dependent on the fulfilment of a stated condition, or "partial," that is, an acceptance to pay part of the amount for which the bill is drawn, or "local," that is, an acceptance to pay at a particular place *and there only*, or qualified as to time, or the acceptance of some one or more of the drawees but not of all (*l*).

(*a*) Section 7 (3). (*b*) Section 5 (1). (*c*) Section 6 (1).
(*d*) Section 6 (2). (*e*) Section 5 (2). (*f*) Section 17 (1).
(*g*) Section 17 (2). (*h*) Section 18 (1). (*i*) Section 18 (2).
(*j*) Section 18 (3). (*k*) Section 19 (1) and (2).
(*l*) Section 19 (2, *a*, *b*, *c*, *d*, and *e*).

EXAMPLES OF GENERAL ACCEPTANCE

(1) Accepted, John Smith.

(2) Accepted at 3, Commercial Street, Northtown, John Smith.

(3) Accepted payable at Bullion Bank, Ltd., Northtown, John Smith.

(4) John Smith.

EXAMPLES OF QUALIFIED ACCEPTANCE

(1) Conditional Acceptance. "Accepted payable on condition of one month's renewal, John Smith."

(2) Partial Acceptance of Bill for £100. "Accepted for £50 only, John Smith."

(3) Local Acceptance. "Accepted payable at Bullion Bank, Ltd., Northtown, *and there only*, John Smith."

(4) Qualified as to time. Bill of Exchange drawn at one month after date. "Accepted payable three months after date, John Smith." (See also (1) above.)

(5) Qualified as to parties. Bill drawn on John Smith and John Brown, accepted by one only. "Accepted, John Smith."

6. **Signature.**—No person is liable as drawer, indorser or acceptor of a bill who has not signed it as such (*a*), but a person signing in a trade or assumed name is liable thereon as if he had signed it in his own name (*b*), while 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 (*c*). 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 (*d*). Where a signature indicates that the signatory signs for or on behalf of a principal, or in a representative character, he is not personally liable; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not free him from personal liability (*e*). Subject to certain statutory exceptions, a 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

(*a*) Section 23. (*b*) Section 23 (1). (*c*) Section 23 (2).
(*d*) Section 25. (*e*) Section 26 (1).

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, but an unauthorised signature not amounting to a forgery may be ratified (*a*).

The drawee is precluded from denying to a holder in due course "the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill" (*b*). Accordingly, if the drawee accepts a bill to which the drawer's signature has been forged, the drawee will not be able to set up the forgery against a banker, provided the banker is a holder in due course. It is the duty of the drawee to make certain that the bill he accepts bears a genuine signature made or authorised by the drawer, and if he accepts a forged bill he does so at his peril. With regard to indorsements, a different position arises, as the drawee, where the bill is drawn payable to the drawer's order, is precluded from denying the drawer's capacity, but not the genuineness or validity of his indorsement, even if the indorsement is on the bill at the time it is accepted (*c*). And where the bill is made payable to the order of a third person, the drawee cannot deny the existence of the payee and his capacity to indorse, but he can deny the genuineness or validity of the payee's indorsement. As regards a banker who pays a bill of exchange domiciled with him which bears a forged indorsement, the statutory protection given to bankers by s. 60 applies only to cheques. Hence, if the banker pays a bill bearing a forged indorsement he is liable to the true owner in an action for conversion. In addition, he cannot debit his customer's account with the money he has paid out on such a bill, unless the customer by his acts or conduct is precluded from setting up the forgery. But where a bill is drawn payable to bearer, or has become so by genuine indorsement in blank, the banker who pays it to a holder with no title has a good discharge against his customer, since he has paid the bearer of a bearer bill. If the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer, and the banker is protected should he pay it under a forged indorsement.

7. **Amount.**—The sum payable by a bill must be a sum certain, even though it is required to be paid (1) with interest, or (2) by stated instalments, or (3) by stated instalments with

(*a*) Section 24. (*b*) Section 54 (2, *a*). (*c*) Section 54 (2).

a provision that, upon default in payment of any instalment, the whole shall become due, or (4) according to a rate of exchange to be ascertained as directed by the bill (*a*). When there is a discrepancy between the amounts as expressed in words and in figures, the sum denoted by the words is the amount payable (*b*). 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 (*c*). Interest expressed to be payable in a bill should be distinguished from the interest awarded as damages on dishonour (see "Dishonour of Bill," pp. 114–15). An alteration of the amount is a material alteration (*d*). 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, in the absence of some express stipulation, is calculated according to the rate of exchange for sight drafts at the place and on the day of payment (*e*).

8. **Date of Bill and Computation of Due Dates.**—The omission of the date does not render a bill invalid (*f*). 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, the holder may insert the true date of issue or of acceptance, and the bill is payable according to the date so inserted. If, however, the holder in good faith and by mistake inserts a wrong date, and 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 be payable as if the date so inserted had been the true date (*g*). A date on a bill is, in the absence of evidence to the contrary, deemed to be the true date (*h*). A bill may be ante-dated, post-dated or dated on a Sunday (*i*). Any alteration of the date of a bill is a material alteration (*j*).

A bill must be payable on demand or at a fixed or determinable future time (*k*). A bill is payable on demand which is expressed to be so payable, or which is payable at sight or on presentation or in which no time for payment is expressed (*l*). 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

(*a*) Section 9 (1). (*b*) Section 9 (2). (*c*) Section 9 (3).
(*d*) Section 64 (2). (*e*) Section 72 (4). (*f*) Section 3 (4).
(*g*) Section 12. (*h*) Section 13 (1). (*i*) Section 13 (2).
(*j*) Section 64 (2). (*k*) Section 3 (1). (*l*) Section 10 (1).

indorses it, be deemed a bill payable on demand (*a*). A bill is payable at a determinable future time which is expressed to be payable (1) at a fixed period after date or sight (*b*), or (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. An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect (*c*).

Where a bill is not payable on demand three days of grace are, unless the bill otherwise provides, added to the time of payment as fixed by the bill, and the bill is payable on the last day of grace (*d*). No days of grace can be claimed on bills drawn "payable without days of grace," or payable on a certain date "fixed." Thus a bill drawn "On 5th May, 1919, fixed, pay, etc.," falls due on 5th May, 1919, while a bill drawn "On 5th May, 1919, pay, etc.," falls due on 8th May, 1919 (see *Q. B. P.*, Nos. 165–175. Where a bill is payable by instalments days of grace can be claimed on each instalment. Bank post bills issued by the Bank of England are paid without days of grace. It should be noted that bills drawn one, two or three days after date or sight take the three days of grace though subject only to the twopenny stamp duty.

The currency of a tenor bill is the period during which it is current, *i. e.* the period between date of issue and date of maturity. The day after a tenor bill is due to be paid the bill is no longer current. When a bill is payable so many months after date, the due date is calculated by counting the required number of months from the date of the bill, and adding the three days of grace. The term "month" means a calendar month (*e*). This does not mean that a bill dated, say, April 30th at one month after date falls due on June 3rd (that is to say, May 31st plus three days of grace). Such a bill falls due on June 2nd (one month from April 30th brings us to May 30th); three days of grace added make June 2nd. The term "calendar month" in the Bills of Exchange Act is probably used to distinguish a "bill" month from a lunar month of four weeks. At all events by the universal custom of bankers a bill dated on, say, September 30th at three months after date falls due on January 2nd, not on January 3rd. Where a bill is payable at a fixed period after

(*a*) Section 10 (2). (*b*) Section 11 (1). (*c*) Section 11 (2).
(*d*) Section 14 (1). (*e*) Section 14 (4).

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 (*a*). No account must be taken of "lacking" days, so that a bill dated 31st January at one month after date falls due on 3rd March. When a bill is payable after sight, the time begins to run from the date of acceptance, if the bill be accepted (*b*). If the sighting date does not coincide with the date of acceptance, the due date is calculated from the sighting date. Thus if a bill is accepted "Sighted 1st May, Accepted 2nd May," the period runs from the sighting date, not from the date of acceptance. If a bill has been noted or protested for non-acceptance or non-delivery the period runs from the date of noting or protest (*c*). 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 acceptance for honour (*d*). Where bills drawn abroad are payable "middle of January," "middle of February," and so on, such bills are generally considered to fall due on the 18th of the month; this date is arrived at by adding three days to the 15th. In some foreign countries days of grace are not allowed, but bills drawn in such countries payable in this country take the usual three days. Where bills drawn in Russia and some other Eastern countries are dated according to the old style, thirteen days must be added to bring the date into agreement with the calendar we use. Sometimes both styles of dating are given, such as May 5/18: the time is reckoned, of course, from the 18th. 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 (*e*).

When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day (*f*). 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

(*a*) Section 14 (2). (*b*) Section 14 (3). (*c*) Section 14 (3).
(*d*) Section 65 (5). (*e*) Section 72 (5). (*f*) Section 14 (1*a*).

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 (*a*). No account must be taken of "lacking" days, so that a bill dated 31st January at one month after date falls due on 3rd March. When a bill is payable after sight, the time begins to run from the date of acceptance, if the bill be accepted (*b*). If the sighting date does not coincide with the date of acceptance, the due date is calculated from the sighting date. Thus if a bill is accepted "Sighted 1st May, Accepted 2nd May," the period runs from the sighting date, not from the date of acceptance. If a bill has been noted or protested for non-acceptance or non-delivery the period runs from the date of noting or protest (*c*). 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 acceptance for honour (*d*). Where bills drawn abroad are payable "middle of January," "middle of February," and so on, such bills are generally considered to fall due on the 18th of the month; this date is arrived at by adding three days to the 15th. In some foreign countries days of grace are not allowed, but bills drawn in such countries payable in this country take the usual three days. Where bills drawn in Russia and some other Eastern countries are dated according to the old style, thirteen days must be added to bring the date into agreement with the calendar we use. Sometimes both styles of dating are given, such as May 5/18: the time is reckoned, of course, from the 18th. 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 (*e*).

When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day (*f*). 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

(*a*) Section 14 (2). (*b*) Section 14 (3). (*c*) Section 14 (3).
(*d*) Section 65 (5). (*e*) Section 72 (5). (*f*) Section 14 (1*a*).

succeeding business day (*a*). Bank Holidays in England and Ireland are Easter Monday, Whit Monday, first Monday in August, and 26th December if a week-day. If the 26th December is a Sunday, Monday, 27th December, becomes a Bank Holiday. The Bank Holidays in Scotland are New Year's Day (if this day falls on a Sunday the next day becomes a bank holiday), first Monday in May and first Monday in August. Christmas Day and Good Friday were formerly "statutory" holidays in Scotland, and "common law" holidays in England and Ireland, but Scotch law is now uniform with the latter. In Ireland, by the Bank Holiday (Ireland) Act, 1903, St. Patrick's Day March 17th, is a bank holiday, and if this day falls on a Sunday then the next day.

9. **Alterations.**—"An alteration is material," says Chalmers, "which in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial; and it may be that even this test is not wide enough." A material alteration of a bill or acceptance, without the assent of all parties, discharges the bill except as against a party who made, authorised or assented to the alteration, and subsequent indorsers, but where an 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 according to its original tenor (*b*). Material alterations, amongst others, are alterations of the date, amount, time of payment, place of payment, and where a bill has been accepted generally the addition of a place of payment without the acceptor's assent (*c*).

10. **Consideration for a Bill.**—Consideration is defined by Mr. Justice Lush as "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." To be valid, contracts not under seal must be supported by consideration. Reference to the consideration need not be made in the body of the bill, though, as a matter of fact, the words "value received" are generally included. Valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract or by an antecedent debt or liability (*d*). Where value has at any time been given for a

(*a*) Section 14 (1b). (*b*) Section 64 (1).
(*c*) Section 64 (2). (*d*) Section 27 (1).

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 (*a*). The holder of a bill who has a lien on it is a holder for value to the extent of his lien (*b*). An accommodation party to a bill, that is, a party who has signed it without having received any consideration for so doing, is liable on the bill to a holder for value, whether the holder knew such party was an accommodation party or not (*c*). Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value (*d*).

11. **Inchoate Bills.**—A simple signature on blank stamped paper delivered by the signer in order that it may be converted into a bill operates as a *prima 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, acceptor or indorser, as the case may be. Similarly, if a bill is wanting in any material particular the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit (*e*). Such an instrument can be enforced against any person who became a party prior to its completion only if it was filled up within a reasonable time, and strictly in accordance with the authority given. But a holder in due course to whom such an instrument has been negotiated after completion, may enforce it as if it had been filled up within a reasonable time and in accordance with the authority given (*f*).

12. **Issue and Delivery.**—Issue is the first delivery of a bill or note, complete in form to a person who takes it as a holder (*g*). Delivery of a bill is its transfer of possession, actual or constructive, from one person to another (*h*). Every contract on a bill is incomplete and revocable until delivery of the instrument in order to give effect thereto, but where an acceptance is written on a bill it is irrevocable if the drawee has given notice to, or according to the directions of the person entitled to the bill that he has accepted it (*i*). Delivery as between immediate parties, and as regards a remote party other than a holder in due course, must be made by the proper party or under his authority, and may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring

(*a*) Section 27 (2). (*b*) Section 27 (3). (*c*) Section 28.
(*d*) Section 30 (1). (*e*) Section 20 (1). (*f*) Section 20 (2).
(*g*) Section 2. (*h*) Section 2. (*i*) Section 21 (1).

the property in the bill. If, however, 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 (*a*). 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 is presumed until the contrary is proved (*b*).

13. **Negotiable Bills and Negotiation.**—The characteristics of a fully negotiable instrument are stated in another part of this book (see p. 341). A negotiable bill may be payable either to order or to bearer (*c*). 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 shall not be transferable (*d*). 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" (*e*) that is, one that specifies no indorsee (*f*). A bill expressed to be payable to the order of a specified person, and not to him or his order, is nevertheless payable to him or his order at his option (*g*). A bill which contains words prohibiting transfer, or indicating an intention that it should not be transferable, is not negotiable (*h*), but the words prohibiting transfer must be definite. A bill payable to order or bearer cannot be made not transferable on the face of it, for the word "order" or "bearer" overrides the words prohibiting transfer. The words "not negotiable" when added to a crossed cheque have a special statutory significance which is explained elsewhere.

The negotiation of a bill is its transfer from one person to another in such a manner as to constitute the transferee the holder of the bill (*i*). A bill payable to bearer is negotiated by delivery, (*j*) if to order by indorsement and delivery (*k*). (See Part I, Chapter II, Indorsements.) A bill negotiable in its origin continues to be negotiable until it has been either restrictively indorsed or discharged (*l*). When 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 such a bill can acquire or give a better title than

(*a*) Section 21 (2). (*b*) Section 21 (3) (*c*) Section 8 (2).
(*d*) Section 8 (4). (*e*) Section 8 (3). (*f*) Section 34 (1).
(*g*) Section 8 (5). (*h*) Section 8 (1). (*i*) Section 31 (1).
(*j*) Section 31 (2). (*k*) Section 31 (3). (*l*) Section 36 (1).

that which the person from whom he took it had (*a*). For the purposes of negotiation, a bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation an unreasonable length of time, and what is unreasonable is a question of fact (*b*). Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue (*c*). 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 this does not affect the rights of a holder in due course (*d*). The holder of a bill has certain rights acquired by negotiation. He may sue on the bill in his own name (*e*). 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 amongst themselves, and may enforce payment against all parties liable on the bill (*f*). Where his title is defective: (1) if he negotiates the bill to a holder in due course that holder obtains a good and complete title to the bill, and (2) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill (*g*). Where a transferor by delivery negotiates a bill he warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless (*h*) A transferor by delivery does not escape liability if there is a prior forgery.

14. **Capacity of Parties.**—Capacity to incur liability as a party to a bill is co-extensive with capacity to contract (*i*). Where a bill is drawn or indorsed by an infant or corporation, having no capacity 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 (*j*).

15. **Liabilities of Parties and Estoppels.**—The drawee by accepting the bill is the person primarily liable. By accepting he engages to pay it according to the tenor of his acceptance (*k*), and is precluded from denying to a holder in due course (1) the

(*a*) Section 36 (2). (*b*) Section 36 (3). (*c*) Section 36 (4).
(*d*) Section 36 (5). (*e*) Section 38 (1). (*f*) Section 38 (2).
(*g*) Section 38 (3). (*h*) Section 58 (3). (*i*) Section 22 (1).
(*j*) Section 22 (2). (*k*) Section 54 (1).

existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (2) in the case of a bill payable to the drawer's order the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (3) 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 (*a*). When the drawer of a bill delivers it to the payee, or, if it is payable to himself, when he indorses it to another person, the drawer himself becomes liable to the holder. By the act of drawing the bill the drawer engages that on due presentment it shall be accepted and paid according to its tenour, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken. He is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (*b*). The indorsers of a bill are liable in the order in which their names appear on the instrument, the first indorser in point of time being liable to the second, the second in point of time being liable to the third, and so on.

16. **Bill not an Assignment of Funds in Hands of Drawee.** In England a bill does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and if the drawee does not accept he is not liable on the instrument (*c*). In Scotland, however, 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 (*d*)

(*a*) Section 54 (2). (*b*) Section 55 (1, *a*, *b*).
(*c*) Section 53 (1). (*d*) Section 53 (2).

NOTE D (See p. 90)—The term "holder" is given a wide meaning in this definition. It includes, as the definition states, the payee, the indorsee, and the bearer of the bill. In regard to the payee, he is a party to the bill, and his title is indefeasible, and so is that of an indorsee, though, if he be merely an agent for collection, he has to account to his principal. In the case of the bearer, who is defined in the Act as the person in possession of a bill or note payable to bearer, the holder may not necessarily be a lawful holder. For instance, the finder of a bill, duly indorsed so as to make it payable to bearer, is a "holder," but he has no title, though his *bona fide* transferee for value can get a good title. No person can get a title through a forged or unauthorised signature, and such a person is not a "holder." In the general way the expression "holder" includes every person in lawful possession of the instrument

CHAPTER II

BILLS OF EXCHANGE (*continued*)

1. **Presentment for Acceptance.**—A bill should be presented for acceptance as soon as possible, for until the drawee has accepted it, he is not liable to the holder. Refusal of acceptance gives the holder an immediate right of recourse against the drawer and indorsers. But though presentment for acceptance is advisable it is not legally necessary except in three cases: (1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument (*a*). Where such a bill is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time (*b*). If he does not do so, the drawer and all indorsers prior to that holder are discharged (*c*). (2) Where a bill expressly stipulates that it shall be presented for acceptance, or (3) 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 (*d*).

2. *Rules Governing Presentment for Acceptance.*—The rules governing presentment for acceptance are as follows: 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 (*e*). If there are two or more drawees, not partners, presentment must be made to them all, unless one has authority to accept for all, in which case presentment may be made to him only (*f*). Where the drawee is dead, presentment may be made to his personal representative (*g*); if bankrupt, to him or to his trustee (*h*). Where authorised by agreement or usage a presentment through the post office is sufficient (*i*). The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance

(*a*) Section 39 (1). (*b*) Section 40 (1). (*c*) Section 40 (2).
(*d*) Section 39 (2). (*e*) Section 41 (1, *a*). (*f*) Section 41 (1, *b*).
(*g*) Section 41 (1, *c*). (*h*) Section 41 (1, *d*) (*i*) Section 41 (1, *e*).

may treat the bill as dishonoured by non-acceptance (*a*). If a qualified acceptance is taken without the authorisation or subsequent consent of the drawer or an indorser, such drawer or indorser is discharged from his liability on the bill, but this rule does not apply to a partial acceptance provided due notice has been given (*b*). A drawer or indorser receiving notice of a qualified acceptance is deemed to have assented thereto unless he express his dissent to the holder within a reasonable time (*c*).

3. *When Presentment for Acceptance is Excused.*—Presentment of the bill for acceptance is excused, and the bill may be treated as dishonoured by non-acceptance: (1) where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill (*d*); (2) where, after the exercise of reasonable diligence, such presentment cannot be effected (*e*); (3) where, although the presentment has been irregular; acceptance has been refused on some other ground (*f*). The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment (*g*).

4. *Banker Presenting Bill for Acceptance.*—Where a banker holds an unaccepted bill on his own behalf, he will, in his own interests, present it for acceptance as early as possible, because on acceptance he secures additional security in the acceptor's liability, and, if acceptance is refused, he can take action at once against the other parties. The same considerations arise when a banker receives an unaccepted bill for presentation on behalf of a customer, and although in certain cases presentment for acceptance is not legally necessary in order to retain recourse against the drawer and indorsers, the banker must act in a manner most beneficial to his customer's interests, irrespective of any latitude the law allows him. As his customer's agent, the banker must exercise skill and diligence in serving his customer's interests, and since early presentment is very advantageous, the banker must make early presentment; if he fails to do so, and loss ensues to his customer, then the banker will be responsible. If the work which the banker has undertaken to do, whether by express agreement or by implication, is delegated to an agent or correspondent, the banker will be held responsible for the acts of the agent or correspondent, and

(*a*) Section 44 (1). (*b*) Section 44 (2). (*c*) Section 44 (3).
(*d*) Section 41 (2, *a*). (*e*) Section 41 (2, *b*). (*f*) Section 41 (2, *c*).
(*g*) Section 41 (3).

is liable for any loss sustained by the customer through the negligence of the agent or correspondent.

Accordingly, when an unaccepted bill is received for presentment, the banker should present it without delay. Generally speaking, he would present it on the day of receipt. If, however, the bill has only two or three days to run, presentment for acceptance is sometimes delayed until the due date, when it is presented both for acceptance and payment. But there is an element of risk even in a brief delay like this. When a bill is presented to the drawee for acceptance he is entitled to possession of it, and may retain it for twenty-four hours. Hence, if the drawee does not accept or refuse at once, the banker is quite justified in leaving the bill with him, but it should be called for the next day. In calculating the twenty-four hours, non-business days are excluded. Should the drawee refuse to deliver up the bill, accepted or unaccepted, after the expiration of this period, or destroy it, he is liable in an action for damages. When a bill has to be presented in a place not within the bank's area of call, the banker sends it to his agent for presentment by him, or if there is no banker near, the bill may be sent by post to the drawee, a stamped addressed envelope being inclosed for its return. When any of the circumstances are out of the ordinary and the banker is unable to effect prompt presentment for acceptance he should always advise his customer or correspondent of the circumstances. This should be done as a matter of courtesy, even if not legally necessary.

A banker must not take a qualified acceptance without the consent of his principal. If he is offered a qualified acceptance he should communicate at once with his customer or correspondent asking for instructions. A banker should not take the drawee's cheque and surrender the bill, because this would release the drawer and indorsers of the bill, and if the cheque is dishonoured, the drawer and indorsers of the bill, not being parties to the cheque, are not liable on the cheque. Before taking a cheque, therefore, the principal's consent must be obtained. It should be noted, however, that, by taking a cheque, the banker secures an instrument on which the drawee is liable, whereas he is not liable as drawee of a bill, but, if a cheque is taken, the bill must not be given up. A bill may be accepted on the back, but it is usual to accept on the face of the instrument. Since in this country a signature prefixed by a courtesy title is not accepted as a signature,

the acceptor should not sign in this manner, but an expression added by way of description would not invalidate the acceptance. When bills are drawn payable "after sight," the date of "sighting," which should be the date on which the bill is first presented to the drawee, must be added to the acceptance, and the currency of the bill will run from the sighted date even if the date of acceptance is a day later (*Q. B. P.* No. 103). If no place of payment is specified in the bill, the banker cannot insist on the drawee making it payable in the banker's own town, and, as the addition of a place of payment is a material alteration, the banker cannot add one without the acceptor's consent.

The only person competent to accept a bill is the drawee or his authorised agent, and if a bill is drawn on one party and accepted by another, the latter is not liable on the instrument as an acceptor. If a bill is addressed to a trading partnership any partner can bind the firm by signing the firm's name. Where the partnership is a non-trading one the position is different, and only the partner that accepts will be personally liable, unless his co-partners have authorised him to accept bills on their behalf. Where a bill is drawn on two or more drawees, who are not partners, each of the drawees must accept, unless one is specially authorised to accept on behalf of all. If all do not accept, those who do accept are liable, but the acceptance would be a qualified one. A banker who receives a bill of this nature for presentment for acceptance should present it to each of the drawees, unless one drawee has proper authority to accept for all. An infant is not liable on an acceptance given in his personal capacity, but, if acting within the scope of his authority as agent, he can bind his principal. In accordance with the rules already given, presentment, in the case of a bankrupt drawee, may be made either to the bankrupt himself or to his trustee. If the drawee is dead, presentment may be made to his legal representative. Presentment in these two cases is not legally necessary under the Act, but it is desirable that a banker should make due presentment.

When a bill which a banker has presented on behalf of a customer or a correspondent is dishonoured by non-acceptance, the banker should return it to the customer or correspondent. If the bill is a foreign bill it must be protested on dishonour by non-acceptance, but, in the absence of instructions, it can be noted, and a formal protest extended later, if desired.

5. *Presentment for Acceptance of Documentary Bill.*—See Part VI, Chapter VII, p. 430.

6. **Presentment for Payment.**—The general rule, to which there are exceptions, is that a bill must be duly presented for payment; if it is not so presented the drawer and indorsers are discharged (*a*). The acceptor remains liable on a bill accepted generally even if it be not presented for payment (*b*), and if, 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 due date (*c*).

7. *Rules Governing Presentment for Payment.*—The rules governing presentment for payment are as follows: (1) Where the bill is not payable on demand, presentment must be made on the due date (*d*). (2) Where the bill is payable on demand, 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. "Reasonable" time in this connection depends on the nature of the bill, the usage of trade and the facts of the case (*e*). (3) Presentment must be made by the holder or his authorised agent to the payer or his authorised agent at a reasonable hour on a business day and at the proper place (*f*). The proper place is the place of payment (if any) specified in the bill; or, if no place of payment is specified, at the drawee's address as given in the bill; or, if no place of payment is specified, and no address is given, at the drawee's place of business, if known, and if not, at his ordinary residence, if known; in any other case the bill may be presented to the drawee or acceptor wherever he can be found, or at his last known place of business or residence (*g*). (4) Where a bill is presented at the proper place, and no person authorised to pay or refuse payment can be found there, no further presentment need be made (*h*). (5) Where there are two or more acceptors, not partners, and no place of payment is specified, presentment must be made to them all (*i*). (6) Where the acceptor is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and he can be found (*j*). (7) Where

(*a*) Section 45. (*b*) Section 52 (1). (*c*) Section 52 (2).
(*d*) Section 45 (1). (*e*) Section 45 (2). (*f*) Section 45 (3).
(*g*) Section 45 (4). (*h*) Section 45 (5). (*i*) Section 45 (6).
(*j*) Section 45 (7).

authorised by agreement or usage, presentment through the post office is sufficient (*a*). (8) When the holder presents a bill for payment, he should exhibit it to the payer, and, on payment, deliver it up to him (*b*).

8. *When Delay in Presentment for Payment is Excused.*—Delay in presentment is excused when 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 (*c*).

9. *When Presentment for Payment is Dispensed With.*—Presentment is dispensed with (1) where it cannot be effected; (2) where the drawee is fictitious; (3) as regards the drawer when 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; (4) as regards an indorser, where the bill was accepted or made for his accommodation, and he has no reason to expect that the bill would be paid if presented; (5) where presentment is waived. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity of presentment (*d*).

10. *Banker Presenting Bill for Payment.*—When a banker presents a bill for payment on behalf of a customer or correspondent, he must bear in mind the rules given in the preceding paragraphs, and all presentments should be made in accordance with those rules. He must, therefore, present the bill to the acceptor for payment on its due date, and at a reasonable hour. Any delay owing to his negligence may render him liable to make good any loss that may ensue. If, however, a bill is drawn payable elsewhere than at the residence or place of business of the drawee, and the banker, through presenting the bill for acceptance, has not time to present the bill for payment on its due date, the delay is excused, and the drawers and indorsers are not discharged from their liability owing to the delay in presenting the bill for payment. A bill drawn payable at one place, but accepted payable at another, must be presented for payment at the place where it is accepted payable, and since a bill must be presented for payment on its due date, presentment the day previous is not a good presentment. The fact that an acceptor has accepted

(*a*) Section 45 (8). (*b*) Section 52 (4).
(*c*) Section 46 (1) (*d*) Section 46 (2).

a bill without giving value for it, and merely to accommodate the drawer or an indorser, is not sufficient to excuse presentment for payment in due course. And if the banker is informed that the bill will be dishonoured when presented for payment, even if the information is given by the acceptor himself, the bill must nevertheless be duly presented on its due date.

When the services of another banker are necessary in order to present a bill, the bill should, as a rule, be sent to that banker two or three days before maturity, though some bankers do not care to receive bills until the day preceding maturity. When, however, bills are not made payable at a bank, it is better to dispatch them to the collecting banker in time sufficient for him to make inquiries as to any special expenses that may be incurred by him in effecting presentation at a place some distance away. A receipt made by a banker on a bill does not require a stamp, as s. 9, Finance Act, 1895, expressly exempts such a receipt from stamp duty, but only if given by a banker in the ordinary course of his business.

If a bill is not domiciled at a bank, *i. e.* if it is not made payable at a bank, and it is not paid by the acceptor on presentation, a note should be left with the acceptor, containing full particulars of the bill, stating that it is at the bank awaiting payment, and that the matter requires to be attended to before close of business. The bill itself must not be left at the acceptor's address, as obviously such a proceeding would mean the surrendering to the acceptor of the evidence of his liability. Presentment for payment is quite a different matter from presentment for acceptance. In the latter case, the drawee is entitled to possession of the bill, because, until he accepts it, he is not liable on it.

The acceptor should, strictly speaking, pay his acceptance in legal tender, and the presenting banker should not give up the bill except for cash, unless he has received instructions to the contrary. If a cheque is offered, it must be one the fate of which can be ascertained in time to give due notice of dishonour of the bill if the cheque be unpaid. The bill should not be given up, but should be attached to the cheque, and surrendered with the cheque on its payment. If the banker were to give up the bill before the cheque is paid, and in exchange for it, all right of recourse against the drawer and indorsers of the bill would be lost, and he would be left with nothing better than the acceptor's dishonoured cheque and his liability as the drawer of the cheque.

If, when the bill is presented for payment, the acceptor tenders

in part payment some, but not all, of the money due, the banker should accept the money tendered as he does not run any risk by so doing. As Lord Ellenborough said in *Gould* v. *Robson*, 1807: "No one can object to [part payment] because it is in aid of all the others who are liable on the bill." In such circumstances, the bill must not be surrendered; it should, generally speaking, be noted for the unpaid balance, and notice of dishonour must be given, the notice clearly showing that the bill was dishonoured by non-payment of part of the amount of the bill (*Q. B. P.*, No. 299). It is usual also to write on the back of the bill a receipt for the money paid. The receipt should state that the payment is a part payment, and should also make it clear that the money has been accepted without prejudice to the rights of other parties liable on the bill, *e. g.* "Received of —— acceptor of the within written bill, the sum of —— in part payment and without prejudice to the rights of all other parties." If the bill is a foreign bill, it must be protested for the unpaid balance. Part payment discharges a bill *pro tanto*, i. e. so far as the amount paid goes.

11. **Short Bills, or Bills for Collection.**—When bills are handed to a banker by his customer in order that they may be collected when due, and the proceeds credited to the customer's account, they are called "Bills for Collection." This term distinguishes them from "Bills Negotiated," or "Bills Discounted," which are bills for which the banker has given value at once, instead of waiting till he has received the proceeds of the bills when collected. By reason of a practice of entering bills for collection in the pass book in the particulars column with the amounts short of the cash column, they are sometimes called "short bills"—an expression having no reference to the terms for which the bills are drawn. Since these bills are merely handed to the banker for collection and credit of the proceeds, when received, to the customer's account, the banker has no property in them. If, therefore, the banker became bankrupt, his trustee could not claim the bills as part of the banker's assets, and they must be returned to the customer. But, though the banker has no property in the bills, he has a right to retain the bills or their proceeds against any amount due to him by his customer. If a banker, though he has no right to do so, negotiates bills left with him for collection, a transferee who is not aware of the true facts gets a good title, and the customer cannot claim from the transferee either the

bills or their proceeds. When a bill lodged for collection matures after the death of a customer, the banker should credit the proceeds to the executorship account, less any amount for which he has a lien. There is a danger to the banker in the mere collection of bills handed to him by his customer, because if the customer has no title or a defective title to the bills, the banker will be liable to the true owner of the instruments for conversion. It is only in the case of crossed cheques that the banker obtains any statutory protection against the rights of third parties.

12. **Bills Discounted.**—These are fully treated later (see pp. 288–93).

13. **Bills Payable at London Office or London Agents.**—Country branches or banks are always willing to make arrangements that their customers' acceptances shall be payable at the London Head Office, or, if the bank has no London Office, at their London Agents. In order that the bills may be met at maturity, the country branch or bank must receive the customer's instructions in time sufficient for an advice to reach London in advance of the dates when the bills are due for payment. If the bills are to be met, the country branch or bank credits London with the amounts of the bills, and enters corresponding debits in the customer's account. The advice form should be ruled so that the essential particulars can be readily seen. If the bill is a documentary bill, particulars of the attached documents of title should be inserted in the advice.

14. **Bills Retired.**—When a bill is withdrawn from circulation or taken up before it is due, it is said to be "retired." Bankers have an invariable rule not to have anything to do with bills domiciled with them unless the bills are domiciled by their customers, or by customers of another bank for which the banker acts as agent. If, therefore, the acceptor of a bill, domiciled not in accordance with the rule referred to, tenders money in order to meet the bill when due, the banker should refuse to take the money and should return the bill unpaid (*Q. B. P.*, No. 429). When a domiciled bill is retired by the drawer, it is the usual practice to obtain from him a cheque or other authority to debit his account. To retire the bill does not discharge it, and the bill must not, therefore, be cancelled, for, when it falls due, the drawer or any indorser can enforce it against any prior parties. The customer's order to retire his own or another person's acceptances does not require stamping (see *Q. B. P.*, Nos. 1518–22). If a

customer has discounted bills with a banker, and while the bills are still current desires to withdraw his credit balance, the banker cannot prevent him doing so, nor can he compel him to retire the bills. Not until the bills fall due and are dishonoured has the banker any right of recourse against the customer. But if a customer, contingently liable to the banker on bills discounted for him, becomes bankrupt, the banker is entitled to retain until maturity and payment sufficient of any credit balance to meet the contingent liability on the bills.

15. **Rebate.**—The term "rebate" is generally applied to the allowance made to an acceptor (or other party liable on the bill) who retires his acceptance before it is due. This allowance is calculated at an agreed rate on the amount of the bill for the time the bill has still to run. When the bill is given up under rebate it should be indorsed with a discharge such as: "Received payment of the within bill this —— day of —— from —— under rebate at —— per cent per annum" (see also "Documentary Bills under Rebate," p. 431).

The word "Rebate" has also other meanings. When bankers discount bills, it is the practice to credit the discount charged at once to Discount Account (or other subsidiary Profit and Loss Account), but since the discount on a bill is not earned until the bill matures, it follows that at any given date, as at the half-yearly balances, credit will have been taken for discount not yet earned. Accordingly, to counteract this, the amount of unearned discount is calculated and debited to Discount Account, and the amount carried forward to the next half-year. The amount of unearned discount, or, as it is generally called, "Rebate on Bills Discounted," usually figures as an item on the Liabilities side of a Bank Balance Sheet. In this way the current half-year only receives credit for discount actually earned in the period under review. Any amount of interest or commission refunded to a customer is also called a "Rebate."

16. **Payment of Bill by Banker.**—When a drawee accepts a bill payable elsewhere than at his business or private address, the bill is said to be "domiciled" at the place of payment. Unless a banker has expressly or impliedly agreed to pay bills domiciled with him, he is under no legal obligation to do so, even though the customer has a balance sufficient to meet the bills. But if a bill is presented to a banker bearing an acceptance domiciling the bill with him, he is entitled to pay it, irrespective

of the state of the account. Such an acceptance is in itself sufficient authority to justify the banker paying the bill, and charging it to the customer's account. Instead of the normal relationship of debtor and creditor, the relationship between a customer and a banker paying domiciled bills is that of principal and agent. In the provinces, bankers usually require an advice to pay bills domiciled with them, but London bankers generally pay without an advice. If, however, a country banker has been in the habit of paying a customer's bills without advice, he cannot alter his method of procedure without giving due notice to his customer. Advice forms offer some advantages, but they cannot be taken to guarantee the genuineness of any indorsements on the bill.

When paying domiciled bills many of the considerations to be borne in mind are similar to those arising when paying a cheque —the acceptor of a bill being in a position analogous to that of the drawer of a cheque. The following are the points which the paying banker must consider. That the instrument is in form a bill of exchange; that it is properly stamped; that the acceptor's signature is genuine; that the bill is due; that the bill is in order as regards the words and figures, confirmation of material alterations and the indorsements. Furthermore, the acceptor must not have countermanded payment, or be dead or bankrupt. These and other considerations are dealt with elsewhere (see pp. 50–9). If the bill is overdue, it does not appear that the banker is bound to pay it, but he would be justified in doing so. In such circumstances it is always desirable to get the acceptor's authority before paying the bill (*Q. B. P.*, No. 211). As in the case of cheques, if a customer pays in specially to meet a certain bill, the banker must apply the credit as directed, without regard to the condition of the customer's account. A bill to which the drawee's signature has been forged is not his bill, and if a banker pays such a bill he cannot debit it to the drawee's account, unless the drawee, by his acts or conduct, is precluded from setting up the forgery. Where the banker has paid to a *bona fide* holder a bill bearing a forged acceptance, the banker cannot compel the *bona fide* holder to return the money if the holder has been in possession long enough to have altered his position, and this is probably so, even though he may not actually have altered his position (see also pp. 67–8). A banker's position, if he pays a bill under a forged indorsement, is treated elsewhere (see pp. 57–9). If

a person not a customer sends a bill domiciled with a banker to that banker with a request that the proceeds may be remitted to him, the banker should decline to accede to the request, and should return the bill, pointing out to the sender that the bill must be presented in the manner consonant with mercantile custom and usage.

17. **Dishonour of Bill.**—A bill of exchange may be dishonoured by non-acceptance or non-payment. 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 will lose his right of recourse against the drawer and indorsers (*a*). The "customary time" in this connection is considered to be twenty-four hours. A bill is dishonoured by non-acceptance when acceptance is refused or cannot be obtained, or when presentment is excused and the bill remains unaccepted (*b*). On dishonour by non-acceptance an immediate right of recourse against the drawer and indorsers accrues to the holder, provided certain formalities have been complied with, and no presentment for payment is necessary (*c*). A bill is dishonoured by non-payment when it is duly presented for payment which is refused or cannot be obtained, or when presentment is excused and the bill is overdue and unpaid (*d*). On dishonour by non-payment an immediate right of recourse against the drawer and indorsers accrues to the holder (*e*), provided due notice of dishonour has been given, and also against the acceptor, to whom notice need not be sent (*f*).

An action on a dishonoured bill may be commenced at any time after the expiration of the last day of grace, and within six years from the date when the right to bring an action first accrued. The person to bring the action is the person entitled to receive the money.

Where a bill is dishonoured in this country 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, drawer or a prior indorser: (1) the amount of the bill; (2) interest from the time of presentment for payment if the bill is payable on demand, and from the

(*a*) Section 42 (1). (*b*) Section 43 (1). (*c*) Section 43 (2).
(*d*) Section 47 (1). (*e*) Section 47 (2). (*f*) Section 52 (3).

maturity of the bill in any other case; and (3) the expenses of noting, or of protest if it is necessary (*a*). Where a bill is dishonoured abroad the sum recoverable is the amount of the re-exchange with interest thereon until the time of payment (*b*).

18. **Notice of Dishonour.**—The general rule is that, when a bill has been dishonoured by non-acceptance or 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 (*c*). Where, however, 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 are not prejudiced by the omission (*d*). Further, if a bill is dishonoured by non-acceptance and due notice of dishonour is given, it is not necessary to give notice of a subsequent dishonour by non-payment unless in the meantime the bill has been accepted (*e*).

19. *Persons Authorised to Serve Notice.*—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 (*f*). Hence it cannot be given by an indorser if such party has been discharged for want of punctual notice. Notice 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 (*g*). *Effect.*—Notice given by the holder, or on his behalf, enures for the benefit of subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given (*h*). Notice given by or on behalf of an indorser enures for the benefit of the holder, and all indorsers subsequent to the party to whom notice is given (*i*).

20. *To whom Notice must be given.*—As stated, notice must be given to the drawer and each indorser. Instead of giving it to the party himself, it may be given to his agent in that behalf (*j*). A notice left at the drawer's or indorser's shop or office will suffice. Where the person giving notice knows that the drawer or indorser is dead, notice must be given to a personal representative, if there be one and he can be found (*k*). If the party entitled to receive notice is bankrupt, notice may be given either to the party himself or to the trustee (*l*). Where there are two or more drawers or indorsers, not partners, notice must

(*a*) Section 57 (1, *a*, *b*, *c*). (*b*) Section 57 (2). (*c*) Section 48.
(*d*) Section 48 (1). (*e*) Section 48 (2). (*f*) Section 49 (1).
(*g*) Section 49 (2). (*h*) Section 49 (3). (*i*) Section 49 (4).
(*j*) Section 49 (8). (*k*) Section 49 (9). (*l*) Section 49 (10).

be given to each, unless one has authority to receive notice for the others (*a*). Where a bill when dishonoured is in the hands of an agent he may either give notice to the parties liable on the bill or give notice to his principal (*b*).

It has been stated above that any party to a dishonoured bill who does not receive due notice of dishonour is discharged from his liability. The holder, therefore, of a dishonoured bill should, for his own protection, himself send a notice to all parties liable on the instrument. If he does not do so, then his right to sue any party other than his own indorser (to whom he would naturally give notice) and the acceptor, would depend upon the promptness with which the party to whom he gives notice sends on the notice to the party from whom he, in turn, received the bill. And this second party must, in like manner, promptly transmit the notice to his transferor, and so on. If the holder himself gives notice to the drawer and all indorsers, he avoids all risk of loss that might be incurred through the negligence of the other parties. Another point of importance is that the notice must be given by a party who is himself liable on the bill. Hence, prompt notice by the holder to his transferor A makes A liable, and he, in his turn, by giving prompt notice to his transferor B can make B liable. But if A so delays in giving notice to B as to make his notice ineffectual, then B, being no longer liable on the bill, cannot give an effectual notice to his transferor C.

21. *Form of Notice.*—Notice may be written or verbal, or partly written and partly verbal, and may be given in any terms which sufficiently identify the bill and convey the fact of its dishonour (*c*). The return of the bill itself is a sufficient notice (*d*), but, of course, a holder would not usually adopt this method. A written notice need not be signed (*e*), and need not state on whose behalf it was given. A misdescription of the bill does not vitiate the notice unless the party to whom notice is given is misled thereby (*f*). Where notice of dishonour is duly addressed and posted the sender is deemed to have given due notice, notwithstanding any miscarriage by the post office (*g*). Notice by telegram or telephone is probably good; the latter would appear to be included in the category of personal or verbal communications (*h*).

(*a*) Section 49 (11). (*b*) Section 49 (13). (*c*) Section 49 (5 and 7).
(*d*) Section 49 (6). (*e*) and (*f*) Section 49 (7).
(*g*) Section 49 (15). (*h*) Section 49 (5 and 7).

A suitable form of notice is as follows—

Address,
Date.

To.....
.....

Dear Sir,

I hereby give you notice that the undermentioned bill upon which you are liable as drawer (*or indorser*) has been dishonoured by non-payment (*or non-acceptance*). I have to request immediate payment of the amount of the said bill £....., together with expenses....., total £.....

Yours faithfully,
.....
Manager.

Amount £.....
Date ..... Tenor ..... Due .....
Drawer .....
Acceptor.....
Indorsers .....
Payable at .....
Answer given .....

22. *Time for Giving Notice.*—Notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter (*a*). If the person giving and the person to receive notice reside in the same place, notice to be effectual must reach the latter on the day after dishonour. Where they reside in different places, notice must be sent off not later than the day after dishonour, if there be a post at a convenient hour on that day, and if not, by the next post thereafter (*b*). Where a party to a bill receives notice he has himself the same period of time for giving notice that the holder has after dishonour (*c*). An agent giving notice to his principal 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 (*d*). Delay in giving notice is excused where 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 (*e*).

23. *When Notice is dispensed with.*—Notice of dishonour is dispensed with: (1) When, after the exercise of reasonable diligence, notice cannot be given to or does not reach the party

(*a*) and (*b*) Section 49 (12). (*c*) Section 49 (14).
(*d*) Section 49 (13). (*e*) Section 50 (1).

sought to be charged. (2) Where notice is waived. (3) As regards the drawer: (i) where drawer and drawee are the same person; (ii) where the drawee is a fictitious person or a person without capacity to contract; (iii) where the drawer is the person to whom the bill is presented for payment; (iv) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill; (v) where the drawer has countermanded payment. (4) As regards an indorser: (i) where the drawee is a fictitious person or a person without capacity to contract and the indorser was aware of the fact at the time he indorsed the bill; (ii) where the indorser is the person to whom the bill is presented for payment; (iii) where the bill was accepted or made for his accommodation (*a*).

24. *Banker Giving Notice.*—If a bill, which a banker has discounted for a customer, is returned unpaid, he will debit it to his customer's account, returning the dishonoured bill to him. If, however, the customer's balance is insufficient, and the banker does not wish to allow him an overdraft, the banker can hold the bill, and give notice of dishonour at once to his customer and all parties liable on the bill. The banker is entitled to retain the customer's balance, and, pending settlement, should debit the bill to a suspense account and keep possession of the bill until it is paid. Where the bill is paid in for collection, the banker is the customer's agent, and as such must give due notice of dishonour, and will be responsible for any loss occasioned by his neglect to do so. An agent may either give notice to all parties liable on the bill, or he may give notice only to his principal. The method adopted by a banker in practice is the safer and better course of giving notice to the principal, his customer. As a matter of fact, this method is not only safer and better, but is also less expensive and troublesome, and in most cases, indeed, the only practicable method, since the addresses of the other parties are not generally known to the banker. If the banker adopted the former course, he would be responsible for any loss that might ensue to the customer through the banker's failure to transmit effectual notice to all of the parties liable. If a banker holds a bill as security and it is not paid on presentation, he must give due notice of dishonour.

25. **Noting and Protest** (*b*).—A bill is noted in order to secure

(*a*) Section 50 (2, *a*, *b*, *c*, *d*).

(*b*) NOTE.—The specimen forms in this Article are taken from Brooke's *Notary*.

official evidence that it has been dishonoured. When a bill is to be noted, the notary public, to whom the dishonoured bill is taken, re-presents it for acceptance or payment, whichever is required, and if the drawee or acceptor still refuses to accept or pay the bill (as the case may be) the bill is noted. The noting is a minute made on a dishonoured bill or on a slip of paper affixed to the bill, by the notary public. The minute contains the date of presentment, the notary's charges, a reference to the notary's register, and his initials. A slip of paper is also attached to the bill stating the substance of the answer given to the notary's clerk when he presented the bill, *e. g.* "No effects," "No advice." This noting is sometimes followed by a formal document bearing the notarial seal, and attesting the fact that the bill has been dishonoured. This document is called a "protest," and is accepted as evidence in the Courts of every civilised country that the bill has been dishonoured. The law requires a protest to contain a copy of the bill, the notary's signature, the name of the person for whom the bill is protested, the place and date of protest, the cause or reason for protesting, the demand made and the answer given (if any), or the fact that the drawee or acceptor could not be found (*a*). 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 (*b*).

PROTEST OF A BILL FOR NON-ACCEPTANCE

On this the.....day of....., One thousand nine hundred and ....., at the request of A. B., of the City of London, merchant, and holder of the original bill of exchange, a true copy of which is on the other side written (*or is underwritten*), I, R. D., of the said City, Notary Public, by royal (*or lawful*) authority duly admitted and sworn, did produce and exhibit the said original bill of exchange to C. D. on whom it was drawn, at (*his address*) for his acceptance, and demanded acceptance thereof, to which he replied that it would not be accepted at present (*or the answer given*). Wherefore I, the said Notary at the request aforesaid did protest and by these presents do solemnly protest against the drawer of the said bill of exchange and all other parties thereto, and all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, charges and interest already incurred and to be hereafter incurred by reason of the non-acceptance of the said bill of exchange. Thus done and protested at.....in the presence of E. F. and G. H., witnesses.

Dated this.....day of.....One thousand nine hundred and.....

Which I attest,

(Seal) R. D.

Notary Public, L.....

(*a*) Section 51 (7). (*b*) Section 51 (8).

PROTEST OF A BILL ON NON-PAYMENT

On this the.....day of (*continue as in other form*) did produce and exhibit the said bill to E. F., on whom the said bill was drawn (*and by whom the same was accepted, if the bill has been accepted*) at his office situate at, etc., and demand payment thereof, and he answered that it would not be paid.

Whereupon I, the said Notary, at the request aforesaid, did protest and by these presents do protest against the drawer of the said bill, and all other parties thereto, and all others concerned, for exchange, re-exchange and all costs, charges, damages and interest, present and to come (*or future*) for want of payment of the said bill.

Thus done, etc.

Where a foreign bill 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 this formality is omitted, the drawer and indorsers will be discharged from all liability on the bill (*a*), but the acceptor remains liable (*b*). If a foreign bill has been accepted as to part it must be protested as to the balance (*c*). A foreign promissory note which has been dishonoured does not require to be protested (*d*). A bill which has been protested for non-acceptance may be subsequently protested for non-payment (*e*). Where an inland bill has been dishonoured by non-acceptance or non-payment it may, if the holder thinks fit, be noted, and if the bill is for a large amount, or if legal proceedings are likely, or if there are several indorsers, it may be desirable for the holder to have an inland bill noted or protested, but such a course is not legally necessary in order to preserve recourse against the drawer and indorsers (*f*). If, however, an inland bill is to be accepted for honour or paid for honour, protest for non-acceptance or non-payment, as the case may be, is a necessary preliminary (*g*).

When a bill is noted or protested it *may* be noted on the day of its dishonour, and *must* be noted not later than the next succeeding day. This is provided for by the Bills of Exchange (Time of Noting) Act, 1917.* If a bill has been duly noted the protest may be extended subsequently as of the date of the noting (*h*). The place of dishonour is the place in which to

(*a*) Section 51 (2). (*b*) Section 52 (3). (*c*) Section 44 (2).
(*d*) Section 89 (4). (*e*) Section 51 (3). (*f*) Section 51 (1).
(*g*) Sections 65 (1) and 68 (1). See Acceptance for Honour and Payment for Honour *post*. (*h*) Section 51 (4).

* As, however, s. 45 (1) of the Act of 1882 states that a bill not payable on demand must be presented on the day it falls due, a notary, when noting such a bill, should do so on the day of maturity, in order that he can testify that the bill was duly presented on the day it fell due and was dishonoured.

protest a bill; but (1) a bill presented by post, and returned by post dishonoured, 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 so received, then not later than the next business day; (2) if a bill, drawn payable at the business place or residence of some person other than the drawee, is 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 (*a*).

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 (*b*).

Protest is dispensed with by any circumstances which would dispense with notice of dishonour. Delay in noting or protesting is excused when 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 (*c*).

26. *Protest for Better Security.*—On the bankruptcy of the acceptor during the currency of a bill, the holder may cause it to be protested for better security against the drawer and indorsers (*d*). This must not be taken to imply that the holder, on the acceptor's bankruptcy, can demand further security from the drawer and indorsers that the bill will be met at maturity, though under some foreign codes a protest in such circumstances will enable the holder to do this. The only effect so far as the law of this country is concerned is that any one who desires to accept the bill for honour, may do so as if it had been protested for dishonour by non-acceptance.

27. *Householder's Protest.*—Where a dishonoured bill or note has to be protested, and no notary is available at the place of dishonour, any householder or substantial resident may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate will operate as if it were a formal protest of the bill (*e*). The following form,

(*a*) Section 51 (6). (*b*) Section 93. (*c*) Section 51 (9).
(*d*) Section 51 (5). (*e*) Section 94.

which is given in the first schedule to the Bills of Exchange Act, may be used for this purpose—

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 ..... 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. }

The bill itself should be annexed, or a copy of the bill, and all that is written thereon, should be underwritten.

28. *Collecting Banker's Duty as to Noting and Protesting.*—When a banker presents a bill which he has received for collection and it is dishonoured, he must carry out his customer's instructions as to noting and protesting, and he will be liable if he neglects to do so. In the absence of instructions to the contrary, a banker would not usually note a dishonoured inland bill, but if the bill is a foreign bill, the banker must protest it, unless he has received precise instructions from his customer or correspondent not to do so. If a notary public is not available a householder's protest must be drawn up. The banker, however, may content himself with noting the foreign bill, pending further instructions as to the formal protest. He is justified in doing this, because, as already stated, if the bill is duly noted, the formal protest may be extended any time thereafter as of the date of noting. It is the custom of some country banks to send bills for noting to the notary a short time before the close of business, but in London the practice is to send them after closing time. This gives an opportunity for the bill to be taken up at the presenting bank right up to the close of business. Inland bills are often marked "N/N," which means "Not to be noted." If a dishonoured cheque bears foreign indorsements, it should be duly noted or protested.

29. *Stamp on Protest.*—Protests are subject to stamp duty. Where the stamp duty on the dishonoured bill or note does not exceed one shilling, the protest requires a stamp of the same amount as on the bill or note. In any other case, the stamp is one shilling. The stamp may be an adhesive one, which must be cancelled by the notary (Stamp Act, 1891, s. 90 and sched.). An impressed stamp may also be used. The stamp

duty on any notarial act other than a protest is one shilling. There is no stamp duty required in connection with noting.

30. **Effect of Statute of Limitations on Bills.**—The Statute begins to run from the time the right of action first accrued, and no action can be maintained unless it be brought within six years from that time. The barring of a holder's right of action bars also his transferee's right of action. Normally, the time begins to run in the acceptor's favour from the due date of the bill, unless by the terms of the acceptance, presentment to the acceptor for payment is requisite, in which case it would appear that the time runs from the date of presentment. If the bill is accepted after its due date, it is considered that the time would run from the date of acceptance (Chalmers' *Bills of Exchange*, 8th edition, p. 337). If the bill is payable on demand, the time begins to run in the acceptor's favour from the date of issue (presumably the date of the bill) and not from the date of demand or dishonour. So far as regards the drawer and indorsers, the statute, generally speaking, begins to run from the time when notice of dishonour was first received. A bill may be taken out of the Statute by an acknowledgment *in writing* of the debt, signed by the party to be charged, or by his authorised agent, or by a payment by that party on account of interest or principal.

31. **Discharge of Bill.**—Complete discharge of a bill is effected only when all the rights of action upon the instrument are extinguished. Payment, merger, waiver, cancellation and alteration are the grounds of discharge. *Payment.*—A bill is discharged by payment in due course by, or on behalf of, the drawee or acceptor. "Payment in due course" means payment made at, or after, the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective (*a*). Payment to a person who takes through or under a forged indorsement is not payment to the holder, and will not operate as a discharge, but a banker who pays to a person claiming through a forged indorsement a cheque drawn upon himself in good faith and in the ordinary course of business is protected (*b*). Payment must be in legal tender money, unless the holder agrees to accept some other form of payment. The exact sum must be tendered, but a part payment will discharge the bill *pro tanto*. If the holder takes the acceptor's cheque in

(*a*) Section 59 (1). (*b*) Section 60.

exchange for the bill, the holder will lose his rights against the drawer and indorsers of the bill, and if the cheque is dishonoured his only remedy is against the acceptor as drawer of the cheque. Payment by the drawer or indorser of a bill does not, generally speaking, operate as a discharge (*a*), but if an accommodation bill is paid in due course by the party accommodated it is discharged (*b*), for such party is the person primarily liable. If a bill payable to a third party is paid by the drawer, the drawer may enforce payment of the bill against the acceptor, but he cannot re-issue the bill (*c*). Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the payer 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 (*d*). *Merger.*—An example of discharge by merger is where the acceptor becomes the holder of a bill at or after maturity in his own right. *Waiver.*—When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing unless the bill is delivered up to the acceptor (*e*). The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but the rights of a holder in due course without notice of the renunciation are not affected by it (*f*). *Cancellation.*—Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged (*g*). 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 (*h*). An unintentional, mistaken or unauthorised cancellation is inoperative, but the burden of proof lies on the party who alleges that the cancellation was unintentional, mistaken or unauthorised (*i*). It sometimes happens that a banker wishes to return a bill which he has cancelled, in which case he marks it "Cancelled in error," and adds his initials, and provided the bill bears no foreign indorsements, his mistake in cancelling the bill is rectified. If, however, there is a foreign indorsement, difficulty may arise, as in

(*a*) Section 59 (2). (*b*) Section 59 (3). (*c*) Section 59 (2, *a*).
(*d*) Section 59 (2, *b*). (*e*) Section 62 (1). (*f*) Section 62 (2).
(*g*) Section 63 (1). (*h*) Section 63 (2). (*i*) Section 63 (3).

some foreign countries no recourse is possible against a party whose signature has been cancelled, even though the cancellation was done in error. Accordingly, it is possible that the holder or remitting banker in such a case may be justified in refusing to accept the returned bill, or in demanding an indemnity (*Q. B. P.*, Nos. 501–4. *Discharge by Alteration*, see p. 98).

32. **Acceptance for Honour.**—Where a bill has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person *not already liable on the bill* may, with the holder's consent, 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 (*a*). Such an acceptance must be written on the bill, and indicate that it is an acceptance for honour, and be signed by the acceptor for honour (*b*). If it does not expressly state for whose honour it is made it is deemed to be an acceptance for the honour of the drawer (*c*). An acceptance for honour may be for part only of the sum for which it is drawn (*d*). The following are examples of such acceptances—

(i) Accepted supra protest,
WILLIAM BROWN.

(ii) Accepted S.P.,
WILLIAM BROWN.

(iii) Accepted supra protest for the honour of John Robinson,
WILLIAM BROWN.

(iv) Accepted supra protest for the honour of John Robinson, with notarial charges ....., total £.....
WILLIAM BROWN.

The acceptor for honour of a bill undertakes to pay it on due presentment, 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 (*e*). The acceptor for honour is liable to the holder and to all parties subsequent to the party for whose honour he has accepted (*f*).

A dishonoured bill which has been accepted for honour supra protest must be protested for non-payment before it is presented for payment to the acceptor for honour (*g*). Thus the holder

(*a*) Section 65 (1). (*b*) Section 65 (3). (*c*) Section 65 (4).
(*d*) Section 65 (2). (*e*) Section 66 (1). (*f*) Section 66 (2).
(*g*) Section 67 (1).

of a bill which is to be accepted for honour must first present it to the drawee and protest it for dishonour by non-acceptance. Having secured the acceptance for honour, he must again present the bill to the drawee on the due date, and protest it for non-payment. This second presentment is made because "effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied if presented to him again when the period of payment had arrived." (*Hoare* v. *Cazenove*, 1812.)

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 is not in that place, the bill must be forwarded not later than the day following its maturity for presentment to him (*a*). Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment (*b*). If a bill is dishonoured by the acceptor for honour it must be protested for non-payment by him (*c*).

As to the maturity of a bill payable after sight which is accepted for honour, see p. 97.

33. **Payment for Honour.**—Payments for honour are not frequent in practice, and their intention is chiefly to preserve the credit of the persons for whom they are made. As the procedure is somewhat cumbrous and expensive, the better plan for a party, who wishes to intervene, is to obtain possession of the bill by paying the holder.

Where a bill has been protested for non-payment, any person may pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (*d*). Such a payment must be attested by a notarial act of honour which may be appended to the protest or form an extension of it (*e*). 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 (*f*).

Act of Honour on Payment (to be written at the foot of the Protest).
Afterwards on the ..... day of ..... in the year aforesaid before me the said notary and witnesses appeared Messrs. A. B. and Co., of London, merchants, and declared that they would pay the bill of exchange before pro-

(*a*) Section 67 (2). (*b*) Section 67 (3). (*c*) Section 67 (4).
(*d*) Section 68 (1). (*e*) Section 68 (3). (*f*) Section 68 (4).

tested under protest for the honour and upon the account of the C. D. Bank, Berlin, the second indorsers on the said bill.

Holding, nevertheless, the said second indorsers and all others concerned always bound and obliged for reimbursement in due form of law and according to the custom of merchants.

Principal	£100 : 0 : 0	Which I attest,
Notarial Charges	13 : 0	E. F.,
	£100 : 13 : 0	Notary Public.

Received the ..... day of ....., 19 , from Messrs. A. B. and Co., the sum of One Hundred pounds, thirteen shillings sterling, the amount of the said bill and notarial charges thereon.

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 has the preference (*a*). 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 succeeds to the rights and duties of the holder as regards the party for whose honour he pays and all parties liable to that party (*b*). The payer for honour is entitled to receive the bill and the protest on paying to the holder the amount of the bill and the notarial expenses (*c*). If the holder of a bill refuses to receive payment supra protest he loses his right of recourse against any party who would have been discharged by such payment (*d*).

34. **Lost Bills.**—If a bill is lost before it is overdue the person who was the holder of it can compel the drawer to give him another bill of the same tenor on indemnifying the latter against all persons in case the bill is subsequently found (*e*). In any action on a bill, the Court may order that the loss of the instrument shall not be set up provided a satisfactory indemnity be given (*f*).

35. **Foreign Bills.**—When foreign exporters draw bills on this country, the bills are generally drawn in English currency, pounds sterling, but when English exporters draw bills on their foreign debtors, they usually draw them in sterling, and not in the currency of the foreign country. The English exporter also often embodies in the bill the clause "Exchange as per indorsement." The rate at which the exchange is to be made is indorsed on the bill in London at the time of its first negotiation and before it goes overseas. The effect of this is to transfer to the foreign

(*a*) Section 68 (2). (*b*) Section 68 (5). (*c*) Section 68 (6).
(*d*) Section 68 (7). (*e*) Section 69. (*f*) Section 70.

drawee all risk of loss brought about by fluctuations in the exchanges. On the other hand, if the exchange moves in his favour, the foreign drawee derives a corresponding benefit. Naturally, the phrase " exchange as per indorsement " can only apply to bills drawn in sterling, and it is the general custom to insert it in bills drawn on countries where the exchanges are liable to violent fluctuations. The expression " to negotiate " as applied to bills means " to buy," and bankers who buy these bills are said to negotiate them. We append a specimen form of bill containing the phrase " exchange as per indorsement "—

Stamp.

London,
£100. 10*th June*, 1935.

Ninety days after sight pay this First of Exchange (Second and Third of the same date and tenor being unpaid) to the order of James Dunn the sum of One Hundred pounds. Exchange as per indorsement, value received, which place to account as per advice.

JOHN BROWN.

To A. C. Lawton,
Buenos Aires.

In case of need apply to H. Smith & Co.

Foreign bills drawn by English exporters can be sent for collection through a banker, who charges a commission for collection, or they can be sold. The banker who buys the bill quotes a price which takes into account the interest due to him for the time he will have to wait before he can collect the money from the foreign drawee.

If an English banker has bought a bill on a foreign place where he has no agent or correspondent, he can sell it to another banker, who is represented at the place concerned. When a banker sells a foreign bill he indorses it, and becomes liable to the buyer should the bill ultimately be dishonoured. To show this contingent liability he makes an entry in an account with such a title as " Liability for Foreign Bills negotiated." But as the banker looks to his customer for reimbursement should a bill be dishonoured, a like entry is made in an account headed " Customers' Liabilities for Foreign Bills negotiated," or " Liability for Foreign Bills negotiated as *per contra*." The item, " Liability for Indorsements," appears on the Liabilities side of a banker's balance sheet, to show the banker's liability, and the contra on the Assets side to show the customer's liability to the banker. After

sufficient time has elapsed for the bill to be returned if dishonoured, the entries are reversed, and the record of the contingent liability in respect of the particular bill in question extinguished.

In the Foreign Exchange table, the double quotation indicates buyers and sellers, in the same way as the double quotation for stocks and shares. The rates given in the table are the rates ruling in London for bills on foreign centres. If the rates are examined, it will be seen that there is no uniform system of quotation. In some cases the rate is given in foreign currency to the pound sterling, and, in others, shillings and pence or pence to the foreign currency unit. This particular difference is of great importance, and gives rise to some confusion in the minds of the unwary. If the rate is given in foreign currency to the pound sterling, a "high" rate—that is, one above the mint par of exchange—is said to be "favourable," because for each pound paid here, the buyer obtains a greater amount of foreign currency; conversely, a "low" rate—that is, one below par—is "unfavourable." The statement that a rise in the rate is equivalent to a fall in price (of the foreign currency), and that a fall in the rate is equivalent to a rise in the price, can now be understood. In the case of ordinary commodities, the money price varies for a fixed quantity, whereas in these foreign exchange quotations the price—*i. e.* the pound sterling—remains fixed, and the quantity of the commodity—*i. e.* the foreign currency—varies.

If, on the other hand, the rate is quoted in pence to the foreign unit, the opposite effects are produced, and "low rates are for us," that is, favourable, and "high rates are against us." This is because an increase in the number of pence we pay for each foreign unit is obviously a rise in the price, and we shall have to pay out more pounds sterling in London to obtain a stated amount of foreign currency. These quotations are similar to those for any other commodity in that the price varies and the quantity is fixed.

A specimen table is given on pp. 130 and 131. The rates are taken from *The Times* of Jan. 19th, 1939. The main table of rates is given on p. 130, together with comments on the day's movements as quoted in *The Times*, whilst certain Empire rates are given on p. 131.

FOREIGN EXCHANGES

The Times, Jan. 19th, 1939.

After touching \$4·67¾ in the early dealings the New York exchange was back at the over-night Wall Street level of \$4·68 by the gold fixing, and continued to show an upward tendency for the rest of the day, closing at \$4·68⅜, compared with \$4·67 13/16 on Tuesday. The premium on forward dollars again declined; it finished at 7/16 c., one month, and 1 7/16 c., three months. The strength of Canadian dollars against the United States dollar was a noteworthy feature, the Montreal rate remaining unaltered at \$4·71⅝; this reduces the discount on the Canadian dollar to 29/32. Francs were weaker at the start and the French exchange touched 177 7/16 f., but a good recovery occurred later and the rate finished at 177 15/64 f., against 177 9/32 f. on Tuesday. The discount on forward francs remained at ⅛ f., one month, and ¼ f., three months. Belgas depreciated to 27·70½ b., guilders to 8·62¾ fl., and Swiss francs to 20·74¼ f. The premium on forward Swiss francs at three months declined further to 7½ c. and that on forward guilders to 3 c.; on the other hand, the discount on forward belgas at three months was smaller at 1½ c. Free German marks depreciated further to 11·67½ m., the discount on registered marks remaining at 57¼–59¼ per cent.

Following is the list of foreign exchange rates issued under arrangements made by the London banks; it shows the range within which business was transacted yesterday. Bank rates are indicated by the figures given in parentheses following the place names :—

Place.		Method of Quoting.	Par of Exchange before Sept. 20, 1931.	Jan. 18.	Jan. 17.
	%				
New York	(1)	\$ to £	4·86 7/16	4·67¾–4·68⅜	4·67¼–4·67⅞
Montreal		\$ to £	4·86 25/32	4·71–4·72	4·71–4·72
Paris	(2)	Fr. to £	124·21	177 1/16–7/16	177 1/16–⅜
Brussels	(2½)	Bel. to £	35·00	27·65–27·71	27·63–27·67
Milan	(4½)	Lire to £	92·46	88¾–89⅛	88¾–89
Switzerland	(1½)	Fr. to £	25·22	20·70–20·75	20·68–20·72
Athens	(6)	Dr. to £	375·00	540–555	540–555
Helsingfors	(4)	M. to £	193·23	226½–227	226½–227
Madrid	(5)	Pts. to £	25·22	100–300 *	100–300 *
Lisbon	(4½)	Escu. to £	110·00	110–110⅜	110–110⅜
Amsterdam	(2)	Fl. to £	12·11	8·61–8·63½	8·60–8·62
Berlin	(4)	M. to £	20·43	11·64–11·69 (*a*)	11·63–11·66
Budapest	(4)	Pen. to £	27·82	23½–24	23⅛–24
Prague	(3)	Kc. to £	164·25	136¼–137¼	136–137
Danzig	(4)	Gul. to £	25·00	24½–25	24½–25
Warsaw	(4½)	Zloty to £	43·38	24½–25	24½–25
Riga	(6)	Lats to £	25·22	24¾–25¾	24¾–25¾
Bucharest	(4½)	Lei to £	813·60	650–670	650–670
Istanbul		£T. to £	—	5·75§	5·75§
Belgrade	(5)	Din. to £	276·32	203–213	203–213
Kovno	(5)	Lit. to £	48·66	27¼–28¼	27¼–28¼
Sofia	(6)	Lev. to £	673·66	370–400	370–400
Tallinn	(4½)	E. Kr. to £	18·16	17¾–18¼	17¾–18¾
Oslo	(3½)	Kr. to £	18·16	19·85–19·95	19·85–19·95

NOTE.—For continuation of table and notes see next page.

Stockholm (2½)	Kr. to £	18·16	19·35–19·45	19·35–19·45
Copenhagen (4)	Kr. to £	18·16	22·35–22·45	22·35–22·45
Alexandria	Pst. to £	97·50	97⅜–97⅝	97⅜–97⅝
Bombay (3)	Per rup.	1s. 6d.	1/5 29/32–31/32	1/5 29/32–31/32
Calcutta (3)	Per rup.	1s. 6d.	1/5 29/32–31/32	1/5 29/32–31/32
Madras (3)	Per rup.	1s. 6d.	1/5 29/32–31/32	1/5 29/32–31/32
Hong-kong	Per dol.	—	1/2 7/8–1/3 1/8	1/2 7/8–1/3 1/8
Kobe (3·285)	Per yen	24·58d.	1/1 15/16–2 1/16	1/1 15/16–2 1/16
Shanghai	Per dol.	—	8–8¾d.	8–8¾d.
Singapore	Per dol.	2s. 4d.	2/3 13/16–4 1/16	2/3 13/16–4 1/16
Batavia (3)	Fl. to £	12·11	8·59–8·63	8·58–8·62
Rio de Janeiro	Per mil.	5·90d.	3 1/16d.§ (*c*)	3 1/16d.§
Buenos Aires	Paper Pes. to £	11·45	20·36–20·44(*b*)	20·34–20·42
Valparaiso†	Pesos to £	40·00	117* (*d*)	117*
Montevideo	Per peso	4s. 3d.	18¼–19¼d.	18¼–19¼d.
Lima† (6½)	Soles to £	17·38	22·50–23·50	22·50–23·50
Mexico	Pesos to £	9·76	unquoted	unquoted
Manila	Per peso	24·66d.	2/1 9/16–15/16	2/1 9/16–15/16

* Nominal. † 90 days. § Sellers.

(*a*) Registered marks are quoted at a discount of 55½–60½ per cent.; (*b*) The official rate is $15, sellers, and the average remittance rate for importers, $17·13; (*c*) Sellers, official; (*d*) Latest "export" rate.

The following are the rates applicable for payments to the Bank of England for the Clearing Offices:—Spain: 106·50 pesetas; Turkey: 588 piastres; Italy: 88·88 lire.

EMPIRE EXCHANGE RATES

The following rates are for £100 London :—

BUYING RATES

—	Demand.	30 days' sight.	60 days' sight.	90 days' sight.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Australia	126 2 6	126 12 6	127 2 6	127 12 6
New Zealand	125 17 6	126 7 6	126 17 6	127 7 6

SELLING RATES

—	T.T.'s.	Demand.
	£ s. d.	£ s. d.
Australia	125 0 0	125 1 3
New Zealand	124 7 6	124 8 9

—	Buying.	Selling.
	£ s. d.	£ s. d.
S.A. Union Territory (T.T.'s)	100 17 6	100 2 6
Do (sight drafts)	101 2 9	100 2 6
Rhodesia (T.T.'s)	100 5 0	99 15 0
Do. (sight drafts)	100 10 3	99 15 0

35A. Referee in Case of Need.—The specimen bill of exchange given on p. 128 contains the expression, "In case of need apply to H. Smith & Co." S. 15 of the Bills of Exchange Act

states that "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."

In some foreign countries presentment to a case of need is obligatory but in this country it is optional. On acceptance the case of need becomes an "acceptor for honour" (see p. 125). A person does not become a party to a bill by merely being named as a "case of need," and any person who satisfies the conditions may intervene without being mentioned on the bill. The practice is naturally more frequently met with in bills drawn abroad on the United Kingdom or *vice versa*, than in inland bills. In the case of foreign bills the drawers, and possibly the indorsers also, are not in a position quickly to take up bills dishonoured by the drawees or acceptors. The practice is of particular value with documentary bills where there is merchandise to be attended to. A banker should not give up the documents to a case in need, except against payment, unless he has written instructions from the drawer.

36. **Bills in a Set.**—A bill in a set is a bill of exchange that is drawn in two or three parts, each part being on a separate piece of paper. Each part must be worded exactly the same as the other parts, except that the parts are called respectively, the "First of Exchange," "Second of Exchange," and "Third of Exchange," and are so referred to in each of the other parts. Inland bills—that is, bills drawn by one person on another, both of whom are resident in this country—are not drawn in sets. Bills are drawn in sets by foreign traders on persons in this country, and *vice versa*, and are so drawn to minimise the risk of loss in transmission from one country to another. Bankers usually issue drafts on foreign countries in two parts, one being marked "Original" and the other "Duplicate."

When a bill is drawn in two or three parts, the first part is often sent to a banker, or correspondent, in the country drawn on, in order that he may present the bill to the drawee for acceptance. After acceptance has been obtained, the correspondent retains the first part until it is claimed by the holder of the other part or parts. In order that such holder shall know to whom to apply for the "First of Exchange" a reference, "First with Messrs. A. B. & Co.," is written on the remaining part or

parts. On seeing this statement, the holder knows that A. B. & Co. hold the first and accepted part, and all he has to do to secure possession of it is to produce the remaining part or parts. All parts are then together and the whole constitutes one bill (*a*). By sending the first part forward in this manner the advantage of earlier acceptance is obtained. Only one part of a set has to be stamped.

SPECIMEN FORM OF A BILL IN A SET HAVING THREE PARTS

First Part—

Stamp.

703, *Commercial Buildings*,
London,
10*th June*, 1935.

£100.

Sixty days after sight pay this First of Exchange (Second and Third of the same date and tenor being unpaid) to the order of F. Jaasma and Co. the sum of One Hundred pounds, value received.

JAMES NORTON.

To Fritz Evers,
Amsterdam.

Second Part.

Stamp.

703, *Commercial Buildings*,
London,
10*th June*, 1935.

£100.

Sixty days after sight pay this Second of Exchange (First and Third of the same date and tenor being unpaid) to the order of F. Jaasma and Co. the sum of One Hundred pounds, value received.

JAMES NORTON.

To Fritz Evers,
Amsterdam.

Third Part.

Stamp.

703, *Commercial Buildings*,
London,
10*th June*, 1935.

£100.

Sixty days after sight pay this Third of Exchange (First and Second of the same date and tenor being unpaid) to the order of F. Jaasma and Co. the sum of One Hundred pounds, value received.

JAMES NORTON.

To Fritz Evers,
Amsterdam.

(*a*) Section 71 (1).

37. *Statute Law Governing Bills in a Set.*—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 (*a*). 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 (*b*). 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 this does not affect the rights of a person who in due course accepts or pays the part first presented to him (*c*). 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 (*d*). 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 (*e*). 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 (*f*).

38. **Conflict of Laws.**—Where a bill, drawn in one country, is negotiated, accepted, or payable in another country, difficulties may arise as to which country's laws each transaction is to be subject. In the general way, the maxim "locus regit actum," which means "the place governs the act," decides the matter. There are some exceptions, but this is the general rule followed when determining the rights, duties, and liabilities of the parties. Thus the validity of a bill as regards its 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 supra protest, is determined by the law of the place where such contract was made (*g*). But a bill issued out of the United Kingdom is not invalid by reason only that it is not stamped in accordance with the law of the place of issue (*h*), and if a bill conforms, as regards requisites

(*a*) Section 71 (1). (*b*) Section 71 (2). (*c*) Section 71 (3).
(*d*) Section 71 (4). (*e*) Section 71 (5). (*f*) Section 71 (6).
(*g*) Section 72 (1). (*h*) Section 71 (1, *a*).

in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment, be treated as valid as between all persons who negotiate, hold or become parties to it in the United Kingdom (*a*). The interpretation of the drawing, indorsement, acceptance or acceptance supra protest of a bill is determined by the law of the place where such contract is made, but where an inland bill is indorsed in a foreign country the indorsement, as regards the payer, is interpreted according to the law of the United Kingdom (*b*). 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 (*c*).

39. *Re-exchange.*—Re-exchange can only arise when bills are dishonoured in a country different from that in which they were drawn or indorsed, and covers the loss involved by such dishonour. For example, suppose that a London banker buys a bill for £1000, drawn in London on a merchant in Trinidad, and that the bill is dishonoured. The banker can claim from the drawer such a sum as will realise in Trinidad the amount of the bill at the rate of exchange current in Trinidad at the time of its dishonour, plus the usual expenses of protest, stamps, etc. Hence, if the discount in Trinidad for the purchase of sterling bills on London is 1%, the banker is entitled to claim from the drawer £1010, plus the usual expenses. That is, the holder of a bill dishonoured abroad is entitled to claim such a sum as will put him in funds in the foreign country, as if the bill had been duly paid.

(*a*) Section 72 (1, *b*). (*b*) Section 72 (2). (*c*) Section 72 (3).

NOTE (see pp. 85, 90).—Holder in due course. In the case of Jones, R. E., Ltd., *v.* Waring and Gillow, 1926, it was decided by the House of Lords that the original payee of a bill or cheque is not a "holder in due course" within the meaning of Section 29. Before a person can be a holder in due course, the bill or cheque must have been negotiated to him; the original delivery of the instrument is not such a negotiation.

CHAPTER III

PROMISSORY NOTES

(*See also Part V, Chapter II, p.* 292; *and Part VI, Chapter III, p.* 335.)

1. **Definition, etc.**—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 (*a*). An instrument in the form of a note payable to maker's order is not a note until it is indorsed by the maker (*b*). A note may contain a pledge of collateral security with authority to sell or dispose thereof (*c*). An instrument in the form of a promissory note contained the following clause and was held to be a valid promissory note within the meaning of the Bills of Exchange Act " that no time given to, or security taken from, or composition or arrangement entered into with either party shall prejudice the rights of the holder to proceed against any other party." (*Kirkwood* v. *Carroll*, 1903.) It was also held that the sum secured by a promissory note can be made payable by stated instalments. A promissory note is incomplete until delivery thereof to the payee or bearer (*d*). The maker of a promissory note undertakes to pay it according to its tenor (*e*). He is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (*f*).

Hence, no precise form is necessary to constitute a promissory note, but there must be a definite, unconditional *promise* in writing to pay a sum certain in money, and, as in the case of a

(*a*) Section 83 (1). (*b*) Section 83 (2). (*c*) Section 83 (3).
(*d*) Section 84. (*e*) Section 88 (1). (*f*) Section 88 (2).

bill of exchange, the note must not be payable on a contingency. Thus, an instrument reading, "On A's marriage to B, I promise to pay A ten pounds," would not be a promissory note, and the happening of the event does not cure the defect.

A promissory 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 (*a*). It would appear that a promissory note for less than £5 made payable to bearer on demand is void in England and Wales.

2. Specimen Forms.

PROMISSORY NOTE PAYABLE ON DEMAND.

Stamp.

London,
£10. *5th May*, 1930.

On demand I promise to pay to John Brown or order the sum of Ten pounds, value received.

JAMES ROBINSON.

PROMISSORY NOTE PAYABLE AFTER DATE WITH INTEREST.

Stamp.

London,
£50. *5th May*, 1930.

One month after date I promise to pay to John Brown or to his order the sum of Fifty pounds with interest at the rate of five per cent. per annum until payment.

JAMES ROBINSON.

3. Joint and Joint and Several Promissory Notes.—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 (*b*). 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 (*c*).

(*a*) Section 83 (4). (*b*) Section 85 (1). (*c*) Section 85 (2).

JOINT PROMISSORY NOTE.

Stamp.

£20. *London,*
5th May, 1930.

On demand we promise to pay to John Brown or order the sum of Twenty pounds.

JAMES ROBINSON.
THOMAS SMITH.

JOINT AND SEVERAL PROMISSORY NOTE.

Stamp.

£100. *London,*
5th May, 1930.

One month after date we jointly and severally promise to pay (*or* I promise to pay) to John Brown or order One Hundred pounds.

JAMES ROBINSON.
THOMAS SMITH.

4. **Presentment for Payment.**—Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. Failure to do so discharges the indorser (*a*). In determining what is a reasonable time regard is had to the nature of the instrument, the usage of trade and the facts of the case (*b*). 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 (*c*).

Where a promissory note is in the body of it made payable at a particular place, such as " On demand I promise to pay John Smith or Order at the Specie Bank Ltd., Northtown, the sum of, etc.," it must be presented for payment at that place to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable (*d*). Presentment for payment is necessary in order to render the indorser of a note liable (*e*). 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 present-

(*a*) Section 86 (1). (*b*) Section 86 (2). (*c*) Section 86 (3).
(*d*) Section 87 (1). (*e*) Section 87 (2).

ment to the maker elsewhere, if sufficient in other respects, also suffices (*a*).

5. **Promissory Note made Payable at a Bank.**—As in the case of a bill of exchange, the fact that a promissory note has been made payable at a bank justifies the banker in paying it when due and debiting it to the maker's account, but the banker will be liable in the event of a forged indorsement on the note.

6. **Application of Provisions of Bills of Exchange Act to Promissory Notes.**—With the necessary modifications, and subject to certain exceptions, the provisions of the Bills of Exchange Act relating to bills of exchange apply to promissory notes (*b*). In applying these provisions the maker of a note corresponds with the acceptor of a bill, and the first indorser of a note corresponds with the drawer of an accepted bill payable to drawer's order (*c*). The provisions relating to presentment for acceptance, acceptance, acceptance supra protest and bills in a set do not apply to notes (*d*).

Bank notes, which are promissory notes issued by a banker and payable to bearer on demand, are dealt with in Part III, Chapter I, p. 148.

(*a*) Section 87 (3).
(*b*) Section 89 (1).
(*c*) Section 89 (2).
(*d*) Section 89 (3).

CHAPTER IV

STAMP DUTIES

1. Definitions of Bill and Note for Stamping Purposes. For stamping purposes the expression "bill of exchange" has a much wider meaning than that assigned to it in the Bills of Exchange Act, and includes any draft, order, cheque, letter of credit (but see Exemption 4 below), and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression "bill of exchange payable on demand" includes: (1) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and (2) an order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf (*a*).

For stamping purposes the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money (*b*). A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen is to be deemed a promissory note for that sum of money (*c*).

(*a*) Stamp Act, 1891, Section 32. (*b*) Stamp Act, 1891, Section 33 (1).
(*c*) Stamp Act, 1891, Section 33 (2).

2. Scale of Duties.—The stamp duties on bills and notes are calculated according to the following scale, which is given in the Schedule to the Stamp Act, 1891—

Bill of Exchange—

Payable on demand or at sight or on presentation (or within three days after date or sight (*a*)) . . .	£0 : 0 : 2 (*b*)
Bill of Exchange of any other kind whatsoever (except a Bank Note) and Promissory Note of any kind whatsoever (except a Bank Note) drawn, or expressed to be payable, or actually paid or indorsed, or in any manner negotiated in the United Kingdom—	
Where the amount or value of the money for which the bill or note is drawn or made does not exceed £5 . .	£0 : 0 : 2 (*b*)
Exceeds £5 and does not exceed £10 . .	0 : 0 : 2
,, £10 ,, £25 . .	0 : 0 : 3
,, £25 ,, £50 . .	0 : 0 : 6
,, £50 ,, £75 . .	0 : 0 : 9
,, £75 ,, £100 . .	0 : 1 : 0
For every £100 and also for any fractional part of £100 of such amount or value	£0 : 1 : 0

By Section 10 of the Finance Act, 1899, the duty payable on a bill of exchange drawn and expressed to be payable out of the United Kingdom, when actually paid or indorsed or in any manner negotiated in the United Kingdom, shall, where the amount of the money for which the bill is drawn exceeds fifty pounds, be reduced so as to be—

(i) Where the amount exceeds fifty pounds and does not exceed one hundred pounds, sixpence; and

(ii) where the amount exceeds one hundred pounds, sixpence for every hundred pounds, and also for any fractional part of one hundred pounds of that amount. For the purposes of stamping, a bill drawn in and expressed to be payable in the Channel Islands or the Isle of Man, is treated as if it were a foreign bill, but otherwise as an inland bill.

3. Exemptions (*c*).—The following documents do not require stamps—

(*a*) Finance Act, 1899, Section 10.

(*b*) The penny stamp duty was increased to twopence under the provisions of the Finance Act, 1918. See Appendix, p. 464, for the section relating to the increased duty.

(*c*) Schedule to Stamp Act, 1891. Exemptions allowed by special Acts are dealt with under their appropriate headings.

(1) Bill or note issued by the Bank of England or the Bank of Ireland.

(2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers. (See Note, p. 147.)

(3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf.

(4) Letter of credit granted in the United Kingdom, authorising drafts to be drawn out of the United Kingdom, payable in the United Kingdom.

(5) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England, or by the Accountant-General of the Supreme Court of Judicature in Ireland.

(6) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.

(7) Bill drawn by any person under the authority of the Admiralty upon and payable by the Accountant-General of the Navy.

(8) Bill drawn (according to a form prescribed by His Majesty's orders by any person duly authorised to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces or for any other expenditure connected therewith.

(9) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.

(10) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue.

(11) Coupon or warrant for interest to and issued with any security, or with an agreement or memorandum for the renewal or extension or memorandum for the renewal or extension of time for payment of a security. By Section 40 of the Finance Act, 1894, a coupon for interest on a marketable security as defined by the Stamp Act, 1891, being one of a set of coupons whether issued with the security or subsequently issued in a sheet, shall

not be chargeable with any stamp duty. The exemption given by this section does not include a coupon attached to a scrip certificate, which is therefore subject to stamp duty.

An acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment does not require a stamp, nor does a receipt given upon any bill or note of the Bank of England or the Bank of Ireland. By the Finance Act, 1895, the name of a banker (whether accompanied by words of receipt or not) written in the ordinary course of his business as a banker upon a bill of exchange or promissory note duly stamped, or the name of the payee written upon a draft or order, if payable to order, does not constitute a receipt chargeable with stamp duty. It should be noted that a bill which is drawn and expressed to be payable out of the United Kingdom is subject to a reduced scale of stamp duty (as specified in section 2, *ante*) when it is actually paid, or indorsed, or in any manner negotiated in the United Kingdom, but if received merely for acceptance it is exempt from duty.

4. Stamping Inland Bills and Notes.—The twopenny stamp on inland bills payable on demand, at sight or on presentation or within three days after date or sight may be impressed or adhesive. Two penny postage stamps may also be used, but the impressed twopenny "Bill or Note" stamp is not applicable. The drawer and person to whom the bill is presented for payment are the only persons qualified to affix and cancel the adhesive stamp or stamps on one of these instruments. If the drawer affixes a stamp he must cancel it before he delivers the bill out of his hands. The *ad valorem* stamps on inland bills payable more than three days after date or sight must be denoted by impressed appropriated "Bill or Note" stamps. An appropriated stamp is one which, by means of words on the face of it, is specially appropriated to a particular class of document and cannot be used for any other. An *ad valorem* stamp is one which varies in amount according to the value of the instrument to be stamped. Inland promissory notes, whether payable on demand or after date, must bear *ad valorem* impressed "Bill or Note" stamps. (See Note on p. 147.)

5. Stamping Foreign-drawn Bills and Notes.—A bill drawn abroad which is payable on demand, at sight or on presentation or within three days after date or sight may bear a twopenny postage or impressed stamp (or two penny postage stamps).

Bills drawn abroad payable at more than three days after date or sight, and all promissory notes drawn abroad, must bear adhesive *ad valorem* appropriated "foreign bill or note" stamps. By Section 35 of the Stamp Act, 1891, "every person into whose hands any bill of exchange or promissory note drawn or made out of the United Kingdom comes into the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto. Provided as follows: (i) If at the time when any such bill or note comes into the hands of any *bona fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person. (ii) If at the time when any such bill or note comes into the hands of any *bona fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed. But neither of the foregoing provisoes is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp." By Section 36 of the same Act "a bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purpose of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom."

For stamping purposes the Channel Islands and the Isle of Man are deemed to be foreign countries, and bills and notes drawn or made in these parts are foreign bills and notes. In other respects, however, they are inland instruments, *e. g.* a bill drawn in the Isle of Man need not be protested on dishonour in England. Stamp duties are imposed for revenue purposes, and the fiscal arrangements of the Channel Islands and the Isle of Man are controlled by those islands independently of the United Kingdom. (For note respecting Ireland, see Appendix, p. 504.)

Where a bill is drawn abroad in foreign currency the amount

for the purposes of stamping is calculated according to the rate of exchange for demand drafts current on the date of the bill, unless the instrument contains a statement of current rate of exchange, and is stamped in accordance with that statement. This is provided by the Stamp Act, 1891, Section 6. In times when exchange rates are subject to wide fluctuations, it may be a difficult matter for a person not a banker to find out what was the current rate on the date of the bill, and in practice the rate taken for stamping purposes is often the rate on the day of maturity. In view, however, of the wording of the Stamp Act, the Inland Revenue Authorities contend that this practice cannot be supported. (See Journal, Institute of Bankers, February, 1922.)

A bill is not invalid in the United Kingdom by reason only that it is not stamped in accordance with foreign stamp laws; and unless it is desired to secure right of action on the bill in the foreign court, only the English stamp laws need be considered.

6. **Cancellation of Adhesive Stamps.**—An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purposes, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time (*a*). Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid (*b*). Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, shall incur a fine of ten pounds (*c*).

7. **Penalty for Issuing, etc., any Unstamped Bill or Note.**—Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall incur a fine of ten pounds, and the person who takes or receives from any

(*a*) Stamp Act, 1891, Section 8 (1). (*b*) Stamp Act, 1891, Section 8 (2).
(*c*) Stamp Act, 1891, Section 8 (3).

other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever (*a*). Provided that if any bill of exchange payable on demand or at sight or on presentation is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of twopence, and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available (*b*). But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill (*c*).

8. **Stamping Bills and Notes after Execution.**—Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable (*d*). Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof (*e*). (See Note, p. 147.)

9. **Stamping Bills in a Set.**—Where a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill (*f*).

10. **Stamping Bill or Note Payable with Interest.** Where a bill or note is payable with interest the stamp duty is chargeable on the principal sum only unless the interest is capitalised or the actual amount of interest is named. Thus an inland bill or note for £500 at six months after date with interest at the

(*a*) Stamp Act, 1891, Section 38 (1).
(*b*) Stamp Act, 1891, Section 38 (2), and Finance Act, 1918, Section 36.
(*c*) Stamp Act, 1891, Section 38 (3). (*d*) Stamp Act, 1891, Section 37 (1).
(*e*) Stamp Act, 1891, Section 37 (2). (*f*) Stamp Act, 1891, Section 39.

rate of 5 per cent. per annum would require a stamp to the value of five shillings, whereas if the instrument were drawn for "£500 with interest £12 : 10 : 0" it would require a stamp to the value of six shillings.

11. Stamping Foreign-drawn Bills presented for Acceptance.—Section 35 of the Stamp Act, 1891, quoted on p. 144, does not cover presentation of a foreign-drawn bill unaccompanied by any negotiation or any indorsement in order to transfer the property in the bill. Accordingly provided the bill is merely presented for acceptance, no foreign bill stamp is required, but if any of the operations described in s. 35 are performed, or if it is held as a security, then the bill must be duly stamped.

NOTE (see p. 142).—It should be noted that the expression, "United Kingdom," when used in the Stamp Act must now be construed as exclusive of the Irish Free State. Hence documents of the kind described in exemptions (2) and (3) issued by bankers in Great Britain and Northern Ireland to bankers in the Irish Free State must now be stamped on issue.

NOTE (see p. 143).—On occasions, a foreign drawee sends a bill, duly accepted, to his British creditor, who has only to sign as drawer and, if the bill be payable to his order, add his indorsement, to have a complete bill. As the foreign drawee is not likely to have bill forms bearing the requisite British "Bill or Note" impressed stamps, the Inland Revenue authorities permit such a bill to be duly stamped provided it be presented to them for stamping before being signed by the drawer and within seven days of its arrival in the United Kingdom and be accompanied by a written statement that no use has been made of it in the meantime. (See also following Note.)

NOTE (see p. 146).—Hitherto this has been the only exception to the general rule that a bill of exchange drawn in this country cannot be stamped after execution, but s. 42, Finance Act, 1933, now provides that

"Notwithstanding any enactment to the contrary, a bill of exchange which is presented for acceptance, or accepted, or payable, outside the United Kingdom shall not be invalid by reason only that it is not stamped in accordance with the law for the time being in force relating to stamp duties, and any such bill of exchange which is unstamped or not properly stamped may be received in evidence on payment of the proper duty and penalties as provided by s. 14 and subs. (1) of s. 15 of the Stamp Act, 1891."

The penalty is £10 plus the unpaid duty and the Inland Revenue authorities have power to reduce or waive the penalty.

PART III

BANKING INSTRUMENTS, ETC.

CHAPTER I

BANK-NOTES

1. **Definition.**—A bank-note is a promissory note made and issued by a banker and payable to bearer on demand. Bank-notes, said Lord Mansfield in *Miller* v. *Race* (1758), " are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes."

2. **Issue.**—The right to issue bank-notes is strictly controlled by the Bank Charter Act, 1844, and has in England and Wales become the monopoly of the Bank of England. Further provisions respecting the Bank's note issue are contained in the Currency and Bank Notes Act, 1928. Notes are issued by the Bank of England for £1 and 10*s*., and for £5 and multiples thereof.

The Bank Charter Act, 1844, provides that the Bank shall publish a weekly statement showing, separately, the assets and liabilities of the Issue and the Banking Departments. A copy of the Return issued for the week ended 20th January, 1937, is given on page 150.

In regard to the Issue Department, Notes Issued comprise all the paper currency of England and Wales and also a proportion of the notes circulating in Scotland and Northern Ireland, where Bank of England notes of £1 and 10*s*. are legal tender. The Scotch and Irish banks are entitled to issue their own notes of £1 and upwards (but not for fractions of £1), and are empowered to hold Bank of England notes against such issues in place of gold coin.

Amongst the assets shown in the weekly return is the item Government Debt of £11,015,100. This is a very old book debt

on which the Government pays interest. The other two securities call for no comment. The item " Silver coin " consists of silver coin which is current and legal tender in the United Kingdom, and by the provisions of the Currency and Bank Notes Act, 1928, may not exceed £5,500,000. The total of the securities, including the silver coin, amounts at present to £200,000,000, and the issue against them is termed the *Fiduciary Note Issue.* (A reduction to this figure from £260,000,000 was made in December, 1936.)

ISSUE DEPARTMENT

	£		£
Notes issued:		Government debt	11,015,100
In circulation	450,464,130	Other Government securities	188,601,323
In Banking Department	63,196,529	Other securities	373,353
		Silver coin	10,224
		Fiduciary issue	200,000,000
		Gold coin and bullion	313,660,659
	£513,660,659		£513,660,659

BANKING DEPARTMENT

	£		£
Capital	14,553,000	Government securities	74,934,953
Rest	3,573,557	Other securities:	
Public deposits*	13,555,436	Discounts and advances	8,905,857
Other deposits:		Securities	22,079,112
Bankers	100,287,072	Notes	63,196,529
Other accounts	37,568,318	Gold and silver coin	420,932
	£169,537,383		£169,537,383

* Including Exchequer, Savings Banks, Commissioners of National Debt, and Dividend Accounts.

In order to provide for a certain measure of elasticity in the country's note issues, the Treasury may, on the request of the Bank, authorise a specified increase in the fiduciary note issue for a period not exceeding six months, and renewals or variations thereof may be made from time to time in like manner, but no increase can remain in force for more than two years without the sanction of Parliament. Any increase authorised by the Treasury has to be reported forthwith to both Houses of Parliament. The Treasury may also, on the request of the Bank, authorise a reduction in the amount of the fiduciary issue. The Bank has always to keep sufficient securities in the Issue Department to cover the fiduciary issue for the time being.

All the net profits made by the Issue Department have to be paid to the Government, and the Bank, therefore, does not include any of the income from this department in its Income Tax return. The notes are also exempt from stamp duty and payment in lieu thereof.

Prior to the Gold Standard (Amendment) Act, 1931, the Bank was bound to sell to any person, against payment in any legal tender, gold bullion at the price of £3 17*s.* 10½*d.* per ounce troy of gold of the standard fineness of $\frac{11}{12}$ths, but only in the form of bars containing approximately 400 ounces troy of fine gold (Gold Standard Act, 1925, s. 1 (2). This proviso enabled bankers and others to purchase gold for export when required. Under the provisions of the Bank Act, 1844, the Bank is still compelled to exchange for notes all gold offered to it at the price of £3 17*s.* 9*d.* per ounce of standard fineness, though naturally no one is likely to offer gold at this price under present conditions. In this way the Bank maintained a free gold market in London, though its notes were not exchangeable for gold in the same way as they were before the Great War, when gold could be demanded for a £5 note. Hence, though we had no longer the luxury of an internal gold circulation, our notes were convertible into gold for all material purposes. In September, 1931, however, the Amendment Act was passed and the Bank was freed from the obligation to sell gold under the above clause, and this position will no doubt continue until stabilisation is again effected.

3. Tender.—Bank of England notes are legal tender in England and Wales for any amount. The small notes of £1 and 10*s.* are also legal tender in Scotland and Northern Ireland. So long as there remains in force s. 1 (1) of the Gold Standard Act, 1925, which provides that the Bank of England shall not be bound to pay any of its notes in gold coin, notes of £1 and 10*s.* are legal tender by the Bank itself and its branches, including the payment of its own notes of the larger denominations. The larger notes are payable in £1 and 10*s.* notes at the Head Office of the Bank, or, if issued by a branch, then also at that branch. The small notes are payable only at the Head Office. Although the large Bank of England notes circulate in Scotland and Ireland, they are not legal tender in those parts of the British Isles, if, at the time of tender, the person offered payment refuses to accept them. Neither are they legal tender in the Channel Islands or in the Isle of Man.

When a person tenders a bank-note with his name written

thereon, he may, or may not, be liable as an indorser. He is only liable as an indorser if he writes his name with the intention that it shall operate as an indorsement, in which case he becomes liable as an indorser to his transferee and any subsequent holder. When payment is made by a bank-note which is legal tender, the creditor cannot insist on the note being indorsed. Since Bank of England notes are payable to bearer on demand, the issuers cannot legally insist upon a person writing his name and address upon them when presenting such notes for payment. Nevertheless, the Bank of England does require each presenter of a Bank of England note of £5 and over to write his name and address on the back before they will exchange it.

4. **Notes by Post.**—When dispatching notes by post, it was formerly the practice for the sender to cut the notes into halves and remit the halves by different mails. This mutilation does not affect the negotiability of the notes. With regard to the property in the half-notes, it has been held that a third party, who sent the halves of two bank-notes on account of the debt of another person with whom he was about to enter into partnership, was entitled to demand the half-notes back from the receiver when, the partnership arrangements having fallen through, the third party no longer had any desire to complete the transaction by sending the corresponding halves (*Smith* v. *Mundy*, 1860). This decision seems to suggest that the property in the half-notes remains in the sender, but possibly the decision would have gone the other way if the question had arisen in connection with a direct payment from debtor to creditor. The more modern practice, where notes are frequently sent, is to send them entire, and to insure them under a floating policy. Before sending notes of £5 and over by post, full particulars of the numbers, dates, amounts and places of issue, should be recorded for reference in case of loss.

5. **Lost and Destroyed Notes.**—The finder of a lost note has a good title against every one except the loser, and if the finder transfers it to a person who takes it honestly, and for value, this transferee has a good title against all the world, even the loser. But the loser may always sue the finder. Notes found on premises not open to the public belong to the owner of the property, not the finder, but it has been held that notes found on the floor of a shop or on the customer's side of a bank counter belong to the finder, subject, in all cases, to the true owner's title. The loser of a note can claim a fresh note from the issuers

by giving a full description of the note and a satisfactory indemnity. Destroyed notes can be similarly recovered.

In regard to Bank notes of £5 and over, before entertaining an application for payment under indemnity, the Bank of England must be enabled to identify the notes in their books. If the evidence of destruction (in the case of notes alleged to have been destroyed) is conclusive, an application for payment will be considered at the expiration of *one year* from the date of the accident. A statutory declaration is then prepared by the Bank from the facts adduced, and this declaration, having been duly made by the person or persons concerned, has to be returned to the Bank with some substantial offer of indemnity, such as that of a banker. The same procedure is followed in the case of *lost* Bank notes, except that a period of *five years* is required to elapse in cases where no satisfactory evidence of destruction can be adduced.

In the case of destroyed notes of £1 and 10*s*., the Bank of England will not entertain any claim unless satisfactory evidence of destruction, supported by fragments of the notes said to have been destroyed, is forthcoming. Claims should be made in person at the Bank by the applicant, or submitted through the Post Office.

6. **Stolen Notes.**—The thief has no title, but a *bona fide* transferee for value gets a good title even against the true owner.

7. **Stopping Bank-notes.**—When notes of £5 and over have been lost or stolen, the loser may send a full description of the notes to the Bank of England with a request to " stop " the notes. It is the practice of the Bank to suspend payment of the notes after receiving notice of a stop, but the Bank is not entitled to refuse payment of the stolen or lost notes to a *bona fide* holder for value. In a case where a money changer honestly gave value for a note that had been stolen, it was held that he could recover the money from the issuing bank, even though it was proved that a printed list of stolen notes, this one among them, had been sent to him (*Raphael* v. *Bank of England*, 1855). The Courts are very jealous in preserving the negotiable character of negotiable instruments. As will be seen from the case quoted above, the only advantage of stopping a note lies in the value of the advertisement of the loss, and in any possible inquiries into the title of the presenter.

Stops cannot be registered in respect of the £1 and 10*s*. notes.

The following are the Bank's Regulations relating to the stopping of notes of £5 and upwards :

(1) Any Person desirous of tracing Bank-notes, Post Bills, etc., lost, mislaid, or stolen, with a view, if possible, of recovering the property, may, upon payment of a registration fee of 2*s.* 6*d.* cause the Numbers, Dates and other Particulars of such Notes, etc., to be entered, together with the Name and Address of the Applicant, in a Book kept in the Secretary's Office at the Bank of England for that purpose :—Bank-notes, however, being payable to bearer on demand, the Bank cannot hold themselves under any responsibility should notes so entered be paid on presentation, whether from inadvertence of the Clerks of the Establishment, under an order from the Governors, or from any cause whatever.

(2) The proper Officers of the Bank will endeavour, if the circumstances of the case permit, to delay payment of the notes, etc., and to give information of their presentation to the Person who has given notice, and paid the registration fee; but such notice shall not be in force for more than twelve months from its date.

(3) Many Bank-notes, etc., the subject of notice, are presented at the Bank by bankers and other undoubted holders for value, and must be paid on presentation; in these cases the Bank cannot do more than endeavour to give the earliest information to the giver of the notice.

8. **Defacement of Bank-notes.**—The Currency and Bank Notes Act, 1928, provides that " If any person prints, or stamps, or by any like means impresses, on any bank-note any words, letters or figures, he shall, in respect of each offence, be liable on summary conviction to a penalty not exceeding one pound." The object of this clause is to prevent any notes being disfigured by advertisements, and, in particular, to enable the Bank to re-issue the £1 and 10*s.* notes if so desired. Whilst nothing must be put on the small notes, it is understood that the Bank will not object to a bank stamp being put on the *back* of soiled notes of £5 and over when presented to the Bank for payment. It should be noted that this section does not mean that any note so defaced is not a legal tender, but only that the person responsible is guilty of an offence.

9. **Forged or Altered Notes.**—By the Bills of Exchange Act, 1882, s. 58 (3), a person who takes forged notes may recover

their value from his transferor. The claim for recovery must, however, be made within a reasonable time. The wording of the sub-section is as follows: "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. . . ." A bill in this sub-section includes a bank-note. In *Suffell* v. *Bank of England*, 1882, Jessel, M.R., held that the number on a Bank of England note was a material part of the note, and that any alteration of the number vitiated the note, and that even a *bona fide* holder for value could not recover on it. In this particular case the alteration was effected to prevent its recognition as a stolen note. This judgment shows that s. 64, Bills of Exchange Act, 1882, is held not to apply to Bank of England notes. S. 64 runs as follows: "Where a bill [or note] 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."

10. **Statute of Limitations.**—This statute has no application to Bank of England notes, or Scotch and Irish bank-notes. No matter how long such a note remains in circulation, the issuing bank is not discharged from liability. In the Bank Act, 1892, s. 6, there is a special provision with regard to Bank of England notes issued more than forty years and not presented for payment. The Bank is permitted to write off the amount of such non-presented notes, but must, nevertheless, pay them when presented. The period of forty years applies to the large notes. For the small notes of £1 and 10*s*. the period is twenty years.

11. **Foreign Bank-notes.**—Banks treat these instruments as foreign bills and send them to London to be sold. It is not the custom to affix revenue stamps to them when they are negotiated in this country. The practice of banks putting their name stamps on foreign notes for identification purposes is undesirable, as it may possibly affect the value of the notes when negotiated.

CHAPTER II

BANKERS' DRAFTS—DEPOSIT RECEIPTS

1. **Bankers' Drafts.**—A banker's draft means a draft payable to *order* on demand, drawn by or on behalf of a bank upon itself, whether payable at the Head Office or some other office of the bank. Until the passing of the Bills of Exchange (1882) Amendment Act in 1932, they could not be effectively crossed, but by the provisions of this Act, ss. 76 to 82 of the old Act now apply as if such drafts were cheques. Hence a banker paying or collecting a crossed bankers' draft secures the same protection as with crossed cheques. These drafts must not be made payable to *bearer* on demand, since they would be equivalent to bank-notes, which by ss. 10, 11, Bank Charter Act, 1844, cannot be issued except by banks of issue. By s. 5 (2), Bills of Exchange Act, 1882, since both the drawer and the drawee are the same person, the *holder*—not, it should be noted, the *banker*—has the option of treating it either as a bill of exchange or as a promissory note.

These bank drafts cannot be called cheques, since they are not " addressed by one person to another " (s. 3, Bills of Exchange Act, 1882)—the Head Office and the branches constituting one legal entity.

A banker paying an uncrossed banker's draft under a forged endorsement is not protected by s. 60, Bills of Exchange Act, 1882, since he is not entitled to regard the document as a cheque, but he is protected by s. 19, Stamp Act, 1853, which says : " Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any

subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or indorser thereof." This protection would probably extend to a draft drawn abroad on the head office in England, but it does not extend to a draft drawn at a tenor other than on demand, and to come within the scope of this section the document must be unconditional, drawn on a banker, payable to order on demand, and therefore fully negotiable. To obtain protection in case of need, the paying banker must see that it purports to be properly indorsed and that he pays it in good faith.

If a demand draft drawn on a bank by its own branch bears a forged indorsement, the person in possession of it cannot compel the banker to pay it. And this is so even if he has given value in good faith for the instrument. A bank should not, save in exceptional circumstances such as definite evidence of a forged indorsement, stop payment of a draft drawn by a branch on the head office or on another branch, as, in the absence of a forged indorsement, it would be liable on the draft to a *bona fide* holder.

All drafts issued by bankers are subject to the same stamp duties as are bills of exchange. But drafts or orders drawn by one banker in the United Kingdom upon any other banker in the United Kingdom, the same not being payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers, are exempt from stamp duty (Stamp Act, 1891, Exemption 2). They are known as "Bankers' Payments."

When a customer requests his banker to provide him with a banker's draft, the amount of which is to be debited to his account, he should either enclose with his written order a cheque covering the amount of the required draft, or should stamp the written order. Bank drafts drawn payable after date or after sight take the usual three days of grace, except those issued by the Bank of England on itself (as to which see next section).

2. **Bank Post Bills.**—These instruments were invented in 1738 as a preventive against the highway robberies then very prevalent. A smart highwayman who had stolen bank-notes could often cash them at the bank before the authorities had got wind of the affair. But Bank Post Bills, being usually payable at seven days after sight, gave time for notification to the bank to stop payment. They carried no days of grace. They are no

longer issued, and are merely mentioned as a matter of historical interest.

3. **Deposit Receipts.**—When a customer places money on deposit with a banker, a receipt is often given to him of which the following is a specimen :—

BRITISH BANK, LIMITED.

Subscribed Capital £10,000,000. Paid-up Capital £3,000,000.
Reserve Fund £3,000,000.

Head Office: *Lombard Street, E.C.* 2.

No..... OXFORD BRANCH.

£..... .....19.....

Not transferable.

Received from .....

.....

the sum of .....

.....on Deposit Account.

FOR BRITISH BANK, LIMITED.

Entered..... .....Manager.

This Deposit Receipt is not transferable and is subject to seven days' notice of withdrawal.

No interest will be allowed if the money is deposited for less than fourteen days, and interest will cease at expiration of notice of withdrawal.

This Deposit Receipt must be given up on repayment of the amount.

This receipt is merely a written acknowledgment by the banker that he holds a certain sum to the use of the customer. The document is usually marked "Not transferable," and it is also not negotiable. The customer, therefore, by writing his name on the receipt and transfering it to another person for value, confers no legal right on the person to whom he gives it (*Moore* v. *Ulster Bank*, 1877). But though a deposit receipt does not appear to be transferable by simple indorsement—the judgments on the point are not conclusive—the debt of which it is a memorandum may be duly assigned in the same way as any other debt, provided that due notice of the assignment is given to the banker. Nevertheless, the banker, before paying over the money to the

assignee, is entitled to take into consideration any debt due to him by the depositor at the time he received notice of the assignment.

Interest on the deposit may be paid at certain periods at an agreed rate, or the rate may vary from time to time according to the rate allowed by the London joint stock banks. The latter rate generally varies according to the Bank Rate and is fixed by agreement amongst the Banks and duly advertised in the public Press.

Without the express written authorisation of the depositor, the banker should not pay away to a third party the sum represented by the deposit receipt. Even when he obtains the necessary written authority, the banker should ask for proof of identity before paying away the money. If he pays the money to the wrong person he cannot debit the depositor, but it would appear that if the depositor by his negligence leads the banker to believe that he is paying the right person, the banker might, in such circumstances, be entitled to debit the depositor. The banker issuing a deposit receipt should require the depositor's written authority before paying over the money to another banker, as he would in the case of any other third party. Presentation of the deposit receipt with the depositor's mere signature is not sufficient; the signature does "not purport to be an authority to the issuing banker to pay over the money" (Collins, J., in *Evans* v. *National Provincial Bank of England*, 1897). It is nothing more than a receipt for the money, and the banker collecting a deposit receipt would be liable for conversion in case of fraud, as he has no statutory protection whatever.

A deposit receipt has been held to be a good subject of a *donatio mortis causa*, i. e. a gift made in contemplation of death and to take effect only in the event of death from the malady existing at the time the gift is made. "It is a singular sort of gift . . . and may be said to be of an amphibious nature, being a gift which is neither entirely *inter vivos* [*i. e.* between living persons] nor testamentary" (Buckley, L.J., *In re Beaumont, Beaumont* v. *Ewbank*, 1902).

If the deposit receipt merely acknowledges the deposit of the money, the banker cannot demand its production before paying over the money. But if the form of the receipt is such that the signing of the receipt is a condition precedent to the withdrawal of the money, then the deposit receipt must be returned when the

money is handed over. But the banker is not entitled to withhold payment of the money should the receipt be lost or destroyed. All that he can do is to ask the depositor for an indemnity. Whether he is legally entitled to demand such an indemnity, the receipt not being a negotiable instrument, is another question. An overdraft on current account can be safely allowed by the banker on the security of the deposit account before the receipt is actually returned to him—the banker being entitled to set off any overdraft on current account against money placed on deposit. If a deposit receipt is offered to the banker who issued it as a security for the account of a third party, or in support of the depositor's guarantee, the banker should obtain a memorandum of charge or a letter showing the object for which the receipt is lodged, and the receipt itself should be duly discharged by the depositor. Where the receipt offered has been issued by another banker, the same procedure should be adopted, and, in addition, notice must be served on the issuing banker in the manner applicable to the assignment of an ordinary debt.

The form of cheque sometimes printed on the back of the deposit receipt has been held not to change the nature of the account, but to be merely a convenient method adopted by bankers to preserve evidence of the withdrawal of the money. If the deposit stands in the name of a man and his wife, the discharge of both is necessary, but if in the name of a firm, one signature in the firm's name would be all that is required. When receipts are issued in joint names it is desirable to have instructions as to withdrawals and rights of survivors indorsed on the receipts. For further information concerning deposit receipts in joint names, see *Joint Accounts*, p. 237.

There is another form of deposit receipt issued, generally, by foreign and colonial banks for "fixed" deposits. The money in these cases is deposited for definite periods, which vary and are usually from one to five years. The deposit is repayable or renewable on the expiration of the agreed period. The interest may be payable half-yearly, yearly, or when the principal is due to be repaid.

4. *Stamp.*—Deposit receipts given by a banker do not require stamping, but the receipt given by the depositor on withdrawal is liable to the usual receipt stamp duty for £2 or over If the receipt is in the form of a cheque, the stamp must be the cheque stamp duty for any amount. When an increase is made on the

amount deposited, a new receipt should be given and the old one discharged, the usual practice being to ask the depositor to write on the back of the old receipt "Amount increased £200, John Smith," but not to sign the receipt. If the receipt is signed, the usual receipt stamp must be affixed for £2 or over. If the amount is to be transferred to current account an indorsement, "Transferred to current a/c, John Smith," without a stamp, would be sufficient. If interest is paid either by a form of receipt or a form of cheque, the appropriate stamp is necessary.

5. *Statute of Limitations.*—The Statute begins to operate immediately the money is due to be repaid, *i. e.* after the expiration of the specified notice of withdrawal. If the deposit is for a fixed period, the Statute begins to run immediately upon expiration of the agreed period. If the repayment of the money is conditional upon the return of the receipt, then the date of its return is the date upon which the Statute begins to run.

6. *Effect of Garnishee Orders on Deposit Receipts.*—Unless the Deposit Receipt stipulates that it must be returned before repayment of the deposit, the position is the same as for deposit accounts for which no receipts have been given (see p. 213). But if, as is usual, the receipt stipulates that it must be given up on repayment, then its return is a condition precedent to repayment, and a garnishee order has no effect on the account represented by the unreturned receipt.

CHAPTER III

LETTERS OF CREDIT—CIRCULAR LETTERS OF CREDIT AND CIRCULAR NOTES—ACCEPTANCES AND INDORSEMENTS ON BEHALF OF CUSTOMERS

1. Letters of Credit.—There are various kinds of these instruments. One kind is a letter addressed by one banker to another requesting the banker to whom the letter is addressed to hold at the disposal of a named third party a specified amount of money, and to charge the issuing banker with the total amount of all cheques honoured or payments made on the authority of the letter.

Another kind of Letter of Credit authorises the person named in the Letter to draw bills on the issuing banker at the tenor and up to the amount stated in the Letter, the issuing banker on his part promising to accept all bills drawn in accordance with his instructions. This kind of Letter of Credit is usually issued for a specified period, generally not longer than six months. If the Letter undertakes the acceptance of bills without conditions, it is termed an " Open " or " Clean " Letter of Credit. If the promise to accept is a conditional one, viz., that the documents of title to the goods in respect of which the bills are drawn shall be sent to the issuing bank together with the bills for acceptance, the letter is called a Documentary Letter of Credit.

Both these kinds of Letters of Credit contain a stipulation that the amount of all cheques or bills drawn under them shall be indorsed upon them, so that the Letters always show how much of the credit remains available.

Another kind is called a Marginal Letter of Credit, and is so named because on the margin of the actual bill form to be used is a letter detailing the terms of drawing and acceptance. This letter must not be detached from the bill portion of the document.

Specimen forms of an Open Letter and a Documentary Letter are appended.

CLEAN LETTER OF CREDIT.

No. 110. ..... Bank,
London.
Date.....

To .....
.....

DEAR SIR,

You are hereby authorised to draw drafts upon this bank at ninety days' sight to the extent in all of £5,000, say Five thousand pounds, and we hereby engage with the drawers, indorsers, and *bona fide* holders of all drafts drawn under and in compliance with the terms of this Credit, that the same shall be duly accepted payable in London, England, on presentation in order, and that they shall be duly honoured on presentation in order at maturity.

This credit will remain in force for six months from this date. The particulars of all drafts drawn against it must be indorsed on the back hereof, and the bills must specify that they are drawn under Credit No. 110, of the ..... day of ..... 19 .

We are,
Yours faithfully,
..... Bank, Ltd.

DOCUMENTARY LETTER OF CREDIT.

..... Bank,
London.
Date....

To.....
.....

Confirmed Credit No.

DEAR SIRS,

We have been requested to confirm to you that for account of ..... we have opened a credit in your favour for the sum of £..... (say .....) available for ..... drafts on us to be accompanied by the following documents :—

(1) Full set clean "on board" Bills of Lading (in name of .....).
(2) Invoice.
(3) Certificate of Origin.
(4) Marine and War Risk Insurance Policies.
(5) Consular Invoice .....
(6) ..... covering a shipment(s) of ..... at a price of .....
shipped from ..... per Steamship ..... to .....
before .....

We undertake to honour all drafts drawn within the terms of the above credit, provided such drafts bear the number and date of this credit.

We are, etc.

..... Bank Ltd.,
London,
No. 130. Date.....
£.

To ..... Bank.
.....

DEAR SIRS,

You are hereby authorised to negotiate (exchange and all charges payable at .....) within a period of six months from date hereof, the draft or drafts drawn by ..... of ..... on ..... of ..... drawn at ..... days' sight, payable in London, and not exceeding in the aggregate the sum of ..... for ..... per cent. of the Invoice cost of ..... shipped to ..... and consigned to ....., provided such draft or drafts are accompanied by signed Invoices of the shipments against which they are drawn and by the relative Bills of Lading and Marine Insurance Policies or Certificates, indorsed in Blank.

Please note that all drafts drawn against this Credit must state on their face that they are drawn under Credit No. 130, of the ..... day of ..... 19 .

We hereby engage, etc.,

We are, etc.,
..... Bank Ltd.

Letters of Credit are not negotiable, and also not transferable. If the person named in the Letter loses it, or has it stolen from him, and the finder or thief or any other person gets possession of the Letter and presents it to the banker to whom it is addressed, that banker will have to bear any loss should he negotiate any draft bearing the forged signature of the person named in the letter, as such a payment would be no payment as between the paying banker and the person rightfully entitled to sign the drafts. A Letter of Credit states the limit of the credit and the time during which it is held at the disposal of the grantee. These conditions and any others imposed by the grantor-banker must be rigorously observed. No holder of a bill on which the signature of the grantee is forged can maintain an action against the grantor-banker for refusing to accept such a bill, and the holder cannot maintain an action unless the bill drawn on the authority of the Letter complies with the terms expressed in the letter.

The banker, having pledged himself to pay drafts drawn under a credit, takes a letter of guarantee, and, if necessary, security, from the person who has requested him to grant the credit. In the case of a documentary credit, the banker has the security of the merchandise shipped. In the guarantee the guarantor undertakes to provide the funds necessary to meet the drafts before their maturity or undertakes to accept and pay them according whether the bills are drawn on the banker or on the

guarantor himself. Of the specimen forms of credit given above, two are addressed direct to the beneficiary and one to another bank

Letters of Credit are very useful instruments in facilitating commercial relations between, say, an importer here and a merchant abroad, or in financing the shipment of merchandise from one foreign country to another. The importer, for instance, gets his banker to issue a Letter of Credit undertaking to accept bills up to a certain amount drawn by the merchant abroad. Seeing that the credit of the importer is reinforced by the credit of the bank, the foreign merchant is in no doubt about receiving payment for the goods he exports. Moreover, he himself is able to use the Letter in order to get the bills negotiated or discounted, and so obtain payment for his produce, or in getting credit for the purchase of the produce shipped. The Letter of Credit described above is a "Confirmed Banker's Credit," and when once the Letter has been confirmed to the beneficiary, *i. e.* the person in whose favour the credit has been granted, the credit cannot be revoked except with the beneficiary's consent. Such transactions would be impossible unless it was clear that the grantor-banker must comply with the terms of the Letter irrespective of the state of accounts between him and the importer. "The essence of this Letter [of Credit]," said Earl Cairns, *In re Agra & Masterman's Bank* (1867), "is . . . 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."

Another form of credit very frequently used in connection with the financing of shipments of merchandise and produce from countries overseas to this country, and between foreign countries, is one under which the bills are drawn on the importer himself, the banker's services in the matter being requisitioned in order that the foreign exporter may be able to negotiate the bills he has drawn on the importer. The importer signs a document called a "Letter of Guarantee," in which he undertakes to accept and pay all bills drawn under the credit in accordance with the terms and conditions set out therein. The credit is communicated to the beneficiary (or exporter) who can sell his draft to his local banker, and so obtain payment for his produce.

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Letters of Credit are very useful instruments in facilitating commercial relations between, say, an importer here and a merchant abroad, or in financing the shipment of merchandise from one foreign country to another. The importer, for instance, gets his banker to issue a Letter of Credit undertaking to accept bills up to a certain amount drawn by the merchant abroad. Seeing that the credit of the importer is reinforced by the credit of the bank, the foreign merchant is in no doubt about receiving payment for the goods he exports. Moreover, he himself is able to use the Letter in order to get the bills negotiated or discounted, and so obtain payment for his produce, or in getting credit for the purchase of the produce shipped. The Letter of Credit described above is a "Confirmed Banker's Credit," and when once the Letter has been confirmed to the beneficiary, *i. e.* the person in whose favour the credit has been granted, the credit cannot be revoked except with the beneficiary's consent. Such transactions would be impossible unless it was clear that the grantor-banker must comply with the terms of the Letter irrespective of the state of accounts between him and the importer. "The essence of this Letter [of Credit]," said Earl Cairns, *In re Agra & Masterman's Bank* (1867), "is . . . 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."

Another form of credit very frequently used in connection with the financing of shipments of merchandise and produce from countries overseas to this country, and between foreign countries, is one under which the bills are drawn on the importer himself, the banker's services in the matter being requisitioned in order that the foreign exporter may be able to negotiate the bills he has drawn on the importer. The importer signs a document called a "Letter of Guarantee," in which he undertakes to accept and pay all bills drawn under the credit in accordance with the terms and conditions set out therein. The credit is communicated to the beneficiary (or exporter) who can sell his draft to his local banker, and so obtain payment for his produce.

These credits are generally "Documentary," and the bills must, therefore, be accompanied by bills of lading, invoices, and insurance policies, though, as regards insurance, the matter may be arranged this side on receipt of a cable advice from the shipper that the goods are ready for shipment. The bills drawn by the foreign exporter may be for the full invoice value of the goods, or for an agreed percentage, according to the terms of the contract between the parties. The banker who purchases (or negotiates) the bills sends them forward to a banker on this side, and gets as security the documents representing the produce. The latter is hypothecated or pledged to the banker as security under a "Letter of Hypothecation," signed by the exporter, in which the banker is given power to sell the goods on default of the drawee to meet the bills. If the importer does not meet the bills in due course, the banker can sell the goods and thus recoup himself, and call upon the parties for any deficiency. It should be noted that in a credit of this nature, the exporter is fully liable as drawer of the bill, and that the transaction, in effect, is an advance made on the joint responsibility of the drawer and drawee, with the merchandise as collateral security. The banker who issues the credit reserves to himself the right to cancel a credit of this nature in respect of any unused portion of the credit, on giving notice to the parties concerned.

If the credit is so worded that the amount for which it is available automatically reverts to the original amount, it is termed a "Revolving Credit," that is to say, it may, *e. g.*, authorise the drawing of drafts up to a limit of £1000 outstanding at any one time, in which case, as soon as the drafts have run off, the credit becomes available again, until cancelled, or until the date of expiration.

2. *Stamp.*—Letters of Credit for home use are subject to the *ad valorem* stamp duty of bills of exchange payable at more than three days after date or sight (Stamp Act, 1891, s. 32), but Letters for use abroad are exempt (*ibid.* Sch. I, Ex. 4).

3. **Circular Letters of Credit and Circular Notes.**—These are forms of Letters of Credit issued to the grantor-banker's foreign correspondents and agents generally, authorising them to pay to the person specified the sum for which each Circular Note is drawn or to honour drafts up to the limit of amount fixed in the Circular Letter. They are issued for the convenience of persons travelling abroad. It is usual for Circular

Letters of Credit and Circular Notes to be paid for at the time they are obtained from the issuing banker by an amount equal to the face value of the Notes and the limit of the Letter of Credit. A small commission is generally charged, though, if the amount of the Credit be substantial, the issuing banker may look for his remuneration to the interest which will be earned on the amount outstanding under the Credit.

CIRCULAR LETTER OF CREDIT.

Not available after ..... 19 .

No. ..... Bank,
£. London,
Date.

GENTLEMEN,

This letter will introduce to you ..... to whom you will please furnish such funds as ..... may require up to the aggregate amount of ..... pounds sterling against sight drafts drawn on this office, which please negotiate at your buying rate for bankers' cheques on London. Each draft must be plainly marked as drawn under this Letter of Credit No..... and must be signed in accordance with the specimen signature which is on our Letter of Indication of the same number to be produced herewith.

We engage that such drafts shall meet with due honour if negotiated within ..... months from this date.

The amount of each draft must be inscribed on the back of this letter. This letter must be cancelled and attached to the last draft drawn.

We are, etc.

To Messieurs the Bankers mentioned in the Letter of Indication which must be produced herewith.

N.B.—The bearer, for purposes of security, is requested to carry this Letter of Credit apart from the Letter of Indication.

The reverse side of the Letter of Credit is as follows—

DATE.	BY WHOM PAID	AMOUNT PAID.	AMOUNT IN FIGURES.

LETTER OF INDICATION.

(To accompany Circular Letter of Credit.)

No. ..... Bank,
London,
Date.

To Messieurs the Bankers mentioned in this Letter of Indication.

GENTLEMEN,

The bearer of this letter is ..... in whose favour we have

issued our Letter of Credit No. ..... Recommending ..... to your attention and referring you to the specimen signature below.

We are, Gentlemen,
Your obedient Servants,

.....

Specimen signature.

.....

N.B.—This letter should be retained by the holder until the relative Circular Letter of Credit is exhausted, when it must be surrendered to the banker making the last payment.

CIRCULAR NOTE.

..... Bank,
London,
Date.

No.
Circular Note for Ten Pounds. £10.

GENTLEMEN,

This note will be presented to you by ..... whose signature you will find in our Letter of Indication No. ..... to be produced herewith. We request you to pay to ..... order the value of Ten pounds at the current rate of exchange.

We are, Gentlemen,
Your obedient Servants,

.....

To Messieurs the Bankers mentioned in our Letter of Indication to be produced herewith.

On the reverse side is—

£10. At sight pay to the order of ..... Ten pounds value received at ..... this day of ..... 19 .

(Signature) .....

LETTER OF INDICATION.

(To accompany Circular Note.)

..... Bank,
London,
Date.

No.
To Messieurs the Bankers mentioned in this Letter of Indication.

GENTLEMEN,

The bearer of this Letter is ..... who is furnished with our Circular Notes numbered ..... payable at our Head Office, London.

We request you to purchase any of these notes presented to you for payment at the current rate of exchange for sight drafts on London, on their being indorsed in your presence in accordance with the specimen signature given below.

This Letter of Indication should be retained by the holder until all the

Notes have been cashed, when it must be surrendered to the banker cashing the last note.

We are, Gentlemen,
Your obedient Servants,

.....

Specimen Signature.

.....

N.B.—The bearer, for his greater security, is requested to carry this Letter of Indication apart from the Circular Notes.

When Circular Notes or Letters are issued, a separate Letter of Indication is given to the grantee. As will be seen from the form above, it contains a specimen of the grantee's signature. It also has a list of the grantor-banker's foreign correspondents and agents.

It is essential, when use is made of the Circular Letter or Notes, that the grantee should hand the Letter of Indication—which for his protection should be kept separate from the Circular Letter or Notes—to the cashing banker. The cashing banker, before parting with any money, should carefully examine the grantee's signature on the draft or on the back of the Circular Note to see that it tallies with the signature of the Letter of Indication. Moreover, to prevent fraud, the cashing banker should insist on the draft or note being signed in his presence. The cashing banker cashes these drafts or notes in local currency at the buying rate for sight bills on London; that is to say, he exchanges them at the current rate at which he is prepared to purchase sight bills on London. In some cases a small commission is charged, but, as a rule, the cashing banker makes his profit on the transaction in the rate of exchange.

Examination of the specimen Circular Letter will show that the drafts to be honoured must plainly indicate that they are drawn under Letter of Credit numbered so and so. Each draft so drawn must be entered on the back of the Circular Letter, from which the banker will see the amount for which the credit is still available. The Circular Notes—which bear consecutive numbers—must be signed on the back by the grantee when presenting them for payment. The agent or correspondent who cashes the draft which exhausts the limit under the Circular Letter should cancel the Circular Letter, and when cashing the last Circular Note should cancel the Letter of Indication. All the documents must be returned to the issuing bank.

Circular Notes, unlike Letters of Credit, have been held to be

negotiable instruments. This fact emphasises the importance of the warning printed on the Letter of Indication to the effect that the grantee should carry it apart from the Circular Notes. For if he loses the Letter of Indication and the Notes, and the finder imitates his signature and gets the Notes cashed, the grantee may be precluded from recovering from the grantor-banker any loss that may ensue. But this does not help a foreign correspondent who cashes Circular Notes under a forged signature, since there is no privity of contract between him and the grantee.

The value of Circular Notes not used by the grantee will be credited to him on his surrendering them to the grantor-banker, together with the Letter of Indication; so will any balance of the Circular Letter not used. But if he loses any of the Circular Notes the loss is his, and to get a credit he must give the grantor-banker a satisfactory indemnity.

4. *Stamp.*—Circular Letters of Credit for use abroad are exempt from stamp duty, but the drafts drawn under their authority are subject to the usual duties of foreign bills of exchange. Circular Notes are also exempt, but the drafts on the back must be stamped as bills of exchange.

5. **"Acceptances and Indorsements on behalf of Customers."**—In the balance sheet of a London bank there appears on the liabilities side an item, "Acceptances and Indorsements on account of Customers." This item represents the bills outstanding which have been accepted by the bank on behalf of its customers. A large proportion of these bills are drawn under Letters of Credit to meet liabilities due abroad. Formerly, the business of accepting bills was almost wholly in the hands of the merchant and foreign bankers of London, who have specialised in this kind of banking business, but of late years the great London joint stock banks have seriously entered the field, and now do an enormous business in this direction.

The London accepting houses have a unique reputation all over the world, and many million pounds' worth of bills are drawn on these houses against goods exported from one foreign country to another. For example, silk or tea shipped from China to the United States will, as a general rule, be ultimately paid for through London.

The question naturally arises, Why should merchandise that

is never intended to reach this country be ultimately paid for in London? The answer is that London is the financial centre of the world. "Drafts on London," says Mr. Franklin Escher, an American authority on foreign exchange, "are always readily negotiable . . . in all places and at all times." By drawing on London, moreover, the foreign exporter can not only readily negotiate his drafts, but can usually do so at a better rate of exchange than if the draft were drawn on any other financial centre.

As already stated, bankers' acceptances are generally drawn under Letters of Credit. This system works extremely well not only from the importing merchant's point of view, but also from that of the foreign exporter. The merchant here gets the credit of a great bank to reinforce his own credit, and does not have to pay for his imports until some time after the goods have been shipped—according to the tenor of the bills. The foreign exporter, instead of drawing a bill on a trader, who may not be known personally to the local foreign banks, draws on a London bank known all over the world. As soon as he is able to ship the goods he can get payment for them by discounting the London first-class bank bill with the local banker. The foreign merchant, therefore, has every inducement for quoting a close price for his merchandise, seeing that he will get what is equivalent to a spot cash price for it, the discount, of course, being allowed for in the price quoted for the goods.

The system also works well from the banker's point of view. Very rarely does he have to part with any actual money. The whole transaction is based upon the credit, not the cash, of the banker issuing the Letter of Credit, and for the loan of his credit the banker charges a commission—small, it is true, but which in the aggregate shows him a very substantial annual profit. In some cases security is deposited as cover, while in others the credits are documentary, so that the banker gets the documents of title to the goods as security for the bills. If the customer does not provide for the bills, the banker must nevertheless pay them, and it is on account of the banker's liability on the one hand, and his customer's liability to him on the other hand, that the item, "Liabilities of customers on Acceptances and Indorsements," appears on both sides of the banker's balance sheet; one entry showing his liability to the public, which is

contingent and only arises if the customer fails to keep his engagement, and the *contra* entry showing the customer's liability to the banker.

In some balance sheets, this item appears as "Acceptances and Confirmed Credits on account of Customers."

CHAPTER IV

POSTAL ORDERS—CASH ORDERS—CONDITIONAL ORDERS TO PAY—DOCUMENTS IN FORM OF RECEIPTS—DIVIDEND WARRANTS—INTEREST WARRANTS—COUPONS—DRAWN BONDS

1. **Postal Orders.**—Postal Orders and Money Orders are not cheques, since they are drawn by a Post Office on the Postmaster-General or on another Post Office. They are, therefore, outside the protection of the Bills of Exchange Act. They are also expressly marked "Not Negotiable." Moreover, "if an order is lost or stolen, no person into whose hands it may fall, though himself innocent, is entitled to receive the amount of the order. The rightful owner is alone entitled to cash the order" (*Post Office Guide*). But bankers collecting these instruments for customers are specially protected against the true owner by the Post Office Act, 1908, s. 25, which says that "any banker . . . who in collecting in that capacity for any principal, shall have received payment . . . in respect of any postal order or of any document purporting to be a postal order, shall not incur liability to anyone except that principal by reason of having received the payment . . . or having held or presented the order or document for payment." But as bankers usually do not merely *collect* such instruments for their customers, but credit them as cash, they lose the protection of this section and should the orders prove to have been stolen, the banker, if his right of recourse against his customer should prove worthless, would be liable in an action for conversion. By the Post Office(Money Orders) Act, 1883, Sch. I, if the orders are crossed generally they will only be paid through a bank, and if crossed specially, only through the banker to whom they are crossed. When presented for payment by a banker, the payee need not have filled in his name in the stipulated place, or have signed the receipt at the foot of the order, provided that the name of the

presenting bank is stamped on the face of the order. The presenting banker, however, usually insists upon the payee writing or stamping his name on the face of the order. All orders are payable at the G.P.O., London, as well as at the place, if any, mentioned on the face of the order.

The Court of Appeal case, *London & Provincial Bank* v. *Golding*, emphasises a danger to bankers when collecting Postal Orders and Post Office Money Orders. As shown before, the Post Office will pay over the proceeds of these documents with a commendable lack of formality, but the Post Office Regulations permit the Post Office to return the orders to the presenting bank, if at any time later it be found that there is any irregularity, and the bank must refund the money. It must, therefore, be noted that the encashment of these orders for a banker is provisional only (see *J. Inst. Bankers*, May, 1918, pp. 136–7).

2. **Cash Orders.**—Cash orders are drafts payable on demand, usually drawn by wholesale firms upon their retail customers. As these drafts involve presentation to the drawee by the collecting bank, it is the practice both in London and the provinces for bankers to discourage the drawing of these drafts, and in many cases to refuse to collect them.

3. **Conditional Orders to Pay.**—No document can be called a cheque unless it is " an unconditional order in writing " (s. 3, Bills of Exchange Act, 1882). Hence, any document in the form of a cheque that contains a condition attached to the order to pay cannot be a cheque. Such documents are not negotiable, and " would not appear even to be transferable " (Paget, *Law of Banking*, 4th edition, p. 126). As a matter of practice, however, these documents are passed through accounts other than that of the payee. It should be noted that it is the order to pay that must be unconditional. For example, the order to pay on such documents is often expressed in similar wording to the following: " Pay John Jones or order the sum named below on the receipt being duly stamped, signed, and dated." Such a wording undoubtedly expresses a condition precedent to payment, and the document, therefore, cannot be regarded as a cheque and subject to the provisions of the Bills of Exchange Act. But if the order to pay is worded as in an ordinary cheque, and yet there are stipulations on the document which do not occur on an ordinary cheque, the position is not so clear. In *Thairlwall* v. *G. N. Railway. Co.*, 1910, the following wording at

the bottom of a dividend warrant was discussed: "It will not be honoured after three months from date of issue unless specially indorsed for payment by the secretary." Mr. Justice Bray, in giving judgment, inclined to the view that this wording did not make the document other than a cheque, but he also said that he "felt a great deal of doubt on the point." The true test is whether a conditional statement is addressed to the paying banker, or is merely a matter between the payee and the drawer. For example, many documents in the form of a cheque, purporting to be payable to order, bear a statement that the receipt form must be signed, and that no further indorsement is required. This, it might be argued, is addressed to the payee, but even if that be so, the paying banker could not safely allow the direction to be ignored by the payee, and should he do so, he might be under some liability to the drawer, his customer, whose interests he should protect. When the document has a receipt form printed on it, but contains no stipulation as to the signing of the receipt, it has been argued that this does not make the document conditional. Nevertheless, if the payee signed the cheque in any other place but the place allotted for his signature on the receipt form, the paying banker would be in a difficulty. As will be seen from the foregoing remarks, the position, so far as the banker is concerned, is very unsatisfactory.

The receipts on these documents must be duly stamped as receipts, and the order also requires the same stamp as a cheque, except when exempted by statute. Whether the receipt is on the face or the back of the document, if it is payable to order, the payee must also indorse the document. (See also p. 31.)

4. *The Paying Banker.*—It does not appear where the paying banker is to get his protection from should he pay a conditional document bearing a forged indorsement. The sections protecting a paying banker are s. 60, Bills of Exchange Act, 1882, and s. 19, Stamp Act, 1853. S. 60 refers to bills payable on demand and drawn on a banker, *i. e.* cheques; s. 19 refers to any "draft or order drawn on a banker payable to order on demand." Both these kinds of instrument are by their nature negotiable and transferable, but conditional orders to pay are not negotiable, and, though purporting to be payable to order, do not appear even to be transferable. S. 17 Revenue Act, 1883, extends the crossed cheques sections (ss. 76–82, Bills of Exchange Act, 1882) to these documents, but s. 17 expressly provides that nothing in

the Revenue Act "shall be deemed to render any such document a negotiable instrument." Payment over the counter under a forged indorsement or to a presenter having no title would undoubtedly be no payment so far as the true owner is concerned. Moreover, the banker who pays a conditional document which has been crossed and bears evidence of having been transferred, may lose the protection of s. 80, Bills of Exchange Act, 1882, on the ground of negligence, even though he may have paid in accordance with the crossing. To sum up, since these documents, whether crossed or uncrossed, place the paying banker in a very dubious position, they should, as far as possible, be discouraged, and, when they are issued, should be covered by a satisfactory indemnity from the drawers.

5. *The Collecting Banker.*—Since these conditional documents are not negotiable, they should, strictly speaking, be collected only for the payee named in them, and if collected for other persons the banker probably stands to lose the protection of s. 82. Neither would it appear that the banker who credits such documents as cash is protected by the Bills of Exchange (Crossed Cheques) Act, 1906, since there is nothing in that Act which implies that it refers to any documents other than cheques proper. In practice, however, bankers frequently collect these documents for reputable customers who are not the named payees.

6. **Documents in Form of Receipts.**—Another form of document is a mere receipt, the amount of which will be paid by the named bank on presentation (usually within a prescribed time) of the receipt duly signed. Probably these documents may be validly crossed under s. 17, Revenue Act, 1883, but the banker has no protection if he pays under a forged signature or to any person but the rightful party. In regard to stamp duty, the form would appear to come within the wide definition of a bill of exchange given in the Stamp Act (see p. 140), and would require the same stamp as a cheque, since it is a document entitling the recipient to a sum of money (see *Q. B. P.*, Nos. 48-9). In any case, a receipt stamp is necessary when the amount is £2 or over. If the paying banker is furnished with a list of payments to be made, a twopenny stamp must be placed on the list for each payment. The banker who is asked to pay these documents should get a satisfactory indemnity.

7. **Dividend Warrants.**—A dividend warrant is a draft

issued by a company directing its bankers to pay to a named member of the company his share of the divisible profits. A dividend warrant may be validly crossed by virtue of s. 95, Bills of Exchange Act, 1882, which says that "the provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend." If the dividend warrants are crossed, the bank on which they are drawn can refuse payment over the counter (see s. 79 (2), Bills of Exchange Act, 1882).

Those dividend warrants which are drawn in proper cheque form are to be treated like ordinary cheques, but to those drawn in any other form, the provisions regarding cheques do not apply. As we have already stated (see p. 173), Bray, J., in *Thairlwall* v. *G. N. Railway. Co.*, 1910, held, though doubtfully, that a statement at the bottom of a dividend warrant, that payment on presentation after three months would not be made without the secretary's indorsement, did not make the document other than a cheque; but, as this was not the point at issue, the learned judge's dictum must not be taken as final. The only direct legal decision regarding the negotiability of dividend warrants appears to have been in relation to Bank of England dividend warrants payable, not to order or to bearer, but to the payee only, and these were held to be not negotiable (*Partridge* v. *Bank of England*, 1846). As to dividend warrants generally, if payable to order or to bearer, it is probable that their negotiability could be upheld on the ground of mercantile custom, provided, of course, that there was nothing on the face of the document precluding negotiability. As a matter of fact, dividend warrants are frequently marked "Not Negotiable." Since the question of negotiability has not yet been settled, it behoves the collecting banker, for his protection, not, without sufficient reason, to collect these documents for persons other than the payees. Crediting as cash will deprive the collecting banker of the protection of s. 82, since it does not appear that the 1906 Act covers dividend warrants (unless they are cheques). The paying banker also will lose the protection of s. 60 unless the dividend warrant is in proper cheque form; neither will s. 19, Stamp Act, 1853, help him if the document is a conditional one. If the warrants are crossed, the paying banker is protected by s. 80, Bills of Exchange Act, 1882, by virtue of s. 95 of the same Act.

Dividend warrants must be signed by the person to whom they are made payable. *Per pro.* signatures are not valid,

unless the form of procuration has been submitted to and approved by the issuers of the warrant. An authority to sign and indorse cheques does not imply an authority to discharge dividend warrants. By mercantile custom dividend warrants payable to joint payees are discharged by the signature of any one of them, and this practice would probably be upheld in a court of law. (See also p. 35.)

Where there is a special place on the dividend warrant for the signature, the proprietor should sign in that place, and in no other. A signature is required, even though, as is not uncommon, such warrants are made payable to the payee or bearer. All dividend warrants are subject to the same stamp duty as cheques. If there is also a form of receipt, this must be duly stamped, if for £2 or over.

Many shareholders prefer to have their dividends paid direct to their bankers. The issuers also, in many cases, seem to prefer this method, as it is not uncommon for shareholders to receive a circular suggesting this procedure and enclosing the necessary form. If the dividends are paid direct to the banker, he must discharge the warrant in the manner required, and if there is a receipt to be signed, he must use a stamp for £2 and over, as if the document is not a bill of exchange he is not exempted, and even where it is a bill, it is doubtful if the exemption applies. The relative counterfoils should be sent to the holder of the shares. (See p. 475, for Form of Authority.)

8. **Interest Warrants.**—Interest warrants are drafts for the payment of the fixed interest due on Government stocks, debentures, etc. Unlike dividend warrants, when payable to joint payees, the signatures of all are required for the discharge of the interest warrant. They can be validly crossed by virtue of s. 17, Revenue Act, 1883. *Per pro.* indorsements are not accepted. S. 95 and s. 97 (*d*), Bills of Exchange Act, 1882, apparently do not apply to interest warrants, since they are not specifically mentioned. (But see Note, p. 178.)

9. **Coupons.**—Coupons are detachable certificates for the payment of interest on bonds, debentures, etc. They are issued in sheets, each separate coupon being numbered with the same number as the relative bond or certificate, and also with a number indicating the order in which it is to be detached for payment. For example, "Debenture No. 120. Interest Coupon No. 9." The place of payment is also indicated on

the coupon. Each coupon entitles the holder to interest for a certain period, usually six months, and, when due, is cut off and presented for payment. The dates of payment are generally stated on the coupons, but where no date is given it is duly announced in the public Press. Coupons falling due on a Sunday or a Bank Holiday are payable on the succeeding business day (*Q. B. P.*, No. 1568–69). Full particulars of all coupons entrusted to a banker for collection should be entered in a Coupon Book and the dates of payment in a diary.

Customers should not be credited with the value of coupons on foreign bonds presented for payment until the banker has received advices of the net amounts realised. These cannot readily be calculated beforehand owing to differences in income-tax deductions, and, in some cases, the fluctuations of the rate of exchange. In regard to coupons payable, at the holder's option, in this country or abroad, they should either be collected from the issuer's agents in London or sold for presentation at the foreign centre at which they are also payable, whichever the owner may determine to do. His decision will be influenced by the prevailing rate of exchange. Notice of lost coupons should be sent to the paying bankers, but they cannot stop payment on presentation, though, naturally, before paying them after receipt of a "stop," they would make inquiries into the title of the presenter (*Q. B. P.*, No. 1572). Coupons attached to and issued with any marketable security do not require stamping (Finance Act, 1894, s. 40, and Stamp Act, 1891, Sch. I, Ex. 11). Coupons held by a country banker for collection should be sent *uncrossed* to the Head Office or London Agent fourteen days or so before the date of payment. The coupons for each different series should be carefully sorted numerically, and listed on a separate slip.

Difficulties arise when bonds are sold whilst the current coupon is in the banker's hands for the purpose of collection. This is due to the fact that the price of the bonds on the Stock Exchange includes the current coupon, the value of which is not deducted until the due date of payment. If the holder sells the bond without the current coupon, the full amount of the interest the coupon represents has to be paid over to the buyer, and as the holder will only receive the proceeds of the coupon less income-tax, he has to adjust matters in his annual income-tax return. It would simplify matters if the value of

the coupon was deducted from the price of the relative bond, say, fourteen days or so before the due date.

10. **Drawn Bonds.**—These are bonds redeemable by drawings at a named price, the numbers of the bonds drawn being advertised in certain newspapers. The bonds are often left with a banker, not only for the purpose of cutting off the coupons, but to present the bonds for payment, if and when the number of the bond appears in the advertised list of those drawn. Should the holder of the bond overlook the drawing, the fact is brought to his notice, as a general rule, by the issuers refusing payment of the relative coupon when it is presented for payment. But some issuers—as did the Russian Government—have made it their practice to continue paying the coupons of a drawn bond, not as interest on the bond, but as deductions of the capital value of the bond. Accordingly, when the bond is actually presented for payment the holder may find his capital depleted by the value of the coupons paid since the drawing, and the banker, if the bond has been left in his charge, and the date of drawing overlooked by him, would probably incur liability to his customer.

NOTE (see p. 176).—The authorities formerly considered that interest warrants must be distinguished from dividend warrants (which are for distributing a share in profits), but in the case of *Slingsby* v. *Westminster Bank*, 1930, it was held that there was no distinction, and that s. 95 applied. This seems a very reasonable decision, as it is difficult to see what ground there is for making any distinction.

PART IV

BANKERS AND BANKING COMPANIES—BANKER AND CUSTOMER—ACCOUNTS OF CUSTOMERS

CHAPTER I

BANKERS AND BANKING COMPANIES

1. **Definition of a Banker.**—The term " Banker " is very difficult to define. There are no statutory definitions of any value. All that the Bills of Exchange Act, 1882, and the Stamp Act, 1891, attempted to do in this direction was to define a banker as any person carrying on the business of banking—a definition which does not carry us very far. There are no safeguards required by law before a banker may embark on the business of banking, neither is registration necessary, though by the Bank Charter Act, 1844, s. 21, every person carrying on the business of banking in England and Wales must make an annual return of his name, address and occupation, or in the case of companies and partnerships, the names, etc., of all persons composing the company or partnership, and the name under which the business is carried on. Similar returns are prescribed by the Bankers (Ireland) Act, 1825, and the Bankers (Scotland) Act, 1826. But though all who profess and call themselves bankers are compelled to send in these annual returns, there is nothing in the various Bank Acts which can be taken to imply that the status of banker is conferred upon those making the prescribed returns. These annual returns must still be made by bankers other than those controlled by the Companies Act, 1929. In lieu thereof these banking companies are required to send in an annual return and summary in accordance with ss. 108, 110, 361 of the Act (see *post*). Companies, including banking companies, incorporated outside Great Britain, come within the scope of ss. 343–53 of the Companies Act, 1929, and a brief summary of the requirements is given on p. 268.

From the scanty authority we have to guide us, it seems probable that a person cannot claim to be carrying on the business of banking unless he receives money or instruments representing

money on current account, honours cheques drawn thereon, and collects the proceeds of cheques which his customers place into his hands for collection. The banker performs many other functions, as we shall see presently, but this function of receiving money from his customers and repaying it by honouring their cheques, as and when required, is the one function above all other functions which distinguishes a banking business from any other kind of business. Dr. Hart in his *Law of Banking*, 4th edition, p. 1, defines a banker or bank as "a person or company carrying on the business of receiving moneys, and collecting drafts, for customers subject to the obligation of honouring cheques drawn upon them from time to time by the customers to the extent of the amounts available on their current accounts." As in the Bills of Exchange Act, 1882, the term "banker," throughout this treatise, "includes a body of persons whether incorporated or not, who carry on the business of banking" (*ibid.*, s. 2). The Money Lenders Act, 1911, s. 2, provides that no person shall be registered as a money-lender under any name including the word "bank," or under any name which implies that he carries on the business of banking.

2. A Banker's Functions.—The principal business of a banker is to receive money from his customers, and to collect instruments representing money on behalf of his customers, on the understanding that he will refund all moneys received or collected, either on demand or at some definite date agreed upon between him and his customers. He is also (*a*) a lender of money, either by way of loan, or by way of overdraft on current account; (*b*) a discounter of bills and promissory notes; (*c*) an issuer of drafts, letters of credit and circular notes, and an acceptor on behalf of his customers of bills drawn on the authority of letters of credit; (*d*) an issuer of bank-notes—formerly one of the primary functions of a banker, but now confined, in England and Wales, to the Bank of England. Apart from bills issued under letters of credit, the banker does not, as a rule, accept bills drawn by his customers, but, though not compelled to do so, he does usually undertake, either expressly or impliedly, to honour bills domiciled with him by his customers.

The banker also performs other services for his customers. (*a*) he acts as his customers' bailee in taking charge of valuable property, such as a plate, jewellery, securities, etc., which is storable in a small space; (*b*) he acts as his customers' agent

(1) in buying and selling Stock Exchange securities on their behalf; (2) in making periodical payments, such as charitable, library and club subscriptions, insurance premiums and the like; (c) and, if a joint stock company, the bank may act as a custodian trustee under the Public Trustee Act, 1906, and, if empowered to do so by its memorandum of association, as a trustee or executor under a will.

3. **Classification of Banks.**—First, there is the Bank of England, incorporated by Royal Charter, and not affected by the Companies Acts. The liability of the shareholders is limited to the amount of stock they hold. Secondly, the great joint stock banks, registered under the Companies Acts with limited liability. Thirdly, a few joint stock banks with unlimited liability, whose shares are privately held. Until 1858, all the joint stock banks then in existence were companies with unlimited liability. Fourthly, banking partnerships with unlimited liability. Fifthly, Scotch, Irish, Colonial and Foreign Banks, whose principal place of business is outside the precincts of England and Wales. In some of the earlier Colonial Banks formed by Royal Charter, the liability was only partially limited, and was defined in the Charter itself.

4. **Joint Stock Banks.**—The Companies Act, 1929, codifies the law relating to joint stock companies, including Banks incorporated as joint stock companies. The following are the provisions specifically relating to banking companies.

5. *Limit of Ten for Banking Partnerships.*—No company, association of partnership consisting of more than ten persons shall be formed to carry on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act, or of letters patent. (Section 358.)

6. *Annual List of Members and Summary.*—Every company having a share capital shall make an annual list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return. The list must state the names, addresses and occupations of all the past and present members therein mentioned, and the number of shares held by each existing member at the date of the return, specifying shares transferred since the date of the last return by persons who are still members and by persons who have ceased to be members respectively, and the dates of

registration of the transfers. The list must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying particulars relating to the amount of the share capital, number of shares, amount called upon each share, total amount of calls received, total amount of calls unpaid, number of shares forfeited, names and addresses of existing directors, etc. This summary must include a copy, duly certified by a director, or the manager or secretary, of the last audited balance sheet of the company. Banking companies must add a list of all their places of business (ss. 108, 110, 361).

The above list and summary must be contained in a separate part of the register of members, and must be completed within twenty-eight days after the meeting aforesaid, and the company must forthwith forward to the registrar of companies a copy signed by a director or the manager or secretary. The list for the registrar must be written on special forms for the purpose, and be impressed with a five shilling fee stamp (s. 110).

7. *Registration of Unlimited Company as Limited.*—An unlimited banking company consisting of seven or more members may be registered as a limited company on passing a resolution to that effect at a general meeting by a three-fourths majority. Before registration there shall be delivered to the Registrar of Joint Stock Companies: (1) a list showing the names, addresses and occupations of the members, the number of shares or amount of stock held by each; (2) a copy of the Act of Parliament, Royal Charter, Letters Patent, deed of settlement or other instrument regulating the company; (3) particulars of the nominal capital, number of shares, amount paid on each share, name of the company with "limited" added. Notice of intention to register as a limited company must be given to every customer at least thirty days before registration. The word "limited" shall form and be registered as part of its name (ss. 16, 321–33, 359).

An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things: (*a*) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purpose of the company being wound up; (*b*) provide that a specified portion of its

uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up (s. 53).

8. *Reserve Liability of Limited Company.*—A limited company may be special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up except in the event and for the purposes of the company being wound up, and thereupon that portion shall not be capable of being called up except for the purposes aforesaid (s. 49). The majority of joint stock banks have taken advantage of this section.

9. *Statement to be published by Banking Companies.*—Every limited banking company shall, before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, make a statement in the form set out in the seventh schedule to the Act, or as near thereto as circumstances will permit. A copy of the statement shall be put in a conspicuous place in the registered office of the company, and in every branch, office, or place where the business of the company is carried on. The penalty for non-compliance is five pounds (or less) for every day during which the default continues (s. 131).

The form is as follows—

The share capital of the company is....., divided into..... shares of.....each. The number of shares issued is .....

Calls to the amount of ..... pounds per share have been made, under which the sum of ..... pounds has been received.

The liabilities of the company on the first day of January (*or* July) were—

Debts owing to sundry persons by the company—

On judgment . . . . . £
On specialty . . . . . £
On notes or bills . . . . . £
On simple contracts . . . . . £
On estimated liabilities . . . . £

The assets of the company on that day were—

Government securities (*stating them*) . £
Bills of exchange and promissory notes . £
Cash at the bankers . . . . . £
Other securities . . . . . £

10. *Audit of Accounts.*—Every banking company must have its accounts audited annually. The auditors shall be selected, and their remuneration fixed, at each annual general meeting, but a director or officer of the company cannot be appointed auditor of the company. They shall have a right of access to the books, accounts and vouchers of the company, and may demand any necessary information and explanations. The auditors shall report to the shareholders on the accounts and on the balance sheet, stating whether they have received all the information and explanations they have required, and whether in their opinion the balance sheet is so drawn up as to exhibit a true and correct view of the state of the company's affairs. If the banking company has branches beyond the limits of Europe it will be sufficient if the auditors are allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom (ss. 132–4).

The balance sheet of a banking company submitted to a general meeting of its members must be signed in accordance with the provisions of the Companies Act, and the auditors' report must be attached and read. No copy of the balance sheet must be issued, circulated or published which has not been duly signed or without having a copy of the auditors' report attached (s. 129).

11. *Company's Lien on Own Shares.*—The articles of association of a joint stock bank generally provide that the bank shall have a lien upon the shares of the members for all moneys due from the members to the bank. The clause dealing with this runs somewhat as follows: "The company shall have a first and paramount lien upon all shares, other than fully paid shares, registered in the name of each member for his debts, liabilities and engagements, solely or jointly with any other person to or with the company, and that such lien shall extend to all dividends declared on such shares." Another clause also provides that the directors shall have power to sell such shares, the net proceeds of such sale to be applied in or towards the satisfaction of the company's claim against the member, and the residue, if any, to be paid to the member. Furthermore, it has been held in a case where one of the joint holders of bank shares was a partner in a firm indebted to the bank, that, although the shares were trust property the bank's lien must prevail over the title of the

cestuis que trustent, i. e. the beneficiaries. The bank was without notice of the trust at the time the advances were made. (*New London and Brazilian Bank* v. *Brocklebank*, 1882, quoted by Dr. Hart, *Law of Banking*, 4th edition, p. 41.) This permanent lien appears to extend also to the dividends (*Hague* v. *Dandeson*, 1848, also quoted by Dr. Hart at p. 40).

When a banker receives notice of the sale or any charge on the shares of a shareholder, a note should be made in the share ledger, and if it is known that the shareholder has an account with one of the bank's branches, that branch should be advised at once. If the branch has already made an advance on the security of the shares, the account must be stopped, so as to prevent the operation of the Rule in Clayton's Case. A bank cannot safely continue advances to a shareholder against the shares when once notice has been received that the shares are held in a fiduciary capacity (*Mackereth* v. *Wigan Coal and Iron Co.*, 1916). In this case the company relied, for its right to enforce its lien on its shares, on s. 27, Companies (Consolidation) Act, 1908, which runs: "No notice of any trust, expressed, implied, or constructive shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England" (now s. 101). The company's articles of association further provided that no person was to be recognised by the company as holding any share upon any trust. It was held that the section quoted and the clause in the articles only referred to the Company's obligations in registering transfers of shares, and that when the Company desired to deal with the shares for its own benefit, then it must take into consideration all notices it may have received respecting any interest of third parties. Bankers, therefore, who look to their lien on their own shares as security for an advance, must be sure that they have not received notice of any interest of any third party in the shares. (See also *Notice of Lien to Company*, p. 348.)

12. **Banking Partnerships.**—A banking partnership is governed by the clauses in its deed of partnership, and by the Partnership Act, 1890, in the same way as any other firm. By s. 358 of the Companies Act, 1929, a banking partnership, unless registered as a company, must not consist of more than ten persons (but see pp. 247–8). In the case of any other kind of partnership the number is limited to twenty. From

1708 until the passing of the Joint Stock Banking Companies Act, 1857, the trend of legislation was to restrict the banking operations of banking partnerships consisting of more than six members. This Act raised the number to ten, but six remained the maximum allowed for a banking firm issuing bank-notes. Banking partnerships by s. 21, Bank Charter Act, 1844, have to send in an annual return to the Commissioners of Inland Revenue (see p. 179, *ante*).

13. **Branches.**—The legal relation between the branches of a bank and the head office is summed up in the following quotation: "The position of branch banks is that, in principle and in fact, they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes, *e. g.* that of estimating the time at which notice of dishonour should be given, or of entitling a banker to refuse payment of a customer's cheque except at the branch where he keeps his account." (*Prince* v. *Oriental Bank Corporation*, 1878.) In giving notice of dishonour each branch is considered as an independent holder, and therefore entitled, within the usual time, to receive notice from and to transmit notice to the other branches of the same bank (s. 49 (12) (13), Bills of Exchange Act, 1882). In regard to cheques, when a customer draws a cheque he does not draw it upon the bank generally but upon the particular branch at which he keeps his account. One branch is, therefore, not compelled to pay a cheque drawn upon another branch. And if one branch does cash a cheque drawn upon another branch, it has been held that it does so on the credit of the person presenting the cheque, and not as the bankers of the drawer. Hence, if the cheque is dishonoured when duly presented at the branch on which it is drawn, the banker is entitled to recover from the presenter the money paid (*Woodland* v. *Fear*, 1857). But where, in such circumstances, there is a forged indorsement, it must be remembered that the cashing branch has not the protection of s. 60, Bills of Exchange Act, 1882, since it is not the branch upon which the cheque is drawn. And if the cheque were crossed, it is not covered by s. 80 (quoted in full on p. 72). The position is similar to that of cashing or exchanging a cheque drawn on another bank. (See "Cashing or Exchanging Cheques," p. 86.)

If a customer has accounts at two branches of the same bank, the banker may, unless there is an agreement, expressed or

implied, to deal with the different accounts as separate accounts, and in the absence of any notice of trust affecting either of the accounts, combine the accounts, *i. e.* set off a debit balance at one branch against a credit at the other. If the balance remaining be a debit balance, or a balance insufficient to meet a cheque drawn on the branch with the credit balance, the banker is not liable should he dishonour the cheque. But the customer has not the same right to combine accounts kept at different branches of the same bank, and the banker, therefore, is not liable to the customer if a cheque drawn on the branch where there is a debit or an insufficient balance is dishonoured, though the two accounts combined would show a balance sufficient to pay the cheque. Nevertheless, as the banker's right depends on there being no agreement, express or *implied* from the course of business, to keep the accounts separate, it is desirable to give reasonable notice before combining the accounts, or, where set-off is relied on as security, to take a definite agreement. (See Note, p. 223.)

Credits may be paid in at any branch or sub-branch, but before drawing against such credits, the customer must allow sufficient time for advice of the credits to reach the branch at which his account is kept. If he does not do so, he cannot make the banker liable for dishonouring a cheque before advice of any credit had reached the branch concerned. Full details must be sent to the latter of all cheques, etc., composing the credit. Arrangements may be made by which a customer can have his cheques cashed at another branch (see *post*).

Since notice to a principal is, generally speaking, notice to his agents, it seems to be established that a notice, other than notice of dishonour, sent to the head office operates as notice to all the branches after a sufficient time has elapsed to allow of the notice being received by the branches. As already stated, a copy of the statement of assets and liabilities, as required by s. 131 of the Companies Act, 1929, must be exhibited in a conspicuous place not only at the head office, but at every branch, sub-branch, or agency, where the business of the bank is carried on.

14. Bank Agents and Correspondents.—It often happens that a banker is asked to perform some service for his customer, which he cannot perform without employing an agent or correspondent. For example, he may have to collect for a customer a bill payable in Melbourne. Since the banker himself employs the agent for collection, the agent, apart from express agreement,

is responsible to him alone, even though the customer has knowledge that the banker is employing an agent. There is no privity of contract between the customer and the agent. If, therefore, through the default of the agent, *e. g.* his bankruptcy or negligence, the proceeds of the bill on Melbourne fail to reach the customer, the loss must be borne by the banker, not the customer. The agent, however, is liable to the banker for such loss.

Conversely, if the banker remits money on account of a customer to the agent for the payment of bills drawn by the customer, but does not specifically mention the bills to which the remittance is to be appropriated, the customer may not be able to follow the money should the banker fail, and the agent retain the money on account of debts due to him by the banker. But if the banker does specifically appropriate the remittance to particular bills drawn by his customer, then the agent must apply the money sent to the discharge of those bills, no matter what the state of accounts may be between him and the banker.

15. **Payment of Cheques under Advice.**—When a customer wishes to have his cheques cashed at another branch, or at a branch of another bank, he must make application in writing, or sign an appropriate form, stating the limit of amount, daily, weekly, monthly, or quarterly, as the case may be, and also how long he wishes the arrangement to continue. The manager of his branch sends a letter of advice (enclosing a specimen signature), authorising the other branch or bank to honour the customer's cheques up to the agreed limit, and for the stated time, or until the order is countermanded. If the cheques are to be honoured at a branch of another bank the arrangement is made through the respective head offices.

Cheques cashed in this manner are not cancelled by the cashing branch or bank, but are generally marked "Paid by order." The cheques should bear the cashing branch's stamp and may be remitted either through the head office to the drawee-branch or direct, according to the arrangements made. They are sometimes stamped on the back, as *e.g.* "Paid at London Bank, Kensington Branch, *John Jones*, Cashier." The cashing banker is liable if he cashes a cheque under a forged signature. In regard to a forged indorsement, the statutory protection afforded to a banker (s. 60, Bills of Exchange Act, 1882) cashing a cheque for a person having a defective title or no title at all, only applies

to cheques cashed at the branch on which the cheque is drawn. The branch, therefore, which cashes cheques payable under advice should make certain, before handing over the money, that the person tendering the cheque for payment has the drawer's authority to receive the money. The banker might in these cases ask his customer for an indemnity putting the cashing bank or branch on the same footing as regards statutory protection as the drawee-branch. (See also Note, p. 192.)

The banker on whom the cheque is drawn is bound to pay all cheques properly cashed under advice. All running advices to honour cheques issued by a branch and all those received by that branch should be recorded in the proper book, and, in the case of credits opened by the branch, a note of such credits should be made in the ledger account of each customer affected. Stop notices should be sent, where necessary, to every branch where the customer's cheques are payable.

16. **Bankers' Books Evidence Act, 1879.**—Bankers, when called upon to do so, are bound to disclose in a court of law the state of a customer's account. Formerly, the actual books of account had to be produced, but by this Act it was provided that, subject to the specified conditions, a copy of any entry in a banker's books shall in all legal proceedings [including arbitrations (s. 10)] be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded (s. 3). The term " banker's books " includes ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank (s. 9). In order that a copy of an entry in a banker's book shall be admissible as evidence, it must be proved that the book at the time of making the entry was one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank (s. 4). Such proof may be given by a partner or officer of the bank, either orally or by production of an affidavit sworn by him (s. 4). And it must be further proved that the copy has been examined with the original entry, and is correct (s. 5).

The Act further provides that a banker or officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compelled to produce any banker's book, the contents of which can be proved under this Act, or to appear as witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause (s. 6).

If the bank is a party in the action, it can still be compelled to produce its actual books under subpœna. A Court or a judge may give any party to a legal proceeding leave to inspect and take copies of any entries in a banker's books. Unless otherwise directed by the Court, the banker is entitled to three days' notice of any such order (s. 7). This section also appears to give power to the Court to order the inspection of any entries in any account, provided that it is shown to the satisfaction of the Court that such entries have a bearing upon the action. No Court would grant such an order except on the clearest evidence of its necessity. Before executing such an order, three days' notice would have to be given to the third party, and also to the banker.

17. **Clearing System.**—The Clearing System is a contrivance "by which all drafts are brought daily to a common receptacle, where they are balanced against each other" (*Report of the Bullion Committee*, 1810). All balances due from or owing to each particular bank at the end of the day's clearing are settled by means of a book entry at the Bank of England. As Dr. Ellis Powell says in his *Evolution of the Money Market*, p. 305 *n.*, the system of clearing is "a species of highly concentrated representative barter." The system is of incalculable benefit as a time, labour, and currency saver.

18. *London Clearing House.*—Each of the London Clearing Banks sends to the Clearing House in Post Office Court, Lombard Street, two or more representatives four times daily. One clerk sits at the desk allotted to his particular bank, and the other passes round the room depositing on each of the other desks the appropriate bundle (called "charges") of cheques, etc. (called "articles") drawn on the bank to whom the desk belongs, and paid into the perambulating clerk's bank for collection. When the clerks have completed their rounds, each desk totals up what it owes to each other desk in succession, and also what is owing to it by each other desk. The "articles" received by each bank are called its "In clearings"; the "articles" deposited on the desks of the other banks are called its "Out clearings." When the day's clearing is finished, the "Summary sheet" is filled up, and a balance struck. The difference is not paid out or received in money, but is settled by an entry in the books of the Bank of England, to the effect that "of the total amount of the balances of the Clearing Bankers lying there, £x more belongs to Banker Q and £x less to Banker P; a balance which will quite probably turn in the

opposite direction in the clearings of the following day " (Milnes' *Economic Foundations of Reconstruction*, p. 67).

SUMMARY SHEET.

BARCLAYS BANK, LIMITED.

Debtors.					Creditors.				
				Bank Westminster Bank Lom. St. District					
				Glyn Westminster Bank H.O. Lloyds H.O. do. City Office					
				Midland Bank H.O. Midland Bank Thread. St. do. Branches Martins National Nat. Prov. Bank H.O.					
				Westminster Bank Thread. St. Coutts Nat. Prov. Bank P. St. Williams Country Clearing Metropolitan Clearing C.H.					

Appended are the forms respectively used when the net balance on the day's clearings is for or against each particular Clearing Bank—

TRANSFER

SETTLEMENT AT THE CLEARING HOUSE

London, ... 19 .

To the Cashiers of the Bank of England,

Be pleased to TRANSFER from our Account the sum of ..... and place it to the credit of the Account of the Clearing Bankers, and allow it to be drawn for, by any of them (with the knowledge of either of the Inspectors, signified by his countersigning the Drafts).

£..... .....

SETTLEMENT AT THE CLEARING HOUSE.

Bank of England, ... 19 .

A TRANSFER for the sum of ..... has this evening been made at the Bank, from the account of Messrs. ..... to the Account of the Clearing Bankers.

For the Bank of England.

£.....

This Certificate has been seen by me,

....., Inspector.

CREDIT

SETTLEMENT AT THE CLEARING HOUSE.

London, ... 19 .

To the Cashiers of the Bank of England,

Be pleased to CREDIT our Account the sum of ..... out of the money at the credit of the account of the Clearing Bankers.

£..... .....

Seen by me,
.....Inspector at the Clearing House.

SETTLEMENT AT THE CLEARING HOUSE.

Bank of England, ... 19 .

The account of Messrs..... has this evening been CREDITED with the sum of ..... out of the money at the credit of the account of the Clearing Bankers.

£.....

For the Bank of England.

All cheques, whether crossed or uncrossed, presented for payment by one Clearing Bank to another must be presented through the Clearing House. Cheques received too late for presentation on the day of receipt may be sent to the drawee-banker to be "marked," and are presented for payment next morning, and, being marked, would have priority over other cheques presented on that morning. Readers who desire detailed information on this subject are referred to the author's *Elementary Banking*, in which a chapter is devoted to the Clearing System.

NOTE (see p. 189).—The question of protection against payment on a forged endorsement for the cashing branch or banker has again been referred by the Institute of Bankers to Counsel, with the result that it is now considered that payment by another branch at the request of the drawer would be a payment in the ordinary course of business, entitling the branch to the protection of section 60. Where, however, the cheque is cashed by another banker, Counsel considers that the banker does not obtain protection. (See *Journal of the Institute of Bankers*, February, 1924, pp. 55 and 104, for the full arguments, and *Q. B. P.*, No. 488).

CHAPTER II

BANKER AND CUSTOMER

1. **Definition.**—When s. 82, Bills of Exchange Act, 1882, (which gives protection to a banker collecting cheques on behalf of a customer) was drafted, it is unfortunate that no attempt was made to define what constitutes a " customer." From the decided cases it would appear that a customer is a person who has " some sort of an account, either deposit or current account or some similar relation " with a banker (Lord Davey in *G. W. Railway* v. *London and County Bank*, 1901). This definition rules out of the category of a banker's customers any person who has been in the habit of getting his cheques changed by a banker, but has no account with him. The question is further discussed on pp. 74 and 225.

2. **Relation of Banker and Customer.**—The banker when he receives money from a customer does not hold the money in a fiduciary capacity. To say that money is " deposited " with a banker is likely to cause misapprehension. What really happens is that the money is not deposited with, but lent to, the banker, and all that the banker engages to do is to discharge the debt by paying over an equal amount when called upon. The true relationship between the two parties was admirably described by Lord Cottenham in *Foley* v. *Hill*, 1848. " Money," said his lordship, " when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small

rate of interest, according to the custom of bankers in other places. . . . That being established to be the relative situations of banker and customer, the banker is not an agent or factor but he is a debtor." In *Joachimson* v. *Swiss Bank Corporation*, 1921, Lord Justice Atkin gave an admirable summary of the position. He stated that the banker undertakes to receive money and collect bills for his customer's account, and that money so received is not held in trust for the customer but borrowed from him with a promise to repay it or any part of it, during banking hours, at the branch of the bank at which the account is kept, against the customer's written order addressed to the bank at such branch. In regard to the customer, Lord Justice Atkin considered that the customer undertakes to exercise reasonable care in drawing his written orders so as to avoid misleading the banker or facilitating forgery, and that the banker is not liable to repay the customer the full amount of his balance until the customer has demanded payment at the branch at which the current account is kept. The learned judge also stated that as the orders may be outstanding in the ordinary course of business for two or three days, the banker must give reasonable notice to the customer before closing the account.[1]

In the first place, he is bound to honour his customer's cheques provided that (1) they are drawn in the proper form; (2) he has funds belonging to his customer sufficient to pay them; (3) there is no legal cause making such funds, though sufficient, not available for the purpose. Secondly, the transactions between him and his customer are regarded as being of a peculiarly private character, and therefore it is considered that a banker may not divulge to third parties the state of his customer's account, except when legally called upon to do so, or at the request of his customer. Thirdly, the banker has undoubtedly a general lien on all negotiable securities deposited with him as a banker by a customer, "unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien" (Lord Campbell in *Brandao* v. *Barnett*, 1846). What is intended by the term "securities" are such instruments as

[1] In this connection the following extract from the head-note to *Prosperity Ltd. v. Lloyds Bank Ltd.*, 1923, is in point:—"In the absence of special stipulation a banker can close his customer's banking account in credit only on giving him a reasonable notice, dependent on the nature of the account and the facts and circumstances of the case." Times Law Reports, April 25th. 1923.

" promissory notes, bills of exchange, Exchequer Bills, coupons, bonds of foreign governments, etc." (*Wylde* v. *Radford*, 1863). The authorities are agreed in accepting Lord Campbell's dictum that a banker's lien is " an implied pledge." Acceptance of this dictum involves a recognition that a banker, having a lien on his customer's negotiable securities, possesses greater powers than he would have under a simple lien.

Another service rendered by a banker to his customer is to collect his customer's cheques and other credit instruments. In these transactions the relationship between the two parties is that of principal and agent—the banker acting as his customer's agent. The banker also renders other services which will be dealt with in their proper place.

3. **Current Accounts.**—*Payments to Credit.*—All paying-in slips should be signed or initialled by the customer or the person paying in the credit on his behalf. In the case of paying-in slips which have been filled up before being brought to the bank, they should be signed or initialled by the customer or his agent. All alterations must be initialled. It is important that the receiving cashier should see that the date on the slip corresponds with the date on which the credits are paid into the bank. The receiving cashier stamps and initials the slip and also the counterfoil. This stamping is a mere acknowledgment, and does not mean more than that, if the items on the paying-in slip are in order, they will be credited to the customer. Payments in by third parties to a customer's credit must not be revoked unless expressly authorised by the customer, for the customer, in reliance on the payment in, may have altered his position. Acknowledgments to third parties of sums of £2 and over paid in to the credit of a customer must bear the receipt stamp duty. But if the acknowledgment is sent to the customer, and contains words showing that the amount paid in by the third party is credited to the customer's account, such an acknowledgment falls within Exemption I, " Receipt," Stamp Act, 1891, which says that " a receipt given for money deposited in any bank or with any banker to be accounted for, and expressed to be received of the person to whom the same is to be accounted for," shall be exempt from stamp duty. Acknowledgments to customers of credits paid in by third parties should state the nature of the items making up the credits.

Unless there is an express agreement to the contrary, or it has

been the usual course of business between the parties so to do, a customer is not entitled to draw against credits as soon as he has paid them into his bankers. He must, before drawing, give the banker reasonable time to make the necessary entries in his books. If the banker has followed the usual practice of crediting cheques as cash before clearance, he can, nevertheless, return cheques drawn against such uncleared credits marked "Effects not cleared," unless there is an agreement, express, or implied from the course of business permitting the customer to draw against such cheques. For their further protection, bankers often print a notice in their pass books or on their paying-in slips reserving the right to dishonour cheques drawn against uncleared items. The position in regard to this matter is discussed fully on pp. 84–5, under the head of "Effects of Crediting as Cash" and "Banker Holder for Value." The banker is entitled to debit his customer with any credit instruments returned unpaid, even though they have already been credited as cash to the account. Credits posted in error and advised to the customer, either by an entry in his pass book or by communicating the resulting balance, may in certain circumstances be rectified by the banker, but he must not dishonour any cheques drawn in good faith by the customer in reliance upon what he has been given to understand was the amount of his credit balance (*see* under *The Pass Book*, p. 208).

4. *Appropriation of Payments.*—The general rule is that the party who pays the money has the right to say which debt, if he owes more than one, shall be cancelled by the money he tenders to the creditor. For example, a customer may say to a banker that he wishes the money he is paying in to be used in meeting a particular bill or cheque. If he does this, the banker must appropriate the payment as directed by the customer, irrespective of the state of accounts between them. If at the time of payment the debtor does not make any specific appropriation, then the creditor may do so, and may apply the payment to any debt owing by the debtor (*Simson* v. *Ingham*, 1823), even to the discharge of a debt barred by the Statute of Limitations. As soon as the creditor's method of appropriation is notified to the debtor, it becomes irrevocable.

In the case of a running or current account, provided that there has been no specific appropriation by the debtor or the creditor, then the law appropriates the payment, and according

to the law it is the first item on the debit side that is discharged or reduced by the first item on the credit side. In other words, it is the sum first paid in that is first paid out (Sir W. Grant, M.R., in *Clayton's Case*, 1816). This is known as the Rule in Clayton's Case—a rule which vitally affects all current accounts, whether in credit or in debit, though the banker is naturally more concerned with the effect of the Rule on overdrawn accounts.

As already stated, if the customer makes no appropriation, the banker has the right to do so. In *The Mecca*, 1897, it was held that " when the election is with the creditor, it is always his intention, express or implied or presumed, and not any rigid rule of law, that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other, and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction." If, therefore, the banker, contrary to the usual course of dealing, makes any specific appropriation so as to avoid the application of the Rule in Clayton's Case, he must make it in such a way as to show clearly what he intended to do. He need not make the appropriation immediately he receives the money, but, having made it, he makes it once and for all, and " it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation " (*In re Sherry*, 1884).

In order that the Rule in Clayton's Case may apply, it is necessary that the account should be still running. If the account is broken, and a new and distinct account opened, to which all payments in and out are credited and debited, the Rule does not apply so far as the old account is concerned. But if the banker wants to avoid the application of the Rule, he should break the account and, in view of the decision in *Deeley* v. *Lloyds Bank, Ltd.*, 1912, if possible, get the customer's written consent to the opening of a new account quite distinct from the ruled-off account.

The effect of the Rule can be seen from the following example. Suppose that a guarantor dies at the time when the person whose account he has guaranteed owes the banker £2000. If the account is continued unbroken after the guarantor's death all future payments in will go to reduce the £2000 debit balance existing at the time of the guarantor's death, and all payments out will constitute a new debt unsecured by the guarantee. Thus, if the

customer pays into the unbroken account £2000 after the guarantor's death and draws out £1000, the effect of the Rule will be that the debt covered by the guarantee will be wiped out, and the customer will owe the banker £1000, and the £1000 will be unsecured. Similarly, in the case of two surviving partners of a firm of three who continued after the death of the third to deal with their banker in the same way as before, no arrangement having been made to keep separate in the accounts the balance due to the bank at the death of the third partner, it was held that the deceased partner's estate was discharged at the date when the payments in made after the partner's death balanced the debt due from the firm at the time of his decease (*Royal Bank of Scotland* v. *Christie*, 1840). To avoid such an unpleasant state of affairs, bankers usually insert a special provision in the contract of guarantee (*see* Appendix, p. 478), and always stop the accounts and open new ones for future transactions on all occasions of this nature.

When a customer's account consists partly of trust money and partly of his own money, the customer, when drawing out money for his own use, is deemed not to have touched the trust money until he has drawn out all of his own money. But if the trust money paid into his own account belongs to separate beneficiaries, then the Rule will apply as between the beneficiaries, and the first trust money paid in will be the first trust money drawn out. Here is a concrete example: Jones has a credit balance of £2000. He then pays in £500 belonging to Smith, then £750 belonging to Brown and then £1500 belonging to Robinson. He then draws out £3500. Of the remaining £1250, Smith and Brown get nothing, but Robinson is entitled to the whole of the balance.

5. *Set-off.*—Set-off is the statutory right by which a debtor is entitled to take into account a debt owing to him by a creditor when being sued for a debt due from him to the creditor. In order that this right of set-off may be exercised, the debt must be a sum certain, due by and to the same parties, and in the same right. For example, a banker, apart from an express or implied agreement to the contrary, may set off a customer's credit balance against a debt due to him from the customer. The separation of various accounts kept with him by the same customer—such as "Private a/c" and "Colliery a/c"; "Deposit a/c" and "Current a/c"; "No. 1 a/c" and "No. 2 a/c";

and accounts at different branches of the same bank (again apart from agreement, express or implied from the course of business between the parties) does not of itself deprive the banker of his right of set-off. Such separation is, *prima facie*, for the sake of convenience, and it is the balance of the combined accounts which forms the real debt. But if the customer has one account for his own money and another for trust money, the banker cannot set-off a credit balance on the trust account against a debit balance on the personal account. Only those debts can be the subject of set-off which are due and recoverable at the date of set-off. A debt accruing due cannot be set-off against a debt already due. For example, a banker cannot set-off a debt due to him upon a loan account repayable on demand or at a specified date against a credit balance on current account, for until demand or the arrival of the date, the loan is not due for payment.

Where a private customer has an account with an obvious label, such as "Churchwarden's a/c," or "Cricket Club a/c," the banker can be in no doubt that the account is kept by the customer in a fiduciary capacity. But where the descriptive heading does not clearly indicate the nature of the account, there may be difficulty in determining whether it is a trust account or not. For example, such a heading as "John Jones *re* Henry Smith," would not necessarily indicate a trust account. It is just as likely to be a private account opened by Jones to record his business dealings with Smith. But such a heading as "John Jones a/c Henry Smith," could fairly be considered to give notice of trust to the banker, and he would not, therefore, be entitled to set-off a credit balance on this account against a debit balance on any other account of Jones. If the customer were, *e. g.*, the owner of a large amount of small property, and opened an account headed "Rates a/c," the inference would be that this was a mere separation of accounts for the customer's own convenience; but an account so labelled and opened by a rate collector or a borough treasurer would naturally suggest to the banker that it was of a fiduciary character. The banker must, in each case, be guided by his knowledge of the circumstances. The various accounts kept by auctioneers and stock-brokers can, in the ordinary way, be set-off one against the other, though such customers, from the nature of their business, habitually handle other people's money.

Where a customer has both a private account and another account, such as a trust account, for which he is personally liable when it is overdrawn, it would appear that the banker is entitled to set-off a credit balance on the private account against a debit balance on the trust account, but not *vice versa*. Before combining the two accounts, the banker must give reasonable notice, and must not dishonour cheques drawn on the private account before notice (Paget, *Law of Banking*, 4th edition, p. 362). The practice of giving notice should, where possible, be followed, even if not legally necessary. (See Note, p. 223.)

Debts due in different rights cannot be set-off, on the principle that one man's money cannot be used to pay off another man's debt. For example, a debtor must not set-off a personal debt due to him by an executor against a debt due to the estate which the executor is administering, except where the executor is entitled to the full benefit of the estate. Nor can a banker set-off the credit balance on a partner's account (except where he is a sole partner) against a debt due on the firm's account, and *vice versa*. And there is not any right of set-off between a customer's private account and a joint account in which he is one of the parties. If a man dies with his account in debit, the banker cannot set-off a credit balance on the executor's account against the debt, neither can he set-off a credit balance of the deceased's account against the executor's debit balance. In each case a cheque from the executors transferring the balance is required. With regard to the separate accounts of Local Authorities, see p. 278.

Unless by special agreement or in the event of the customer's bankruptcy (Bankruptcy Act, 1914, s. 30 (3)), a banker is not entitled to retain a credit balance to secure himself against a customer's contingent liability on bills discounted for him by the banker, for "you cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time" (Page Wood, V.-C., in *Jeffryes* v. *Agra and Masterman's Bank*, 1866).

6. *Combining Current and Loan Accounts.*—Where a customer has an advance of a lump sum against security—the advance being at once debited to a loan account, and the whole of it credited to his current account—the banker is not entitled to combine the two accounts without reasonable notice to his customer (*Rouse* v. *Bradford Banking Co.*, 1894). Indeed, one

eminent authority, Sir John Paget, in his Gilbart Lectures, 1913 (*Journal of Institute of Bankers*, April 1913, p. 256), goes so far as to say that where an advance of this nature is made, the advance is made once and for all, and the banker, therefore, cannot, even by calling in the loan, combine the two accounts, his true remedy being to sue on the loan and realise the security, the customer, meanwhile, having the right "to draw out the last penny of the sum placed to the credit of his current account." At all events, even when a demand for repayment of the loan has been made by the banker, he must, nevertheless, honour all cheques within the balance drawn and put into circulation by the customer before receipt of the notice. In the Gilbart Lecture referred to above, Sir John Paget called attention to a case where a banker, whose customer had a loan account and a current account, had a garnishee order served upon him which was held to attach the current account. The banker had not called in the loan, which was repayable, as is usually the case, on demand, and it was held that he was not entitled to retain the balance on current account as a set-off against the loan account, and thereby defeat the garnishee order. In *Bradford Old Bank* v. *Sutcliffe*, 1918, it was held that a current and a loan account were not to be treated as one account, and that payments in to the credit of the current account did not go in discharge of the loan account under the operation of the Rule in Clayton's Case.

The question as to whether a loan account and a credit current account must be combined arises when, for example, a banker receives notice of a second charge on the security for the loan account, the amount of which has been credited to a current account. The principles given above, however, still apply. It is only for advances made after receipt of notice that the second mortgagee can claim precedence. Hence, immediately on receipt of the notice, the loan account must be ruled-off and interest to date charged to the current account. No further advances can be made on the loan account to rank before the second charge, but the security remains good for the amount already advanced irrespective of any credit balance on current account. (See *Journal Institute of Bankers*, 1927, p. 168.) The matter is further discussed on p. 382.

7. *Garnishee Orders.*—A garnishee order is an order of the Court, obtained by a judgment creditor, attaching funds in the hands of a third party who owes the judgment debtor money,

warning the third party (the garnishee) not to release the money attached until directed by the Court to do so.

There are two forms of original orders in garnishee proceedings, the order *nisi* and the "summons." The former commands the garnishee (the third party) to appear before the Court, when, if he cannot satisfy the order, he must shew cause. If the order is made *absolute*, the judgment creditor is entitled to demand from the garnishee the money due in satisfaction of the judgment debt. The garnishee should not pay over any funds until an order *nisi* is made *absolute*, as it is only payment under the latter which gives the garnishee an effective discharge against the judgment debtor. Furthermore, there is the risk of the judgment debtor being made bankrupt, in which case, to be effective against the trustee in bankruptcy, the order must have been absolute and payment actually received by the creditor before a receiving order is made, and before notice of the presentation of a bankruptcy petition, or the commission of an available act of bankruptcy. (Bankruptcy Act, 1914, s. 40.)

A "summons" is similar in effect except that it gives the garnishee the option of paying into Court a sum sufficient to satisfy the debt and costs five clear days before the date of the hearing, when no further costs will be incurred. If the banker proposes to exercise this option, he should so inform his customer, against whom he will obtain a good discharge for the amount paid. If the customer's balance is insufficient completely to satisfy the order, the banker must pay over what there is available. The banker need not then appear at the hearing. Specimen forms are given on p. 503.

A garnishee order served on a banker (the third party) attaches the *whole* of the customer's balance on current account, without reference to the amount of the judgment debt, and until the withdrawal of the order, the account must remain dormant, even as regards cheques put into circulation before the date of the order. The order only affects debts actually due or accruing due (*i. e.* already incurred but payable at a definite future time) at the date of the order (Rules of the Supreme Court, Order 45, Rule 1). The order does not affect future debts, *i. e.* debts not existing at the time the order is served. It is therefore the usual practice of bankers, immediately on receipt of the order, to inform the customer that the order has been served upon him and to open a fresh account, through which all future items should be passed—the old account being left dormant until the

garnishee matter is settled. The order cannot affect this new account, for the banker's debt, represented by the balance in the customer's favour, was not a debt due or accruing due at the date of the order. If the new account is in debit, the banker, by virtue of his lien on the balance of the old account, can, after satisfaction of the garnishee order, transfer the balance to the new account. Unless, however, the customer is quite reliable, the new account should be kept in credit, as, should a receiving order in bankruptcy be made against the customer before payment under an order absolute and the release of the account, the trustee would be entitled to the whole balance tied up by the order. (See also Note, p. 223.)

Before paying the balance into Court the banker is entitled to deduct from the balance any debts due to him from the customer which existed at the date of the order, and for this purpose he can combine all the customer's current accounts, which he previously could have set-off without notice to the customer. But he is not entitled to retain moneys to meet a contingent liability of the customer on bills discounted by the banker for the customer, and still running. Nor is he entitled to transfer the balance on the current to the loan account, so as to defeat a garnishee order.

If the customer's account is overdrawn, there is no debt due, and, therefore, no money to attach, and this is so even though at the time that the order is served the customer had not reached the agreed limit of overdraft. If the order is not withdrawn, the banker should, nevertheless, attend the hearing.

In *Jones* v. *Coventry*, 1909, it was decided that cheques credited as *cash*, though uncleared, come within the garnisheed debt, on the ground that the banker by crediting as cash is collecting them for himself and not for his customer, so that the whole balance, including the uncleared cheques, is an existing debt within the meaning of Rule I. In view, however, of the more recent *Underwood Case*, it is doubtful whether this would still hold good. In any event, if the banker is able to show that, although unpaid cheques had been credited to the account in the bank's books, there was a definite understanding with the customer that he should not draw against them until cleared, the ruling might be different. (See also p. 85.) The garnishee order does not affect any funds not actually in the banker's hands at the date of the order, *e.g.* the proceeds of stocks and shares sold by the customer's instructions, and not yet handed over to the banker by the broker.

In the head-note to *Koch* v. *Mineral Ore Syndicate, London &*

S. Western Bank, Ltd., Garnishees, reported in the *Solicitors' Journal and Weekly Reporter,* May 24th, 1910, it says that "Unless a garnishee *nisi* correctly designated the judgment debtor and the account which he has with a bank, the bank on which the order is served need not retain the money of the customer which the order purports to attach, since the onus of ascertaining whether the order in truth and in fact applies to a particular customer's account does not rest with the bank." This onus of proof rests upon the judgment creditor, and if the banker has a reasonable doubt that the order does not apply to his customer, he should refuse to give effect to the order until his doubts are dissipated. But no banker would do wisely in refusing to obey an order merely because of a technical error in the description of the judgment debtor, *e. g.* a wrong initial or an obvious misspelling in the name. If the customer does not deny his liability under the order, it is desirable for the banker to get a written admission of the liability from the customer, and so prevent future complications. Where the judgment debtor was one of the parties to a joint account, *e.g.* a partner in a firm, it was held in *McDonald* v. *Tacquah Gold Co.*, 1884, that the joint account could not be attached. Neither can a balance be permanently attached if it turns out to be trust money (see also p. 552*c*), nor is a garnishee order valid as against a trustee in bankruptcy unless payment has been made under an order *absolute* before receipt of the notice of bankruptcy.

When a garnishee order is served on the head office of a bank against a customer having an account at a branch, the order should be forwarded without delay to the branch, and the account at the branch stopped immediately on receipt of notice of the order. Accounts at foreign branches out of jurisdiction of the English Courts are not attachable on the grounds that payment in England would not be a legal discharge in the foreign country. The effect of a garnishee order on Deposit Accounts is dealt with on p. 213 and Deposit Receipts on p. 159.

8. *Charges.*—The common law rule is that interest is only recoverable when it is payable either (*a*) by express agreement, or (*b*) by custom or usage of trade. Certain credit instruments, such as bills of exchange, are subject to interest by statute law (Bills of Exchange Act, 1882, s. 57 (1 *b*)). A banker is entitled to charge interest on loans, either by express agreement or by right of custom. Moreover, owing to the banking practice of

adding the interest to the principal debt each half year, he is usually enabled to charge compound interest. This right to charge compound interest is often further consolidated, at any rate so far as charges already incurred are concerned, by the customer's tacit acceptance of such charges in previous half years.

Where there are definite times established by custom for entering in the customer's account the interest payable on advances, the banker is not entitled, without due notice to his customer, to debit his charges at any other than the customary dates, in order, for example, to justify his dishonouring of a cheque because the balance, after deduction of the accruing interest, would be insufficient to meet it. And if the banker has agreed to allow his customer to overdraw up to a specified limit, he cannot, without due notice, debit his charges at other than the customary times, and dishonour cheques drawn within the agreed limit.

The banker's right to compound interest ceases on the death or bankruptcy of a customer. In the event of death, it was decided in *Provincial Bank* v. *O'Reilly*, 1890, that the banker is entitled to charge simple interest up to the date of payment. In the event of bankruptcy he may only prove for simple interest up to the date of the receiving order, and, in the case of a deed of assignment, up to the date of the deed.

Mortgages for fixed sums, apart from express agreement, only carry simple interest. It therefore follows that the banker must keep the mortgage account separate from the current account, but money advanced on mortgage to secure a fluctuating balance may be merged in the general account, and compound interest charged. Interest on cheques paid on an overdrawn account is chargeable from the date of payment, whether by the drawee-banker or his agent under advice, not the date of drawing. The question of income tax and interest is dealt with later.

As regards commission, it has been judicially recognised that a banker, like any other agent, is entitled to charge a reasonable commission for services rendered to his customer, such as, for example, the acceptance and payment of bills. Though some banks do not charge a commission for keeping a current account, except when the balance falls below a fixed minimum, yet the practice of charging a commission is sufficiently general to warrant the opinion that a claim for such commission could be legally enforced by the banker.

9. *Statute of Limitations.*—Since the basic relationship between

a banker and his customer is that of debtor and creditor, the Statutes relating to limitations of actions on contracts operate as between any other debtor and creditor. For debts, other than specialty debts, *i. e.* debts expressed in deeds, an action must be " commenced and sued within six years next after such action or suit, not after " (Statute of Limitations, 1623, s. 3). A banker cannot recover any debit balance of an account which has lain dormant for six years, provided that the debt has not been acknowledged in a writing, signed by the debtor or by his duly accredited agent (Statute of Frauds Amendment Act, 1828, s. 1, and Mercantile Law Amendment Act, 1856, s. 13). In an unconditional acknowledgment of the debt, a promise to pay is implied by law, but, if, for example, the customer writes to the banker and says, " I acknowledge that I owe you £100, but I cannot and will not pay," the acknowledgment is not sufficient to arrest the operations of the Statute. If there has been a proper acknowledgment in writing, the Statute begins to run from the date of the writing. So also if there has been a part payment of the debt, or of interest on the debt, the Statute runs afresh from the date of the last payment of interest or principal. If the writing promising to pay expresses also a condition of payment, to make the writing an effective acknowledgment it must be shown that the condition has been fulfilled. In regard to a credit current account, the position is modified by the special relationship between banker and customer, and in *Joachimson* v. *Swiss Bank Corporation*, 1921, it was held that an express demand for repayment is a condition precedent to the right to sue the banker for the balance. Hence, the Statute does not begin to run until the customer has made a demand for repayment which the banker has not complied with. Though of no practical importance, it may be added that this decision means that bankers may be legally called upon to repay credit balances which have been dormant for more than six years.

Periodical entries in a banker's books of the amount of interest due on a dormant loan or overdraft does not of itself enable the banker to maintain an action against the borrower after six years, if the borrower has not operated on the account, or has not made any such acknowledgment as is required by Statute. Where a customer keeps several current accounts all in the same right, they are all considered as one account, and operations on any one would prevent the Statute running in respect of any dormant balance on the other or others. But with regard to a current

account and a definite loan account there may be some difference, since, admittedly, the banker cannot combine the accounts without due notice to his customer. Hence, if no such notice had been given, it might be argued that the Statute ran in respect of each account separately. The question is largely one of academic interest, since, in the general way, charges on the loan account would either be paid directly, or indirectly by a debit to the current account. The latter is the usual method. If interest is allowed on a dormant balance, its addition, half-yearly, by the banker, as the debtor, will prevent the Statute operating in his favour.

If the debt is covered by security (other than a mortgage on real property), the banker does not lose his right against the security, even though his personal remedy against the debtor may be barred. If the security is a mortgage on real property, both the personal remedy and the right against the security are barred after twelve years (Real Property Limitation Act, 1874, s. 1).

If the debtor was out of the United Kingdom at the time the debt was incurred, the six years does not begin to run in his favour until he returns to the United Kingdom. If he does once return the Statute continues to run, notwithstanding that he may again depart out of the country. For the effect of the Statute on Infants, Lunatics, and Joint Debtors, refer to Index.

10. *Closing an Account.*—In banking this phrase is used to denote the final severance of relations between the banker and his customer by the withdrawal of the customer's balance in the banker's hands, either by the customer's own act, or at the request of the banker. When a banker wishes to close an unsatisfactory account, he usually sends a written intimation to the customer that he will not receive any further credits on the customer's behalf, and requesting the customer to withdraw his balance, or, alternatively, stating that he will honour the customer's cheques up to the limit of the credit balance. It is not usual in such circumstances for the banker to send the customer a cheque for the balance. A banker is not entitled to close an account without giving such reasonable notice as will obviate any damage to the customer's credit. But a customer may close an account merely by presenting a cheque for payment drawn for the balance in his favour, though it is usual for him to inform the banker of his intention and for him to return unused cheques. A banker cannot prevent a customer withdrawing his balance and

closing his account even though there are bills running under discount for him and on which, therefore, he is contingently liable. (See also footnote, p. 194.)

In legal phraseology "closing an account" is often used with the same meaning as a banker would use "stopping an account." Stopping an account means, in banking practice, ceasing to permit operations upon the account. A banker is bound to stop an account in the event of (*a*) the death, insanity or bankruptcy of a customer, or, in the case of a limited company, notice of voluntary liquidation or of the making of a winding-up order; (*b*) the service of a garnishee order or other order of the Court; (*c*) notice of an assignment to a third party of the balance standing in the customer's favour. These contingencies are dealt with elsewhere under appropriate headings. Secured accounts may also be stopped through some event happening which decreases the value or affects the availability of the security. For example, a current account secured by a mortgage would be stopped as soon as the banker received notice of a second charge upon the security. And where an account is covered by a guarantee or other security given by a third party, the account would be stopped on receipt of notice of the death, insanity or bankruptcy of the third party.

11. *Secrecy.*—The guiding case on this subject is *Tournier* v. *National Provincial Bank*, 1923, where it was held that the banker's obligation of secrecy regarding his customer's affairs was a legal one arising out of contract implied in the relation of banker and customer, but that the duty of secrecy is not absolute but qualified. The following qualifications were cited as examples: (*a*) where disclosure is under compulsion by law; (*b*) where there is a duty to the public to disclose; (*c*) where the interests of the bank require disclosure; (*d*) where the disclosure is made by the express or implied consent of the customer. In any case, secrecy is a jealously guarded tradition of bankers. (See also *Bankers' Opinions*, pp. 221–3, and *Bankers' Books Evidence Act*, p. 189.

12. **The Pass Book.**—The real effect of entries in the pass book—the statement of account current between banker and customer—has not yet been satisfactorily determined. Sir John Paget contends, and to all business men his contention must appear reasonable, that the proper function of a pass book "is to constitute a conclusive, unquestionable, record of the transactions between banker and customer, and it should be recognised as such." The learned writer goes on to say that debit

entries, at least, after being fully examined by the customer, should be considered as final and not capable of being reopened to the detriment of the banker (Paget's *Law of Banking*, 4th edition, p. 294). But the real position is very far removed from the ideal position as set forth by Sir John Paget. In America, happily, the matter has been judicially dealt with in a way that should commend itself to all reasonable persons, whether bankers or customers. We refer to the judgment of the New York Court of Appeal in *Morgan* v. *U.S. Mortgage and Trust Co.*, 1913. The presiding judge said: "The depositor who sends his pass book to be written up and receives it back with his paid cheques as vouchers, is bound to examine the pass book and vouchers and to report to the bank without unreasonable delay any errors which may be discovered. . . . It seems to me that when, having obtained from the bank a list of vouchers and balanced pass book, which was intended to give and would have given them a correct basis for comparison and verification, they disregarded these, they were guilty of such obvious oblivion of their duties that no extended argument can make plainer their negligence than does the mere recital of facts. . . . Negligence in this case means the neglect to do those things dictated by ordinary business customs and prudence and fair dealing towards the bank, which, if done, would have prevented the wrong-doing which resulted from their omission." Commenting on this ruling, Mr. Frederick Huth Jackson (Annual Meeting, Institute of Bankers, 1913), said that in the case of a business firm, where that firm returns the pass book to their bankers with the various items ticked, the bankers should then be entitled to consider that as *prima facie* evidence of the correctness of the pass book, and he thought that reasonable business men would agree to that; but the same principle could not be applied to private persons, in whose case return of the pass book without comment should not be considered as *prima facie* evidence that the private person has agreed the pass book. This seems a fair statement of what ought to be the position, and it is to be hoped that at some time it will be expressed in a judicial decision, the present state of affairs being so very unsatisfactory from all points of view.

13. *Entries from the Customer's Standpoint.*—As the law now stands, it seems safe to say that pass book entries *in the customer's favour* are *prima facie* evidence against the banker, but not conclusive evidence, and the banker, therefore, is not debarred

from endeavouring to prove that any entry is an erroneous one, but he cannot recover the money wrongly credited if the customer can show that, in good faith and relying upon the accuracy of the entry, he had been induced to alter his position. To lessen the chance of any such *bona fide* alteration of position, it behoves the banker, therefore, to see that any items wrongly entered in the customer's favour are corrected immediately upon detection, for, obviously, the longer the item remains uncorrected, the weaker becomes the banker's chance of recovering the money wrongly credited.

Since it is essential that the customer should establish his *bona fides* in taking advantage of the wrong entry, it would not be easy, as a general rule, for an ordinary business man to establish his case, but the position would be different as regards, for example, an officer in the army who had been accustomed to draw against moneys paid direct into his account with the army agents. If any amount were wrongly credited to such a person it is quite conceivable that he might draw upon it in good faith and spend when he would otherwise not have spent. Clearly, in such circumstances the banker would be unable to prove any right to recover the money. This point was decided in the old case of *Skyring* v. *Greenwood*, 1825, by a very strong bench, and was cited with approval in *Holt* v. *Markham*, 1923.

Just as the law, even in its present state as regards the pass book, would not sanction any attempt of the customer fraudulently to take advantage of an error in his pass book to the banker's detriment, neither would it allow the banker to withhold money which he had received for a customer, even though the customer may not have pointed out the omission in his pass book.

14. *Entries from the Banker's Standpoint.*—The conflict in legal opinion is so marked that it is impossible to give any clear exposition of the effect of pass book entries in the banker's favour. All that can be said from the cases decided in the English courts is that before a customer can be estopped from denying the accuracy of his pass book entries, he must have been guilty of such negligence as to cause the banker's position to be detrimentally affected, or the customer must have acted in such a manner as to indicate that he had treated the account as a definitely settled account. But there remain the questions: What constitutes a sufficient degree of negligence, and what does amount to a settled account? Lord Esher, in *Chatterton* v. *London*

& County Bank, 1891, said that the banker had no right to infer that the customer had even looked at his pass book, though the pass book had been received by him, the items ticked off, and the pass book returned without comment to the banker. If Lord Esher's view be correct, the question of contributory negligence on the customer's part, through his not examining the pass book, cannot arise, for if he is not bound to examine the book, he cannot be accused of negligence if he fails to do so. The question whether the account should be deemed a settled account after return of the book bearing evidence of examination does not appear to have been raised, but Sir John Paget considers (*Law of Banking*, 4th edition, p. 302) that the remarks both of Matthew, J., and Lord Esher in the above-mentioned case would be " equally fatal to any contention based on that ground."

The point as to what can be considered a settled account was raised in another case (*Vagliano Bros.* v. *Bank of England*, 1891), but no satisfactory conclusion was reached, though the trend of the judgment seems to indicate that the passing to and fro of the pass book did imply some sort of a duty on the part of the customer to examine it; but the judges did not appear inclined to consider that examination of an account by the customer and the return of the pass book was conclusive evidence of a settled account, and that thereby the customer would be estopped from disputing the accuracy of the entries.

In order to make his position as secure as the present unsatisfactory state of the law will allow, the banker should make it his business always to get the pass book sent in, made up, and returned to the customer as frequently as possible. In no case should the book be allowed to remain at the bank for any considerable time without giving the customer an opportunity of examining it. When a pass book is given out, the date should be marked in the ledger together with the initials of the clerk who gives it out, and is responsible for its accuracy. Where a statement in lieu of a pass book is used, it should be sent at frequent intervals. The dates of dispatch should be marked in the ledger together with the initials of the clerk giving it out. It is hardly necessary to add that all pass books and statements should be carefully checked to ensure accuracy. When a pass book has been lost, the book replacing it should be marked " Duplicate." With the spread of mechanical book-keeping, Statements are becoming more used in this country.

Credits should be entered in a pass book after they have been posted in the ledger, and not before.

15. **Deposit Accounts.**—Money placed on deposit may be repayable (*a*) on demand, (*b*) at so many days' notice, (*c*) at the end of a definite period. The customer usually, but not always, has an acknowledgment in the form of a Deposit Receipt, or a Deposit Pass Book is issued to him. But no matter what may be the kind of acknowledgment given by the banker, it will not prevent him from debiting the deposit account with any cheques or other instruments afterwards returned unpaid, whether credited to the deposit account or cashed direct for the customer.

When a customer pays in money on deposit, the money cannot be considered as a fund held by the banker in trust for the customer. It is merely a loan to the banker, and the customer is entitled to no more than the repayment of an equivalent sum at the time which the agreement between the two parties specifies. Like any other debt, money on deposit may be validly assigned under s. 136 of the Law of Property Act, 1925, but before parting with the assigned money, the banker is entitled to deduct from the balance any debts due to him by the depositor at the date he received notice of the assignment.

It does not appear that a customer is legally entitled to draw cheques against a deposit account. This is certainly true as regards deposit money repayable after a stipulated notice or after the expiration of a definite period, but the position is not so clear as regards money repayable on demand. In *Hopkins* v. *Abbott*, 1875, Malins, V.-C., made some remarks which appear to indorse the opinion that cheques can be drawn against such a deposit account, but Dr. Hart (*Law of Banking*, 4th edition, p. 255) is of opinion that Vice-Chancellor Malin's dictum is questionable. Sir John Paget in his book (p. 87) considers that such a depositor is " probably not " entitled to draw.

But though the legal right to draw cheques against a deposit account is non-existent in cases (*b*) and (*c*) and problematical in case (*a*), and that consequently the banker is not bound to honour cheques so drawn, it is not uncommon for bankers to allow their customers to do so. A banker may also allow the customer to overdraw his current account, the banker relying for his security on his right of set-off as between the current and deposit accounts. This right of set-off exists whether the banker does or does not hold the relative deposit receipt, if any, and can be exercised

although the customer, after drawing the cheque, may have become bankrupt; and since the receipt is not negotiable or even transferable, this right of set-off is not defeated should the depositor have transferred his deposit receipt to a holder who takes it in good faith and for value.

Money on deposit due for payment on a Sunday is payable on the succeeding business day. The interest, which is simple, not compound, ceases on the date of expiry of the notice of withdrawal, not at the date on which notice is given. If no notice is given, it is customary to deduct interest on the amount withdrawn for the period specified for notice. No income tax is deducted from the interest on deposit accounts repayable on demand or at short notice, but the Colonial banks, under the instructions of the Inland Revenue authorities, deduct income tax on their fixed deposits in London, which are repayable at fixed periods of a year or more.

Minors may open deposit accounts and can give a valid discharge for the money repaid to them. Deposit accounts opened in joint names are treated under Joint Accounts (see p. 237), and Deposit Receipts are more particularly considered on pp. 156-9.

16. *Effect of Garnishee Orders on Deposit Accounts.*—A garnishee order affects all debts due or accruing due. Consequently, deposit accounts repayable on demand or at a fixed date are attached. So also are deposits repayable after the expiry of a specified notice which has been given. In view of the *Joachimson Case* (see p. 206), if the garnishee order itself operates as a demand for repayment then the debt becomes accruing due and so attachable, even though the depositor has not given notice. Sir John Paget's view is that such an account is not attached. (See also p. 159.) The order attaches the *whole* of the account, if attachable, irrespective of the amount of the judgment debt.

17. *Statute of Limitations.*—In the case of deposit accounts repayable on demand, the Statute does not begin to run until demand has been made for repayment. In the case of those repayable at the end of an agreed period or after the expiration of an agreed notice, the Statute runs from the time the money is due to be repaid. The guiding principle is that the Statute begins to run immediately the depositor is entitled to enforce his rights against the banker. Furthermore, payments of interest by the banker would effectively prevent the application of the Statute.

18. **Income Tax.**—The customer must pay the full interest charged by the banker for money advanced for any period less than a year, or made by way of a fluctuating balance on current account; he cannot deduct income tax from such interest. If the customer wishes to have the tax refunded to him he must include it in his own income tax return. To enable him to do this the banker will, on request, provide him with a signed certificate in the form prescribed by the Inland Revenue authorities. It will be seen that it calls for particulars of the security, though this information is not always demanded, but where it is required the customer's written sanction to give it should be obtained. The certificate must not include commission or other banking charges; only interest is permissible. The following is a specimen of form R 62 :—

BANKER'S CERTIFICATE

I, the undersigned, Manager of the ..... hereby certify that the sum of £..... (say .....) has been charged to and paid in full without deduction of Income Tax by M ..... of ..... during the Year ended 31st March (or 5th April), 193 , as Interest, exclusive of commission and any other charges.

The Security held by the Bank, in respect of the advance amounting to £....., is as follows :— .....

.....

Dated this ..... day of ..... 193 .

.....

Signature of Manager.

R 62. (Bank Stamp.)

There is, however, an exception in the case when a definite sum of money has been advanced on mortgage by a banker for a fixed period *not less* than a year, at a fixed rate of interest. The banker is then bound to deduct income tax from the interest charged to the customer (Income Tax Act, 1853, s. 40, and *Goslings & Sharp* v. *Blake*, 1889). Any tax paid in this manner is adjusted when the banker makes his own income tax return.

The Income Tax Act, 1918, provides that any banker, or person acting as a banker, who sells or otherwise realises coupons for any dividends (save such as are payable in the United Kingdom only when the tax is deducted by the paying banker), and pays over the proceeds to any person or carries the same to his account, "shall be included as being a person entrusted with the payment of dividends." The expression "dividends" includes interest, annuities, dividends, and shares of annuities, and the expressions "coupons" and "coupons for any dividends" include warrants for or bills of exchange purporting to be drawn or made in payment of any dividends. In accordance with this

banks deduct income tax from coupons collected for their customers. To enable the latter, when making their annual returns, to account for the tax thus deducted, bankers complete form R 189A (for specimen see Appendix, p. 506).

In order to avoid any possibility of issuing two certificates on forms R 62 or 189A, or the like, a record of all such certificates should be kept. Duplicates, if issued, should be clearly marked.

Customers, who have proved to the satisfaction of the Inland Revenue authorities that they are not resident in Great Britain or Northern Ireland, are entitled to have their coupons in respect of foreign and colonial dividends and certain British Government War Stocks collected free of income tax. Where a banker holds the relative bonds or share certificates, a list has to be prepared on a prescribed form, which a bank official has to swear before the Inspector of Foreign and Colonial Dividends, testifying to the foreign residence of his customer. It is essential that the banker keeps himself satisfactorily advised of any visits of his customer to this country, as residence here for certain specified periods in any tax-year renders the customer liable to British income-tax. Hence, the banker should take from his customer a form containing the requisite declarations and embodying an indemnity covering the banker against any loss by reason of any subsequent claim being made by the Inland Revenue Commissioners. The banker if called upon must produce the relative scrip. The sworn declaration must accompany the coupons when presented for payment.

Where the scrip is not held by the banker, a different procedure is necessary. Particulars of the procedure appropriate to this and other cases can be obtained from the Inspector of Foreign and Colonial Dividends.

19. Purchase and Sale of Stock Exchange Securities.— The purchase and sale of Stock Exchange securities for their customers is one of the subsidiary services rendered by bankers. The Lord Chancellor in *Banbury* v. *Bank of Montreal*, 1918, stated that " while it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appeared to him to be clear that there might be occasions when advice might be given by a banker as such and in the course of his business. . . . If he undertook to advise he must exercise reasonable care and skill in giving the advice. He was under no obligation to advise, but if he took upon himself to do so, he would incur liability if he did so negligently " (*The Times Law Reports*,

June 25th, 1918). This was not the point at issue, but the statement is significant.

The customer's instructions should be taken on the usual bank form, giving full particulars of the securities and stating the limit of price, if any. If the security is a registered one, the order to sell should be signed by all the registered holders, and if it is to bearer, by each person holding himself out to be the owner.

When a purchase is intended, full particulars of the security required should be stated on the order, together with any limits of price, and it is preferable that a clause be added giving the banker authority to debit, if necessary, the customer's account with the cost. Orders to buy or sell do not require stamping, not even when the order embraces a power to debit the customer's account with the purchase price, as the sum is not a sum certain.

As suggested by the Lord Chancellor's remarks quoted above, the banker, as his customer's agent, must act with all diligence both in buying and selling, forwarding his principal's instructions to the brokers accurately and without variation, and when the transaction is completed he must get possession of the proper documents of title in a purchase and of the proceeds in a sale. If the banker negligently fail to secure a purchase or to effect a sale, he will be liable to the customer for any loss that may ensue. So also will he be liable for any loss if he varies the instructions which the customer has sent him. The banker makes his profit on these transactions by dividing the commission with the broker. The fact that the commission is divided should be clearly stated on the broker's contract note.

20. **Standing Orders.**—Bankers perform another subsidiary service for their customers by making periodical payments on their behalf, such as club, library and charitable subscriptions, and insurance premiums. The order must bear the same stamp duty as cheques (Stamp Act, 1891, s. 32 (*b*)), and the stamp should be affixed by the customer. The debit slips periodically made under the order do not require stamping. It is essential that the banker should keep a diary in which such payments may be entered on the dates when they are due to be paid, for if the payments are not duly made, the banker is responsible for any loss that may ensue.

21. **Valuables for Safe Custody.**—The fact that the banker, for his own protection, has to provide himself with strong rooms, makes him peculiarly suitable as a medium for taking charge of such of his customer's valuables as can be conveniently stored

in his strong rooms. By taking charge of property in this way, the banker becomes a *bailee*, i. e. a person to whom goods are entrusted for a specific purpose. There are two kinds of bailees —gratuitous bailees and bailees for reward. Since the banker does not usually make a specific charge for taking care of his customer's property, it has been argued that he is a gratuitous bailee. On the other hand, some authorities contend that the practice of taking charge of their customers' valuables is so general that it is as truly a consideration for the customers' opening or continuing their accounts as some of a banker's other services undoubtedly are. Therefore, it is contended, the banker is a bailee for reward. The subject has been discussed almost *ad nauseam*, for the reason that the duties and responsibilities attaching to a paid bailee are naturally greater than those devolving upon an unpaid bailee. Of course, if the customer said, "I will open an account with you if you will take charge of the family diamonds," there could be no doubt that the banker would then be a bailee for reward; but where no such bargain is entered into, and no specific charge made for the accommodation, the better opinion seems to be that the banker is a gratuitous bailee.

A gratuitous bailee is "only bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description" (Lord Chelmsford in *Giblin* v. *McMullen*, 1868). On the other hand, a paid bailee must do more than this. He must safeguard the property by every means in his power, and to ensure this, must provide the most effective appliances possible. Another vital distinction between a paid and an unpaid bailee is that a paid bailee is liable for loss caused through mere negligence, whereas an unpaid bailee is only liable in cases of gross negligence. "Gross negligence" is a difficult term to define, but since the banker is necessarily a person skilled in taking charge of valuable articles, he must use that skill even if he takes charge of things gratuitously, and if he does not use that skill he would be guilty of gross negligence (*Shiells* v. *Blackburne*, 1789).

After all, since a banker has to his hand all the protective appliances necessary for a paid bailee, the question whether he in effect takes charge of his customer's valuables gratuitously or for reward is of theoretical rather than of practical importance.

All articles left for safe custody must be entered in the safe custody register, which should be signed by the customer and by the bank official who receives the articles. When the things are given up, the book must be signed as a receipt, unless, as is sometimes done, a separate receipt is taken from the customer. As a rule, a banker gives a receipt for valuables deposited with him. If the receipt contains the words "for safe custody," Sir John Paget does not consider that the phrase adds to his liability (*Law of Banking*, 4th edition, p. 73). These or similar words do not make him an insurer of the goods, and apart from negligence, he is not liable if the goods are lost. Moreover, the banker's liability for goods entrusted to him is in no way affected by his knowledge or lack of knowledge of the nature of the goods; and in the absence of negligence on his part, he will not be liable if the goods are stolen or fraudulently used by persons in his own employment.

If the banker accepts valuables for safe custody, he is bound to deliver them to the person who entrusted him with them. If he delivers them to the wrong person he is liable, not on the ground of negligence, but for conversion. A person is guilty of "conversion" who, being in possession of goods, deals with them in a manner that deprives the rightful owner of dominion over them. Conversion must be "an unauthorised act which deprives another person of his property permanently or for an indefinite time" (*Hiort* v. *Bott*, 1874), and it is no defence in an action for conversion for the defendant to plead that he acted innocently. If a banker has reason to doubt the genuineness of the order demanding delivery of the goods, he is entitled to withhold delivery for a reasonable time in order to make inquiries.

If a third party presents the customer's authority to inspect or to withdraw all or part of the articles deposited, the banker must satisfy himself that the third party does not act outside the scope of the customer's authority. It is usual for a bank official to be present on occasions of inspection or withdrawal by a third party, in order to see that the customer's instructions are not exceeded.

22. *Death of Customer.*—Executors are not entitled to remove articles left in the banker's charge by a deceased customer until they produce probate of the will, and where there is more than one executor, it is the practice to obtain the authority of all before the articles are released to any one of them.

23. *Deposit by Trustees and Executors.*—If articles are deposited by trustees or executors the banker should obtain the authority of all before parting with the articles. This course is essential in the case of trustees, who have no power to delegate their authority, save in exceptional circumstances, even to one of themselves, but in the case of death, authority vests in the survivors or survivor. (But in the case of trustees see also p. 278.)

24. *Joint Depositors.*—Articles deposited in the joint names of persons not being partners should not be released except on the authority of all the depositors, unless there is a mandate permitting withdrawal by less than all. The death or bankruptcy of a party is dealt with on p. 240.

25. *Bankrupt Depositor.*—Bankruptcy of a person who had deposited articles for safe custody involves getting the permission of the Official Receiver, before the banker can safely release any of the articles left in his charge by the bankrupt.

26. *Lien.*—A banker in *his capacity of bailee* has no lien on articles left in his charge merely for safe custody, but if the articles have been left with him in order that he may deal with them in *his capacity of banker*, his right of lien exists. "Bankers," said Lord Campbell in *Brandao* v. *Barnett*, 1846, "have a general lien on all securities deposited with them *as bankers*, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien." Thus the banker would have no lien on jewellery or securities left in the banker's charge solely for safety's sake. Where such articles as bonds with coupons attached are left in the banker's hands it is a question of fact whether the lien does or does not arise. If the customer himself cuts off the coupons and hands them to the banker for collection, the inference is that the *bonds* are left merely for safe custody, and the lien would not attach to them, but the lien would attach to the *coupons*, since they came into the banker's hands in his capacity as banker. If the customer had authorised the banker to cut off the coupons, then the lien would attach both to the bonds and the coupons, but if the banker had given an acknowledgment which stated that the bonds had been received "for safe custody," he would have no lien on the bonds on the ground that they were expressly deposited for safe custody, as evidenced by the terms of the receipt.

Where stock or debenture certificates are deposited by a customer, who has given instructions to the issuers of the certifi-

cates that all warrants for dividend or interest are to be paid direct to the bank, it would appear that the lien attaches to the warrants, but Sir M. Chalmers thinks it doubtful whether it would attach to the certificates themselves (*Q. B. P.*, No. 1097). This opinion of Sir M. Chalmers may be based on the fact that though the stock certificates are in the banker's possession, he does not actually *handle* them, and it would make no difference if they were not in his possession, whereas in the case of bonds with coupons attached, which he has instructions to cut off, he does actually handle the bonds themselves, and possession of them is necessary in order that he may carry out his duty in connection with them.

When securities or other valuables are originally deposited for safe custody and afterwards tendered as cover for an advance, the banker should make the change of position clear by taking a memorandum showing the purpose of the new deposit. If this is not done, the banker's lien would not attach in the event of the customer's bankruptcy, and the securities would have to be surrendered to the trustee for the benefit of the creditors generally.

27. **Bank as Custodian Trustee.**—A custodian trustee is a trustee, appointed under the Public Trustee Act, 1906, s. 4, who has the custody, as distinct from the management, of the trust property. The only parties eligible for such an appointment are the Public Trustee, and a banking or insurance *company* or body corporate, "entitled by rules made under this Act to act as Custodian Trustee" (s. 4 (3)). Since the Act expressly limits the appointment to banking *companies* and bodies corporate, it follows that private bankers are not eligible, though they are entitled to act as bankers of a trust. Banking companies appointed to the office have, by s. 4 (3), "power to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as Custodian Trustee." It is to be noted that a banking company which is the banker of a trust does not thereby become a Custodian Trustee and entitled to the fees of that office.

28. *Duties of Custodian Trustee.*—By s. 4 (2*a*), the trust property shall be transferred to the Custodian Trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the Trustee Act, 1893. S. 4 (*b*) says that the management of the trust and the exercise of any

power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the Custodian Trustee (hereinafter referred to as the managing trustees); but, "subject and without prejudice to the rights of any other person, the Custodian Trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustees shall have free access thereto and be entitled to take copies or extracts therefrom" (s. 4 (2*c*)).

S. 4 (2*e*) says: "All sums payable to or out of the income or capital of the trust property shall be paid to or by the Custodian Trustee: Provided that the Custodian Trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in that case shall be exonerated from seeing to the application thereof, and shall not be answerable for any loss or misapplication thereof."

The Custodian Trustee must concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management, unless the matter in which he is requested to concur is a breach of trust or involves a personal liability upon him in respect of calls or otherwise. Unless he so concurs he is not liable for any act or default on the part of the managing trustees (s. 4 (2*d*)). By s. 4 (2*h*) the Custodian Trustee, acting in good faith, is not liable if he accepts as correct and acts upon any *written document* drawn up by the managing trustees in connection with the trust property. Neither is he liable for acting upon legal advice obtained by the managing trustees independently of himself, as, for example, advice obtained from a solicitor other than the Custodian Trustee's own solicitor.

"The power of appointing new trustees, when exercisable by the trustees, shall be exercisable by the managing trustees alone, but the Custodian Trustee shall have the same power of applying to the Court, for the appointment of a new trustee, as any other trustee" (s. 4 (2*f*)).

28*a*. *Bank as Trustee.*—In addition to acting as Custodian Trustee, a banking company, if duly authorised under its constitution, is a "trust corporation" within the meaning of the various Property Acts, enumerated on p. 361, and as such may act as executor, administrator or trustee, in the same way as the Public Trustee.

29. **Banker's Opinions.**—A bank manager should be scrupulously careful when answering inquiries made through another bank (the only medium he should recognise) with regard to the financial position and business integrity of one of his customers. For if his report be too favourable he may have to face an action for misrepresentation brought by the inquirer, and if he speaks too unfavourably there may be an action for libel brought by the customer.

Until the House of Lords' decision in *Banbury* v. *Bank of Montreal*, it was considered that to render the parties liable on an answer to an inquiry, it was necessary for the opinion to be in writing and signed by the party to be charged. It was further considered that these cases came within s. 6 of Lord Tenterden's Act, so that it was the signer himself who was liable, not his principal. This was confirmed as recently as 1910 in *Parsons* v. *Barclay & Co. and another*, where the bankers were dismissed from the action on the ground that the representation was not made under the Company's seal, and therefore the Company was not responsible.

The Statute of Frauds Amendment Act, 1828 (known as Lord Tenterden's Act), s. 6, runs as follows: "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon [such representation or assurance] unless such representation or assurance be made in writing signed by the party to be charged therewith." The words interpolated are not in the original Act, but are inserted to make sense.

Now, however, in the case of *Banbury* v. *Bank of Montreal*, it was laid down by the House of Lords that this section applies only in the case of *fraudulent* misrepresentation. Hence, as fraudulent misrepresentation in connection with bankers' references is not likely to arise, this section is no longer a source of protection to bankers. The position now would appear to be as follows: there can be no cause of action in the case of *innocent* misrepresentation, but, if there exists a duty, then there may be an action for negligence and breach of duty; the principal cannot escape liability for the negligence of his agent. Furthermore, if an action is brought, it will be no defence to say that the opinion was given orally.

These principles were illustrated in the case of *Batts Combe Quarry Co.* v. *Barclays Bank, Ltd.*, 1931, where the answer to the inquiry was given to the plaintiffs' bankers, and by them to the plaintiffs. It was held that the defendant bank owed no duty to the plaintiffs, and that there was no evidence of negligence.

When answering such inquiries the manager should confine himself to general statements, and should not disclose the actual condition of the account, unless specially authorised to do so by the customer. In the Appeal Case, *Parsons* v. *Barclay & Co. and another*, 1910, the Master of the Rolls strongly repudiated the suggestion of the Court below that it was the duty of the manager, before giving information, to make outside inquiries, and laid it down that all that was required of him was to speak from his personal knowledge of the customer, and of his account.

The practice of bankers of giving information to one another for their mutual protection is well established, and is of very considerable value to the business community, whose credit facilities would be severely curtailed were the custom not in vogue. On the other hand, in the case of *Tournier* v. *National Provincial Bank*, the implication was that, even as between bankers, information concerning a customer should only be given at his request or with his express or implied consent. (See also *Secrecy*, p. 208.)

NOTE (see pp. 187 and 200).—In regard to the banker's right to set-off accounts against each other, it has been stated that he can do this provided there is no agreement, express, or implied from the course of business, to the contrary. As the latter might be a difficult matter for the banker to disprove, it is advisable, in cases where he is relying on the right to set off a credit balance against a debit balance, to take an agreement from the customer, authorising him to combine the accounts at any time without notice and to return cheques which, as a result of his having taken such action, would overdraw the combined account. Alternatively, the banker can give his customer reasonable notice to the same effect, but in the meantime it might be dangerous to dishonour cheques drawn on the credit account. (Cf. *Greenhalgh* v. *Union Bank of Manchester*, 1924.) In view of the conflicting opinions, the safer course, which is becoming more common, is to take an agreement.

When the accounts are stopped by such an event as the customer's death or bankruptcy, then, in the absence of any notice of trust, the banker's right to set off is undoubted.

NOTE to p. 203.—In some cases of late, garnishee orders have been expressed to attach "an amount not exceeding the sum of." There does not appear to be any definite practice established yet as to whether the whole account should still be regarded as tied up or only the limited amount.

CHAPTER III

ACCOUNTS OF CUSTOMERS

1. Opening an Account.—A banker should not open an account with a person unknown to him without first obtaining references from responsible parties as to the proposed customer's integrity and responsibility. Omission to do this may have unpleasant consequences, not only for the banker concerned, but for other bankers and the general public. Putting aside the palpable risk of the applicant dosiring, for nefarious purposes, to obtain possession of a cheque book, there is always the possibility of his being an undischarged bankrupt—the perils of dealing with whom are discussed in the Bankruptcy section of this book (see p. 469). If the account is opened by the payment in of cheques the banker also runs considerable risks. If the cheques are uncrossed he will be liable to the true owner. If the cheques are crossed he may or may not have the protection of s. 82, Bills of Exchange Act, 1882. This section of the Act only covers him if he collects the crossed cheques for a customer, and acts in good faith and without negligence. In *Ladbroke & Co.* v. *Todd*, 1914, a thief opened an account with a stolen cheque, professing himself to be the payee. He was not introduced to the bank and no references were obtained. The cheque was specially cleared at the request of the thief, and he drew out the proceeds on the next day. The fraud was discovered soon afterwards. The drawers thereupon sent another cheque to the real payee, and took an assignment of his rights in the stolen cheque, and, as holders of the cheque, or alternatively as assignees, brought an action against the bank to recover the proceeds collected by the bank as money had and received to their use. Evidence was given that it was the general practice of bankers to obtain a satisfactory introduction or reference. It was held that the banker had acted in good faith, but was guilty of negligence in not taking reasonable precautions to safeguard the interests of the true owner of the cheque, and that therefore he had put himself outside the protection of s. 82. Bailhache, J., also said that the banker would have been entitled to the protection of the section as having received payment for a customer, but had lost it owing to his want of due care. The judge was of opinion

that the relation of banker and customer began as soon as the first cheque was handed in to the banker for collection, and not when it was paid. In the case of *Commissioners of Taxation* v. *English, Scottish, and Australian Bank Ltd.*, a further decision was given towards establishing the complete interpretation of a "customer" within the meaning of s. 82. Their lordships stated that a person whose money has been accepted by a bank on the understanding that it undertakes to honour cheques up to the amount standing to his credit is, whether his connection with the bank is of short or long standing, a "customer" of the bank within the meaning of this section. It was considered that the word "customer" signifies a relationship in which duration is not of the essence (*Times Law Reports*, March, 1920). These two decisions are quite satisfactory, but the importance of obtaining a proper introduction or reference must be noted. In regard to the latter, the House of Lords in *Lloyds Bank* v. *E. B. Savory & Co.*, held it to be negligence (depriving the banker of the protection of s. 82) not to ask a customer (respectably introduced) the name of his employer, and, in the case of a married woman, the name of her husband's employer.

A specimen must be taken of each customer's usual signature. Some banks have all signatures signed in a signature book, in which case the book must be carefully indexed, either by numbering each signature or the pages of the book. Whichever system is adopted, the signature number, or the page of the signature book, should be recorded against the heading of the account, or in the ledger index, to facilitate quick reference. Another method adopted is to take all signatures on cards. These cards can always be kept sorted in alphabetical order, and kept up to date by taking out the signatures of closed accounts. In addition to the specimen signature, signature books and cards are generally ruled for the customer's full name, address and occupation. (See also "Drawer's Signature," p. 3.)

Each customer's full name should be written in bold characters above his account in the ledger, and his address and occupation should be added. Where the customer does not use his full name, or all his initials, the account should still be headed with the full name, and a note made of the manner in which the customer signs. Where the customer is a limited company, the names of the directors and secretary should be given, and, in the case of a fund, society or committee, the names of the persons

who are responsible for the account. Full names and addresses of all persons who are joint account holders or partners should be recorded in the ledger. Particulars of all authorities to sign on an account, and also of any credits opened with other branches and banks for the encashment of the customer's cheques, should be entered in the ledger against the heading. If the customer is allowed to overdraw, the amount of the sanctioned limit and its expiry date should be duly recorded. The object of recording these facts is to provide the ledger-keeper with the information he is most likely to require when posting the ledger.

2. **Authorities to Sign on Account.**—When a customer wishes to operate on his account wholly or partially by delegated authority, it is important that the banker should get from his customer a mandate expressing in precise terms what powers have been delegated to the mandatory. An authority to draw and indorse cheques does not necessarily imply an authority to draw, accept and indorse bills of exchange, and unless expressly provided for, it does not authorise the mandatory to overdraw the account so as to make his principal liable, or to pledge or withdraw securities. If there is a limit of time during which the authority to operate is to be exercised, or limit of amount, this should be expressed in the mandate. The mandate should also state that any revocation of the authority must be in writing, and that until such revocation is received, the mandate shall remain in force. Specimens of the signatures of all the parties who are being authorised to sign should be added at the foot of the mandate. The mandate does not require stamping. Powers of attorney are dealt with later under the heading *Agents*.

Notes of any mandates given should be entered in the customer's ledger account, with full details of the powers conferred on the mandatory and the time limit, if any, during which the agent is empowered to act, and any limit in amount. It is usual to index these mandates for the purpose of quick reference.

For special features with regard to authorities in connection with Agents, Joint Accounts, etc., see under those headings. In the case of Companies, Associations, etc., the mandate, drawn up in accordance with resolutions duly passed and authenticated, appointing the bank as bankers of the Company, etc., is the banker's authority to open the account. And in all cases of Partnership and Executorship accounts, a mandate should be signed defining clearly the relations and duties of the parties.

3 Agents.—An agent is a person who has power to act for or on behalf of another person, called his Principal. A writing expressing the powers of the agent is not, generally speaking, a necessary element in the appointment of an agent, but, where there is no written authority, the powers of an agent are conjectural, and are determined by the usage of the particular trade, the course of dealing between the parties, and the conduct of the principal and agent. If the banker is cognisant of the fact that an agent has exceeded his powers, the banker cannot make the principal liable for those acts of the agent which do not come within the scope of his authority. If an agent is appointed to execute a deed for his principal he cannot bind his principal unless he has been appointed under seal. An agent may not, except with his principal's express or implied consent, appoint another person to act for him so as to make the principal liable for the sub-agent's acts. There is no privity of contract between the principal and the sub-agent. Any person of sound mind may act as an agent, even an infant, though the latter has, generally speaking, no power to make contracts in which he appears as a principal. An undischarged bankrupt may also act as agent.

The following is a form of mandate usual when an agent is empowered to operate upon another person's account.

Mandate or Authority for a person to draw on another person's account.

To the ..... Bank, Limited.

Referring to the Current Account opened at your Bank, I hereby request you to honour all cheques drawn on the said account by the person whose signature is hereunder written, notwithstanding that such cheques may create or increase an overdraft to any extent, and I authorise the said person on my behalf to make, draw, accept, or otherwise sign any Bills of Exchange, Promissory Notes or other negotiable instruments, and to discount the same with your Bank or otherwise, and also to indorse cheques or other negotiable instruments of any description.

This authority shall continue in force until I shall have expressly revoked it by a notice in writing delivered to you.

Dated this ..... day of ..... 19 .

.....

The following is the signature of the person authorised to sign as above mentioned.

.....

Such a mandate does not require a stamp, but if it is in the form of an agreement between the two parties it must be stamped.

The powers of an agent, as defined by the written authority, are strictly construed, and the banker must not allow the agent

to exceed them. Thus, if an agent is empowered to draw and indorse cheques, that does not imply an authority to draw, accept and indorse bills of exchange, nor does a power to operate on an account necessarily imply a power to overdraw the account, and the principal will not be liable for any unauthorised borrowing (*Jacobs* v. *Morris*, 1902).

An agent may sometimes quite honestly enter into a binding contract on behalf of his principal, and it may turn out afterwards that he had no power to do so. In these circumstances, though he cannot be sued as a principal on the contract, it has been held that he warrants his authority as an implied condition of the contract, and may, therefore, be sued for a breach of this warranty (*Collen* v. *Wright*, 1857). In one case, directors of a building society borrowed, on behalf of the society, money which it turned out they had no power to borrow. It was held that the directors were personally liable, for "persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for a breach of an implied warrant of authority," but to make the agent liable it must be shown that the want of authority was not known to the third parties. In another case, *Starkey* v. *Bank of England*, 1903, a stockbroker, by virtue of a power of attorney forged by one of two joint holders of stock, but which the stockbroker believed to be genuine, instructed the bank to transfer stock, which they did, and the proceeds of the sale were applied by the forger of the power of attorney to his own use. It was held that the bank would have to transfer a like amount of stock to the true owner. The bank then claimed to be indemnified by the stockbroker, and their claim was allowed on the ground that the stockbroker was liable for a breach of a warrant of authority.

In all cases where an agent signs on behalf of his principal, he must so sign as to make it clear that he signs in a representative capacity. If he does not do this he may make himself personally liable. It is not sufficient to add to his signature words describing him as an agent or as filling a representative character (Bills of Exchange Act, 1882, s. 26 (1)). He is not always safe if he attaches his bare signature to a document in which he is described as an agent.

In some cases the agent may be empowered to sign his principal's name, but the usual form of signature is *per procuration* (*p.p.* or

per pro.). An agent authorised to indorse cheques *per pro.* is not thereby entitled to negotiate or cash them, or to pay them into his private account. Any banker who permits an agent to do any of these things incurs considerable risk, unless he has the principal's express authorisation. Again, the banker is put upon inquiry if an agent, who has power to *draw* cheques on behalf of his principal, pays such cheques into his private account, for "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 was acting within the actual limits of his authority" (s. 25, Bills of Exchange Act, 1882). This section covers all signatures put on by delegated authority; the expressions *per pro.* or *p.p.*, though usual, are not essential.

The case, *Morison* v. *London, County and Westminster Bank*, 1914, shows how careful a banker ought to be when dealing with an agent. Morison had empowered his agent to draw cheques on his behalf. The agent drew several cheques, signing them *per pro.* as authorised by Morison, and paid them into his own account at another bank. It was held that the agent's bankers were negligent in not making inquiries as to the agent's authority to receive the cheques (see p.256).

Where a principal places securities in the charge of his agent and instructs him, either verbally or by letter, to obtain the loan of a named sum upon the security of the documents, and the agent secures a loan larger in amount than that asked for by the principal, the lender acting in good faith and without knowledge of the borrowing limit is entitled to hold the security against the whole of the sum advanced, although the principal himself may have received only a part of the money actually borrowed. Where the securities are fully negotiable, the banker is quite safe in taking them as security from an agent, even though, at the time the securities were deposited, the agent professed to act as principal, provided always that the banker, when taking the fully negotiable securities, acted in good faith. But "if there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry" (Lord Herschell, in *London Joint Stock Bank* v. *Simmons*, 1892).

The death, insanity, or bankruptcy of the principal determines the authority of the agent to act on his behalf, and upon notice

of any of these events the banker must immediately suspend all operations on the account. Cheques presented after the principal's death should be returned, marked "Drawer deceased." But if the agent dies, any cheques signed by him on behalf of his principal, and presented subsequent to his death, should be paid. Insanity of the principal, or of the agent, determines the authority, but a principal, certified as insane, is liable for any authorised transactions entered into on his behalf by the agent with any person who was ignorant of the principal's insanity. Bankruptcy of the agent does not necessarily determine his authority.

4. *Power of Attorney.*—An agent is sometimes appointed by power of attorney. A power of attorney is a writing usually, but not necessarily, under seal, authorising a person to act as attorney for another person; that is to say, to do any special lawful act, or a series of lawful acts, on behalf of that other person. A general power which gives the agent power to collect and pay debts, and to transact business for his principal, does not, as a general rule, include an authority to draw, accept and indorse bills of exchange so as to make the principal liable. Nor does it authorise the agent to borrow money on behalf of his principal, or to pledge his principal's property. It is, therefore, important that the banker should carefully peruse the letter of attorney to see what are the actual powers conferred by the document on the agent. If the power is given for a fixed period, or during the continuance of a happening to the principal, *e. g.* his absence abroad, such limitations should not escape the banker's attention. It is usual for the banker to have a certified copy of the power.

Agents signing under a power usually sign *per pro.*, or sometimes after the donor's name add such words as "By his attorney, John Smith." In exceptional cases the attorney might be empowered to sign in the form of the donor's name only. A power becomes void on the death, bankruptcy, or insanity of the principal, in the same way as any other authority to act, but such revoking will not affect the rights of third parties where they are ignorant of such revocation, and a statutory declaration by an attorney that he has received no notice or information of any revocation is to be conclusive proof of non-revocation, if made before or within three months of the act (Law of Property Act, 1925, s. 124). A general power of attorney requires a 10*s.* stamp.

5. **Lunatics.**—A person making a contract is presumed to be of sound mind, and if mentally unsound, he can only avoid the

contract if he, or some one on his behalf, can prove that the other party knew his mental condition at the time of contracting (*Imperial Loan Co.* v. *Stone*, 1892). Thus, if a man accepts a bill of exchange, he is liable on the bill, whether he is insane or not, unless he can prove that the person who got him to accept the instrument was aware at the time that he was insane. In regard to a subsequent holder of such a bill, the editors of *Byles on Bills*, 17th edition, p. 81, suggest that the onus of proving that the bill had been taken for value and in good faith might lie on the holder, by virtue of s. 30 (2), Bills of Exchange Act, 1882. But if a lunatic buys necessaries he cannot avoid the contract, but must pay a reasonable price for them (Sale of Goods Act, 1893, s. 2).

When a banker receives proper notice of a customer's lunacy, all operations on the account must be suspended until receipt of an order of the Court, or of proof of the customer's recovery. All cheques honoured by the banker before receipt of notice can be debited to the lunatic-customer's account, but the banker may be liable for all cheques honoured after receipt of notice. The banker will not be safe in relying upon mere hearsay evidence of his customer's insanity, but knowledge that his customer is detained in a lunatic asylum will be sufficient authority for the suspension of operations on his account.

When a person is found to be of unsound mind the usual practice nowadays is for the Court to appoint a Receiver, who manages the mentally unsound person's affairs under the direction of the Masters in Lunacy. All cheques must be signed by the Receiver. If the customer is suffering from temporary mental derangement, it is not uncommon for the banker to waive his strict legal rights, and to allow the customer's wife or next of kin to operate on the account, provided that a certificate in the form of a statutory declaration from two medical men is obtained, and that satisfactory security is furnished indemnifying the banker against any claim that may afterwards be made by the customer to recover any amounts so withdrawn whilst he was mentally deranged.

A contract made by a mentally unsound person during a lucid interval is valid, if the other contracting party can prove that the lucid interval really existed at the time the contract was made. But a person found by inquisition (*i. e.* an inquiry held by a Master in Lunacy) to be incapable of managing his own affairs cannot deal with his property (except to make a will during a lucid interval) until the inquisition is annulled by the Court. The

authorities seem doubtful whether a certified lunatic can be made bankrupt except by order of the Court. The Statute of Limitations begins to run, so far as a lunatic is concerned, not from the time when the action first accrued (*e. g.* the due date of a bill), but from the time when the lunatic was certified to have recovered. For the effect of the lunacy on a mandate given by him, see p. 229.

6. Intoxicated Persons.—In the eyes of the law, drunkenness does not affect a person's power to contract, but the law will not allow any person to take undue advantage of a drunken person's state. If, therefore, a person induces another person, who is so drunk that he does not know what he is doing, to give him a bill or cheque, the drunken person may avoid the instrument so far as the person who improperly induced him to execute it is concerned, but if the instrument in the meantime has been transferred to a holder who takes it in good faith and for value, the drunken person cannot deprive the holder in due course of his rights under the instrument. If a customer tenders, when drunk, his own cheque over the counter, and insists upon having cash for it, the banker would be well advised to have a witness to the signature and the payment of the money.

7. Trustees in Bankruptcy, Liquidators of Companies, Receivers, etc.—Trustees in bankruptcy must pay all moneys received in their official capacity into the Bankruptcy Estates Account at the Bank of England, but the Board of Trade, on application by the Committee of Inspection, may give permission for accounts to be opened with any other bank. No trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account (Bankruptcy Act, 1914, s. 88). All payments out shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the debtor's estate and shall be signed by the trustee and countersigned, where there is a Committee of Inspection, by at least one member, and by such other person, if any, as the creditors or Committee of Inspection may appoint, and where there is no Committee, by such person, if any, as the Board of Trade may direct (Bankruptcy Rules, 1915, r. 342). In practice, however, bankers do not usually require the cheques to be countersigned by one of the members of the Committee of Inspection unless special instructions to this effect are given at the time the account is opened. It has not been decided whether

or not the banker incurs any liability by his omission to see that the rule is followed. All cheques drawn by a trustee in his official capacity are exempt from stamp duty (B. A., 1914, s. 148), and so are those drawn by liquidators in a winding-up by the Court or a creditors' voluntary winding-up.

Similar regulations are made by the Companies Act, 1929, in regard to payments in and out of the Companies Liquidation Account at the Bank of England, or account at a local bank opened by a liquidator appointed by order of the Court to wind up a company's estate in England. Where there is more than one liquidator, the Court in the case of a compulsory liquidation or the appointment in a voluntary liquidation declares whether the signing of cheques, or any other act required to be done by the liquidator, shall be done by one or more than one or by all. There is considerable doubt whether joint liquidators have any power to delegate their authority even to one of themselves.

In regard to borrowing, trustees in bankruptcy may, with the permission of the committee of inspection (or the Board of Trade), mortgage or pledge any part of the bankrupt's property to raise money for the payment of his debts (B. Act, 1914, s. 56 (5). The Companies Act, 1929, s. 191 (2) (*e*), authorises liquidators appointed under a winding-up by the Court to raise on the security of the assets of the company any money requisite without sanction of the Court, committee of inspection, or Board of Trade. The exercise of this power, however, is subject to the control of the Court to which any creditor may apply with respect to the liquidator's exercise or proposed exercise thereof. A liquidator in a voluntary winding-up, whether members' or creditors', and in a winding-up under the supervision of the Court may exercise borrowing powers without sanction. (See also Winding Up, pp. 264–67.) Normally a liquidator is merely an agent of the company, so that he does not incur any personal responsibility for advances made to the company.

A receiver may be appointed in a variety of cases, *e. g.* by the Court to take charge of property in dispute, by a mortgagee, by debenture holders, etc. If there is a business to be carried on, a receiver and manager is appointed. Power to borrow depends on the appointment, and care must be taken as to the requisite authority and security. Unless definitely accepted, it is not safe to rely on the receiver's personal responsibility.

8. **Married Women.**—Before the passing of the Married Women's Property Acts, 1870–1882, a woman's property—with

some modifications and exceptions—became, on her marriage, the absolute property of her husband. By the Act of 1882, a woman married after the passing of the Act could hold and dispose of any property in the same way as an unmarried woman could, and this applied to property acquired after marriage as well as to property that she had at the time of marriage. That is to say a married woman was enabled to hold property as a separate estate and to enter into contracts binding it. There were still, however, certain important contractual differences between a man or an unmarried woman and a married woman. A creditor had no personal remedy against a married woman and her property could be made subject to restraint against anticipation. The expression "restraint against anticipation" means that a married woman, whose property was subject to it, could only deal with the income she had actually received or which had accrued due. A married woman also could not be made bankrupt unless she carried on a trade or business. On the other hand, her husband was liable for his wife's torts—a wrong such as slander, forgery—during their marriage. There were certain other special features, but this brief summary is sufficient to enable the reader to appreciate the change brought about by the new Act.

By the Law Reform (Married Women and Tortfeasors) Act, 1935, the law has now gone a step further towards making the status of a married woman equal to that of a spinster or man. By this Act, the greater part of which came into force on 1st January, 1936, a married woman shall be capable of acquiring, holding and disposing of any property, rendering herself liable in respect of any tort, contract, debt and be subject to the bankruptcy law, etc., in all respects as if she were an unmarried woman. A married woman can now, therefore, be made a bankrupt even if not trading, and she alone is responsible for her own torts. But existing restraints against anticipation, or one imposed by any instrument executed before 1st January, 1936, shall continue to be, or shall become effective. In regard to the latter, a restraint imposed by a will dated prior to the above date, but not effective until the death of the testator, will be effective provided the testator dies before 31st December, 1945. With these exceptions a married woman's property is now as available to her creditors as that of a man.

A married woman still has implied authority to pledge her husband's credit for necessaries for herself and his household,

though this presumption of authority may be rebutted in certain circumstances. S. 11 of the Married Woman's Property Act, 1882, dealing with life policies has not been repealed (see p. 355). The new legislation will not affect the practice of bankers in regard to women being separately advised by their own solicitors when giving security for other parties, particularly in the case of a married woman giving security for an advance to her husband.

An account opened in the joint names of husband and wife should be treated as an ordinary joint account, and the usual authority taken regarding the signing of cheques. The authority should also state to whom the balance is to go on the death of either. If to the survivor, it is a convenient method of ensuring that the wife shall have available funds in the interval between death and probate of her husband's will, since, as survivor, she is entitled to withdraw the balance. In certain circumstances it may be that the balance will not be considered part of the husband's estate, but, in any case, it is property that is deemed to pass on his death, and the widow will have in due course to pay any duties attracted on such part as was provided by the husband. If the balance is part of the husband's estate, then his estate bears any death duties. The beneficial ownership of the balance is a question of fact in each case. If the wife dies first, any part of the balance which she provided is part of her estate. A deceased married woman's property is controlled by probate or letters of administration in the usual way.

By s. 36, Bankruptcy Act, 1914, the husband is not entitled to any dividend for money lent to his bankrupt wife *for her trade or business* until her other creditors are satisfied. The position of a married woman who has lent money to her bankrupt husband for his trade or business, *or otherwise*, is the same. The Statute of Limitations operates between husband and wife as between any other debtor and creditor.

9. **Infants.**—Any person under the age of twenty-one is an *infant* (in Scots Law a *minor*). By s. 22 (2), Bills of Exchange Act, 1882, where a bill is drawn or indorsed by an infant, the infant can convey a good title to a holder, who is entitled to receive payment of the bill, and the holder can enforce his rights under the instrument against any party thereto except the infant. Since by s. 22 (1) of the same Act " capacity to incur liability as a party to a cheque is co-extensive with capacity to contract," an infant by law having no capacity to contract cannot be sued

on any cheque that he may draw, even if it is in payment of necessaries; but in the latter case, though not liable on the instrument, he is liable on the consideration. It follows that if a banker exchanges a cheque for an infant, he cannot recover the proceeds if the cheque is afterwards returned to him dishonoured.

Provided that the account is always kept in credit, there is no reason why a banker should not open an account with an infant. But the infant must not be allowed to overdraw the account, for by s. 1, Infants Relief Act, 1874, "all contracts whether by specialty or by simple contract entered into by infants for the repayment of money lent or to be lent . . . shall be absolutely void," and, moreover, the banker cannot avail himself of a security given by an infant to secure his account. But if the security is given by a third party the banker can enforce his rights against the third party. An account opened in the joint names of an infant and an adult can be operated on like any other joint account, but the infant cannot be made personally liable for any overdraft.

An infant may act as an agent, and, as agent, if given power to do so, he can draw, accept and indorse bills, which are binding on his principal, and may overdraw his principal's account, if that is within the scope of his authority, but the banker should not knowingly allow an infant to do any of these things without the *written* authorisation of the principal. An infant may validly witness a signature.

An infant may be appointed as executor, but he cannot act as such until he attains full age, and if sole executor his duties meanwhile are performed by his guardian or such other person as the Court may appoint. Neither can he make a valid will, unless he be an infant soldier or seaman on active service (Wills Act, 1837, ss. 7 and 11, reaffirmed by the Wills (Soldiers and Sailors) Act, 1918). If, therefore, an infant who has a banking account dies, any balance to his credit cannot be withdrawn until the letters of administration taken out by his next-of-kin are produced to the banker. An infant cannot be appointed a trustee.

An infant may be a partner, but he is not personally liable for the debts of the partnership incurred during his minority. But he is bound by the state of accounts between himself and the adult partners, and must contribute to losses as well as share in profits. When he attains his majority, the infant partner must expressly repudiate the partnership, or he will be taken to have affirmed it,

and will be liable for any partnership debts contracted after he became of full age. An infant cannot be made bankrupt, except, possibly, for debts incurred for necessaries. When a firm which includes an infant partner goes bankrupt, proceedings may be taken against the firm " other than the infant partner," or against the adult partner or partners. Any other action against the firm would have to be taken in a similar way. The banker's usual form of written authority as to the drawing and indorsing of cheques, etc., should invariably be taken from the partners when there is an infant partner, and whether the firm is a trading or a non-trading firm. The Statute of Limitations begins to run when the infant becomes of full age.

10. **Joint Accounts.**—This section deals with those joint accounts which are neither partnership accounts, nor trust accounts. The latter are fully treated later under the appropriate headings. Accounts opened in the names of husband and wife have already been dealt with under *Married Women*. The following remarks apply to deposit receipts in joint names as well as to current and deposit accounts.

When a joint account is opened, it is advisable to get all the parties concerned to state in writing what signatures are necessary for operations on the account. Unless this is done the banker is not safe in honouring any cheques unless signed by all the parties. This is an exception to the general rule that a man may pay a debt to one of several persons with whom he has contracted jointly, and the exception is due to the particular kind of contract that exists between the banker and his customer (*Husband* v. *Davis*, 1851). And if, for instance, an account is opened by one party in the joint names of himself and another, without the authority of that other, the latter must, nevertheless, join in signing before the banker can safely permit any withdrawal. It is desirable that the full title of the account, as shown in the bank's books, should appear on each cheque.

If the joint parties wish to delegate their authority to operate on the account to an outside party, all the joint parties must unite in giving the authority. The authority taken when a joint account is opened should state to whom the balance is to be paid in the event of the death of one or more of the joint parties; for though, generally speaking, the balance of the account is at the disposal of the survivor or survivors on the death of a party, it is advisable to have a written record of the intentions of the parties.

Satisfactory evidence of the death of a joint party must be produced when the cheques have to be signed by all, before the balance can be withdrawn by the persons entitled to do so under the written authority, but if the signing of cheques has been delegated to one or more of the surviving parties, this proof of death is not necessary, since the survivors have power to draw out the balance at any time and to give a good discharge.

If the banker receives notice that the joint account is, in reality, a trust account, he is not necessarily safe in allowing the survivors to withdraw the balance (see p. 278). Difficulties sometimes arise when the legal representatives of a deceased joint account holder intervene and claim to have an interest in the joint account. It would appear, however, that, apart from express agreement, the ordinary principle of a joint debt applies, and that the banker is entitled to pay the surviving party the balance on satisfactory proof of death. There does not appear to be any judicial decision on the point, but if this ruling is correct then a banker is justified in refusing to pay any attention to claims made by the deceased's legal representatives. And there is no reason to doubt but that the same ruling holds good even though the deceased has attempted to deal with the account in his will. As to whether the survivor is the beneficial owner of the balance is another question, and is a matter to be settled between him and the legal representatives. Meanwhile, he holds that part of the balance, provided by the deceased, as trustee for the latter's estate.

The banker, not being a trustee for, but a debtor of, the deceased, is not entitled to refuse payment of the balance to the survivors on the ground that probate duty on the deceased's estate has not been paid.

In the event of the bankruptcy of one of two or more joint parties, the only safe course for the banker is to stop all operations on the account, pending the joint instructions of the solvent party and the trustee in bankruptcy. Cheques outstanding after receipt of the notice of bankruptcy are a difficulty, but it would appear that the banker can do no other than return the cheques, carefully avoiding, when doing so, any appearance of damage to the credit of the solvent parties. The insanity of any party to a joint account revokes any mandate given by the parties.

On the death of a joint party it is usual and advisable for the banker to stop the account and get the survivors to transfer the balance by cheque to a fresh account opened in the names of the survivors. On the death of all the joint parties any balance is payable to the legal representatives of the one that died last.

Cheques on the joint account may be stopped by any one of the joint parties, even by a party who has delegated his authority to operate on the account to one or more of the other joint parties. For the banker should regard the countermand as a provisional revocation of the general authority given when the account was opened, which general authority any one of the joint parties has the right to revoke at any time. If the cheques are signed by all, the death of one of the signatories will not affect the banker's duty to honour cheques bearing his signature, for though the banker's authority is, technically speaking, determined by the death, the cheques bear the signatures of all those in whom the balance automatically vests. But if the authority to sign has been delegated, the banker should return all cheques presented after notice of the death of any *signatory*, as the authority is cancelled.

The fact that persons have jointly opened an account does not imply that they have power to pledge each other's credit. If, therefore, an overdraft is required, the banker should see that all the joint parties concur in the request. For if this is not done, only those who are responsible for the borrowing can be made liable to repay the sum borrowed. Even if all concur in the borrowing, they are all, apart from agreement, only jointly liable, and on the death or bankruptcy of any one of them, his estate is discharged, and the banker must look to the remaining party or parties for repayment.* To avoid this, a clause, permitting an overdraft on the joint and several responsibility of all, may be included in the mandate which is signed by all when such accounts are opened. Or the banker may take a joint and several guarantee from the parties, in which case, upon the death or bankruptcy of any of the parties, his estate will be bound (see also *Joint and Several Guarantees*, p. 319). Another advantage of securing the joint and several liability of the parties is that it will also enable the banker, after reasonable notice, to set-off a credit balance on the private accounts of any of the parties against an overdraft on the joint account. Otherwise he is not entitled to exercise his right of set-off between the accounts. The Statute of Limitations will run in favour of a joint debtor who has made no sufficient acknowledgment of his debt, unless he has delegated his authority to make payments and to acknowledge the debt to one or more of the other joint parties, by whom an acknowledgment or part payment has been made.

When a banker sells any kind of property belonging to joint holders, he must hand over the purchase money to all of them, unless one or more has authority to receive payment on behalf of all. Also when valuables are deposited in joint names for safe custody, the consent of the legal representatives of a deceased party, and of the trustee of a bankrupt party, is necessary before the banker is entitled to part with the articles to the remaining parties. (See also Note, p. 310.)

The accounts of non-trading partnerships should be treated as joint accounts, not partnership accounts. For a partner in a non-trading firm has no power to bind his co-partners when he borrows money. Neither has he an implied power to bind his co-partners by accepting a bill or signing a promissory note. Only the partner who signs is liable. It is therefore necessary, when dealing with non-trading partnerships, to get the authority of all in order to bind all. The authority should contain a clause admitting joint and several liability, so that the estate of a deceased or bankrupt partner may be bound. Such professional firms as solicitors, doctors, architects, accountants and auctioneers (except when they also buy and sell goods), are included in this category.

11. **Partners.**—The law of partnership is codified by the Partnership Act, 1890. Partnership, by s. 1 of the Act, is defined as "the relation which subsists between persons carrying on a business in common with a view of profit." By ss. 357 and 358, Companies Act, 1929, no private partnership carrying on a business that has for its object the acquisition of gain can consist of more than twenty persons, and, if the business is that of banking, the number is limited to ten. A firm consisting of more than the statutory number of partners must be registered as a company under the Companies Act, 1929.

A partnership can be created either by a parol agreement, or by an agreement in writing, but whether the agreement is by word of mouth or in writing, persons dealing with the partnership are not bound to know what arrangements have been made by the partners *inter se*, and any act done by any partner, in course of the ordinary partnership business, even though prohibited by the partnership agreement, will bind the other partners. This is according to s. 5 of the Partnership Act, 1890, which says: "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts

of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member binds the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner." By s. 14 (1), same Act, every person who by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm. In short, any person holding himself out to be a partner may be estopped from denying that he is a partner.

When the account is opened all the partners should join in an authority detailing who is to sign on behalf of the firm, and the form of signature. Each partner who is to operate on the account should sign in the signature book as he intends to sign in all transactions binding the firm.

Every partner in a *trading* firm has an implied power to bind his co-partners by the drawing and indorsing of cheques, the drawing, accepting and indorsing of bills of exchange, and the making and indorsing of promissory notes. He has also an implied power to borrow money on behalf of the firm. But a partner in a *non-trading* firm has no such implied powers, except possibly in the drawing and indorsing of cheques (see Joint Accounts, *ante*). But the implied powers of a partner in a trading firm to pledge the firm's credit are confined to those transactions incidental to the firm's ordinary course of business. He has no power to bind the firm, unless specially authorised by the other partners, for a purpose apparently outside the objects of the partnership business (Partnership Act, 1890, s. 7), but is himself personally liable for the consequences of any such act. For example, it would appear that any partner has an implied authority to open an account in the *firm's name*, but it has been held that he has no implied power to open an account *in his own name* on behalf of the partnership business, so as to make his co-partners liable for any debit balance on the account (*Alliance Bank* v. *Kearsley*, 1871). But if it can be shown that the other partners had expressly authorised the partner to open a partnership account in his own name, then the firm would be bound by the act of the partner. It has also been held that

where a bank has transferred its business to or amalgamated with another bank, any partner may bind his co-partners by assenting to a transference of the account to the new bank (*Beale* v. *Caddick*, 1857).

Any partner has an implied authority to countermand payment of any cheque drawn on the firm's account, and the banker is bound to comply with the instructions issued by that partner. If the partners desire that a person outside the partnership should operate on the account, the authority must be signed by all the partners; a mandate issued by less than all the partners is not sufficient authority for the banker to act upon.

Any partner in a *trading* partnership has an implied power to sell or pledge any of the partnership property, but a banker should get any memorandum of deposit taken by him signed by all the partners. Any partner can even mortgage real property belonging to the firm, but the mortgage thus created would only be an *equitable* one, even though the partner had executed a legal mortgage; for a partner has no implied power to bind his co-partners by deed. To obtain a legal mortgage over real property or chattels real (*i. e.* leaseholds) belonging to the partnership, the concurrence of all the partners is necessary, either in the mortgage deed itself, or in a deed authorising the partner to execute the mortgage on behalf of himself and his co-partners. No partner can bind his co-partners by giving a guarantee on behalf of the firm, unless it is customary for that particular firm or usual in that particular trade to give guarantees (*Brettel* v. *Williams*, 1849). Consequently, a guarantee should be executed by all the partners.

It should be noted that the implied power of a partner with regard to negotiable instruments has some limitations. For example, he cannot, as a general rule, bind his co-partners by accepting a bill of exchange in blank, or by accepting an accommodation bill, except so far as regards a holder for value who took the instrument without notice of the blank acceptance, or that the firm was an accommodation party (see *Journal of the Institute of Bankers*, January 1912, pp. 24–5).

Every partner in a firm is jointly liable with the other partners (in Scotland severally also) for all debts and obligations of the firm incurred while he is a partner; and after his death, his estate is also severally liable in a due course of administration for such debts as remain unpaid, but subject, in England and Ireland,

to the prior payment of his private debts (Partnership Act, 1890, s. 9). A joint liability is not individual but collective; it is the liability of all together. Hence, though each partner is liable for all the debts contracted by the firm from the moment he became a partner and all the time he continues to be a partner, and the creditor is entitled to sue any partner or all of them, only one action can be brought. Judgment obtained against *all* the partners gives the creditor power to enforce it not only against the partnership property, but also against the private estates of the partners. But if some and not all the partners are sued, and judgment is secured against them, those not sued are discharged from liability, even though the judgment is unsatisfied. In *Kendall* v. *Hamilton*, 1879, two partners in a firm consisting of three were sued and judgment, which was unsatisfied, obtained against them. The third partner was then sued, but it was held that the judgment already obtained against the others was a bar to an action against the third partner. In this case the creditor did not discover that there was a third partner until after he had brought his action against the other partners. It should also be noted that the liability of the partners in this action was joint, and not joint and several. If the debt had been a joint and several debt, the creditor could have maintained his action against the third partner. But where the cause of action is a breach of trust committed by a partner in the ordinary course of his business, a judgment obtained against one partner does not discharge his co-partners, since for such wrongful action or omission on the part of their colleague, all the partners are *jointly and severally* liable (*Blyth* v. *Fladgate*, 1891, and ss. 10–12, Partnership Act, 1890). But if a partner, being a trustee, improperly employs trust property in the business, or on account of the partnership, no other partner is liable for the trust property to the beneficiaries, provided always that the other partners were not privy to the breach of trust. But such misapplied trust money may be followed and recovered from the firm, if still in its possession and under its control (Partnership Act, 1890, s. 13).

From the foregoing it will be seen that unless the banker has secured this several liability, it is very necessary to ensure that all the partners are made subject to any action, as by the rule given above, it is easy for a sleeping partner to be overlooked and his liability extinguished. A partner may bind his co-

partners by signing a joint promissory note, but he can only bind them jointly, not jointly and severally, by signing a joint and several note, though he, himself, will be bound severally.

If partners have private accounts as well as a partnership account, it is not incumbent on the banker to question the validity of transfers of money from the partnership account to the private accounts, and *vice versâ*. But the banker should not permit any partner to pay into his private account cheques drawn payable to the *firm*, unless express authorisation for such a course has been obtained from all the partners. Unless the partners have entered into an agreement to be jointly and severally liable for an overdraft, the banker has no right of set-off between the partner's private accounts and the partnership account. If the joint and several liability is included in the mandate or authority which covers the partners' operations on the account, and there is not, in addition, a guarantee, it is advisable to have the mandate duly stamped as an agreement. Set-off between the accounts of the partners on the one hand, and the partnership account on the other, would probably be permissible, subject to reasonable notice. The practice of obtaining a mandate admitting joint and several liability, or a joint and several guarantee, has much to recommend it, for the banker then has the option of proceeding against the partners jointly or severally and successively, and, in the event of bankruptcy, he can prove on their private estates and on the partnership estate concurrently, each claim being for the whole debt, but he may not receive more than twenty shillings in the pound.

By s. 33 (1), Partnership Act, 1890, "subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner"; and by s. 36 (3), the estate of a partner who dies or becomes bankrupt is not liable for partnership debts contracted after either event has occurred, and it makes no difference whether the creditor was or was not aware that the partner was dead or bankrupt, but the deceased or bankrupt partner's estate is liable for debts contracted before the death or bankruptcy. When the partnership is dissolved by the death, bankruptcy, or retirement of a partner, the banker should stop the account at once if he intends to retain his lien on the deceased, bankrupt, or retiring partner's estate. If this is not done, the Rule in Clayton's Case will operate. The continuing partners should be

asked to open a new account for future use. Appointment by the Court of a receiver of the firm is sufficient ground for a banker to refuse any further operations on the partnership account. The receiver is then the only person who has power to deal with the partnership property.

The lunacy of a partner does not of itself dissolve a partnership, but upon the application of a fellow-partner (or the next friend or person having title to intervene on behalf of the insane partner) the Court may decree a dissolution when a partner is found lunatic by inquisition, or shown to the satisfaction of the Court to be of permanently unsound mind (Partnership Act, 1890, s. 35 (*a*)). Moreover, the Court has power to grant an injunction inhibiting the insane partner from interfering in the partnership business. The banker should act as on the death of a partner.

On the death of a partner, the other partners, by the right of survivorship, are entitled to any balance remaining on the partnership account, and can give the banker a valid discharge for it. The deceased partner's executors, or the trustee in bankruptcy of a bankrupt partner, have no power to bind the firm. In the matter of cheques issued before the deceased partner's death, the banker should only return them, marked "Partner deceased," if the account is overdrawn and he decides to stop the account in order to preserve his lien on the deceased partner's estate; otherwise he should honour them.

By s. 38, Partnership Act, 1890, after the dissolution of a partnership, the authority of each partner to bind the firm continues, notwithstanding the dissolution, so far as may be necessary to wind up the partnership business and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise, provided that the firm is in no case bound by the acts of a partner who has become bankrupt. That is to say, the remaining partners can sell or pledge the partnership assets, whether real estate or personal estate (*Butchart* v. *Dresser*, 1853, and *Re Bourne*, 1906), for the purpose of completing a transaction already begun, or of securing an overdraft already granted, and the banker is entitled to assume, in the absence of evidence to the contrary, that the remaining partners were, by so pledging the assets, engaged in the business of winding up the partnership affairs, and the banker's mortgage would therefore take priority over any claim of a deceased partner's executors, or a bankrupt partners' trustee, for his share in the partnership

assets. From the case of *In re Bourne*, it would appear that a mortgage of partnership real property, made by a surviving partner who is carrying on the business of the old firm, is good as against the deceased's partner's legal representatives, and that a mortgagee is quite safe unless he knows the money is not to be used for the proper business of the old partnership.

As we have already stated, a firm is in no case bound by the acts of a partner who has become bankrupt, and therefore, if a cheque drawn by a partner who is the subject of bankruptcy proceedings is presented, the banker should not pay it without getting it confirmed by the other partners. The partnership estate is wound up by the remaining partners, without the intervention of the bankrupt's trustee. The bankrupt's share in the assets passes to his trustee, who cannot bind the firm, but may be authorised by the Court to bring an action in the names of the trustee and the other partners, notwithstanding that the other partners may have released the debtor, or other person against whom an action has been brought, which release shall be void (Bankruptcy Act, 1914, s. 117). If a firm is made bankrupt, it involves the bankruptcy of every member of the firm, and the banker must not permit operations on any accounts standing in the partners' names. Security deposited by an individual partner to cover the firm's account can be treated by the banker as a collateral security, and he may, therefore, prove against the partnership estate for the whole debt. And if the firm gives security to cover an individual partner's debt, the banker can also prove against the individual partner's estate without taking the security into account. If a security is deposited to cover both the partnership and a partner's account, the banker would, as a rule, put the security against whatever debt it is collateral to, so as to secure his right of proof for the whole debt on the remaining estate.

By s. 33 (6), Bankruptcy Act, 1914, the partnership assets are applicable in the first instance in payment of the joint, *i. e.* the partnership, debts; and the separate, *i. e.* the private, estate of each partner is applicable in the first instance to the payment of his private debts. Any surplus on the separate estates is to be dealt with as part of the joint estate, and any surplus on the partnership estate is to be dealt with as part of the respective private estates, in proportion to the right and interest of each partner in the partnership estate. It follows from this that the

partnership and private creditors cannot prove in competition with each other, the partnership creditors proving on the firm's estate, and the private creditors on each partner's private estate. By Rule 287, Bankruptcy Rules, 1915, the partners have to submit a statement of the partnership affairs, and each partner a separate statement of his private affairs. But if there is no partnership estate and no solvent partner, the firm's creditors rank *pari passu* with the private creditors, and if an individual partner fraudulently converts partnership moneys to his own use, the firm's creditors are entitled to prove against the private estate of the fraudulent partner in competition with his private creditors (Ringwood, *Principles of Bankruptcy*, 12th edition, p. 184).

The disposal of the residue after all the outside creditors have been satisfied is (subject to any agreement to the contrary) as follows: (1) paying to each partner *pro rata* what is due to him for loans advanced to the firm, (2) paying to each partner *pro rata* what is due to him in respect of capital, (3) any surplus to be divided in the proportion in which the profits are divisible (Partnership Act, 1890, s. 44).

By s. 36 (1), Partnership Act, 1890, where a person deals with a firm after a change in its constitution, as, *e. g.*, the retirement of a partner, he is entitled to treat all apparent members of the old firm as still being members of the firm, until he has had notice of the change. Where there have been no previous dealings between the parties a notice in the *Gazette* is sufficient (s. 36 (2)). But where there have been previous dealings, any way of giving notice once proved is sufficient (*Lindley on Partnership*, 7th edition, p. 251). After notice has been sent out and received, the retiring partner is no longer liable for debts incurred afterwards by his former partners. When a partner retires, the banker should, if the account is overdrawn, and he wishes to retain the liability of the retiring partner, stop the account and request the continuing partners to open a new account.

S. 17 (1) states: "A person who is admitted as a partner into an existing firm does not thereby become liable to the *creditors* of the firm for anything done before he became a partner." And this is true even when the incoming partner has agreed with the old partners to make himself liable for debts incurred before he joined the partnership. But where there has been a novation of the debt, *i. e.* where the parties have agreed to substitute the liability of the new firm for that of the old,

then the incoming partner will be liable. When a new partner comes into a firm, it is necessary for the banker to stop the account and get the partners of the old firm to sign a cheque transferring the balance to a new account, and also a letter signed by the partners of the new firm authorising the banker to debit to the new account all outstanding cheques and all bills dishonoured.

Any alteration in the constitution of a firm, whether by the death, bankruptcy or retirement of a partner, or by the incoming of a new partner, will affect any charge which may have been given on the partnership property. A new mortgage or memorandum of deposit should therefore be taken signed by all the new and continuing partners. By s. 18, Partnership Act, 1890, a continuing guarantee in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions, by any change in the constitution of the firm. And the position is the same in the case of any other security given by a third party. The necessity of stopping the account when any change takes place in the constitution of a firm, in order to prevent the application of the Rule in Clayton's Case has already been emphasised. When all the securities are in order, the balance standing on the old account should be paid off by a cheque signed by all the partners of the new firm.

When any alteration takes place in the constitution of a firm, it is of great importance to the banker, if the firm is likely to require or continue an overdraft, to know how the capital of the firm is going to be affected. For example, retirement of a partner may involve either the immediate withdrawal of his capital, or its retention by the firm as a loan, bearing interest. In either case it can no longer be reckoned as part of the firm's assets, and in the second case would rank *pari passu* with the other debts of the firm.

12. Limited Partnerships.—This kind of partnership, framed upon the French model of partners *en commandite*, was first put upon a legal footing by the Limited Partnership Act, 1907. Partnerships formed under this Act cannot consist of more than twenty persons, and one, at least, must be a general or unlimited partner, *i. e.* one liable for all the debts and obligations of the partnership, the others being limited partners, liable only to the extent of the amount of capital each has contributed to the partnership. A limited partner, so long as he remains a limited

partner, must not draw out any part of his contributed capital. If he does do so, he is still liable to the creditors of the firm, up to the amount of the contributed capital he has drawn out. In the case of a banking firm the total number of partners must not exceed ten. A corporate body may be a limited partner (s. 4).

Every limited partnership must be registered with the Registrar of Joint Stock Companies, and, if not so registered, the partnership shall be deemed to be an ordinary partnership in regard to all its members, whether limited or general (s. 5 and L. P., Rule 2). The register can be inspected by any person on payment of the prescribed fee (s. 16), and any change in the particulars registered must be advertised in the *Gazette* (s. 10).

A limited partner must not take part in the management of the firm; if he does so he is liable for all debts and obligations of the firm incurred *while so acting* (s. 6 (1)). A limited partnership is not dissolved by the death or bankruptcy of a limited partner or by his lunacy, unless the lunatic's share in the partnership cannot be ascertained and realised otherwise than by dissolution (s. 6 (2)).

In the event of the dissolution of a limited partnership, its affairs are to be wound up by the general partners, unless the Court otherwise orders (s. 6 (3)). If all the general partners are adjudged bankrupt, the assets of the limited partnership vest in the trustee, and the rules relating to the bankruptcy of ordinary partnerships apply, with the necessary modifications, to limited partnerships (Bankruptcy Act, 1914, s. 127).

The Act does not enact that the firm's name must show that the partnership is a limited partnership. Consequently, unless the information is volunteered, or the banker specifically asks the question, he would have to search the Register to find out whether there were any limited partners or not. This is an important point, as a banker may be relying on a man of substance who is associated with the firm, and it may afterwards transpire that he is a limited partner for a small amount only.

S. 6 (1) provides that a limited partner shall not take part in the management of the business, but that he may, either by himself or his agent, inspect the firm's books and examine into the state and prospects of the business, and may advise thereon. The wording of this section seems to suggest that the limited partner has power to apply to the banker for information regarding the partnership account, but it is clear that he has no power as a

limited partner to draw cheques. When, however, any request for information is tendered by a limited partner, the banker should obtain the general partners' instructions as to what course he should pursue.

13. **Associations, Committees, Societies, etc.**—Accounts are often opened by persons in control of the funds of Sports Clubs, Agricultural and other shows, Subscription Societies formed to promote some national object, and the like. The committee of management of such societies usually depute certain of their number to operate on the account. If the account is always in credit, the banker has no need to trouble himself about locating responsibility for debts incurred on behalf of the society, but if an overdraft is required, it is essential that he should be able to fix the liability for repayment of the loan upon some definite person or persons. For these voluntary associations, being unincorporated, cannot be sued, neither are the individual members who administer the funds personally liable for any overdraft, provided that the members of the committee or council deputed to operate on the account clearly sign cheques in their representative capacity, and have not held themselves out as having authority to overdraw. For example, if an account of this nature is opened under the style of "The Excel Cricket Club, John Jones, Treasurer," and cheques are signed in that manner, in the general way, neither John Jones nor the committee of the club is personally responsible for any overdraft. Therefore, if an advance is required, the banker should obtain a guarantee from responsible parties—inside or outside the association—guaranteeing repayment.

When an account of this nature is opened in the name of the Society, which is the usual and correct method, the banker should be given an authenticated copy of the resolution appointing the treasurer, and the bank as bankers of the Society, with specimen signatures and detailed instructions as to how cheques are to be signed (see Appendix, p. 476, for specimen form). The foregoing should be embodied in a mandate, signed by the chairman of the meeting and countersigned by the secretary (see Appendix, p. 476, for specimen form). Any change in the officials should be immediately notified to the banker. If the treasurer dies or vacates his office, the banker, immediately on receipt of notice, should stop the account, but should honour all cheques drawn before receipt of the notice of death or resignation,

but presented afterwards, unless such cheques are countermanded before payment by a duly authenticated resolution of the controlling committee. The executors of a deceased treasurer do not take over an official account of this nature, and the account, therefore, must remain dormant until the banker receives a duly authenticated copy of the resolution appointing a new treasurer.

If the account on behalf of such an association is opened in the following form "John Jones, a/c The Excel Cricket Club," then John Jones is personally liable for any overdraft created by the drawing of cheques on this account. When an account is opened in this form, the banker is entitled to consider it as a personal account of John Jones, and, therefore, does not need to see a copy of any resolution respecting the account. When an association's funds are vested in and banked in the names of trustees, it is necessary that the banker should see the trust deed, and the rules of the association defining the powers of the trustee, and stating how withdrawals from the fund are to be made. The banker should get a mandate signed, and provided that this conforms to the rules and the provisions in the trust deed, and is strictly adhered to, the banker will not incur any liability.

14. **Building Societies.**—Since every building society is governed by its rules (registered with the Chief Registrar of Friendly Societies), it is incumbent upon the banker to obtain a copy of the rules in order to ascertain the regulations controlling the actions of the persons entitled to operate on the account. The rules declare how cheques are to be signed, and the banker must see that these rules are strictly adhered to. A copy of the resolution appointing the bank as bankers to the society should be included in a mandate, together with specimen signatures and full instructions as to the signing of cheques. This mandate must be duly authenticated (see Appendix, p. 476, for specimen).

Building societies are of two kinds: (1) incorporated, and (2) unincorporated. The incorporated societies are controlled by the Building Societies Acts, 1874–94. No building society established under these Acts can lawfully begin operations without first obtaining a certificate of incorporation from the Chief Registrar of Friendly Societies. The few unincorporated building societies still in existence are regulated by the earlier Building Societies Act, 1836, and by the Friendly Societies Acts, 1829 and 1835. Incorporated building societies are sub-divided

into (1) terminating and (2) permanent building societies. A terminating building society is one that terminates when every member has obtained an advance. A permanent building society is one that has no fixed time of determination.

Formerly, building societies had no power to borrow money unless the rules expressly authorised them to do so, but by s. 15, Building Societies Act, 1874, a power of borrowing, within statutory limitations, has been conferred upon all societies incorporated under this Act, and by s. 16 (2) of the Act, the rules must set forth how the society intends to avail itself of the borrowing powers prescribed by the Act. S. 15 of the same Act says that in a permanent building society, the total amount to be received on loan or deposit must not at any time exceed two-thirds of the amount for the time being secured by mortgages from its members. In a terminating building society, the amount so received may be either two-thirds of the amount lent on mortgage, or a sum not exceeding twelve months' subscriptions of the members' shares for the time being in force. In ascertaining the amount secured on mortgages, mortgages twelve months or more in arrears, or where the society has been in possession for twelve months, must not be included. These are the limits fixed by statute, but the rules of any particular society may impose further restrictions on the borrowing powers, and no society can competently borrow more than is provided for by the rules.

From what has been said, it can be seen how necessary it is that a banker making an advance to a building society should be thoroughly conversant with the rules, and the Acts governing the society's method of procedure. This is the more necessary since as Brett, L. J., said in *Chapleo* v. *Brunswick Building Society*, 1881, "where a society or a company has upon the face of its constitution, that is, either by the statute or statutory rules under which it is constituted, only a limited authority to borrow, then it seems to me that a person dealing with such a society or company must either inquire or run the risk"—the risk, that is, of being debarred from recovering from the society money borrowed in excess of the limits imposed either by statute or by the rules of the society.

Accordingly, the banker, before making an advance, must know whether the society has power by its rules to borrow and to pledge or mortgage its assets as security. Borrowing powers do not necessarily imply powers to give mortgages. An advance

made to a building society should be on a loan account, so as to keep it distinct from the current account; this enables a check to be more easily kept on the total advanced.

Since the total amount that the society is permitted to borrow must always be *less* than the amount out on mortgage to its members, it follows that, although at the time of the banker's advance to the society, the total amount borrowed may be within the statutory limit, at some other time, during the continuance of the loan, the statutory amount may be exceeded owing to the falling in of mortgages. By s. 43 of the Act of 1874, "if any society . . . under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society . . . shall be personally liable for the amount so received in excess." Apart from the personal liability of the directors, the banker has another remedy by virtue of the doctrine of subrogation, *i. e.* when a person borrows without authority or in excess of his authority, and applies the borrowed money in payment of legal debts and liabilities, the lender's claim becomes valid to the extent such legal debts and liabilities are so reduced.

The few unincorporated societies not yet registered under the Acts of 1874 and 1894 have no power to borrow, except in so far as they are expressly authorised by their rules.

15. **Friendly Societies.**—These mutual benefit societies are regulated by the Friendly Societies Acts, 1896 and 1908, the Collecting Societies and Industrial Assurance Companies Act, 1896, and the Societies Borrowing Powers Act, 1898. No society can be registered under the Friendly Societies Acts, until its rules have been submitted to and approved by the Chief Registrar of Friendly Societies. All operations on the account are controlled by the rules, which stipulate how cheques are to be drawn and indorsed. There must not be any deviation from the procedure as set forth in these rules. Cheques drawn by a duly *registered* Friendly Society are exempt from stamp duty, but those of unregistered societies are not. The borrowing powers and powers of mortgaging the society's property are regulated by the rules.

When opening an account with one of these societies, the banker should get a copy of the rules for future guidance, and a mandate. The mandate should embody the resolution appointing the bank as bankers to the society, include specimen signatures,

and state how cheques are to be signed. With regard to the latter, the banker should see that the instructions given conform to the rules of the society. The banker should satisfy himself that any society claiming to be entitled to use unstamped cheques is, in fact, authorised to do so.

16. **Companies.**—The *internal* management of a joint stock company is governed by its Articles of Association, while its *external* operations are controlled by its Memorandum of Association. A copy of each of these documents is therefore necessary to a banker who proposes to have dealings with the company. Another document containing useful information is the company's annual balance sheet. A comparison of the latest with one issued, say, five years ago, would afford substantial evidence of the financial progress or otherwise of the company. The banker should keep a copy of each of these documents for reference.

Where the company proposing to open an account is newly formed, the banker should also see its Certificate of Incorporation, issued by the Registrar of Companies. This certificate is conclusive evidence that all the statutory requirements of the Act have been complied with. (Companies Act, 1929, s. 15 (1).) In the case of public companies the banker should also see the Certificate issued by the Registrar certifying that the company is entitled to commence business. Until this has been issued, no public company can begin business operations or borrow money. Any contract made by the company before its issue is provisional only, and not binding on the company until it has been issued (*ibid.* s. 94). If for any reason this certificate is not granted the company cannot be sued on any contract entered into pending its issue. This does not apply to Private Companies (see p. 257), which can begin business as soon as incorporated.

"The Memorandum of Association," said Lord Selborne in *The Ashbury Carriage Co.* v. *Riche*, 1875, "is . . . a company's fundamental and, except in certain particulars, its unalterable law." In the Memorandum are set forth the objects for which the company was established, and the powers with which those in charge of its operations are invested. Nothing contained in the Memorandum can be altered except by sanction of the Court, upholding a special resolution of the company (*ibid.*, ss. 4 and 5), but certain things incidental to the carrying out of the declared objects of the company may be done, even though

not mentioned in the Memorandum. Any act done or contract entered into by the company, which is outside the scope of the Memorandum, is *ultra vires* (*i. e.* beyond the powers) of the company, and not binding upon the company, and this is so even though the directors acted in good faith, and their action is indorsed at a general meeting of the shareholders.

The Articles of Association contain the regulations controlling the internal management of the company. The Articles together with the Memorandum must be registered with the Registrar of Joint Stock Companies. Subject to the provisions of the Companies Act, 1929, and to the conditions contained in its Memorandum, a company may by special resolution (see p. 266) alter or add to its Articles (*ibid.*, s. 10).

Every person dealing with a company is taken to know the provisions of the Memorandum and Articles, so far as they relate to the company's dealings with persons outside the company (*Mahony* v. *East Holyford Mining Co.*, 1875). Both the documents can be inspected by any person at the Registry of Joint Stock Companies in London or Edinburgh respectively upon payment of a fee of one shilling. The banker, therefore, before dealing with a company, must get to know the powers of the directors as prescribed in the two documents, more particularly their borrowing powers and their powers to mortgage the company's assets, and the regulations controlling the signing and indorsing of bills and cheques. But the banker is not taken to know anything relating to the internal management of the company.

A copy of the resolution of the directors, appointing the bank as bankers to the company, should be included in a mandate giving all the necessary particulars of the way in which the moneys of the company may be drawn out for the purposes of the company, and including specimen signatures (see Appendix, p. 501, for specimen form). This mandate duly signed by the chairman and countersigned by the secretary forms the banker's authority for transacting business with the company, and this authority, provided it is consonant with the provisions of the Memorandum and Articles, will hold good even though as a matter of fact the resolution may have assigned powers to persons not properly appointed for such functions. S. 143 of the Companies Act, 1929, says that the acts of a director or manager shall be valid, notwithstanding any defect which may afterwards be discovered in his appointment or qualification.

Any change in the directorate or secretaryship should be notified to the banker by enclosing a duly authenticated copy of the resolution making the change of appointment.

The Directors are persons appointed by the shareholders to manage the business of the company in their interests. They are the agents of the company in its dealings with outside persons, and their powers are strictly defined by the Memorandum and Articles. If they go beyond the powers conferred upon them by these documents, they are personally liable, provided that the party with whom they have contracted had no notice that they were going beyond their powers. For example, if they borrow from a banker without authority or in excess thereof, they are personally liable, as having committed a breach of warranty of authority, provided that the banker, when advancing the money, was acting in good faith and without knowledge of the lack of authority, and that a scrutiny of the Memorandum and Articles would not have revealed the lack of authority.

Directors acting honestly and without culpable negligence within the scope of their authority "discharge both their equitable as well as their legal duty to the company" (Lindley, M.R., *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899). They are not liable for mistakes made honestly or for not exercising due care in the administration of the company, but if the lack of care is of such a gross nature that no reasonable business man could justify it, then they are liable. (For bankruptcy of a director see p. 471.)

The Secretary's position depends upon the authority with which he is clothed. *Prima facie*, his duties are those of a mere scribe, deputed to record and carry out the instructions of the directors. But if his powers are greater than these, and the persons dealing with him know it, then his actions within the scope of the authority conferred upon him are binding both on the directors and the company. Neither the directors nor the secretary should be allowed to put cheques payable to the company into their private accounts.

The danger of allowing a director or other agent to place cheques payable to the company or to his principals to the credit of his own account was emphasised in the case of *Underwood* v. *Bank of Liverpool & Martins Ltd.* Underwood converted his business into a private limited company in which he held all the shares except one. By the Articles he was appointed sole director. A floating debenture was issued charging all the assets of the company to secure its banking account. Soon after the

formation of the company, Underwood commenced to pay into his own private account cheques in favour of the company duly indorsed by himself as sole director. In an action brought by the Receiver for the debenture holders, it was held that Underwood's bankers had been guilty of negligence, and they had to refund all amounts so received. The points to be noted are that the collecting banker was guilty of negligence, although Underwood was for practical purposes the sole proprietor of the company, his action being undoubtedly a fraud on the company's creditors, and, even in the case of a " one-man " company, that the company is absolutely an entity of itself quite apart from that of its chief proprietor. A banker should not allow any director or other agent, or a partner, to put to his own account cheques drawn payable to his principals or firm.

S. 26, Companies Act, defines a Private Company as one " which by its Articles (*a*) restricts the right to transfer its shares; (*b*) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were while in that employment, and have continued after the determination of that employment to be, members of the company; and (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company." S. 1 of the same Act provides that a private company shall not consist of less than two persons, and other sections of the Act absolve such companies from some of the regulations imposed upon public companies—the most important of these being exemption from the obligation of sending an annual statement in the form of a Balance Sheet to the Registrar (s. 110 (3)).

Every company, other than a private company, registered under the Companies Act, is a public company and must consist of not less than seven members. Banking partnerships consisting of more than ten, and other partnerships consisting of more than twenty, persons must by ss. 357–8 of the Act be registered as companies, either public or private, and with limited or unlimited liability.

By s. 18 (1), where it is proved to the satisfaction of the Board of Trade that a limited company is being formed for promoting commerce, art, science, religion, charity, or other useful object, and intends to apply its profits, if any, or other income in promoting its objects, the company may be registered with limited

liability, without adding the word " Limited " to its name. All other limited companies must have the word " Limited " as the last word of their name (s. 2 (1)).

By s. 93 (1), every limited company " shall have its name mentioned in legible characters on all . . . bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company. . . ." The signing of bills, cheques and promissory notes may be done in one of two ways : (*a*) by a duly authorised agent signing the name of the company only, (*b*) by a duly authorised agent signing by or on behalf of or on account of the company, followed by the agent's signature. Both forms of signature will be binding on the company (s. 30). If the true name of the company does not appear on the documents enumerated in s. 93, or if the officials signing have not the requisite authority, they may incur personal liability on the instruments, unless the same are duly paid by the company (see s. 93 (4)). If the name of the company is not on the bill, cheque or promisory note, the official is also liable to a fine not exceeding £50.

17. *Borrowing Powers.*—When a joint stock company requires an advance it is essential that the banker should know whether the company has or has not the power to borrow money, and to mortgage its assets, and any limit thereto. These powers, with or without restrictions, are usually contained in the Memorandum and Articles. These documents may give power to borrow money, but not to pledge the company's property as security; or the power to borrow and give security may only be exercisable by the company in general meeting, and not merely by resolution of the directors. If borrowing and mortgaging powers are not mentioned, then, unless the company is a *non-trading* one, it has implied powers to do these things to such an extent as is reasonable and necessary for the carrying out of its declared objects (*In re Hamilton's Windsor Ironworks*, 1879). Where the company is a non-trading company, any power to borrow and mortgage must be included in its memorandum; otherwise no such power exists, and it cannot even discount bills of exchange. A banker lending money to a company is not put upon inquiry as to what the company intend to do with the money, and if the loan is misapplied it cannot be avoided, provided that the lender acted *bona fide*, and without knowledge of the intended misapplication.

S. 45 provides that it shall not be lawful for a company to

give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person, of any shares in the company. This prohibition, however, does not apply where the lending of money is part of the ordinary business of a company, and a bank may, therefore, make advances where the money is to be used for the purchase of its own shares. Advances to enable employees to purchase fully-paid shares in the company are also excepted. As such advances are illegal and *ultra vires*, great care must be exercised should the banker have any reason to suspect that any proposed advance is in contravention of this section.

Directors who have authority to do certain things, but have exceeded their powers, are said to have acted *ultra vires* of the directors. If such acts are within the powers conferred by the Memorandum and Articles, i. e. *intra vires* of the company, the company can, by resolution, ratify such acts, and so bind the company. But if the shareholders do not ratify such acts, the directors may be personally responsible for breach of an implied warranty that they possessed the necessary authority. But if the directors borrow, and the *company* has no power to borrow, or has limited powers and the directors exceed those limits, then the act of borrowing is *ultra vires* of the company, and is void, and cannot be made binding on the company. In such cases the banker, as lender, must rely for partial or full repayment on his right of subrogation (see p. 253 *ante*). But this right of subrogation does not extend to securities belonging to, or to the priorities of, the creditors in whose shoes he is entitled to stand.

18. *Register of Charges.*—Mortgages and charges of the description noted below which are created by limited companies formed in England under the Companies Act, must by s. 79 of the Act be registered with the Registrar of Companies. Failure to do this involves heavy penalties (s. 80). The banker, therefore, who proposes to lend to a limited company should, before doing so, inspect the Register (fee 1*s.*) to see whether any prior encumbrances exist. (Searches should also, in the appropriate cases, be made at the Land Registry or the Middlesex or Yorkshire Registries.) The following are the main provisions of s. 79 relating to the registration of charges. The expression "charge" includes mortgage.

Every charge created after the 1st July, 1908, by a company registered in England, and being either—

(*a*) A charge for the purpose of securing any issue of debentures; or

(*b*) A charge on uncalled share capital of the company; or

(*c*) A charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d*) A charge on land, wherever situate, or any interest therein; or

(*e*) A charge on book debts of the company; or

(*f*) A floating charge on the undertaking or property of the company; or

(*g*) A charge on calls made but not paid; or

(*h*) A charge on a ship or any share in a ship; or

(*i*) A charge on goodwill, on a patent or a licence under a patent, or on a trademark or on a copyright or a licence under a copyright,

is void, so far as any security on the company's property or undertaking is thereby conferred, against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument (if any) creating the charge, are delivered to the Registrar of Companies for registration within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured. When a charge thus becomes void, the money secured thereby becomes immediately payable, but will, of course, only rank as an unsecured debt. A certificate of registration is given by the Registrar of any charge so registered, stating the amount thereby secured, and the certificate is conclusive evidence that all the requirements of this Section have been complied with. A copy of this certificate of registration must be indorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the charge so registered. Mortgages and charges on land under the Land Registration Act, 1925, must also be registered under that Act. (For charges by foreign companies see p. 268.)

S. 80 (1) enacts that it is primarily the duty of the company to register particulars of every charge coming within the section,

but any person interested therein may register and recover from the company the fees paid. The lender should, for his own protection, see that registration is duly effected. Registration must be made within twenty-one days after the charge has been *executed*, not twenty-one days after the money has actually passed from the lender to the borrower. In *Esberger* v. *Capital and Counties Bank*, 1913, the liquidator of Esberger & Co. claimed the return of certain title deeds as against the bank with whom they had been deposited to secure an existing overdraft. Sargant, J., held that the security, in order to be valid, should have been registered within twenty-one days after its creation, and such creation dated from the time the deeds were deposited and not from the time the security was perfected. His Lordship therefore ordered that the proceeds of the security (which had been sold) should be handed over to the liquidator for distribution amongst the creditors. Any deposit of title deeds as a security, whether or not a memorandum is taken, must be registered, but shares and debentures in another company do not need registration if deposited as security. By s. 79 (6), the deposit of a negotiable instrument to secure the payment of any book debts of a company does not require registration, but by the clause (*e*) quoted above, any *assignment* of book debts, present or future, must be duly registered. If a company acquires property subject to a registrable charge, registration must be effected within twenty-one days after acquisition (s. 81).

Not only must all charges coming under the statutory description be registered, but by s. 88 (1) the limited company itself must keep at its registered office a Register of Charges, and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or property of the company. This Register may be inspected by any creditor or member of the company without fee, and by any other person on payment of a fee not exceeding 1*s*. (s. 89). The Register kept by the company should contain a complete record of all charges registrable at Bush House, W.C. 2, and, in addition, charges secured by the deposit of choses in action, such as shares, debentures and negotiable securities, and documents of title to goods. The fact that a debt is secured must be stated in the company's balance sheet, though the security need not be specified.

19. *Companies' Debentures as Security.*—If a company requires an overdraft, and proposes to deposit its title deeds as security,

it is important that the banker should ascertain whether the company has issued debentures or debenture stock, and if such have been issued, whether the debentures contain a specific charge or a floating charge upon the company's property. If the charge is a floating charge (for description see p. 352), the company has the right, so long as it remains a going concern, to deal with its assets in any way it pleases, *e. g.* to create a specific charge over them. It is a common occurrence, however, for debentures creating a floating charge to contain a clause prohibiting the company from creating any charge or mortgage on the company's property, ranking either in priority or *pari passu* with the existing debentures. If the banker takes the title deeds as security and has notice of this condition, he cannot obtain priority over the debentures' floating charge. Since registration under s. 79 for companies takes the place of registration under the Land Charges Act, under which registration is equivalent to actual notice, presumably priority cannot now be obtained in any circumstances (see also p. 352).

An issue of debentures by a company, which has an existing unsecured overdraft, should have the effect of a danger signal upon the banker. For if the debentures contain a charge over the company's assets, they have priority over unsecured creditors in the event of a winding up. Further, it should not be forgotten that whereas a floating charge over the goods, chattels and effects of an ordinary partnership would have to be registered as a Bill of Sale, such a procedure is not necessary in the case of a limited company. The latter is consequently freed from the publicity and damage to credit incidental to the registration of a Bill of Sale. Where a banker takes a company's own debenture as security for an overdraft, the debenture should be issued in the names of the bank's nominees, and preferably made payable on demand. (See p. 484 for specimen form of Debenture detailing the events in which security is enforceable and powers of holder.)

If there is no prior charge, the debenture should contain a clause prohibiting the company from issuing any other debentures ranking in priority or *pari passu* with it. A memorandum of deposit stating the purpose of the deposit should also be taken. Before accepting the debenture as security, the banker should ascertain that it is drawn up in accordance with the provisions of the memo and articles of association, and should see that it is registered, within twenty-one days of execution, with the

Registrar of Companies. If the debenture creates a specific charge over any of the company's property, the title deeds of such property should be deposited with the debenture. The charge can be given by a separate mortgage or the debenture can include a charge by way of legal mortgage. The banker should see periodically the receipts for fire insurance, ground rents, etc. By s. 75 (4), Companies Act, where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debenture shall not be deemed to have been redeemed by reason only of the company's account having ceased to be in debit while the debenture remained so deposited.

S. 75 of the Companies Act is a most important one to bankers. It provides that where a company has redeemed any debentures previously issued, then the company shall have power to re-issue the debentures with the same priority as if they had never been redeemed, either by re-issuing the same debentures or by issuing others in their place, unless any provision to the contrary, express or implied, is contained in the articles or in any contract entered into by the company, or unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled. Where a company has power to re-issue debentures which have been redeemed, particulars with respect to the debentures which can be so re-issued shall be included in every balance sheet of the company. The term "debenture" includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not.

Before taking mortgages or charges from any company which has previously issued debentures, the banker must pay special attention to this section, and the company should be required to furnish satisfactory evidence that any previously redeemed debentures have been effectually cancelled and cannot be re-issued.

By s. 266, *ibid.*, where a company is being wound up, a floating charge on the company's property created within six months of the beginning of the winding up shall, unless the company was solvent immediately after the charge was created, be invalid, except to the amount of cash paid to the company at the time or after the creation of, and in consideration for, the charge, together with interest at 5 per cent. per annum. (See also p. 302.)

By s. 86 (1), *ibid.*, if a banker or other person obtains an order of the Court for the appointment of a receiver or manager of a company's property, or appoints such a receiver or manager under any powers contained in any instrument, he must, within seven days of the date of the appointment, give notice of the fact to the Registrar of Companies, and the Registrar, on payment of the prescribed fee, shall enter the fact on the Register of Charges. Failure to do this renders the banker or other person liable to a heavy fine. A receiver or manager must also give notice on ceasing to act. If the receiver is appointed by another person, the banker is probably protected as to his transactions with the company up to the moment he receives notice of the appointment, even though made after the date of such appointment. Notice to the Registrar and record of the fact in the official Register of Charges would not, in Sir John Paget's opinion, be deemed sufficient notice to the banker (*Q. B. P.*, No. 462). S. 31, Bankruptcy Act, 1914, relating to mutual credits and dealings (see p. 465), does not apply to the appointment of a receiver and manager. The banker, therefore, in such circumstances, has no lien on the credit balance of a company for its contingent liability on bills discounted (*Q. B. R.*, No. 1347). The case is different when a company is wound up (see *post*, p. 267).

20. *Winding up.*—By s. 126, Bankruptcy Act, 1914, no receiving order can be made against any corporation, or against any partnership, or association, or company, registered under the Companies Act, or any enactment repealed by that Act. A company terminates its career by its being what is called "wound up"; during the process it is said to be "in liquidation." Winding up may be necessary (1) because the company is unable to pay its debts; (2) because it is deemed advisable to reconstruct the company, or to amalgamate with, or be absorbed by, another company; (3) because of the non-compliance with statutory regulations. There are three ways in which a company may be wound up: (1) By the Court (Compulsory Liquidation). (2) Voluntary Liquidation. (3) Voluntary Liquidation under Supervision of the Court (s. 156).

21. *Compulsory Liquidation.*—A company may be wound up by the Court (s. 168) if—

(1) the company has by special resolution resolved that the company be wound up by the Court:

(2) default is made in filing the statutory report or in holding the statutory meeting :

(3) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year :

(4) the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven :

(5) the company is unable to pay its debts :

(6) the Court is of opinion that it is just and equitable that the company should be wound up.

By s. 170 (1) of the Act, an application for a compulsory winding up must be made to the Court, and may be presented by the company itself, or by any creditor or creditors, or by a contributory (*i. e.* " a person liable to contribute to the assets of a company in the event of its being wound up " (*ibid.*, s. 158)). By s. 175, *ibid.*, the winding up of a company commences from the date of the presentation of the petition, and by s. 189 (1) at the same date the liquidator takes control of all the property and things in action to which the company is entitled, and the powers of the directors cease. Where, before presentation of a petition for winding up by the Court, the company has passed a resolution for voluntary winding up, the winding up is deemed to have commenced at the time of the passing of the resolution unless the Court directs otherwise (s. 175). By s. 185 (1) on a winding-up order being made, the Official Receiver becomes provisional liquidator, and has power to act (subject to the control of the Court) until the creditors and contributories, in separate meeting, have decided whether to ask the Court to appoint the Official Receiver or other person as liquidator (s. 185 (2)). The appointment of a Committee of Inspection (if any) is also to be made at these meetings. When the Official Receiver becomes liquidator he may (s. 209 (1)) apply to the Court to appoint a special manager to control the business of the company under the supervision of the Court.

22. *Voluntary Liquidation.*—A company may be wound up voluntarily (s. 225)—

(1) When the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is

to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily :

(2) if the company resolves by special resolution that the company be wound up voluntarily :

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

A voluntary winding up commences from the time of the passing of the resolution authorising the winding up (s. 227). S. 117 defines an *extraordinary resolution* as one which has been passed by a majority of not less than three-fourths of such members as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the extraordinary resolution has been duly given. A *special resolution* is similar in all respects, except that the period of notice is not less than twenty-one days, though a shorter notice may be given if all the members entitled to attend and vote so agree. When a company has resolved to wind up voluntarily, the resolution must be advertised in the *Gazette* (s. 226).

There are two kinds of voluntary liquidation (s. 230) :—

(*a*) A members' voluntary winding up, and

(*b*) A creditors' voluntary winding up. Every voluntary winding up will be a creditors' winding up unless the directors, before the notices calling the meeting to pass the resolution for winding up are issued, have made and filed a statutory declaration to the effect that they have made a full inquiry into the company's affairs and are of the opinion that it will be able to pay its debts in full within a period not exceeding twelve months.

In a members' winding up, the liquidator is appointed and his remuneration fixed by the company in general meeting, whilst in the case of a creditors' liquidation the power to nominate and fix the remuneration of the liquidator is in their hands. The creditors may appoint a Committee of Inspection.

The company must cease to carry on business from the commencement of the winding up, except so far as may be required for the beneficial winding up thereof ; but the corporate state and corporate powers of the company continue until it is dissolved (s. 228). As already explained, a distinction is made betweer

the winding up of a solvent and an insolvent company, the control in the former case being vested in the members and in the latter case in the creditors. Hence, on the appointment of one or more liquidators, the powers of the directors cease, except so far as the company in general meeting or the liquidators in the case of a members' winding up, or the creditors or their committee of inspection in the case of a creditors' winding up, sanction the continuance thereof. Where there is no liquidator, the Court may appoint one (s. 249). The Court may also remove a liquidator and appoint another one.

23. *Liquidation under Supervision.*—When a company has resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions as the Court thinks just. The liquidation continues in the same manner and the liquidator has, subject to the restrictions imposed by the Court, the same powers as in a voluntary winding up (ss. 256–60).

24. *Effect on Banking Account.*—Notice of the commencement of a winding up, whether voluntary or compulsory, as soon as received by the banker, should be followed by an immediate suspension of all operations on the account "Commencement" has already been explained. Apart from direct notice, there is the statutory advertisement in the *Gazette* of the petition or of the authorising resolution. In the case of a voluntary winding up, this would probably operate as a sufficient notice, at any rate after the time necessary for it to come to the banker's knowledge, and cheques paid before such notice would probably be allowed. In a compulsory liquidation, however, it is very likely that a banker would not be permitted to debit cheques paid after the date of the petition but before he has had notice. Since, if a winding-up order is made, it dates back to the presentation of the petition, it behoves a banker to exercise great care when dealing with a company which is in low water. When a company is wound up, a banker is entitled to set off a credit balance on the company's account against its contingent liability on bills discounted.

S. 264 (3) of the Companies Act, 1929, is of assistance to bankers in cases where a company is in difficulties and the banker is asked to provide wages. The salaries or wages of clerks,

servants, workmen and labourers are, subject to the scale laid down in the Act, preferential claims in a winding up, and this section provides that if any payment of such wages or salary be made out of money advanced by any person for that purpose, the lender shall have the same right of priority as the clerks, etc. would have had, had they not been paid.

24A. *Companies Incorporated outside Great Britain carrying on Business within Great Britain.*—Part XI of the Companies Act, 1929, is devoted to these companies. In addition to foreign companies, companies incorporated in Northern Ireland, the Irish Free State, the Channel Islands and the Isle of Man are subject thereto. A certified copy of the charter, statutes or memorandum and articles, or other instrument defining the constitution of the company, with a list of directors and the names and addresses of one or more persons resident in Great Britain authorised to accept service of process and any notices, must be filed with the Registrar of Companies.

A balance sheet must be taken out each year and filed. Every foreign company must conspicuously exhibit on every place where it carries on business in Great Britain the name of the company, country where incorporated, and whether the liability of the members is limited. Similar information must be given in any prospectus, and on all bill-heads, letter-paper, notices and advertisements, etc.

The provisions of the Act in regard to the registration of charges extends to all companies incorporated outside England in respect of charges on property in England (s. 90). Companies incorporated in Scotland also come within this section.

25. **Deceased Customer, Executors, and Administrators.**—By s. 75, Bills of Exchange Act, 1882, notice of a customer's death determines the duty and authority of a banker to pay his customer's cheques. Therefore, upon receipt of notice of his death, all operations on the account should be suspended until production of probate, if the deceased has left a will, or of letters of administration, if the deceased died intestate. Cheques paid before receipt of notice can be debited to the account, and cheques marked by the banker at the customer's request, or in accordance with the custom of the local clearing, and paid by the banker after receipt of notice, can also be debited to the account; so also can any amount due to a stockbroker for purchases made by the

banker on the customer's behalf, and similar liabilities incurred by the banker on the customer's instructions.

After exhibition of probate [or letters of administration] to the banker, the executors [or administrators] should be allowed to close the account, and deal with the deceased's securities. A banker must not pay over any money, or release any securities on production of any foreign or colonial probate—only a probate taken out in this country can control any English estate. *Probate* is a copy of the deceased's will, made out under the seal of the Probate Court Registry, together with a certificate stating that the will has been proved. The banker should peruse the copy of the will in order to see how the deceased has disposed of his property, and should make notes of any details that may affect the account. Although neglect to do so does not involve any statutory penalty, it is the custom of bankers to ascertain that the amount declared liable for estate duty is not less than the balance paid over to the legal representatives.

The following particulars of probate or of letters of administration should be recorded by the banker: Dates of the will and of probate; where probate was granted; the date of exhibition and the name of the person exhibiting it; the probate value of the estate; names and powers of the executors, administrators, or trustees. These details should be entered in the ledger against the deceased's account, or in the Probate Book. If the will provides for the continuance of the business by the legal representatives, then the banker should have a copy of the will for his own use and make a special note of any regulations as to the signing of cheques, bills, etc., and the powers of the legal representatives to accept bills, borrow, pledge and mortgage property, etc. A copy of any proved will can be obtained from Somerset House.

When executors or administrators carry on the deceased's business they are personally liable for all debts contracted by them while so acting, and this is so even when they act avowedly in the character of executors or administrators (*Labouchere* v. *Tupper*, 1857), but they are entitled to be indemnified out of the estate. Executors [or administrators] may carry on the deceased's business, apart from any authority conferred upon them by the will, for a limited time necessary for them to sell the business as a going concern, but it is a breach of trust, unless expressly authorised by the will, to carry on for longer than is reasonably

necessary for this purpose. And even if so authorised, their first duty is to pay the testator's debts, and delay in realising assets to do this may be deemed a breach of trust.

Executors and administrators have substantially the same duties; they differ only in the manner of their appointment. An executor derives his authority from the will; an administrator is appointed by authority of the High Court. If there is more than one executor or administrator, they are regarded as one person, having a joint interest in all the estate of the deceased, and an interest not capable of division. That is to say, the acts of one, when administering the estate, are, generally speaking, deemed to be the acts of all, *e. g.* any executor or administrator, where there are more than one, can give a valid discharge for a debt due to the estate, or for a credit balance handed over to him by the banker, but one of several executors or administrators cannot sell or transfer real property without the authority of the Court (Administration of Estates Act, 1925, s. 2). Generally, all the executors and administrators must concur in any transfer of stocks and shares (National Debt Act, 1870, s. 23, and Companies Clauses Act, 1845), but in certain cases one of several may validly effect a transfer. By s. 27, Administration of Estates Act, where any probate or administration is revoked under this Act, all payments *bona fide* made to any executor or administrator prior to revocation is a legal discharge for all persons making such payments. An infant may be appointed executor, but, if sole executor, cannot act during his minority (see p. 236 for procedure); and since the passing of the Married Women's Property Act, 1882, a married woman may act either as executrix or administratrix, and her husband does not share in any liability she may incur as legal representative, unless he has intermeddled in the administration of the estate. Before delivering up any securities deposited by the testator, the banker should obtain the authority of all the executors.

Bankers very often advance money to executors and administrators in order to provide funds for the probate duty, for until probate or letters of administration have been granted, the legal representatives are not entitled to draw money out of the deceased's account. Before advancing the money, the banker should ascertain from the will, or the letters of administration, or otherwise satisfy himself, that the persons applying for the accommodation are the proper persons. Executors have power

to pledge specific assets before probate and the act will be valid if probate is granted to them, but, if declined, difficulty may arise. Administrators cannot give such a charge before obtaining grant of administration. Except for this their powers are similar. Accordingly, the practice is to make advances to executors and administrators on their personal responsibility covered often by their joint and several guarantee. A banker cannot hold against such advances, securities deposited by the deceased (*Farhall* v. *Farhall*, 1871). After grant of probate or administration, the representatives can pledge specific assets of the deceased. If they do this the banker is secured, but, if not, he must rely upon his personal remedy against the legal representatives. Since only those who have authorised the loan are responsible for it, the banker, before granting an advance, should get the written sanction of all the executors; and as an unsecured loan is the personal debt of the executors, the banker cannot levy execution against the general assets of the estate. A specific security is necessary, and must be definitely charged. All the executors must join in any charge over the landed property of the deceased, and in any transfer of shares registered in their joint names. Indeed, it is advisable, even when not legally necessary, to get the signatures of all the executors to all mortgages and charges.

It should be noted that if the account is opened in the joint names of the executors the ordinary rules respecting the liabilities of joint account holders for any overdraft apply (see p. 237), and a joint and several guarantee is therefore desirable. If the account is opened in the name of the estate a guarantee is essential.

The banker cannot set-off a debt due to him by the legal representatives against a debt due from him to the estate, and *vice versa* (*Rees* v. *Watts*, 1855). Set-off cannot be pleaded unless the debts are between the same parties and in the same right.

The paying off of a debit balance on the deceased's account should, generally speaking, be effected as soon as the executors are able to realise sufficient of the deceased's assets, but it is all a question of arrangement between the banker and the legal representatives. If the deceased left a credit balance on his account, this should be drawn out by the legal representatives' cheque (signed by all), and transferred to the executorship account. Such an account would either be opened in the personal names of the legal representatives (without reference to the executorship), or in the following form: "The Executors of John Smith, de-

ceased, H. Brown and W. Robinson, Executors." If the account is opened in the personal names of the executors, all the executors should sign cheques, unless other arrangements are made when the account is opened. If the account is opened as avowedly an executorship account, one executor could legally operate on the account, and the banker, unless a different arrangement is made, must pay all cheques so drawn; but it would appear—the matter is not beyond doubt—that any executor can, at any time, countermand the payment of cheques drawn by any other executor. Where all the executors sign the cheques it is beyond doubt that any one of them can countermand payment. To avoid disputes, the banker should come to some definite arrangement at the time the account is opened, and get his usual form of mandate or authority for joint accounts, signed by all the executors or administrators; but no matter what instructions are then given, any executor can revoke them at any time, and the banker is bound to take notice of such revocation.

Generally speaking, executors have no power to delegate their authority, but they may authorise, by power of attorney or otherwise, outside parties to do for them certain acts incidental to the executorship; *e. g.* they may grant an outside party a power to sell property on which the executors hold a mortgage, and have decided to foreclose. Save in special circumstances, however, they have no power to delegate their authority to operate on the executorship account. The banker should not return a cheque signed by two or more executors, one of whom has since died, unless the account is overdrawn on the personal responsibility of the executors, and the banker wishes to retain the deceased executor's liability. Breach of trust by an executor is dealt with later under *Trust Accounts*.

On the death of an executor (unless otherwise provided for in the will) or of an administrator, his powers are vested in his co-executors or co-administrators (if any). If he be the sole executor, his duties devolve upon his executor, but, if he be the sole administrator, fresh letters of administration must be applied for. This administrator is appointed by the High Court to complete the winding up of the estate, and is called an administrator *de bonis non administratis*, i. e. administrator of goods not administered. An administrator *de bonis non* (the shortened form is the one commonly used) is also appointed if a sole executor dies intestate before winding up the estate.

An executor, once he has acted as an executor, cannot, as a rule, renounce his duties, unless under s. 6 (2), Public Trustee Act, 1906, he elects to transfer his duties to the Public Trustee, which he can do with the sanction of the Court. The Public Trustee has power to act either solely or jointly with the continuing executors or administrators (if any).

Executors often act in the dual capacity of executors and trustees. They first act as executors, and then, if the testator has left any of his property in trust, are also usually appointed to deal with the trust property. In such cases it is often difficult for a banker to determine where an executor is *functus officio* (*i. e.* a person who has discharged his duties), and has become a trustee. If probate has been exhibited to him, the banker may be fixed with notice that the executor is, or is about to become a trustee. This is important where there are two or more executor-trustees, because one trustee cannot delegate his authority save for special transactions or during absence abroad (see p. 276).

26. Trust Accounts.—With regard to Trust Accounts, the general principle of treatment by the banker is that he must not knowingly be a party to a breach of trust. That is to say, if a customer places money that the banker knows is trust money in his charge, the banker must not allow the customer to draw out the money for a purpose obviously inconsistent with the customer's duties as a trustee. The banker must not act upon mere suspicion. Before refusing to honour his customer's cheques he must have substantial grounds for believing that a breach of trust is intended. The law regarding this point was well stated by Lord Chancellor Cairns in *Gray* v. *Johnston*, 1868: "In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place . . . be proof that the bankers are privy to the intent to make this misapplication of the trust funds; . . . and if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance above all others will most rapidly establish the fact that the bankers are in privity with the breach of trust which is about to be committed."

The keynotes of this much-quoted passage are to be found in the phrases "personal benefit to the bankers" and "designed and

stipulated for." In order to fix the banker's liability, these phrases must be taken in conjunction. The banker may derive some "personal benefit," and yet not be held privy to any fraud, on the ground that the personal benefit was not "designed and stipulated for" by him. For example, the mere fact that the trustee has transferred money from a trust account to his private account in reduction of an overdraft does not, of itself, make the banker a party to any fraud (*Coleman* v. *Bucks and Oxon Bank*, 1897). In such circumstances the banker clearly derives some benefit from the transfer. Here it may be as well to emphasise the fact that the banker's primary duty is to honour his customer's cheques. The relationship of banker and customer would be, unquestionably, an impossible one if the banker was put upon inquiry every time his customer drew a cheque, even a cheque on a trust fund. Now suppose that when the trustee's private account is overdrawn, the banker makes a pressing demand upon him to reduce the overdraft, and, in response, the trustee transfers money from what the banker knows to be a trust fund to his private account, then probably it would be held that the "personal benefit" to the banker was "designed and stipulated for," and the banker would have to refund the money to the *cestuis que trustent* (the beneficiaries) if it turned out that they had been defrauded.

It must be said, however, that two of the recorded judgments in cases dealing with trust funds, imply that a banker's duty in his treatment of such funds is more onerous than is suggested by the above. In the first place, Fry, J., in *Foxton* v. *Manchester and Liverpool District Banking Company*, 1881, laid it down that "those who know that a fund is a trust fund cannot take possession of that fund for their private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money." This dictum was quoted with approval by Farwell, J., in *Attorney-General* v. *de Winton*, 1906, and if this reading of the law is correct, then it is clear that the banker runs great risk in allowing any transfer of trust funds by which he personally benefits, as, for example, a transfer which happens to reduce a private overdraft, made by the customer without demand from the banker that the customer should reduce his liability.

Cheques drawn in favour of a trust, whether crossed or uncrossed, must not be credited to the trustees' (or executors') private

account, or the banker will make himself liable for any misappropriation on the ground of negligence. In regard to his right of set-off, the banker cannot exercise it between the trust account and the trustee's private account. But if he is not aware that one of the accounts is a trust account he may exercise it, but not after receipt of notice that one of them is a trust account, so far as subsequent transactions are concerned. And as the customer is personally liable for any overdraft on the trust account, the banker can, subject to reasonable notice, exercise his right of set-off against the private account to cover advances on the trust account.

The mere fact that a customer has more than one account does not necessarily affect the banker with notice that one of them may be a trust account. It all depends on the circumstances of each case. Many customers, for convenience' sake, have various accounts distinguished as Account No. 1, Account No. 2; or "House a/c." and "Farm a/c.," etc. In none of such cases of separation is there *per se* any indication of a trust account, and in the absence of any such indication, or of any agreement to the contrary, the banker is entitled to regard the accounts as one account, and to set-off one against the other. But the distinguishing marks of some accounts do not admit of such a simple classification. For instance, the expression *re* in an account headed "John Smith *re* James Jones" is considered not necessarily to indicate a trust, whereas, if the account were headed "John Smith a/c James Jones," it is thought that notice of trust would be implied. (See Sir John Paget's answer to No. 1116, *Q.B.P.*)

Where a County Treasurer had two accounts, one a private account and the other headed "Police Account," it was held that the banker had clear notice that the latter was a trust account, and that, therefore, he was not entitled to combine the accounts and exercise his right of set-off. (*Ex parte Kingston, In re Gross*, 1871.) This ruling would also apply to a customer known to the banker as a Rate Collector, who had a private account and an account marked "Rate Account." But if the customer were a private person, and had two such accounts, the ruling would not apply. Neither does the fact that the banker knows that persons carrying on the business or profession of auctioneers, or stockbrokers, are accustomed to handle other people's money, of itself, affect the banker with notice that one of two accounts

opened by a stockbroker, or auctioneer, and marked, *e. g.*, "Office Account," is necessarily a trust account, even though, as a matter of fact, clients' money had been paid into it (*Teale* v. *Williams, Brown & Co.*, 1894). As Lord Herschell said in *Thomson* v. *Clydesdale Bank, Ltd.*, 1893 : "It seems to me that, if because an account is opened with bankers by a stockbroker, they are bound to inquire into the source from which he receives any money which he pays in, it would be wholly impossible that business could be carried on, and I know of no principle or authority which establishes such a proposition."

Solicitors' accounts are governed by the Solicitors Act, 1933, and the Rules made thereunder. All money belonging to their clients must be credited to a "client" account. (See Appendix, p. 552, for excerpt from the Act and the Rules.)

Generally speaking, the banker is quite safe in opening an account for persons professing to be trustees, and is under no obligation to see the trust deed or other evidence of their appointment. (See Note, p. 285.) It is better to open the account as a trust account, and treat it as such, than to open it as an ordinary joint account with an intention to avoid notice of trust, for when once the banker has notice that the account is a trust account, he cannot avoid it by suppressing all reference to the trust in the heading.

When a trustee mixes trust money with his own money, he is taken to have drawn out his own money in preference to the money he holds as trustee, and therefore the Rule in Clayton's Case does not apply, but it does apply as between the several beneficiaries (where more than one), and the first trust money paid in is, therefore, taken to be the first trust money paid out.

Trustees, unlike executors, have no individual powers. They must all act together, and they cannot delegate their authority to any other person, even to one of themselves. Consequently, all must join in the signing of cheques, save where it is expressly provided for in the trust deed that one may sign on behalf of the others. Countermand of payment of a cheque may be effectively made by any one of the trustees, and the banker is bound to take notice of such countermand.

S. 23 of the Trustee Act, 1925, makes statutory the power frequently given in Wills to trustees and personal representatives to employ an agent, whether a solicitor, banker, stock-broker, or other person, to transact any necessary business incidental to the execution of the trust or administration of the estate, and they will not be responsible for such agents' default. This section does not authorise trustees to delegate to one or more of

their number the power to draw cheques on the trust account. It only permits the employment of paid agents to do specific work. S. 25 gives a *trustee*, who intends to remain out of the United Kingdom for more than one month, authority to delegate by power of attorney his powers and discretions to any person or trust corporation. He cannot, however, appoint as his attorney his only other co-trustee, unless the latter be a trust corporation. The power of attorney must be filed at the Central Office, and will only be available when the donor leaves the country and ceases on his return. The donor-trustee is responsible for his attorney's acts and defaults. A statutory declaration should be made by the attorney that the power is in operation and has not been revoked by the donor's return.

Trustees have generally no implied power to borrow for the purposes of the trust, and unless the trust deed gives them express powers to borrow and to pledge the trust property, they cannot give security. (See p. 552*c* respecting limited statutory power.) But trustees are personally jointly liable for all advances made to them. Neither have trustees any power to deposit trust property as security for their private accounts. The position of a banker who advances on a security which afterwards turns out to be trust property is dealt with elsewhere.

Under s. 7, Trustee Act, 1925, a trustee may, if not prohibited by the trust, invest in authorised securities payable to bearer, provided, unless the trustee is a trust corporation, the bonds and the collection of the income be entrusted to a bank. The latter must not part with the bonds, except on the written authority of all the trustees. (A joint authority for withdrawal is always necessary for all valuables deposited in joint names.) Trustees have statutory protection against loss due to such a deposit. They are also authorised to deposit trust moneys with a bank. No trustee, unless expressly authorised by the trust deed, may carry on the testator's trade or business for a longer time (except in special circumstances) than is reasonably necessary in order to sell it as a going concern.

On the bankruptcy of a trustee, any property held on trust by him for the benefit of any other person is not divisible amongst his creditors (Bankruptcy Act, 1914, s. 38 (1)). This would not include the case where the trustee has any beneficial interest in the property. Unless the trustee is a trustee in bankruptcy, the fact that a receiving order has been made against him does not necessarily involve the resignation of his office, but by s. 41,

Trustee Act, 1925, where a trustee becomes bankrupt a new trustee *may* be appointed in his stead. By s. 18 (quoted in Appendix, p. 552*d*) on the death of a trustee, the surviving trustee or trustees have power to act, but only if there is nothing to the contrary in the trust deed. As in many cases the deed provides for the appointment of a new trustee, the banker would not be safe in allowing the remaining trustees to operate on the account, until he had satisfied himself, by a perusal of the deed, that they were empowered to continue without the co-operation of a new trustee. By s. 36, Trustee Act, 1925, where a trustee dies, or desires to be released, or refuses to act, or is unfit to act, the person or persons nominated in the deed, or, if there is none, then the remaining trustee or trustees or the personal representative of the last trustee, may in writing appoint a new trustee or trustees. By s. 41 the High Court has power to appoint new trustees when they are not appointed as above.

The Public Trustee Act, 1906, ss. 2 and 6, empowers the Public Trustee to act as Custodian Trustee, ordinary trustee, administrator, or executor, and in that capacity he may employ any banker, etc. (s. 11 (1)), that he may consider necessary, but in selecting the banker, etc., to be employed, he may, subject to what he considers the interests of the trust, take into consideration the wishes of the creator of the trust and of the other trustees (if any) and of the beneficiaries.

27. **Public Accounts.**—*Local Authorities.*—The Local Authorities Act, 1908, s. 2 (*a*), defines a local authority as a council of a County, Borough, Urban District, Rural District, or Parish, and a joint committee, or joint board of any two or more such councils, to which any of the powers or duties of the appointing councils may have been transferred or delegated under the provisions of any Act of Parliament or Provisional Order; and a Parish Meeting under the provisions of the Local Government Acts, 1894 and 1933.

These public bodies are strictly controlled by various statutes, the principal being the Public Health Act, 1875, the Municipal Corporations Act, 1882, and the Local Government Acts, 1888, 1894 and 1933. Every authority must appoint a Treasurer to receive and pay out all moneys controlled by the authority. The Treasurer must not (except in the case of a Parish Council) be a member of the Council, and must give sufficient security for the faithful execution of his duties. The orders for payment

must be drawn on the Treasurer, and, in the case of Counties and Boroughs, must be signed by three members of the Council, and countersigned by the Clerk, or by a deputy approved by the Council. The orders issued by Rural and Urban District Councils are usually signed in the same way. The proper form of the account is "John Smith, Esq., Treasurer of the Mayor, Aldermen and Burgesses of the Borough of Blanktown," not "The Mayor, etc., in account with the Blanktown Bank, Ltd." The procedure in regard to County authorities is the same. A Parish Council may appoint either one of their own number, or any other fit person to act as Treasurer, who must give such security as is required by the regulations. In the case of Parish Councils, all orders must be signed by two members of the Council. Generally, the Treasurer is the manager of a local branch of a bank, but in some of the large towns there is an official appointed to this post.

The officials—rate collectors, etc.—of the local authority, who collect the revenues, pay all amounts direct into the Treasurer's account at the bank. Separate accounts must be kept for each separate undertaking of the local authority, as, for example, "Electricity Supply a/c," "General Purposes a/c," "Water Supply a/c," etc. Neither the local authority nor the bank is entitled to amalgamate the various accounts, *i. e.* neither is entitled to set-off a debit balance, say, on the Electricity Account against a credit balance, say, on the General Purposes Account (*Attorney-General* v. *Corporation of West Ham*, 1910).

It is held by most authorities that it is not competent for a joint stock bank to be the Treasurer of a local authority, except in the few cases permitted by statute. The provisions of the statutes controlling the operations of these public bodies seem to uphold the view that the Treasurer must be an individual personally responsible to the local authority appointing him. It should be noted that the orders for payment are drawn upon the Treasurer and not upon the bank at which the moneys received are paid in by the various officials. For example, the orders to pay run somewhat as follows: "To John Smith, Esq., Treasurer of the Blankshire Urban District Council at the City Bank Ltd., Pay —— or *order* the sum of —— and charge the same to the account of the said Urban District Council." The Local Government Board insist that the orders must be payable *to order*, and not *to bearer*. These orders are presented by the payees to the bank for payment. If the orders are not signed as laid down, then

the Treasurer is furnished with a list of payments, duly signed by members of the Council and countersigned by the Clerk, authorising him to pay orders for each amount specified in the statement, when the orders are presented to him.

The orders for payment must be duly stamped, and, according to the Inland Revenue authorities, it would appear that stamps must be put on this list for each payee's name on the list.

The Treasurer's pass book, whether he be the Treasurer of a County Council, a Borough Council, or any other local authority, should clearly show that the account is between him and the local authority, not an account between the local authority and the bank.

Since these orders must be drawn on the Treasurer and not on the bank, they are not cheques within the meaning of s. 60, Bills of Exchange Act, 1882, which section protects a banker paying under a forged indorsement. Moreover, not being cheques, they cannot be effectively crossed. Hence arises the question of the Treasurer's position, both as regards the local authority and the true owner, when he has paid under a forged indorsement. He was authorised by the authority to pay a certain named person. This he has not done, but has paid some other person, who has forged the true payee's signature. Clearly it might be argued that since he has not obeyed his instructions he must pay the penalty, and should not be permitted to debit the authority with the money he has paid to the wrong person. Fortunately, however, for the Treasurer, it was held in a case decided in 1875 (*Halifax Union Guardians* v. *Wheelwright*) that it was unreasonable that the Guardians—the account having been opened by the Treasurer for their benefit—should be able to recover from the Treasurer what they could not recover from the bank. Two points that helped the Court to decide in favour of the Treasurer were (1) that the moneys of the Guardians were paid in by the officials direct into the account, and (2) interest on the credit balance over and above a certain sum was paid by the bank to the local authority. This was held to be evidence that the account was in reality the authority's account, that they had adopted it, and that it was kept at that particular bank with their consent (see *Gilbart Lectures*, March 1911). This decision shows how necessary it is that a bank manager who has been appointed Treasurer should get a definite resolution of the authority stating

that the account has been opened at the bank at their express desire, and that the Treasurer has their mandate to pay out of the account all orders drawn upon him. For his further protection it is desirable also, where possible, to get a provision inserted specifically indemnifying the Treasurer against liability for the payment of forged orders. It should be noted that the Treasurer can only obtain the same protection as a banker is entitled to. That is to say, the statutory protection of ss. 60 and 80, Bills of Exchange Act, 1882, and s. 19, Stamp Act, 1853, would be excluded if the documents were those *conditional* orders to pay which these bodies frequently issue (see *Conditional Orders to Pay*, p. 172).

As regards the true owner, since the Treasurer has paid the wrong person, and the document is not a cheque, he has no statutory protection, and is liable for conversion of the document. If he is able to maintain that, as between himself and the authority, he is entitled to be treated as a banker, then he can debit the authority with the amount. But this does not help him with the true owner, and it would seem that the Treasurer must lose the money so paid at least once, and twice over if he cannot charge it against the authority.

With regard to the banker who collects such a document bearing a forged indorsement, there is no protection whatever. The document is not a cheque, and therefore cannot be effectively crossed. Consequently, the banker is excluded from the protection of s. 82 Bills of Exchange Act, 1882. Moreover, as the documents are not drawn upon a banker, s. 17, Revenue Act, 1883, does not cover them.

The whole trouble arising from forged indorsements is due to the fact that the Local Government Board insists upon these documents being made payable to order. If it were permissible to make them payable to bearer, both the Treasurer and the collecting banker would be protected. *Per procuration* indorsements on behalf of individuals should not be accepted in discharge of documents of the kind we have been discussing.

28. *Borrowing by Local Authorities.*—As a general rule, no local authority has any legal power to borrow unless it can point to some statutory provision expressly or impliedly authorising it to do so. Again, generally speaking, a local authority, having statutory power to borrow, can only do so in the manner authorised by the statute (*Reg.* v. *Reed*, 1880). For example, if a local

authority has statutory power to borrow money on the security of the rates, it does not imply a power to borrow money, say, by overdraft at a bank, without giving security (*Rex* v. *Locke*, 1910). The borrowing powers of local authorities, except when exercised by virtue of s. 235, Public Health Act, 1875, are under central control. In some instances, the controlling authority is the Treasury, in others the Home Office or the Board of Trade, but in most cases borrowing operations are under the jurisdiction of the Minister of Health, to whom the powers and duties of the Local Government Board were transferred by s. 3, Ministry of Health Act, 1919. The principal statutes regulating these borrowing powers are the Public Health Act, 1875, the Municipal Corporations Act, 1882, the Local Government Acts, 1888, 1894 and 1933, the Education Acts and the Electric Lighting Acts.

Judicial decisions, notably in *Attorney-General* v. *Corporation of West Ham*, 1910, have emphasised the unsatisfactory position of both borrowers and lenders in regard to advances made to local authorities. It is imperative, therefore, that the banker, before loaning any money should ascertain (1) whether the local authority has statutory power to borrow, (2) what are the limits of that power, (3) what form of borrowing is authorised and what security must be offered, (4) what Government sanction is necessary before the statutory power can be exercised. Some amelioration of the position, for such Authorities as come under it, has been made by the L.G.A., 1933, s. 203 of which provides that

> "A person lending money to a Local Authority shall not be bound to inquire whether the borrowing of the money is or was legal and regular, or whether the money raised was properly applied, and shall not be prejudiced by any illegality or irregularity in the matters aforesaid or by the misapplication or non-application of such money."

This frees the lender from the necessity of inquiring into these matters, but it does not mean that he can ignore facts pointing to the contrary which may come to his knowledge, without inquiry. Another section of this Act authorises, without the consent of any sanctioning authority, temporary borrowings on loan or overdraft for certain purposes. The Act, however, does not define "temporary" and the section is not generally applicable.

The essential thing for the banker to keep in mind when dealing with local authorities is that, save when created by Royal Charter, they are bodies brought into being and absolutely controlled by statute. Whatever the statute creating the authority does not expressly or impliedly authorise it to do is "to be taken to be prohibited" (*Attorney-General* v. *G. E. Railway Co.*, 1880). That is

to say, any act done without or in excess of statutory authority, express or implied, is *ultra vires*, and therefore null and void. Furthermore, all persons dealing with local authorities are presumed to know the authority's statutory powers and limitations (*Chapleo* v. *Brunswick Building Society*, 1881, see p. 252). A local authority has, therefore, generally, no implied powers, and the statutes and rules governing it must be followed precisely.

If a local authority borrows *ultra vires*, then repayment of the loan is also *ultra vires*. In other words, no debt can be created by illegal borrowing. The banker, therefore, who lends to an authority acting *ultra vires* when borrowing, may be forced to refund any moneys repaid to him by the authority, and also any interest charged on the unauthorised loan (*Attorney-General* v. *Tottenham Urban District Council*, 1909).

The position of the lender is made less secure by the fact that each undertaking of the local authority is kept in a water-tight compartment. Each account must be kept separate and distinct, and the banker has no right of set-off between the different accounts. Again, money borrowed for a particular purpose must be used for that purpose, and for no other, and repayment cannot be made by allocating money borrowed for another purpose. For example, money borrowed for the improvement and maintenance of the authority's Tramway undertaking cannot be repaid from the receipts obtained from the ratepayers for their Water Supply; neither can it be repaid from the General Purposes Fund.

Government Auditors make a strict yearly audit of the accounts of local authorities.

From what has been already said about the rights of subrogation in this book (see p. 253), it might be argued that the banker who had loaned money to an authority acting *ultra vires* when borrowing, was entitled to succeed to the rights of those creditors who had been paid out of the money advanced by the bank. Theoretically this is true, but, apart from the difficulty of following the money, there comes the further question—Where is the local authority going to get the money from to satisfy the bank's claim? Clearly it can only be done by levying a rate, but the levying of a rate to repay money borrowed *ultra vires* is illegal, and, if levied for the payment of the creditors to whose rights the banker has succeeded, it must be remembered that a rate cannot be levied to meet expenditure incurred more than six months previous to the rate levy. As Sir John Paget points out (*Gilbart Lectures*, February, 1911), presumably the six months would begin to run from the payment to the original creditors, not from the payment to the bank.

PART V

THE BANKER'S FUNDS

CHAPTER I

OF WHAT THE FUNDS CONSIST

Introductory. *Bank Balance Sheet.*—The nature of the funds in the hands of a banker and the manner of their employment can be readily seen by a glance at the *pro forma* balance sheet on p. 284. The manner of setting out the accounts varies slightly, and some banks follow the recommendations of the Cunliffe Committee, and show a little more detail than is given in the specimen.

The total of the funds of the banker available for the purposes of his business comprises: (1) The Proprietors' Funds, consisting of Paid-up Capital, Reserve Fund and Balance of Profit and Loss Account; (2) Money lodged by customers on current and deposit accounts.

1. **Capital.**—*Authorised Capital,* also called *Nominal* or *Registered Capital,* is the amount which the banking company at its inception takes power to issue. *Subscribed Capital* is that part of the authorised capital which has been taken up by and issued to the shareholders. *Paid-up Capital* is that part of the subscribed capital which the shareholders have contributed in cash. *Uncalled Capital* (divided into *Callable Capital* and *Reserve Capital*) is that part of the subscribed capital not paid up. *Callable Capital* is that part of the uncalled capital which the directors have power to call up when they deem fit, whilst *Reserve Capital* is only callable in the event and for the purposes of the company being wound up. This uncalled capital—both callable and reserve—forms additional security for customers who have lodged money with the bank. Most joint stock banks have uncalled capital, but the capital of some is fully paid up. The proportion of subscribed capital that has been actually

paid up varies with each bank. The proportion of the paid-up capital and reserve fund—taken together—to the liabilities on current and deposit accounts of the "Big Five" joint stock banks in England, considered together was 6·3 per cent. at the end of 1934. This proportion is considerably lower than for the period of some twenty years or so before the Great War, though even then the tendency of deposits to increase proportionately more rapidly than capital and reserves was evident.

2. **Reserve Fund.**—This fund consists of accumulated undivided trading profits (plus, in some instances, premiums received on the issues of new shares), set aside to provide for contingencies and any unusual call upon the bank's resources. In most cases, the reserve fund approaches in amount the paid-up capital, and in some cases it is greater than the paid-up capital.

In addition to the Reserve Fund, most of the banks have accumulated *Secret Reserves*, which are not disclosed in the published balance sheets. One source of such secret reserves is to be found in the under-valuation of Bank Premises. The Bank of England goes even farther than the other big banks, for the freeholds of the Head Office and Branches—though of immense value—do not figure in the balance sheet at all. Probably many of the freehold premises owned by the large banks are estimated at much below their actual market value. Another source of secret reserves is the valuation of investments at below market price. The value of this form of secret reserve is naturally subject to some variation, owing to the fluctuations in the prices of gilt-edged securities, and at one time before the War, and also since, the banks had to provide very large sums to meet the depreciation in their investments. As will be seen from the banks' published balance sheets, they also have Reserves for Contingencies which no doubt reach very large figures. Whatever may be said from the shareholder's point of view against this policy of creating undisclosed reserves, it must give cause for satisfaction to the bank's customers that the financial position of the banking concern to which they have entrusted their money is in reality considerably stronger than is disclosed by the published accounts. The value of this conservative policy has been shown in recent years when banking troubles have been manifest in so many foreign countries.

3. **Balance of Profit and Loss Account.**—This item represents profits undivided each half year and carried forward. This

BANK BALANCE SHEET

Liabilities.	£ s. d.	*Assets.*	£ s. d.
Share Capital Authorised : ..... Shares of £..... each		Coin, Bank Notes, and Balances with the Bank of England	
Share Capital Issued : ..... Shares of £..... each, £..... paid		Balances with, and cheques in course of collection on, other Banks in Great Britain and Ireland	
Reserve Fund.....		Money at Call and Short Notice	
Dividend payable on.....		British Treasury Bills.....	
Balance of Profit and Loss Account		Bills Discounted	
Current, Deposit, and other Accounts, including Provision for Contingencies ..... £		Investments at or under Market Value— Securities of, or guaranteed by, the British Government (of which £..... is lodged for Public Accounts) ..... £	
Balances due to Affiliated Banks £		British Dominion and Colonial Government Securities, British Corporation Stocks £	
		Sundry Investments..... £	
Acceptances, Indorsements, etc., on Account of Customers		Investments in Affiliated Banks (at cost, less amounts written off) ..... Shares in ..... Bank, Ltd.	
		Advances to Customers and other Accounts.....	
		Balances in account with Affiliated Banks	
		Liability of Customers for Acceptances, Indorsements, etc.	
		Bank Premises (at cost, less amounts written off)	

The profits of the Subsidiary Banks for the year have been included in the above accounts to the extent of the dividends received.

Directors' Remuneration for the year, including Remuneration paid to them as Directors of Affiliated Banks, amounted to

undivided profit is useful for equalising dividends and is an additional reserve.

4. **Current, Deposit and other Accounts.**—This item represents the bank's liabilities to its customers for money paid in on current and deposit accounts. It is sometimes amplified by the clause " including rebate on bills not due and provision for bad and doubtful debts and contingencies, etc." About 94 per cent. of the " Big Five " banks' available funds in England is derived from this source.

NOTE (see p. 276).—This is the view expressed by Sir John Paget (*Q.B.P.* 1294), but Mr. A. F. Topham, K.C., in the Gilbart Lectures, 1931, recommends in all cases where the banker knows that an account is a trust account that he should ascertain the terms of the trust and file a copy of the instrument creating it for reference as to the appointment of new trustees, borrowing powers, etc.

CHAPTER II

EMPLOYMENT OF FUNDS

1. General Considerations.—As already stated, about 94 per cent. of the banker's funds in England is provided by the money lodged with him by his customers on current and deposit accounts, and since most of this money is repayable at call or at short notice, it is essential that a banker should employ his available funds in such a manner that at any time he can lay his hands upon sufficient cash to meet any unexpected demand upon his resources. Accordingly, he keeps an amount equivalent to about 22 to 23 per cent. of his liabilities on current and deposit accounts in the form of cash in the tills, at the Bank of England, balances with and cheques in course of collection on other banks, and money at call and short notice; 29 per cent. is invested in Government and other securities; 39 per cent. is in loans and advances to customers and in bills discounted; and about 2 per cent. is in Bank Premises. The figures given show the position at the end of 1934, when, owing to the difficulties of the past few years, the proportion of discounts and advances had fallen considerably below, and that of investments had risen much above, what may be regarded as the normal ratios. The statements for the 30th June, 1935, showed a small decrease in the ratio for investments and a small increase in that for advances. The way in which each bank distributes its funds depends upon the class of business it is doing and the character of the deposits, and the figures of any particular bank would no doubt show considerable variation from the ratios given above. If the amount of money lodged with a particular bank is liable to large fluctuations, it will be necessary for that bank to keep more money in its tills than if the amount of money lodged fluctuated from time to time within narrow limits. Generally speaking, the deposits of a country bank are more stable than those of a banker in London and the large manufacturing towns. A banker, therefore, whose clientele is mainly connected with

agriculture, may, without taking undue risks, be able to keep a smaller proportion of his funds in cash than a banker whose chief customers are of the manufacturing and distributing classes.

2. **Liquid Assets.**—These consist of cash in hand and at the Bank of England, balances with and cheques in course of collection on other banks, and money at call and at short notice. As stated above, the relation between the liquid assets and the bank's commitments towards its customers varies very considerably, and depends upon the character of the business done by each particular bank. The proportion of the total of these items averages about 22·5 per cent. of the total money lodged on current, deposit and other accounts.

3. *Cash in Hand and with the Bank of England.*—This item includes coin and Bank of England notes held by the bank at its head office and branches for its immediate needs, and balances with the Bank. The latter includes also the balances kept at the Bank of England for the settlement of the daily clearings and cash held in reserve for contingencies. It is in this way that the Bank of England has become the reserve depot of all the other banks in the country. This item represents about 11·1 per cent. of the deposits.

4. *Balances with and Cheques in course of Collection on other Banks in the United Kingdom.*—This item is self-explanatory, and appears in all the balance sheets of the larger banks.

5. *Money at Call and Short Notice.*—This item, amounting to about 8 per cent. of the deposits, represents loans made to bill-brokers and stockbrokers, generally against first-class bills and approved securities. Sometimes the loan is made from one day to the next, when it is called " overnight money." The loan may also be " at call," *i. e.* repayable on demand, or it may be " at short notice," usually seven days (hence called " weekly money "), and very rarely for a period exceeding a fortnight.

Banker's loans to stockbrokers generally run from account to account, *i. e.* from one Stock Exchange settlement to another. This settlement normally occurs twice a month (*i. e.* the middle and last Thursdays) for all stocks and shares other than Consols and all British Funds, and also Colonial Government Stocks and new issues, all of which are dealt in for cash. Formerly the settlement for Consols and similar securities was once a month, but this practice was abolished during the Great War. These loans are often secured by depositing bundles of securities valued

at the make-up price of the day, with a margin of from 5 per cent. to 10 per cent. to cover possible market fluctuations.

Bill-brokers and discount houses use the money they borrow in the discounting of bills. If the money is "called" by the banker who has lent it, the broker has to borrow from another banker, or to re-discount his bills, either with another banker, or, in case of need, his first-class bills of short currency can be discounted with the Bank of England. In the normal way, the broker can very easily reduce his indebtedness with the proceeds of his bills as they mature and are paid. Owing to the growing shortage in the supply of bills in recent years, discount houses have found it necessary to divert their resources more and more to dealings in gilt-edged securities.

6. **Investments.**—These consist of first-class securities, such as War Loan and other Stocks guaranteed by the British and Colonial Governments, Municipal Corporation Stocks, British and Indian Railway Debenture Stocks, etc. The ratio to deposits amounts to about 29 per cent. These gilt-edged investments are usually looked upon as liquid assets, and in normal times they may undoubtedly be so considered, but in times of war and financial panic they are not so readily saleable as to merit the title "liquid." Even in ordinary times a general attempt on the part of the big banks to realise their investments would have a disastrous effect. It should be noted that, in some cases, a small part of these investments are not realisable at all, being earmarked as security for National, County, and other Public Accounts. These earmarked Stocks are registered in the names of joint trustees, the bank receiving the dividends. The amount of these earmarked securities is shown in a note on the balance sheet. The figure given above does not include investments in the shares of affiliated institutions which are stated separately in the balance sheet.

7. **Bills Discounted.**—This item represents the total amount of maturing bills discounted for their customers. These bills are of three kinds: (1) Treasury Bills; (2) First-class bills discounted for the bill-brokers, as short period investments; (3) Ordinary trade bills discounted for customers. In some bank balance sheets Treasury Bills are stated separately. Owing to the decline of the mercantile bill in favour of the cheque as a means of internal payment, bill discounting now forms a small part of a banking business, though bankers would be glad to see the bill

come into greater use again. The average percentage to deposits is about 13 per cent. In individual cases the figure varies considerably, depending on the class of business carried on by the banker.

First-class bills are, as George Rae says in his *Country Banker*, 5th edition, p. 243, "the highest form of banking security." He goes on to point out that they are even better than Consols in one particular, since the principal sum will be paid in full when they reach maturity, whereas the price of Consols continually fluctuates. Another feature which makes them such an excellent investment for bankers is that they run for varying periods, and the banker can therefore increase his cash resources by the simple expedient of refusing to discount more bills. And by buying bills from the brokers due at convenient times, he can arrange his finances to suit obligations, in the way of meeting dividend payments and the like. Good bills can also be re-discounted.

"To discount a bill is to buy it, to become the transferee of it, by having it indorsed or transferred by delivery by the holder, giving him a price settled either by agreement or by the current rate in the money market, and based on the time the bill has yet to run. . . . A discounter is a holder for full value. He is not a pledgee, he can deal and part with the bill as he likes, his title to the bill and to sue on it is absolute and covers the whole face value, he is in no sense a trustee for the previous holder as to any part of the bill or its proceeds. The person who gets the bill discounted is a transferor; if by indorsement then with all the liabilities of an indorser, if a transferor by delivery then with the liabilities attaching to that character. In either case he parts with all right, title and interest in the bill and its proceeds." [1]

Discounting a bill must be distinguished from the pledging of a bill. When a banker takes a bill as security, he, as pledgee, has only an interest in the bill equal to the amount he has advanced on the security of the bill. The bill itself remains the property of the pledgor.

When a banker is asked to discount a bill for a customer, he has to take into consideration, first, the financial position of his customer and of the drawer, if his customer is not the drawer, and of the acceptor and other parties to the bill, if any. His decision will be influenced by his knowledge of the financial

[1] Sir J. R. Paget in the Gilbart Lectures, 1912.

stability of his customer, and the acceptor, and any indorser, coupled with the information he can glean from his acceptor's ledger, such as amounts and due dates and fates (if matured) of all previous bills drawn on that acceptor, which the banker has discounted, either for this customer or for others. From his bill-books he can also find out the usual fate of bills drawn by the particular customer. This information as to past transactions, and the amounts, if any, of bills still running on the acceptor, or discounted by the customer, or discounted for other customers and accepted by this customer, will enable the banker to come to a decision. If the acceptor is also a customer of his, he will again be provided with valuable information as to the acceptor's responsibility. If the acceptor has his account at another bank an inquiry put through in the ordinary way will disclose all that is required. Finally, the banker should be satisfied that the bill is a *bona fide* trade bill, accepted for value and given in a transaction which it is usual to settle by such means. And here the customs of the various trades have an important bearing. For example, a bill given by a private individual to a retail trader would not be a suitable bill for discount, since it is not usual for accounts between tradesmen and their customers to be settled by bills. Another kind of bill not suitable for a banker to discount is an accommodation bill. Yet another is a bill created to furnish the acceptor with fixed capital. As George Rae points out in his *Country Banker*, 5th edition, p. 247, fixed capital, such as fixtures, machinery, etc., should be provided out of a man's own means. "In any case they are no basis to run bills of exchange upon; neither are vessels in course of construction, or navigating the high seas." Non-transferable bills, *i. e.* payable to "John Smith only," are also to be avoided, as in the event of dishonour, the banker could not sue on the bill. Bills of short currency are preferable to those of long currency, and bankers do not, as a rule, discount those having more than six months to run.

When discounting a bill, the banker should see that it is in order as regards its form, the stamp and the acceptance, and that the customer's indorsement is on the bill. The last is important in cases where the customer is not also the drawer of the bill or an indorser, because his indorsement makes him a party to the bill, and, as such, liable on it in the event of its being dishonoured. Otherwise, being a transferor by delivery,

he is not liable unless the bill happens to be a forgery, in which case he is liable, as by s. 58 (3), Bills of Exchange Act, 1882, he warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be. Indorsement on each bill is not always necessary to fix liability on the transferor. For example, a firm of bill-brokers had been in the habit of sending bills to their banker for discount. The bankers held a general agreement on the following terms: "In consideration of your discounting for us any bills you may approve and think fit from time to time, we hereby guarantee the due payment of them as they respectively fall due." It was held that, although the bill-brokers did not indorse each separate bill, the terms of the agreement made them as liable as if they had actually indorsed them (*Ex parte Bishop*, 1880). Bills drawn abroad are not invalid in this country simply because the foreign stamp has not been affixed, but the holder may have difficulty in suing on them in the country of origin unless they bear the proper foreign stamps.

The mere fact that a customer is contingently liable to the banker for bills discounted does not entitle the banker to retain part or the whole of the customer's credit balance in order to cover the contingent liability, but, if the customer becomes bankrupt, the banker may retain until maturity sufficient of the credit balance to meet bills discounted for the customer, or on which he is liable as acceptor. The same rule applies where a company is being wound up, but does not apply where a receiver or manager is appointed. (For *Proof on Bill*, see pp. 435–6.)

It is not uncommon, where a customer is in the habit of getting his banker to discount his bills, for an agreement to be drawn up whereby the customer undertakes to maintain a minimum balance as cover against bills discounted. This enables the banker to retain the stipulated balance until the bills have matured. A provision should also be inserted declaring that any reduction of the agreed minimum balance should not be taken to imply that the banker has waived his right to have such balance restored to and maintained at the agreed figure.

If a bill is discounted and afterwards dishonoured, and the customer's balance is not sufficient to meet the bill, notice of dishonour, and a request for payment, should be sent to the customer, and to all other parties liable on the bill. The banker should keep possession of the dishonoured bill, and should retain the customer's credit balance, debiting the amount of the bill

to a suspense account. A foreign bill should be noted or protested, and in the case of an inland bill it may be desirable to note it

Discounted bills, being the absolute property of the banker, are kept apart from bills sent in for collection. They are entered first in a Bills Discounted Register, Bills Discounted Journal, or a book with a similar title and use, which contains full particulars of each bill discounted, and the amount and rate of discount. Each bill is given a distinctive number, which is written on the bill itself. The banker also keeps a Bills Discounted Ledger, with an account for each customer for whom bills have been discounted. This ledger account enables the banker to see at a glance how much paper he has discounted for a particular customer, and to restrict discount facilities when the total amount is, in his opinion, as much as the customer's financial position warrants. The customer is contingently liable on the amount of bills running under discount for him.

All discounted bills are entered in a Bill Diary to ensure prompt presentment on maturity. All the bills maturing on the same day are entered on the same page. When the due date arrives, the bills are passed forward for presentation. The banker also keeps an Acceptors (or Upon) Ledger in which accounts are kept in the name of each acceptor, with details of each bill bearing his acceptance. This enables the banker to control the amount of any particular acceptor's paper held by him. Brief extracts of reports obtained as to the acceptor's standing and responsibility are entered in this book, together with the date and source of the report. If a bill is withdrawn, or dishonoured, or renewed, the fact is duly recorded for future guidance.

Since a banker, when discounting a bill, credits to his discount account the whole of the discount charged, he must make a reserve for those of his discounted bills which have not matured when his Profit and Loss Account is made up. This item appears on the liabilities side as " Rebate on bills not due." The reason for this is that the discount on a bill is not fully earned until the bill has matured.

8. *Promissory Notes.*—Bankers sometimes advance money to their customers on the security of promissory notes—the practice being common in some agricultural districts, particularly in Wales and Ireland. The customer himself, if sufficiently sub-

stantial, may be the sole maker. Or if not, one or more other persons may join him as surety or sureties. When sureties join with the customer in making the note, it is usual to take not a joint, but a joint and several note. For the reason of this see p. 243, and for other information regarding promissory notes taken as security see pp. 335–8.

9. **Advances.**—This item represents the banker's advances to customers, and has now fallen to an average of about 39 per cent. of the banker's deposits. These advances are not in the nature of permanent loans for the purpose of providing the customers with fixed capital, but are repayable on demand, or at short notice. This is a necessary condition, as the funds out of which these advances are mainly provided are repayable by the banker on demand, in the case of current accounts and some deposits, and on short notice in the case of deposit accounts. Although advances are usually repayable on demand, or at short notice, the possibility of immediate repayment when due, depends upon the use to which the customer has put the money advanced. If the loan is used to tide over a temporary excess of payments over receipts, prompt liquidation of the loan is frequently possible. But where the customer treats the loan as a more or less permanent addition to his floating capital, repayment is more difficult and less prompt. If the loan has been used to provide new machinery, or in the improvement or purchase of business premises, prompt repayment is even more problematical. It should be one of the banker's axioms to advance moderate sums to many customers, rather than large sums to few customers. Not only is this more profitable, but if, unfortunately, a small advance becomes a bad debt, the banker can face the loss with that equanimity which might fail him if the advance were a large one. In the early days of banking, the lending of too large a proportion of a banker's resources in one or two big advances had disastrous effects upon more than one influential banking institution. Accordingly, another canon of sound banking is that advances should be small and of a temporary nature, designed to provide the borrowers with floating capital, or to meet a temporary shortage of cash, and not to provide them with the capital wherewith to carry on business, or to sink in fixtures and other permanent forms. Advances of the latter nature should be obtained on mortgage.

A banker may advance money in one of two ways: (1) by

allowing his customer to overdraw his current account; (2) by granting a loan on a separate account. The first is the method more frequently adopted, particularly in the provinces. Where the loan is by way of overdraft, the customer is debited with interest at the usual periods—quarterly or half-yearly—on the daily debit balance. If the advance is made on a separate loan account, the account is debited with the full amount of the loan, which is credited at once to the customer's current account. Interest is charged—quarterly or half-yearly—on the whole amount loaned. Obviously the former method is the more advantageous to the customer; but this advantage is to an extent offset by the fact that a banker usually charges a commission for working an overdrawn current account. Where the accommodation is effected by means of a separate loan account, the value to the banker of the credit balance on the current account is put against any commission due for working the account.

When a banker agrees to allow his customer an advance, the document of charge usually contains a provision making the loan repayable on demand. He also takes power, as a rule, to cancel the specified limit, if and when he deems it advisable to do so. But he must give reasonable notice to his customer before acting upon his decision to cancel the limit, and must pay all cheques within the limit originally agreed upon, drawn, and put into circulation before the customer has received notice. How much notice is required will depend upon circumstances. If, however, the banker has agreed to advance up to a certain limit for a specified period, he cannot, before the expiration of that period, give notice of discontinuance, and sue the customer for the money already advanced. And if the advance has been made on a loan account, and the amount credited to a current account, the banker cannot, on giving notice, combine the two accounts and dishonour cheques which otherwise would have been paid. But if the banker has taken security for an advance, and the customer has impaired its value as, *e. g.* by giving a second charge to another person upon security given to the banker for advances on current account, then the banker can stop the account at once, and dishonour the customer's cheques.

When a banker is asked for a loan, his first inquiries should be directed to the possibility of repayment by the borrower. Some would-be borrowers, such as salaried persons and annuitants, depend upon an income which ceases to exist at their

death. Unless, therefore, a borrower of this type has private means under his own control, he should not, generally speaking, be accepted as a borrower without giving satisfactory security, for, in the event of his death, repayment of the loan from his estate is often troublesome, and, more often, not possible. Even if the amount is ultimately repaid, the banker's money is bound to be locked up, and the banker has an asset which lacks that first essential from his point of view, namely, easy convertibility into cash. A life policy forms a good supplementary security as cover for advances of this nature.

The suitability, as borrowers, of persons engaged in the professions often depends, not so much upon their incomes, as upon their annual expenditure. Many professional people, with fairly large incomes, spend, in "keeping up appearances," almost as much as they earn. Any sudden diminution, therefore, in their earning powers, may result in seriously jeopardising their financial stability.

In regard to the investments of private and professional people, examination of their accounts will usually disclose whether or not they have means other than what they derive from their occupations. It should be noted, however, that if the unearned income consists of rents from house property, it will not be easy to arrive at the actual net income, because of the difficulty of separating such payments in from others. There will also be a difficulty in tracing the necessary disbursements made in connection with the property for repairs.

The majority of a banker's borrowers are drawn from the trading community. The borrower may be an individual, a partnership or a company. Companies are dealt with elsewhere (see pp. 254–68). With regard to a person or a firm engaged in trade, it often happens that an advance is required temporarily in order to finance some purchase of stock, raw material, etc. Here the banker must be guided by the nature of the account and of the borrower's business, and his knowledge of the trader's integrity and business acumen. The kind of business conducted by the customer is an important factor in determining the banker's decision when dealing with all borrowers who carry on trades or businesses, whether individuals, firms or companies. It may be that the proposed borrower is an agent dealing with his principal's moneys, and retaining, as his means of livelihood, a percentage on the turnover. In such a case, he might have,

prior to his periodical settlements with his principal, fairly large balances to his credit, and show a good turnover, and yet be a person of small means, not competent to repay a loan, which, if he were dealing with his own money, might not be difficult. Or, if trading with his own money, the proposed borrower may be disposing of his goods on shorter terms of credit than are allowed to him by his sellers. If this is his method of trading, his credit balance at any given time may not afford reliable evidence of his real financial position. Again, he may be in the habit of paying his accounts mostly by acceptances, in which case the banker may have to take into account bills still outstanding.

Other sections of the borrowing community are the various Local Authorities and those companies and corporations created by charter. The borrowing powers of these and other special customers are dealt with in the chapter entitled " Accounts of Customers," under the appropriate headings.

When examining an application for an advance, the first considerations will be (*a*) the personal character of the applicant; (*b*) the record and value of his account. Provided that his personal knowledge of the customer is favourable, and that the account is worth encouraging (and here it may be repeated that a knowledge of the nature of a man's business is essential for an accurate reading of his account), the banker will inquire how much the customer wants, for how long he wants it, what it is wanted for, how and when the customer proposes to repay it, and what security, if any, he proposes to lodge as cover. These particulars having been obtained, the banker will naturally want to know something about the applicant's assets and liabilities. After listening to the borrower's statements, it may be necessary for the banker to discount heavily what has been submitted. Borrowers are naturally prone to be over-sanguine, especially when estimating their ability to repay within a fixed time, and in judging the rapidity with which moneys owing to them can be collected. A most important point is the amount of the proposed borrower's liabilities which are due for payment and the relation this amount bears to his assets available for this purpose; this will enable the banker to see whether the proposed advance is likely to be of any *real* and permanent assistance to the borrower—it is no good staving off the inevitable for a few weeks or months. In considering the statement submitted

to him, the banker must not overlook the fact that most businesses are subject to fluctuations and times of depression. Generally speaking, the banker should not be satisfied with verbal statements, but should ask for a balance sheet. This, if properly drawn up, affords the clearest indication of the customer's real position, and, when signed by the customer, renders him liable to an action for obtaining money by false pretences, if it can be shown that he deliberately falsified his position. When considering the advisability of an advance to a firm whose chief offices are abroad, the banker should not overlook the probable difficulty of following that part of the assets which is outside the jurisdiction of the English Courts.

That very sagacious banking authority, the late George Rae, in the *Country Banker* (5th edition, p. 36) points out the dangers of making unsecured advances in a passage well worth quoting: "Let us suppose that you have advanced £1000 for three months without security to a client believed at the time by everybody, yourself included, to be a man of substance and undoubted for the amount. Let us further suppose that this estimate of his means turns out to be a delusion, and that the man fails, and is made bankrupt, and pays five shillings in the pound. Now your clear profit on the transaction, taking all things into account, will not have much exceeded a £5 note. To secure this modest recompense of reward you have risked £1000 and lost £750. You will have to make 150 fresh advances of a thousand pounds each—that is to say, you will have to incur fresh uncovered risks to the amount of £150,000 to redeem your loss." Of course, there are many occasions when an unsecured advance is justifiable, especially if only required for a short time, but, as a rule, bankers rightly require security to be deposited.

10. *Balance Sheets.*—As already pointed out, examination of a customer's balance sheet is often necessary before an advance can be granted. A properly prepared balance sheet should disclose a conservative view of the customer's financial position, based upon the fact that his business is a going concern. No balance sheet can, or indeed should, represent the position that would result if all the assets were suddenly thrown upon the market. A balance sheet, supported by a qualified auditor's certificate, is usually more dependable than a balance sheet drawn up by the customer himself, but it must be remembered

that even a competent auditor has to rely upon the customer for the correctness of much of his data. Still, under the auditor's supervision, the chance of innocent misrepresentation is made less possible. A case was recently brought to the writer's notice in which a person held leasehold property valued at £1,300 on which there was a mortgage of £900. In the balance sheet the customer had included the leasehold property on the assets side as being worth £400, and made no mention of the mortgage of £900! In this particular instance the customer had not the slightest intention of misrepresenting the true position.

When a customer desires accommodation, he is naturally inclined to over-estimate the value of his assets, and to under-estimate his liabilities. But even if this natural tendency has been repressed, the banker, when perusing the balance sheet, must not lose sight of the fact that the customer, when valuing some of his most important assets, *e. g.* plant and machinery, must have regard to their cost and their value to him for use in a going concern. Their second-hand value would usually be considerably less, and the banker must weigh this fact when estimating the true worth of these assets.

"It may be stated also that, as a general rule, the more difficult an asset is to realise, the greater will be the loss on its realisation, if hurriedly effected. The loss entailed by rapidly calling in a large number of trade debts will probably be less, on a percentage basis, than the loss which would ensue if land or buildings or plant and machinery were put up to auction and sold without reserve; further, items such as 'Goodwill' and 'Fixtures,' though originally they may have been costly to acquire, may be absolutely useless for the purpose of raising immediate funds. It is upon the wise preservation of a reasonable and adequate proportion of a trader's resources in a liquid form (*e. g.* Cash, Book Debts and Bills Receivable), having regard to the amount of his trade creditors and other immediate indebtedness, that the ability of the trader to honour his obligations, and therefore to maintain his commercial credit, must always depend" (Cropper's *Bookkeeping and Accounts*, 16th edition, p. 143).

It is for the banker to ascertain whether in the particular balance sheet he is examining, this "reasonable and adequate proportion" of liquid assets has been preserved. If there are

investments it is important to ascertain whether they have been written down to present market value, what is their nature, whether easily realisable or not, and whether they are partly or fully paid-up. No matter what the investments may be, a reasonable margin, varying with the particular kind of securities held, should be allowed to cover market fluctuations.

The item "Sundry Debtors" shows the sum total of what is owing to the customer. Both the banker and the auditor are, naturally, to some extent in the hands of the customer, when estimating the true value of this item. An important point to consider is the nature of the debts—whether they be few debts of large amount, or many debts of small amount. Small debts cost more to collect, but the risks of loss are better divided. Another most important point is the nature of the customer's trade, and the class of business he conducts. At all events, a sufficient margin—varying with the nature of the business—should be allocated as a reserve for bad and doubtful debts. "Bills Receivable" are bills of exchange which the trader has received from his customers in full or part settlement of their account. It is an advantage to have a debt evidenced by a bill of exchange, as the bill can be negotiated or sued upon.

The item "Stock in trade" is one of the most difficult items for an outsider to value accurately. Even if the stock has appreciated in value since it was bought, it should never be valued at more than cost price, and if it has depreciated, it should be taken at market price, or, if the market is slumping, at less than the market price. The value of the stock depends upon its nature. Take, for example, a grocer's stock. While a few articles, such as raw coffee and tinned sardines, if of good quality, may actually improve by keeping, most articles, including tea, dried fruits, and packet goods, rapidly deteriorate. So with regard to a draper's stock. Many of such articles as ladies' millinery and fancy goods, having been created by the fashion of the moment, are, when the fashion changes, almost unsaleable, or only saleable at ruinous reductions. Whatever valuation may be put upon the stock, it will, generally speaking, be a higher figure than would actually be realised if the stock had suddenly to be sold in the open market. This is particularly true of unfinished goods, the value of which, in the event of a forced sale while in an unfinished state, will, generally speaking,

be much below the value which the trader has justifiably put upon them.

"Fixed Assets," *e.g.* furniture, plant, machinery, buildings, etc., are of a wasting character, and each year should be written down to allow for depreciation. This kind of asset, like most other kinds, is of greater value to the owner for use in a going concern than if put up for auction. If the premises are leasehold, a perusal of the lease will disclose the nature of the covenants —sometimes very burdensome, and probably entailing forfeiture of the lease and re-entry of the lessor if not duly observed. Furthermore, the ground rent may be a heavy one, and at any rate it is a continuous charge. If the premises have been built specially for a particular trade, this fact must be taken into consideration when estimating their value. Such buildings are often not adaptable, without considerable outlay, for other trades, and this would militate against a quick and profitable sale of the premises, if it became necessary. Should there be a mortgage on any of the fixed assets, the banker will need to exercise great caution, because if the mortgage is called in, the value of the mortgagor's equities will depend upon his ability to pay off the mortgage or to raise a fresh one. If the mortgagee forecloses and forces a sale of the property, any margin of value is apt to disappear. The amount of the trader's capital, and the value of his fixed assets, as shown in the balance sheet, are items of considerable importance, because if all the trader's capital is sunk in his buildings, plant, etc., it is evidence that his working or floating capital is obtained on credit. Here again the nature of the trade must be taken into consideration.

Intangible assets such as "Goodwill" and "Preliminary or Formation Expenses" often appear in a balance sheet. From the lender's point of view the second asset (which should only appear in the balance sheet of a company) is absolutely valueless, and should not be taken into consideration at all. With regard to Goodwill, it would be, generally speaking, very imprudent to regard this asset as immediately saleable at anything like the figure at which it may stand in the balance sheet. Goodwill has been defined as the "benefit arising from connection and reputation," or, as Lord Eldon put it, "Goodwill is nothing more than the *probability* that the old customers will resort to the old place." This item the banker, therefore, will do well to regard as of doubtful value, and in many cases as of no value at all.

On the liabilities side, the item "Sundry Creditors" should consist solely of ordinary trade debts, but it often includes loans and mortgages. It is generally safe to assume that the liabilities are not over-estimated, and will have to be met sooner or later. Then there may be contingent liabilities, as, *e.g.*, on bills discounted and not matured, and on guarantees, which the customer may have ignored either unintentionally or of set purpose. The banker should ascertain what proportion of the debts are due to be met immediately and compare this total with the total of liquid assets available to meet them. Another vital point on which the banker should satisfy himself is whether the proposed loan is going to be of any real service in meeting pressing claims, and enabling the trader to carry on his business. If, even with the assistance of the loan, the trader is unable to clear off his pressing liabilities, then the loan is of no advantage either to him or to the banker.

11. *Scrutiny of an Account.*—When an advance has been granted, particularly when unsecured, the banker should keep the account under constant observation. Upon clear evidence that the position is not what it should be, the banker will, of course, do what lies in his power to protect his own interests. Financial collapse is usually preceded by the appearance of danger signals which a discerning eye can quite easily see. Such danger signals are: (1) payment by the customer of his usual trade creditors at longer intervals than heretofore, and at longer intervals than is customary in the particular trade; (2) an increasing tendency for his debit balance always to hover near the full amount of the advance; (3) taking (and immediately discounting) bills from sound customers whose practice had been to pay by cheque during the customary credit periods of the trade; (4) taking bills from weak customers who require them to be renewed; (5) providing for his cheques and bills just before they are presented for payment. All these tendencies show an increasing shortage of working capital, the cause of so many bankruptcies. Moreover, the banker should regard warily any sudden large increase in turnover, which may be the result of judicious advertising, or the fruit of seed sown in former years, or be accounted for by a popular craze for the particular goods made or sold by the customer, but which, on the other hand, may arise from cutting prices or from some other element that makes the net result unprofitable and, in the long run, disastrous.

12. **Bank Premises.**—This item represents the cost of the premises—head office and branches—less what has been written off for depreciation. As already pointed out, it is safe to say that in most cases Bank Premises stand in the balance sheets at much below their real market value.

NOTE (see p. 263).—In connection with borrowing by limited companies, it is a common practice for the banker to insist on the directors' personal guarantee. If no security is offered, it is not unreasonable for the banker to ask the directors to show their own faith in their company. The practice has much to commend it. Care, however, should be exercised if the directors decide to issue a debenture or charge on some asset of the company to cover the guaranteed debt. In voting for the creation of such a security, the directors, by reason of their liability under their guarantee, are personally interested and there is a possibility of the security being upset on a liquidation. (Cp. *Victors, Ltd.*, v. *Lingard*, 1927.) Unless, therefore, the debenture or other security is created before the guarantee, it is desirable to have the authorising resolution passed by the company in general meeting. The form of notice to shareholders calling the meeting and setting out the terms of the proposed resolution should be approved by the bank.

In the case of guarantees to secure the accounts of limited companies and other statutory bodies, a clause covering *ultra vires* borrowings is sometimes included.

PART VI

SECURITIES

CHAPTER I

SECURITIES GENERALLY

1. **Classes of Securities.**—A banker in the course of his business has many different kinds of securities submitted to him as cover for advances to his customers. Some borrowers tender stocks and shares, others guarantees by responsible parties, others title deeds, others life policies, others, again, bills of exchange, promissory notes and documents of title to goods. Customers less fortunate may have nothing better to offer than second or even third mortgages, shares partly paid up, undeveloped building land, bills of sale, mortgages on mines, brick-fields and other wasting properties, and reversions. Bankers usually look askance at these latter kinds of securities, since they all lack one or other of the requisites necessary to make them attractive as cover for an advance. Eliminating these undesirable forms, there is still a sufficient diversity of types available to enable the banker to avoid advancing too large a proportion of his funds against any one type of security and so incurring an additional risk, namely, the risk of general depreciation in any particular class of security which might affect him seriously if he had not such a wide choice. It is a great advantage for a banker to have numerous branches spread all over the country, as he thereby gets a much more varied assortment of security offered him, varying from the title deeds of the country market town to the shipping documents of the seaport.

Whatever class of security a banker agrees to accept, he will only very rarely advance up to the full market price, but to cover himself against over-valuation and market fluctuations, and the

loss which may arise owing to a forced sale, will deduct a sufficient margin depending upon the class of security.

2. **Lien, Pledge, or Mortgage.**—There are three ways in which a banker may avail himself of securities as cover for an advance: (*a*) by Lien; (*b*) by Pledge; (*c*) by Mortgage. In each case the banker does not become absolute owner of the property, but has rights over the property until the debt due to him is repaid. With regard to an ordinary lien, the borrower is still the owner of the property, but the creditor is in actual or constructive possession of the property, yet has not, generally speaking, a right to sell it (see pp. 311–14). In a pledge the pledgee is entitled to the exclusive possession of the property until the debt is discharged, and the pledgee has, in certain circumstances, the power of sale, but the ownership remains in the pledgor, subject to the pledgee's rights. In other words, a lien is a mere right to retain a thing, whereas a pledge gives a special property in the thing pledged. Unlike property subject to lien, it is not essential that the thing pledged should be actually owned by the pledgor; it is sufficient if he pledges it with the owner's consent. If the pledgee sells the property he must account to the pledgor for any surplus remaining after liquidating the debt, and he may sell without recourse to the Court. In a legal mortgage a special interest in the property passes conditionally to the mortgagee, who has, also, a right of sale, but not necessarily the possession of the property, which usually remains with the mortgagor. The securities subject to lien are those which come into a banker's hands in the ordinary course of his business, as, for example, bills, cheques, and other negotiable instruments, deposited with him in order that he may collect the proceeds. Lien does not apply to property tendered to him as cover for an advance, as the transaction is one of pledge or mortgage. Securities subject to pledge are goods and chattels and fully negotiable securities. The legal delivery of the goods to the pledgee is an essential part of a contract of pledge. But it is not essential that there should be an actual manual delivery. Constructive delivery is sufficient, such as delivery of the key of the warehouse in which goods are stored, or delivery of the documents of title to the goods. Securities subject to mortgage are title deeds, life policies and stocks and shares.

3. **Realisation of Securities.**—In all cases, even when the document of charge gives him a power to realise without reference

to the borrower or the person who has deposited the security, the banker, before selling the security, should demand repayment of the loan, and give reasonable notice that he is going to sell. Where the security has been deposited by a third party and is sold, the banker should put the proceeds to a suspense account, so as to leave the full debit balance on the debtor's account for the purpose of proving on his estate. For the procedure in the event of the borrower's bankruptcy, see under "Bankruptcy," p. 465. Bankers' documents of charge usually contain express powers of realisation, and the loan is also expressed to be repayable on demand. As to the method to be adopted in each case, further particulars are given under the relative headings.

4. *Disposal of Surplus.*—If a banker realises a security he must account to the borrower for any surplus remaining after the debt has been discharged, but if the borrower owes him other debts besides the loan for which the realised security was deposited as cover, he is entitled to retain sufficient of the surplus as a set-off against these other debts, provided always that he has received no notice of a second charge upon the security. While any security given to secure a specific advance is in the banker's hands, the borrower has the right of demanding it back upon tendering the amount of the loan which it was deposited to cover. The banker has in this case no right, apart from express agreement, to retain the security as cover for other debts owing by the borrower. But, as already stated, if the banker realises the security, he has the right of retaining either the whole or a part of the *money* received from the sale as a set-off against those other debts owing to him by the borrower to which the right of set-off can apply. At first sight, this distinction may seem difficult to explain, but the reason for it is that as soon as the security is sold, the proceeds are a *debt* due by the banker to the customer, and as such is subject to the banker's right of set-off (see Paget, *Law of Banking*, 4th edition, p. 396). If a third party has given security for a customer's account, and pays off the debt, he is entitled to the benefit of any securities the customer himself may have deposited with the banker as cover for the account. Before, however, delivering up these securities or their proceeds to the third party, the banker should notify the customer and any other interested party, such as his trustee in bankruptcy, of his intention to give up the securities, and obtain consent to their surrender.

5. **Collateral Securities.**—A collateral security is a security belonging to and deposited by a third party to secure a customer's account. This type of security must be differentiated from a security deposited by and belonging to the customer himself. The distinction is clearly seen by what happens when a customer becomes bankrupt. When this event occurs, all securities belonging to him must be either sold or valued, and the amount realised by sale or determined by valuation is available to reduce the total indebtedness of the bankrupt customer. The banker can then claim on the estate for the balance remaining. In the case, however, of third party securities, the banker is entitled for the time being to ignore the collateral security, and claim on the estate for the full amount of the customer's debt. If the dividend or dividends he receives from the estate are not sufficient to wipe out the debt, then the banker can look to the collateral security for the partial or full liquidation, as the case may be, of the balance of debt remaining. This double right of remedy makes a collateral security very attractive to a banker, but there are disadvantages which are fully treated in the chapter on " Guarantees " (see p. 321).

Briefly, where a banker has taken a third party security, he must watch that some event does not occur which will change the status of the parties and bring in the Rule in Clayton's Case. This will arise when any event happens which was not contemplated by the parties at the time the security was deposited and if the account is continued unbroken. In the normal way, all ordinary events are covered in the form of guarantee or document of charge signed by the third party, but to avoid any risk or trouble, the banker, as a general rule, should stop the account and open a new account for subsequent transactions whenever changes occur, as, *e. g.*, in the constitution of a firm by the admission, bankruptcy, retirement, or death of a partner; in a limited company by its amalgamation with, or absorption by, another company; and in the case of an individual by his death, bankruptcy, or insanity. These observations with respect to firms and companies apply both when the security is given for, and when it is given by them. In the case of collateral security a Memorandum of Deposit showing the purpose of the deposit is essential.

In the Stamp Act, 1891, the term " collateral " is used with reference to a security " being a collateral, or auxiliary, or addi-

tional, or substituted security . . . or by way of further assurance . . . where the principal or primary security is stamped." "Collateral security" here means "additional security," and such a security may be stamped at a reduced rate.

6. **Memorandum of Deposit.**—Bankers' mortgage deeds and memoranda of deposit are prepared by their solicitors, and are carefully drawn up so as to provide for every contingency, and give power to the banker to act in any way that may best conserve his own interests, without prejudicing his right of action against the security. Specimen forms will be found in the Appendix (see pp. 493–5), and should be carefully studied in conjunction with this part of the book. Although a Memorandum of Deposit is not essential to create a charge over the property deposited, it is advisable that one should be taken in every case, if only to avoid disputes as to the purpose of the deposit. For example, without some written evidence to the contrary, a borrower might afterwards contend that he deposited the security to cover an overdraft existing at the time of deposit, but not as security for future advances. As already stated, where the security is collateral, a memorandum is essential. Documents of charge given to bankers usually contain a provision that the loan shall be repayable on demand. Legal mortgages are dealt with in the chapter on "Title Deeds."

A Memorandum of Deposit executed by a customer to secure his own account should be constructed somewhat as follows. It should begin with a statement that the customer has deposited the securities with the intention to create a charge on his estate and interest in the property. It should secure repayment on the bank's demand of all moneys owing at the time of the deposit, and all moneys advanced from time to time, including interest, banking charges, commission, and any law costs incurred in connection with the account (see the specimen form in the Appendix for the full clause). The document should also contain a binding promise by the customer to execute a valid legal mortgage if and when called upon to do so—this mortgage to contain a power of sale, and any other provisions that the bank may deem necessary to secure the repayment of the loan. It is usual also to include a declaration that the property deposited belongs to the customer, and that it is unencumbered. The customer should always agree to pay a stated rate of interest for all moneys owing. A schedule of all the deeds, or of the

principal deeds, should be given at the end of the memorandum, and the customer should sign below (in some forms, above) the schedule, and his signature be witnessed by a bank official. The memorandum must be dated and stamped.

If the security is deposited by a third party, there should be additional clauses whereby the depositor waives his right to claim against the principal debtor's estate in the event of the principal debtor becoming bankrupt, and giving the banker power to retain the dividends, and compositions, etc., until the whole debt is discharged. The banker also should be given power to grant the debtor time or other indulgence, etc., without prejudicing his claim against the security. The consideration should also be stated, and is usually described as "opening" or "continuing" the account. Many of the clauses contained in a memorandum given by a third party are similar to those included in a guarantee (see specimen form in Appendix of third party memorandum).

The foregoing merely gives the particulars usually contained in a simple Memorandum of Deposit, but sometimes a more elaborate form is used in which are provisions covering every possible eventuality that may affect the banker's position as regards the security. Where the borrower is a firm, the memorandum should provide for any change brought about by the retirement, death or bankruptcy of a partner, or the admittance of a new partner; and where the borrower is a limited company, provision should be made to cover amalgamation or absorption, these two clauses applying, in the case of a joint stock bank, to both borrower and bank. It is advisable to include in a third party memorandum the right on the part of the banker to stop the account on any occasion he thinks fit, and the right to open a new account for new transactions. Sometimes the memorandum is under seal and includes a power of sale or an irrevocable power of attorney (see "Title Deeds," pp. 386).

7. **Register of Securities.**—A banker keeps a careful and complete record of all securities deposited with him as cover. In this register should be entered under the names of the account concerned such particulars of each security deposited as will enable the banker to see at a glance the precise nature of the security, its approximate market value, the form of the banker's charge, and whether the security belongs to the customer or to a third party. Any fact which may tend to alter the market

value, or any special circumstances connected with the security should be duly recorded. Some of the entries require periodical revision; for example, the market price of stocks and shares, surrender value of life policies, notes as to the financial position of guarantors, etc.

Security registers are generally ruled so that much of the information necessary, such as the date of deposit, date of the bank's charge, and the estimated value, etc., is given in separate columns. A wide column for "particulars of security" is provided, and the following is a typical entry for the deposit of a Life Policy: "Life Policy £500, with profits, dated 15/10/12, No. 100151, Alliance Assurance Co., payable age 60, 1950 [*or* at death], own life [or life of A. B.], age admitted, notice of assignment to company 25/1/20." In the same space or, better, in separate columns, should be recorded the amount of the annual premium, and the dates and amounts of each payment, the date when last paid, date of the assignment or mortgage and the amount it is stamped to cover. The column for the estimated value should contain the surrender value written in pencil. This figure should be obtained from the company from time to time, together with the amounts of any accrued bonuses.

The following would be a typical entry for shares deposited to secure an account: "500 shares £1 each, fully paid [*or* 10*s.* paid], Nos. 0501 to 1000, Ordinary [*or* Preference] in Blank Company, Ltd., own name [*or* name of A. B.], notice to company 20/2/20, transfer completed and stamped." As in the example given above, the date of the deposit and date of the agreement or memorandum accompanying it, and the market value, are usually given in separate columns. If the security has coupons attached, the entry should contain information relating to them.

Where title deeds are deposited the details are more varied, but it is, nevertheless, possible to describe the security in a few words. For example: "Mortgage £500 [*or* Equitable Mortgage] of freehold farm house and buildings, known as 'Home Farm,' Blanktown, and 110 acres land, John Smith to Henry Jones, 10/1/20, consideration £4000, Fire policy £1000, Alliance Assurance Co." In separate columns should be recorded the date of the deposit, date of the mortgage or charge, and estimated value. If the property is leasehold that fact should be stated,

together with appropriate details of the length of lease, expiry date, amount of ground rent and notice to lessor, etc. In regard to the Fire Policy, the entry should show whether indorsed with a note of the bank's interest, due date of premium, and date last paid.

Further examples are not necessary. A security register should so describe the security that all its salient features can be quickly grasped. Matters affecting the security adversely, such as notice of a second mortgage, should be duly recorded, preferably in red ink.

NOTE (see p. 239).—In regard to the bankruptcy of a joint account holder, some authorities consider that the bankrupt party's estate is not released from liability. In the general way, a banker secures the several liability of the parties, so that the question would not arise.

NOTE (see p. 240).—There seems to be some conflict of opinion as to the proper course to follow on the death of a party where there are articles held for safe custody in joint names. Sir John Paget (*Law of Banking*, 4th edition, p. 86) states that the directions of the deceased party's legal representatives should be obtained, but that there may be some difference in the case of choses in action (*e. g.* securities). Even if there is a mandate authorising delivery to the survivor, the mandate would be cancelled by the death of a party. The matter depends on whether the articles deposited are joint property or common property. On the other hand, in *Q.B.P.* 1536, it is stated that securities can be handed to the survivor on satisfactory proof of the death of the other joint party. If, in fact, the parties are executors or trustees, then the considerations relating to those capacities would apply.

CHAPTER II

BANKER'S LIEN

1. **Definition.**—A lien is the right to retain property belonging to a debtor until he has discharged a debt due to the retainer of the property. A lien may be either (*a*) particular, or (*b*) general. A particular lien arises from the particular transaction connected with the property subject to the lien; a general lien arises not only out of the particular transaction but also out of the general dealing between the two parties in respect of other transactions of a similar character. Banker's lien is a general lien, and covers "all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien" (*Brandao* v. *Barnett*, 1846). A general lien does not derive from the common law. It has arisen from judicial decisions recognising the usage of trade. It usually arises, not from special agreement, but out of the business relations between the parties; nevertheless, a general lien may be created by special agreement.

2. **Property Subject to Lien.**—Banker's lien does not apply to securities deposited with the banker for safe custody only. To be subject to lien the property must come into the hands of the banker to be dealt with in his business. In other words, the lien would apply to all those documents that come into the banker's possession in the ordinary course of his business as the banker of his customer. These comprise such documents as "promissory notes, bills of exchange, exchequer bills, coupons, bonds of foreign governments, etc." (*Wylde* v. *Radford*, 1863), but even such documents are not subject to the lien if the customer can prove that the documents were held by an agreement, express or implied, or for a particular purpose, or under special conditions, inconsistent with the claim of a general lien. For example, suppose that the customer brings the documents to his banker to raise a loan on them, which the banker declines

to grant, and that the customer leaves the bank parlour, but forgets to pick up the documents. The banker has no right of lien on the documents for any debt due by the customer on general account. But suppose that the customer instructs his banker to pay out a certain sum in exchange for 100 shares in a company—the banker will have a lien on the share certificate. But if the customer takes the certificate away and then brings it back, saying, "Take charge of this for me," it is probable that the right of lien would be lost. If the share certificate is deposited by the customer as cover for a specific advance, with or without a memorandum of deposit, the question of lien does not arise, for the banker becomes an equitable mortgagee in respect of the share certificate. If the particular loan be repaid, the customer can demand the return of the certificate, even though he may still be indebted to the banker on general account. This is an example of that "express contract" which excludes lien, referred to in *Brandao* v. *Barnett*, quoted above. But if the banker has a power of sale and has exercised that power, then the proceeds are subject to his general lien or, more correctly, set-off. As will be seen from the last example, the banker's lien is not limited to fully negotiable securities. And with regard to the latter, the banker's lien will still hold good even though it afterwards transpires that the fully negotiable securities do not belong to the customer, provided, of course, that the banker has acted in good faith.

Sometimes it is difficult to decide whether the securities come into the banker's hands as the banker of his customer, and in the course of his business as such, or in his capacity of bailee. In the latter case, if safe custody was the object of the deposit, then this would be a contract inconsistent with lien, which would therefore not arise. Take, for example, bonds with coupons attached. If the bonds are deposited with the banker, and the customer himself comes to the bank to cut off the coupons, then it is considered that the lien would attach to the coupons if paid into that bank for collection, but not to the bonds. If the banker himself cuts off the coupons and credits the proceeds to the customer's account, then it is considered that the lien attaches to both bonds and coupons. Take similar examples: (*a*) Deposited Bonds which must be exhibited by the banker each time interest is collected by him; (*b*) Deposited Drawn Bonds which are to be presented by the banker when due for payment;

(*c*) Certificates of debentures and other stocks registered in the customer's name and deposited with the banker to whom, by the customer's instructions, the dividend warrants are periodically paid direct, and credited to the customer's account. In cases (*a*) and (*b*) it is considered that the lien attaches to the bonds; in (*c*) Sir M. Chalmers is of opinion that the lien would attach to the dividend warrants as and when received, but regards it as doubtful whether it would attach to the certificates, though it appears that he personally thinks that the lien would not attach, in which opinion he is supported by Sir John Paget (see *Law of Banking*, 4th edition, p. 358, and *Q. B. P.*, No. 1111).

In regard to bills, promissory notes, and cheques, by s. 27 (3), Bills of Exchange Act, 1882, " 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." That is to say, as holder for value, provided he took the instrument in good faith, he could sue the acceptor and other parties to the bill, notwithstanding that his customer had a defective title to the bill. But if he claims under a forged indorsement he has, by s. 24, Bills of Exchange Act, 1882, no right to retain the instrument or to enforce payment against any party to the bill. The banker can sue on the whole bill, but, if he has only a part interest, he must hand over the surplus to the customer, or to the true owner, if the customer's title is defective.

In the absence of a contrary agreement, the banker has a lien on all bills, cheques and notes sent to him by a customer for collection. It should be noted that a lien does not give any property in the thing subject to lien, but merely a right to retain it. The banker, therefore, whose interest in a bill is partial, has not the property in the bill that an ordinary holder for value would have. The property remains in the true owner. But the banker who has a lien on the bill can retain his interest even against the true owner (see also Discounting Bills, p. 288).

3. **Powers under Lien.**—A banker's lien has been defined as an " implied pledge " (*Brandao* v. *Barnett*, 1846). An ordinary lien does not imply a power of sale, but a pledge does. Since the definition quoted is generally accepted as accurate, it seems reasonable to assume that the banker has the power to realise securities over which he has a lien, subject, of course, to reasonable notice to his customer. The question does not arise in regard to

bills, notes and cheques, for s. 27 (3), Bills of Exchange Act, 1882, confers on the banker the full rights of a holder for value, and enables him to sue in his own name. But with regard to other securities the position is not so clear, though the general opinion seems to be that the banker has a power of sale, especially if the securities are fully negotiable (see Paget's *Law of Banking*, 4th edition, p. 391 *et sqq.*, for an admirable discussion on the subject).

4. Statutes of Limitations.—Since the effect of the statutes is to bar the personal remedy, not to discharge the debt, they do not affect property over which the banker has a lien (*London and Midland Bank* v. *Mitchell*, 1899). This is not the case with securities relating to land, in which, by the Real Property Limitation Act, 1874, the remedy is barred after twelve years. The banker can also hold securities which become subject to his lien against debts which have become statute-barred.

CHAPTER III

GUARANTEES

1. **Definition.**—A guarantee is a written promise made by one person to be collaterally answerable for the debt, default, or miscarriage of another person. By the Statute of Frauds, 1676, s. 4, no action to enforce the fulfilment of such a promise can be maintained unless the agreement, "or some memorandum or note thereof," is in writing, and signed by the party to be charged or by his lawfully authorised agent.

The essence of a contract of guarantee is that the guarantor is only collaterally answerable; the original debtor is not released from his liability. All that the guarantor promises to do is to pay, either the whole or an agreed part of the debt, if the person who has contracted or will contract the debt, fails to do so. It is the principal debtor (*i. e.* the customer of the bank in the kind of guarantee we are concerned with) who is primarily responsible.

There are other kinds of promises to pay another person's debt which are not contracts of guarantee. For example, if Smith agrees with Brown that if Brown will release Smith's friend Robinson from his liability, he (Smith) will pay the debt, this is not a contract of guarantee but a *novation* of the debt, *i. e.* a substitution of a new debtor for the original debtor. Or again, Smith may agree with Brown that if Brown will let Robinson have certain goods, he (Smith) will see that Brown is paid for them. Such a promise is a contract of *indemnity*, not of guarantee, and need not be in writing to be enforceable against Smith.

As already stated, there must be written evidence of the guarantee if it is to be enforceable in a Court of law. This written evidence need not be in any formal shape, but there must be sufficient writing to show that a contract of guarantee has been entered into. The writing must therefore contain (1) the names of the parties, (2) the essential terms of the

contract. The consideration necessary to support any simple contract, *i. e.* a contract not under seal, must exist, but there need not be any written statement of it. Bankers' guarantees, drawn up by their solicitors, generally set forth the consideration. Sometimes it is stated to be the opening or continuing of a customer's account, or giving, at the request of the guarantor, the customer further time to pay an existing debt or forbearing to sue for that debt. Whatever form the consideration takes, the vital thing is that the banker promises to do or to forbear doing something at the request of the guarantor, whose promise, therefore, to be collaterally answerable for the debt is made for valuable consideration.

So far as the actual form of guarantee is concerned, it is essential that it should be designed to cover all kinds of transactions and provide against all possible contingencies. In the case of third party securities, which include guarantees, the contingencies which the form should provide against have already been briefly enumerated in a previous chapter, and each will be treated separately in this chapter It must be remembered that the surety is in law a favoured debtor, and that he has many implied rights which bankers restrict by clauses in their guarantee forms, so as to enable them to act at all times in their own interests without hindrance.

Nearly every form of security has its drawbacks, and a guarantee is no exception. In the first place, it is obvious that its value as a security depends entirely upon the financial stability of the guarantor; secondly, to be effective, it must most carefully define the liabilities of the guarantor, or surety, as he is often called.

When, therefore, a banker proposes to protect himself by means of a guarantee, he must first of all, by careful inquiries, satisfy himself, as far as is possible, that the guarantor will be able, conveniently and without embarrassment, to redeem his promise to pay if the customer accommodated fails to do so. For instance, the banker should not regard persons with fixed incomes terminable at death, who have no other means, as fit persons, generally speaking, to become guarantors. Again, a person may, at the time of entering into a guarantee, be quite able and willing to perform all that he agrees to do, but his financial position, through no fault of his own, may change for the worse. It, therefore, behoves the banker, so long as the guarantee

remains operative, to supplement periodically his preliminary inquiries. Especially should he be on the alert for any evidence that the guarantor has been settling, or is about to settle, any substantial part of his property on his dependants, or otherwise place it beyond the control of his creditors.

Guarantees under hand must be stamped sixpence as agreements. If the stamp is an adhesive one, the first signatory must write his signature across it. A stamp may be impressed any time within fourteen days from the date of the document. Sometimes the banker has occasion to look to an informal letter as a guarantee, and in such cases the letter should be duly stamped as an agreement within the fourteen days. Bonds or guarantees under seal require an *ad valorem* stamp of 2*s*. 6*d*. per cent., which may be impressed without penalty within thirty days after the date of the execution of the deed.

2. **Disclosure of Material Facts.**—The guarantor should enter into the contract as a free agent with adequate knowledge of the nature of his liability. Any attempt at pressure on the part of the banker would seriously affect the value of the guarantee as a security. It is no part of his duty to *volunteer* a full disclosure of the debtor's dealings with him. He is not bound, in the words of Lord Chancellor Chelmsford (*Wythes* v. *Labouchere*, 1858) "to inform the intended guarantor of matters affecting the credit of the debtor or of any circumstances unconnected with the transaction in which he is about to engage which will render his position more hazardous." But if the guarantor questions him with reference to such matters, the banker must give a straightforward reply and one not capable of being misconstrued. But though the banker is not bound to disclose all that he knows about his customer's dealings, he must not conceal from the guarantor any fact materially affecting the transaction between the banker and his customer. As a great judge once put it, "the avoidance of a contract of guarantee by the non-disclosure of a material fact depends in each case upon whether, having regard to the nature of the transaction, and the relations of the parties, *the fact not disclosed is impliedly represented not to exist*. To quote again from the same authority, as summarised in the head-note: "Very little said which ought not to have been said and very little omitted which ought to have been said, will suffice to avoid the contract"—Sir Edward Fry in *Davies* v. *London and Provincial Marine Insurance Company*, 1878.

3. Capacity to Contract.—Generally speaking, any person able to make a contract may enter into a guarantee; therefore, infants and persons of unsound mind are not eligible. A partner has no implied authority to bind his co-partners by giving a guarantee in the firm's name. It will, however, be binding upon them if (1) he is authorised by his co-partners to give a guarantee, or (2) if the giving of guarantees is a necessary part of the ordinary business of the firm. In every case of guarantees given by a firm it is advisable that all the partners should join in executing the document. If the guarantee is under seal all the partners must sign, for no partner can bind his co-partners by deed, unless authorised under seal. A married woman may enter into a guarantee, but a judgment against her can only be enforced against her separate estate, and that only when her separate estate is not subject to a restraint against anticipation. (See also s. 52 Bankruptcy Act, 1914, summarised on p. 235.) But since it is essential that the guarantor should be a free agent when entering into the contract, and should also fully appreciate what contract is being entered into, bankers should be wary when taking a guarantee from a woman to secure her husband's or other relative's account. In all such cases, to avoid any appearance of undue influence, the banker should carefully explain the nature of the transaction to her, and, where possible, insist on the guarantor being separately advised by her own solicitor.

Guarantors should bind themselves, their executors, and administrators, and, if the document is under seal, their heirs as well (Paget, *Law of Banking*, 4th edition, p. 425). Though not legally necessary, it is desirable that the guarantor's signature should be witnessed. This is generally done by a bank official.

It is true that a trading company has implied powers to do some things (*e. g.* to borrow money), necessary for the conduct of their business, even if such things are not set forth in the Memorandum of Association. But very few companies would have implied powers to guarantee the debts of outside parties, even if those other parties were customers of the company, and so in some way connected with the company. It therefore behoves the banker, if a company is proposed as a guarantor, to examine the memorandum to make certain that the company has express powers so to act. A guarantee given under the company's seal must be stamped with an *ad valorem* stamp of 2*s.* 6*d.* per cent. If given under hand it must bear a sixpenny

stamp and must be signed as provided for by the Articles, and should be accompanied by a duly authenticated copy of the resolution of the board authorising the act.

4. **Alterations.**—As in every other contract, any material alterations must be assented to and initialled by the guarantor, and by each guarantor, if there are more than one. Any material alterations made without the guarantor's consent will be a ground for avoiding the contract. When several parties enter into a guarantee, but are liable for different amounts, no guarantor must be allowed to alter the amount for which he is liable without the assent of the other parties.

Sometimes a guarantor executes, as surety for the same person, a guarantee additional to one already entered into. In such cases the second guarantee should close with a clause declaring that the second guarantee is additional to and not in substitution for the guarantee signed on such a date and for such an amount.

5. **Joint and Several Guarantees.**—When several persons co-operate in the giving of a guarantee, their liability may be (*a*) several, *i. e.* separate, (*b*) joint, or (*c*) joint and several. In a several guarantee each of the guarantors may be sued separately for the whole of the guaranteed debt, subject to any limit to the amount of the guarantee, and an unsatisfied judgment against one does not prevent the banker taking proceedings against each of the others. The death or bankruptcy of any one of the several guarantors does not, of itself, release his estate from liability for advances made before the banker receives notice of these events. In a joint guarantee each surety is liable for the whole amount, but *all* must be sued together; for, if proceedings are taken against a less number than all, the sureties not included in the action are discharged from all liability, even though the banker obtains an unsatisfied judgment against the surety or sureties he has elected to sue. And on the death or bankruptcy of a joint guarantor his estate is freed from all liability under the guarantee, and the banker must look to the remaining guarantors for the whole amount. In a joint and several guarantee the parties may be sued in the way the banker deems fit, and the remedy against them is not satisfied until the whole debt has been recovered, the banker's only limit being the amount for which the guarantee is drawn to cover. And the estate of a party who dies or becomes bankrupt remains liable

for advances made prior to each of these events. From these considerations it is obvious that a joint and several guarantee affords a better protection to the banker than any other kind of guarantee.

In all cases of co-suretyship the banker should take care that all the proposed guarantors duly execute the contract, and no advance should be made on a guarantee until all the parties have signed. For if one or more of the sureties fail or refuse to sign, and those that have already signed can prove that they agreed to enter into the contract on the faith of its being participated in by one or more of those that have not signed, they will be discharged from all liability. Accordingly, if any of the proposed sureties wish to withdraw or refuse to sign, the best course for the banker is to get the willing signatories to sign a new guarantee.

6. **Kind of Guarantee.**—*Specific or Continuing.*—The promise to be collaterally answerable may be so worded as to refer to a specified transaction only. Such a guarantee is called a *specific guarantee*, and it is void on repayment of the special advance it was given to secure. Or the guarantee may be worded so as to cover, within an agreed limit, the fluctuating debit balance of an account at any time during the continuance of the guarantee. This is called a *continuing guarantee.* If a specific guarantee is taken, the advance must be made on a separate loan account and not on a current account, so as to avoid the operation of the Rule in Clayton's Case, by which any payments in will discharge the guarantee *pro tanto.* A continuing guarantee is not affected by any payments in, for it is framed to secure the final debit balance. This liability of the guarantor to be answerable for the final balance must be clearly stated in the guarantee, because, unless the contrary is explicitly stated in the memorandum, the law assumes that the guarantee covers nothing but the debt due at the time the guarantee was entered into.

It is not advisable that the moneys covered by the guarantee should be described as " a debt due or owing from " the principal debtor, because it is possible, though the matter is open to doubt, that if the principal debtor become bankrupt, the guarantor may evade liability by contending that the bankruptcy annulled the debt, and substituted in its place the right to prove against the debtor's estate, and that since there was nothing " owing "

by the principal debtor, the guarantor's promise to be collaterally answerable was determined. To avoid all risk, therefore, of such a repudiation, the surety's liability should be expressed in terms that cover all moneys advanced to, paid for, or incurred by the bank on behalf of their customer, together with interest and all other charges that may be payable thereon (see Clause I, Specimen form, "Guarantees," Appendix, p. 477).

7. *Limit of the Guarantee.*—Another important feature in a guarantee is the amount it is designed to cover. If it is agreed that the surety, in case of need, shall only be liable for a fixed sum, that sum must be clearly stated. The guarantee must also state whether the guarantor is surety for the *whole* of the customer's debt—subject to the proviso of limitation—or whether he is surety for that *part* of the whole debt equivalent to the limit fixed by the guarantee. The distinction here indicated would have important results in the event of the customer's bankruptcy. For if the surety has guaranteed the *whole* debt, the banker can (*a*) demand repayment from the surety of that part of the debt he has guaranteed, and (*b*) prove against the bankrupt's estate for the *whole of the debt.* Moreover, if the bankrupt has also deposited collateral securities to cover his overdraft, the surety's claim to any benefit in such securities is postponed till the banker has received from all sources twenty shillings in the pound. But if the surety is guarantor for only his *part* of the debt, he can pay the banker and prove on the bankrupt's estate himself for the amount of his payment, by which amount the banker would have therefore to reduce his proof. He would also be entitled to a proportionate share in the benefit of any other securities deposited by the bankrupt. Accordingly, bankers' guarantees are usually framed so that the guarantee extends to the whole amount advanced, with a provision that the surety is not liable for more than the fixed sum named. Further, the surety expressly declares that he will not prove in competition with the banker in the event of the bankruptcy of the principal debtor, or take advantage of any other securities the banker may hold, until the whole debt due to the banker has been liquidated. The wording of the guarantee should make it clear that the fixed limit refers to the amount for which the guarantor is contingently liable, not the sum actually advanced, or to be advanced, to the borrower. Such forms as "In consideration of your advancing John Jones a sum not

exceeding £500, I hereby guarantee you due payment of that amount," are wrong, as the fixed limit is expressed as the consideration. Should, therefore, the banker, relying on such a form of guarantee, honour a cheque which raised the debt beyond the £500 limit, the surety might repudiate his liability on the ground that the banker had not kept to his contract.

8. *Charges, Discount, etc.*—A perusal of the specimen forms in the Appendix, pp. 477–81, will show that the wording is designed to cover all possible contingencies. In regard to discount, commission, interest and other banking charges, law costs, etc., if it is intended to cover these items they must be expressly mentioned, for they are not covered by any form of words guaranteeing the due payment of "advances," since these items are not advances.

9. *Ascertainment of the Ultimate Balance.*—If the guarantee is drafted to secure the ultimate balance of an account, then the account must be kept as a banker usually keeps such an account. For example, when the overdraft has reached the limit guaranteed by the surety, the banker cannot suddenly rule off the account and place all future payments into a separate account, and thus deprive the surety of the benefit of them. Cotton, L. J., *in re Sherry*, 1884, said as follows: "The balance which the surety guarantees is the general balance of the customer's account, and to ascertain that, all accounts existing at the time the guarantee comes to an end, must be taken into consideration." Any other course would be improper in "that it would prevent the balance of the account from being ascertained in accordance with the terms of the guarantee." But when the guarantee comes to an end, the banker is quite justified in ruling off the account and opening a fresh one, and the surety can neither claim the benefit of any payments into this account nor is he liable for any debit balance thereon.

10. **Conditions of Determination of Guarantee.**—Provided that such a procedure is not barred by the terms of the guarantee, the banker can take proceedings against the surety as soon as the principal debtor has been requested to pay his debt and has failed to do so. The banker is not bound to get what he can out of the customer before coming upon the surety, nor does it appear that he need first resort to any other securities lodged by his customer (see Paget, *Law of Banking*, 4th edition, p. 435 *et sqq.* on this point). We deal elsewhere with the ques-

tion as to when the banker who has agreed to an overdraft can stop the account, and sue for the debit balance.

11. *Revocation or Withdrawal of Guarantee.*—A guarantee should be drawn up so that it defines clearly in what way the guarantee shall be determined. In the absence of any such provision, the guarantor's right to determine depends upon the nature of the consideration. If the consideration is forbearing to sue for a debt already incurred by the customer, then the guarantor's liability cannot be evaded, either by a notice of withdrawal or in the event of his death. If the consideration is an advance to be made on a loan account and credited to the customer's current account, the banker, on receiving notice of withdrawal, cannot stop the account and dishonour cheques drawn on the balance standing to the credit of the current account, and the surety cannot evade his liability for the balance on the loan account or compel the banker to treat the accounts as one and dishonour the customer's cheques (*cf. Bradford Old Bank* v. *Sutcliffe*, 1918).

A continuing guarantee *under hand* may be determined at any time if there is no provision for notice made in the guarantee. Upon receipt of notice, the banker must at once communicate the notice to his customer and stop the account, so as to prevent the operation of the Rule in Clayton's Case. All outstanding cheques presented after the receipt of notice can only be paid at the banker's risk. But in the case of a continuing guarantee *under seal*, the question of equity affects the guarantor's position, and all outstanding cheques issued before the customer has had notice of the determination are covered by the guarantee, but the banker must not make any further voluntary advances. Upon determination of the guarantee, whether under hand or under seal, the banker is entitled to stop the account and to open a new account, through which all future debits and credits should be passed. The right to stop the account and open a new one for future transactions is usually provided for in the guarantee.

The difficulty about outstanding cheques and pending transactions is usually avoided by an express provision in bankers' guarantees to the effect that determination is subject to a specified period of notice. Such a notice should be expressed somewhat as follows: "This guarantee shall be a continuing guarantee . . . until the expiration of three calendar months after

notice in writing shall have been given by me, my executors, etc., in determining the same" (see Clause II, specimen form "Guarantees," Appendix, p. 477). But then come the questions: What is the banker to do while the notice is still running? Can he safely allow the customer to draw up to the full sum guaranteed? With regard to the latter, Sir John Paget does not think he can. The banker is indeed entitled to honour all outstanding cheques, and bills accepted for the customer before notice of the determination and still maturing. Such payments are undoubtedly recoverable under the guarantee. "Possibly it might cover other transactions in the ordinary course of business begun prior to revocation and completed during currency of notice" (*Gilbart Lectures*, May, 1909, and also *Q. B. P.*, No. 1221). The guarantee would also cover the fulfilment of obligations entered into by the banker with the customer, or with third parties on his behalf, prior to revocation. Upon receipt of notice of revocation, the banker should immediately give notice to his customer, and should pay all cheques issued prior to receipt by the customer of notice of withdrawal, provided that such cheques are within the agreed limit.[1] In these, and in similar cases, the banker must be in a position to prove, if necessary, delivery of the notice to his customer. Hence his notice should be in writing and sent by registered post or some other method by which receipt of the letter and the time of its receipt can be ascertained and proved.

A guarantee under hand given for a limited period may be revoked by the guarantor at any time within that period, subject to the repayment of any money due under it. As soon as the notice is received by the banker he is barred from making any fresh advances to his customer, but all outstanding cheques issued by the customer prior to communication of the notice are covered. Upon the determination of a guarantee given for a limited period, a renewal can be effected either by an indorsement, duly stamped, on the guarantee, expressing a continuance of the guarantee for another limited period and signed by the guarantor or guarantors, or by the drawing up of a new guarantee stamped in the ordinary way. Unless a new guarantee is created or the old one is properly indorsed, the account should be stopped immediately on expiration of the period, and the guarantor informed of the amount for which he is liable.

Notice of withdrawal from one of several guarantors involves stopping the account, unless the remaining guarantors enter into

[1] See also Note E, p. 338.

a new guarantee, or agree in writing to continue their responsibility for the overdraft. Notices of withdrawal should always be in writing, but unless written notice is provided for in the guarantee, it would appear that verbal notice is sufficient (*Q. B. P.*, 1220). These notices do not require stamping, but revocation of a withdrawal requires stamping sixpence as an agreement, though a new guarantee would be preferable.

A guarantee is terminated when the customer pays off the overdraft and closes his account, and the guarantee, in such an event, would not cover any transactions on an account re-opened by the customer. When a guarantee has been discharged, it is the usual practice to cancel it in the surety's presence and to keep it with the bank's papers, but if the surety so desires the cancelled guarantee may be surrendered to him.

It may be mentioned here that, subject to the provisions of the guarantee and to reasonable notice, the banker is entitled to set-off any credit balance of the guarantor in his hands against the liability on the guarantee.

12. *Death of Guarantor.*—Notice of the guarantor's death involves stopping or ruling off the account, unless specified notice of determination from his legal representatives, or the continuing liability of the guarantor's estate, is expressly provided for in the guarantee. In the absence of any such provisions, fresh advances made after notice of death are not covered, and, moreover, the Rule in Clayton's Case begins to operate. The new account, unless otherwise secured, should be kept in credit, and, so far as the banker is concerned, any credit balance on this account will not affect the total liability of the surety's estate under the guarantee.

If the guarantee contains a provision that the surety may revoke it during life by giving a specified notice, but no provision that a like notice shall be required from the surety's legal representatives in the event of his death, then mere notice of his death will absolve his estate from liability for any fresh advances made after notice. In order to bind the surety's estate both provisions as to notice are usually inserted in bankers' guarantees. It is usual for the banker to give notice of the existence of a guarantee to the deceased's legal representatives.

As already mentioned, the estate of a deceased joint guarantor is not bound after notice of death, but the estate of a deceased joint and several guarantor is bound, provided that the account

is at once stopped, or that there is in the guarantee a provision continuing the liability of the estate. With regard to the surviving guarantor or guarantors, the authorities are not clear as to the precise effect of the death on their liability for future advances. To avoid all question the guarantee should provide that whatever happens to a guarantor, the continuing liability of the others, either for past or for future advances, shall not be affected. In all cases of death of or determination by, one of two or more co-guarantors, it is advisable that the account should be stopped and a new account opened which should be kept in credit until the surviving guarantors can enter into another guarantee, or write a letter continuing their responsibility.

13. *Insanity of Guarantor.*—The banker's procedure as soon as he receives notice of the insanity of a guarantor should be on the same lines as after notice of death. It must not be forgotten, however, that, in the general way, lunacy is not covered in the usual guarantee form so completely as death. Hence, in the absence of express provisions, notice of the lunacy of a guarantor terminates the guarantee as to future advances in exactly the same way as the death of a guarantor when his guarantee contains no condition as to notice of determination from his legal representatives or for the continuing liability of his estate after his death. The account, therefore, in the absence of express provisions, must be stopped immediately notice of the guarantor's lunacy is received, and the lunatic's estate is liable only for the balance then due (see *Bradford Old Bank* v. *Sutcliffe*, 1918).

14. *Bankruptcy of Guarantor.*—Upon learning of the surety's failure, the banker should at once stop the account, demand payment from the principal debtor, and, if he default, prove on the surety's estate. Even before default of the principal debtor the banker is entitled to prove against the surety's estate in respect of a contingent liability under the guarantee (Bankruptcy Act, 1914, s. 30 (3). In his proof against the surety, the banker need not take into account any securities received from the principal debtor, but not yet realised. But if *before proof* against the surety, he has received a part payment of his debt in the shape of realised securities, or a dividend—paid or declared—from the principal debtor's estate, he must take into account such payments when making his claim. But if any such payments are made or declared *after* his proof has been sent in, he need not submit

an amended claim. Discharge of the bankrupt surety wipes out all his liability under the guarantee (Bankruptcy Act, s. 28 (2)).

The estate of a joint guarantor who has become bankrupt is not bound, and the remaining solvent guarantors must shoulder the whole liability. But the bankruptcy of a guarantor severally, or jointly and severally, liable, does not thereby release his estate. As on the death of a co-guarantor, the banker should at once stop the account pending some new agreement with the remaining guarantors.

15. *Changes in Parties.*—S. 18, Partnership Act, 1890, provides that a continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee was given. By "change in the constitution of the firm" is meant the change caused by the death, bankruptcy, retirement or admittance of a partner or partners. Bankers' guarantees usually provide for any such contingency, but if this is not so, the account must be stopped and a new account opened. Otherwise the Rule in Clayton's Case will operate. Apart from any provisions in the guarantee, it is preferable that the account should be broken, so as to bind the estate of the deceased, bankrupt or retiring partner.

With regard to the other party in a contract of guarantee, viz. the banker, provision must also be made for "any change in the constitution of the firm," if it is a banking partnership. Joint Stock Banks are not affected by this section, since a change of membership does not involve a change of constitution. Neither does the opening of new branches, for the head offices and branches form a legal entity, expanded or contracted by the opening or closing of branches, but always one concern. But it has been held that when any bank is absorbed by a larger bank in such a way as to lose its identity, then all guarantees held by the absorbed bank are terminated by its absorption. If the absorbing bank is a joint stock bank its own guarantees would not be affected. When two or more banks—whether banking partnerships or joint stock banks—amalgamate, all guarantees held by the contracting banks are revoked as to future transactions, unless there is an agreement to the contrary. A guarantee given to a joint stock bank should therefore be drafted to cover

such events. If this has not been done, the accounts should be stopped at once, pending the execution of a new guarantee, or a letter from the guarantor agreeing to allow his guarantee to remain. Any such letter should be stamped sixpence as an agreement. These remarks apply to companies whose accounts are secured by guarantees and to guarantees given by companies.

16. **Release of Surety.**—The Courts are very jealous in preserving a surety's rights, and therefore any variation in the terms of the contract he has entered into may result in his discharge from liability. Indeed, it has been held that if there is any alteration, except it be obviously either unsubstantial or for the benefit of the surety, the surety himself is the sole judge whether or not, in spite of the variation, he will consent to remain liable; and unless he does so consent he will be discharged (*Holme* v. *Brunskill*, 1877). It is true that bankers' guarantees are so comprehensive in character that almost every kind of transaction likely to take place between a banker and his customer is covered. But, despite these protective provisions, the banker should be careful not to prejudice the surety's position without giving him notice and getting his consent, even though the action contemplated may be covered by the terms of the guarantee. It should be noted that if the surety is released by any action of the banker, the banker must surrender any securities deposited by the surety to reinforce his guarantee.

17. *By Release of or Giving Time to the Principal Debtor.*— Unconditional release of the principal debtor involves release of the surety; for since the principal debtor is released, it follows that the person liable only on his default is also released. But any release of the principal debtor which contains a proviso reserving rights against the surety, even though such a release may be unconditional in form, so far as regards the principal debtor, is after all only a partial discharge, for by reserving his rights against the surety, the banker is entitled to sue him, and he, in his turn, is entitled to sue the principal debtor for the money he has paid to the banker on his behalf. If, however, the agreement is in form merely a covenant not to sue the principal debtor, containing no proviso reserving rights against the surety, then in effect it is an absolute release of both principal debtor and surety, and both are discharged. The surety will also be discharged if the banker assents to a composition deed outside the provisions of the Bankruptcy Acts, which releases

the principal debtor, unless he has obtained the surety's consent or unless he expressly reserves his rights against the surety, because, by his assent, the banker voluntarily discharges the debtor from any further liability. Usually, however, bankers' guarantees give the banker power to compound or make any other arrangement with the principal debtor without prejudicing his rights against the surety. Discharge of the principal debtor under the Bankruptcy Acts will not of itself discharge the surety, neither will the acceptance by the banker of a scheme or composition after adjudication under the Bankruptcy Acts. Novation of the debt releases not only the principal debtor but also his sureties absolutely.

If the banker, after the guarantee has been executed, enters into a *binding* agreement with the principal debtor for good consideration to give him further time or other indulgence, the surety will be discharged, unless he has given his consent to the indulgence, or the banker has reserved his rights against the surety. The italicised word "*binding*" should be noted. The surety is not discharged merely because the banker forbears to sue the principal debtor, or seems reluctant to press him for payment. If the banker had taken a bill or note from the principal debtor for the balance of his account, that would be construed as a giving of time, unless there was clear proof that the instrument was taken as additional security and not as consideration for postponing the banker's right of action against the debtor until the maturity of the instrument. The reason that the surety is discharged by giving time to the principal debtor is that the banker has "put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract" (Lord Eldon in *Samuell* v. *Howarth*, 1817). In other words, the banker by giving time materially alters the position of the surety towards the principal debtor. It is therefore essential that the guarantee should contain a provision to the effect that the banker may give such further time or other indulgence to the principal debtor as shall, in the banker's judgment, appear to be reasonable.

18. *By Release of or giving Time to Co-surety.*—When two or more persons enter into a joint, or a joint and several, guarantee, each surety has a right of contribution against his co-sureties

for any amount paid by him under the guarantee over and above his due share. If, therefore, a banker deprives any surety of his right to contribution in equity, or prejudices that right, by releasing one or more of his co-sureties, the surety whose right of contribution is affected will also be discharged. But if a banker agrees not to sue one surety but expressly reserves his rights against the other or others, these others are not discharged, but they can exercise their right of contribution against the surety not sued, and compel him to pay his share of the moneys they may have to disburse.

Where, however, the sureties are *severally* (not jointly, or jointly and severally) liable, release of one does not involve release of the others, unless they can prove that a right to contribution of the released surety existed and has been prejudiced by his discharge. Accordingly, a banker's guarantee should expressly provide that the liability of the remaining co-sureties shall not be affected by the release of or the giving of time or other indulgence to one or more of the co-sureties. If there is no such provision in the guarantee, the banker must not prejudice his rights against all by varying the contract in favour of any particular surety, without the consent of all.

19. *Release by Varying the Securities for the Same Debt.*—Since a surety who discharges his liability under a guarantee is entitled to the benefit of any securities of the principal debtor that the banker may hold, it behoves the banker to deal with such securities so as not to deprive the surety of his right of benefit. If the banker does negligently or improperly deal with such securities and loss to the surety ensues, the surety will be released *pro tanto*. And unless there is an express provision in the guarantee to the contrary, the banker may not exchange or surrender any of these securities without the surety's consent, but if the banker takes a further security from the principal debtor, even without the surety's consent, the surety will not be discharged, provided that the taking of further security does not involve the giving of more time to the principal debtor without the surety's consent. Bank guarantees should contain a clause stating that the banker shall be entitled to recover on the guarantee the full amount guaranteed without having recourse to any securities held or to be held, and giving the banker a free hand as regards the varying, exchanging or releasing of any securities (see also " Rights as to Securities," *post*).

20. **Rights of Surety.**—A surety may, at any time while the guarantee is in force, ask the banker for particulars of the extent of his liability, and the banker is bound to give the necessary information. But this does not mean that the banker is bound to disclose, at the surety's request, all the details of his dealings with the principal debtor; *e. g.* he must not allow the surety a look at the principal debtor's ledger account. Further, the surety may at any time request the banker to call in the advance, or he may himself pay the principal debtor's debt and enforce his remedies against the principal debtor. If necessary he may, upon a proper indemnity, use the name of the banker in any action or proceeding in connection with his obtaining indemnification for the amount he has paid (Mercantile Law Amendment Act, 1856, s. 5). The surety's rights as to revocation or withdrawal have been already dealt with.

If the surety elects to discharge his liability under the guarantee, he at once steps into the banker's shoes, and becomes a creditor of the principal debtor, and succeeds to all the banker's rights. If the principal debtor cannot pay and is adjudicated bankrupt, the surety is entitled to prove on his estate, either for the sum he has actually paid to the banker or for his contingent liability if he has not actually parted with the money. But if the surety's liability is a contingent one, the banker can also enter his proof against the estate, but as the banker and the surety cannot both prove for the same debt at the same time, bankers' guarantees usually reserve the right of proof to the banker in such cases. That is to say, by such a provision the banker is entitled to receive any dividends or compositions out of the debtor's estate. In addition, there is the other clause making the guarantee cover the *whole* debt. The inclusion of these clauses will effectually prevent the surety proving against the estate in competition with the banker (see also "Limit of the Guarantee," *ante*).

If there is no provision in the guarantee waiving the surety's right of proof in favour of the banker, or if the guarantee is not framed to cover the whole debt due, then the surety may tender to the banker, at any time before the banker has sent in his proof against the principal debtor's estate, the full sum for which he is liable. The banker must, in that event, deduct this amount, when proving, and the surety can also prove for the amount he has paid to the banker. But if this restrictive provision is in the guarantee, the proper course for the banker is, not to refuse

the money, but to place it to a suspense account and prove for the whole debt, provided, of course, that the principal debtor owes more than the surety is liable for.

Any surplus remaining in the hands of the banker, after he has received twenty shillings in the pound for his debt, must be returned to the surety, or if there is more than one, then to each *pro rata* according to the several liabilities that have been discharged by them. In all cases of co-suretyship it is advisable, unless the surplus money is to be paid into Court, to withhold payment until the co-sureties can come to an agreement as to what part of the surplus each is entitled to receive.

21. *Rights as to Securities.*—When the surety has discharged his liability under the guarantee, not only does he succeed to the banker's rights and equities, but he is also entitled by s. 5, Mercantile Law Amendment Act, 1856, to the benefit of all or part of the principal debtor's securities held by the banker as cover for the guaranteed debt, and it does not affect the surety's right to benefit whether the securities were deposited before, at the time, or after the contract of guarantee was signed. Neither does it matter whether the surety knew or did not know that the banker held such securities. But the surety has no right to securities held by the banker to cover a separate and distinct debt of the same principal debtor. Moreover, if the surety has guaranteed not the whole but a part of the debt, he is only entitled to a *pro rata* benefit from the securities. If the whole debt is covered by the guarantee, the surety is not entitled to any benefit from the securities until the banker has been paid in full. It is advisable, however, to state expressly in the guarantee that the banker shall have this right of retaining securities until the whole of the debt has been repaid to him. The banker is entitled to sue the surety before having recourse to the securities, but this power should also be expressly provided for in the guarantee. Before giving up any securities belonging to the debtor to a surety who has repaid the whole advance, the banker should give notice to the debtor and any other interested parties.

Unless debarred from so doing by the terms of the guarantee, the banker may, when proving against the principal debtor's estate, surrender to the trustee any securities deposited by the principal debtor and prove for the whole debt (see under "Bankruptcy," p. 466). In cases where the surety deposits his own securities to reinforce his guarantee, these, being collateral

securities, need not be taken into account when proving against the debtor's estate.

22. *Rights against Co-sureties.*—Each co-surety is liable to the banker for the whole amount of his guarantee, but they have certain rights *inter se*. As they are sharers in the liabilities, they are also in equity entitled to share any means of recoupment arising out of the joint transaction. And they share these means of recoupment equally, if their liability as between themselves is equal, and rateably, if it is unequal. For example, if any one of them has paid to the banker more than his due share of the debt, he is entitled to call upon his co-sureties for such contributions as will compensate him for what he has overpaid. Moreover, any securities deposited by the principal debtor with any of the co-sureties as cover for the liability under the guarantee must go into hotchpot (*i.e.* be pooled, so as to secure equable division), and when realised are divisible amongst all the co-sureties equally or rateably, as the case may be.

This right of contribution obtains whether the co-sureties are liable jointly, or jointly and severally, or by the same guarantee, or by separate guarantees. But there is no right of contribution where the sureties are liable for separate and distinct debts of the same principal debtor. In estimating the proportion of contribution, those unable to pay are not brought into account. Thus, if there were four sureties, equally liable as between themselves, and one of them became bankrupt, the surety who discharged the whole liability under the guarantee would be entitled to demand a third from each of the remaining and solvent sureties. So far as the banker is concerned he is not entitled to any benefit from the realisation of any securities deposited by the principal debtor with the sureties.

23. *Rights against Debtor.*—As soon as the surety has paid either the whole or any part of the sum due under the guarantee, he is entitled to take proceedings against the principal debtor, provided that the right of action is not waived in favour of the principal creditor by the terms of the guarantee. Before paying, the surety should notify the principal debtor that he intends to satisfy the banker's demands. On the bankruptcy of the debtor, the surety may prove in respect of his contingent liability, provided that he has not waived this right.

24. **Statute of Limitations.**—Where a guarantee is given under hand, the banker's right of action is barred in six years

after the date upon which the debt was first recoverable by action. But where a guarantee is given under seal the period of limitation is twenty years. There is an exception in the case where a surety has given a guarantee for payment of a mortgage debt secured on land. Here the limit is twelve years, both as regards the mortgagor and the surety (s. 8 Real Property Limitation Act, 1874).

In the much-discussed case of *Parr's Banking Company* v. *Yates*, 1898, Yates, a surety, had in 1887 entered into an agreement under hand to be collaterally answerable for all moneys which might be owing by a customer of Parr's, together with interest, commission and other banking charges. The bank had ceased making any advances to the customer at the end of 1890, and the customer from time to time paid moneys into his account up to a period within six years previous to the date of the action. The bank had also charged and entered up against him, half-yearly, interest and commission. It was held that the Statute of Limitations barred an action (brought in 1898) against the surety for the advances, but that the bank was entitled to recover interest, commission and banking charges which had accrued due from the customer within six years of the date of action and had not been paid. In this case Vaughan Williams, L. J., said: "My view is that the cause of action on the guarantee arose as to each item of the account, whether principal, interest, commission, or other banking charge, as soon as that item became due and was not paid, and consequently the Statute of Limitations began to run in favour of the defendant in respect of each item from that date." In the same case Smith, L. J., also said: "The doctrine that interest is an accessory which falls to the ground with the principal does not apply to a case like this, because the payment of interest, commission, and other banking charges due from the guaranteed party is as much guaranteed as the sums advanced themselves. I do not think that the doctrine with regard to the appropriation of payments to interest before principal upon which the defendant relies has any application to the present case." This decision has been much criticised and bankers' guarantee forms have been framed (see next page) to overcome the resultant disadvantages. In any case it emphasises the importance of not allowing a guaranteed account to become statute-barred so as to discharge either the borrower or the surety or both of them.

To prevent the operation of the Statute, bankers' guarantees

usually contain a provision to the effect that the surety undertakes to repay the amount advanced two or three days after demand. It was held in *In re J. Brown's Estate, Brown* v. *Brown*, 1893, that demand for repayment was a condition precedent to a right of action, *i. e.* the money is not due to be repaid until the surety has been asked to pay it. The insertion of this clause thus effectually prevents the operation of the Statute until demand for repayment has been duly made. In *Bradford Old Bank* v. *Sutcliffe*, 1918, the Court of Appeal held that when a guarantor contracted in a guarantee to pay "on demand," demand was a condition precedent, and that the Statute did not begin to run until demand was made. This is a decision satisfactory to bankers, though, as already stated, the general form of bankers' guarantees provides for two or three days' notice. Moreover, it is the usual practice of bankers, before the six years have expired, to get the surety to give a written acknowledgment that the guarantee is still in force; sometimes a new guarantee is taken. Any letter of acknowledgment should be duly stamped. By s. 14, Mercantile Law Amendment Act, 1856, part payment or acknowledgment of liability made by one surety does not prevent the Statute running in favour of the other or others. Likewise, acknowledgments by the debtor of his debt or payment on account of his debt, while they prevent the Statute from running in the debtor's favour, do not affect the surety's position so far as the Statute is concerned, since the debtor is not the surety's agent, duly authorised to make payments or acknowledgments on his behalf.

25. **Promissory Notes and Bills.**—It is not unusual for suretyship to be created by other means than by a formal contract of guarantee. That is to say, the customer may join with other parties in the making of a promissory note payable to the banker, the joint and several being the usual form employed for this purpose. The form of the instrument indicates that all associated in its issue are principal debtors to the bank and liable as such. It was formerly held that a principal on a bill or note could not be shown to be a surety, but now where it can be proved that one or more of the parties to the note is in fact a surety or sureties, the creditor is bound to treat him or them as sureties, and must abide by the rules that govern the relationship of creditor, principal debtor and sureties. All those parties to the bill or note who are, in fact, sureties, have the same rights, duties and liabilities as in a formal contract of guarantee. And on his part the

banker must be as careful in dealing with the true principal debtor as if the suretyship had been created by an ordinary guarantee. Indeed, he should be more careful, since the sureties of a bill or note do not waive their rights in favour of the banker as they usually do in a well-drawn guarantee.

With regard to these joint notes, it should be observed that by s. 14, Mercantile Law Amendment Act, 1856, part payment of principal or interest by one co-maker does not prevent the Statute of Limitations from running in favour of the other or others. Just before the expiry of the six years a sufficient written acknowledgment of the debt should be obtained from all the parties, or a new joint note should be signed, preferably the latter. If the borrower does not pay the note when it becomes due, it is advisable for the banker to give notice to the other makers, but such notice is not legally necessary, and failure to give it does not discharge the other parties to the note. Renewal of a note involves cancellation of the old note, but this should not be done until the new note has been actually issued, for should any of the signatories refuse or fail to sign the banker could sue on the original note. Accidental cancellation of the old note is by s. 63 (3), Bills of Exchange Act, 1882, inoperative, but the burden of proof that it was unintentional lies upon the banker.

Security proffered by a customer in the shape of a bill or note drawn in his favour should not be accepted by the banker unless the customer indorses the bill or note, and he should also sign a memorandum showing the nature of the deposit. No notice of this deposit need be sent to the other parties of the bill or note. A bill or note given as security for a debt should be distinguished from a bill or note given in payment of a debt. In the first case, the banker, by taking the bill or note, does not postpone his right of action on the debt, but in the second case the remedy on the debt is suspended until the maturity of the instrument.

When bills are pledged as security for an advance the banker "is deemed to be a holder for value to the extent of the sum for which he has a lien" (s. 27 (3), Bills of Exchange Act, 1882). As pledgee, he can sue on the bill, accounting to the pledgor for any surplus. He is, moreover, bound to present the bill at maturity just as if he were the actual owner, and, if it is dishonoured, must give due notice to the pledgor. Should he fail to do this, and the bill prove valueless, he cannot afterwards sue the pledgor either on the bill or the overdraft secured by the bill. The banker's

position in the event of the failure of the pledgor or of the acceptor of the bill is dealt with under "Bankruptcy" (see pp. 435–6).

In *Pease* v. *Hirst*, 1829, it was held that a joint and several promissory note made by a customer and three sureties in favour of a bank was a continuing security. The effect of this is that the Rule in Clayton's Case does not operate. When taking such a note as security for advances on current account, the banker should take a memorandum, signed by all parties, showing the object for which the note was given and describing the note as a continuing security, and including the usual clauses of a banker's guarantee. The note should be payable on demand and be renewed within six years to prevent the Statute of Limitations taking effect against the banker. It would appear that a note payable not on demand but at a fixed date cannot be considered as a continuing security, unless there is evidence to show that it was taken as such. If, therefore, the banker accepted such a note, it is essential that the accompanying memorandum should describe it as a continuing security, otherwise the Rule in Clayton's Case would operate, though the better and more usual course would be to discount it. In regard to the advance, it is not unusual to make it on a separate loan account opened in the customer's name or in the names of the customer and the sureties, the amount of the note being passed as a credit through the borrower's current account. By s. 83 (3), Bills of Exchange Act, 1882, "a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof," but the evidence of pledge must not be so worded as to make the note into an agreement.

In the head-note to *Macdonald* v. *Whitfield*, 1883, it was stated that "the liabilities *inter se* of successive indorsers of a bill or note must, in the absence of evidence to the contrary, be determined according to the ordinary principles of law merchant, whereby a prior indorser must indemnify a subsequent one." But where, as in the above case, the successive indorsers indorse as sureties for a debt, these indorsers are liable to equal contribution *inter se*, and the ordinary rule of indemnification according to the priority of indorsement does not apply. Indorsers who indorse bills in order to guarantee their payment, thereby incur "the liabilities of an indorser to a holder in due course" (see s. 56, Bills of Exchange Act, 1882), but they are not liable unless the bill is regular and complete on the face of it at the time of their

indorsement. For example, when a creditor drew a bill on his debtor payable to himself, and, *without indorsing it*, sent it to his debtor for acceptance and for indorsement by a surety, the surety was held not liable to the drawer, since the bill was not complete when he indorsed it, *i. e.* it lacked the drawer's indorsement (*Jenkins & Sons* v. *Coomber*, 1898). On the other hand, in somewhat similar circumstances in the House of Lords case of *Macdonald* v. *Nash*, 1924, it was held that there was an intention on the part of the indorser to incur liability to the drawer of the bill. This is regarded by some authorities as a dubious decision, and in cases where the banker is directly interested it is desirable to have a memorandum or letter showing the nature of the transaction. (See *Q. B. P.*, No. 659.)

If a banker is taking a bill or a promissory note as security, he should not be named as payee if the instrument is to be indorsed by a third party as surety, unless the banker takes also a memorandum or letter from the indorser admitting his suretyship. This is because a *subsequent* indorser cannot be sued by a *prior* indorser. The memorandum or letter furnishes the written evidence always required in connection with suretyship.

It may be added that if a note with an indorser is held as a continuing security, it is very desirable to have his written admission of the purpose and continuing nature of the instrument, as it is probable that such a note by itself would be limited to a few months (see Chalmers' *Bills of Exchange*, 8th edn., p. 313). The better and more usual practice is for all parties to join in as makers.

NOTE E—In regard to the determination of a guarantee containing a clause stipulating for a specific period of notice, it is quite possible that the Court would interpret the clause more liberally towards the guaranteed party than the authority quoted on p. 324. It certainly does not seem equitable that the guarantor should be entitled practically to disregard the period of notice, and very probably place in a very serious position a guaranteed party, who had entered into *bona fide* commitments relying on the stipulation for a period of notice. Until the matter is settled judicially, the banker must use his discretion, and while protecting the interests of himself and of his customer, act equitably towards the guarantor. (See also *Journal of the Institute of Bankers*, April, 1922, p. 150).

CHAPTER IV

STOCK EXCHANGE SECURITIES

1. **General Considerations.**—The term "Stock Exchange securities" covers all such documents as Debentures, Bonds, Scrip, Stock and Share certificates, issued by joint stock and other companies, by public authorities and by governments. These documents are a very common form of security offered to bankers, and they possess the following advantages over other forms, such as Title Deeds, Mortgages, Life Policies, etc. First, they are readily marketable; secondly, they are easily transferred and at little cost; thirdly, their present market value can usually be accurately determined; and fourthly, some of them are fully negotiable—a most valuable quality from a banker's point of view.

When a banker is offered this type of security he ascertains the market quotation, allowing for any accrued dividend that may be contained in the price, and providing a sufficient margin for market fluctuations. The margin necessary will vary with different securities, and will depend on their nature. For example the margin will be greater on securities with fluctuating dividends, as Railway Ordinary Stock, than on those with fixed dividends or interest, as Railway Debenture Stock. Many perfectly sound securities, especially some of the best Industrial issues, are very strongly held, and therefore rarely figure in the "Business Done" column of the Stock Exchange List, and the market quotation is in such cases purely a nominal one, though, as a rule, the value is round about the figure quoted. Confirmation of the quotation can usually be obtained upon application to the secretary of the company. If the security is not quoted in any Stock Exchange List, application to the secretary is the only safe means of finding out what the security is really worth, and its sale is a matter of negotiation, and for this reason is not a security favoured by bankers.

The value of a particular class of stock or share often depends upon the classes of shares and stock issued by the same company which come before or after it in ranking for dividend or interest. Thus an Ordinary Share paying 10 per cent. in a company which has issued no other class of shares or stock, would, other things being equal, be better as a security than an Ordinary Share paying 10 per cent. in a company which had also issued 5 per cent. Preference Shares, and still better than an Ordinary Share paying 10 per cent. with 4½ per cent. Debenture Stock and 5 per cent. Cumulative Preference Shares ranking before it. On the other hand, the Debenture Stock is the most suitable as a security, since the capital amount, and the interest on it, have behind them the Ordinary and Preference Shares and the dividends paid thereon.

The certificate is only presumptive evidence that the holder has a right to the stock and shares described in it (Companies Act, 1929, s. 68). For example, in cases where a company has called up part of its capital or has been reconstructed, the certificates are often retained by shareholders who, through failure to pay the call or to fulfil the terms of reconstruction, have forfeited their shares. Again, the Articles of Association of a joint stock company usually provide that the company shall have a first and paramount lien on the shares for any debt due from a shareholder.

If the shares are not fully paid up when the certificate is issued, there is generally a space on the back for entering calls as they are paid. Before lending, therefore, on partly paid up shares, the banker should make certain of the present condition of the security, and that no call has been made which the shareholder has failed to pay. Calls not paid up are, in England, by s. 20, Companies Act, 1929, in the nature of a specialty debt, *i. e.* a debt expressed in a deed, and companies, as a rule, reserve the right to forfeit any shares on which the calls are unpaid. If the shares have been forfeited, the holder would probably not have troubled to return the certificate to the company. In taking partly paid shares as a security the banker has to face another risk, viz. that if a call is made and the shareholder cannot find the money, the banker must do so in order to retain his hold on the security, or otherwise sell out, possibly at a depreciated price.

2. **Fully Negotiable Securities.**—Fully negotiable securities are the ideal securities as cover for an advance, for, if taken in

good faith and for value, the holder is entitled to retain them against the true owner, even though the true owner may be a beneficiary under a trust and the trustee has fraudulently transferred them to the holder.

An instrument can only be said to be fully negotiable when the absolute ownership of the property represented by the instrument vests in the holder, so that (1) he is not prejudiced by any defect in his transferor's title, and (2) he can sue on the instrument in his own name. This transfer of ownership is effected in two ways: (1) *By indorsement* and *delivery*. Here the instrument itself provides an authentic record of successive transfers. (2) *By delivery*. Here the *bona fide* possessor of the instrument is presumed to be the owner. The latter instruments are negotiable in the fullest sense of the word. Such a document may have been stolen, or be trust property, but a pledgee who takes it *bona fide* and for value has an indisputable title against all the world.

A fully negotiable instrument must be transferable, (1) by statute law, or (2) by prevailing mercantile custom judicially recognised. With regard to (2) it does not follow that because a foreign instrument is negotiable in the country of origin that it is also negotiable in this country. But many foreign instruments negotiable in the country of origin have been recognised by the Courts as negotiable in this country, even though they do not possess all the characteristics necessary for an English negotiable instrument. Examples of fully negotiable instruments are: Bonds payable to bearer, Scrip payable to bearer, Share Warrants payable to bearer, Exchequer Bonds, East India Bonds, Treasury Bills. Modern commercial conditions have necessitated an enlargement of the number of fully negotiable instruments, and a recognised mercantile custom to treat a particular class of instrument as fully negotiable has been held to warrant judicial recognition of their negotiability. Thus, in an action brought in 1898 regarding an English trading company's debentures payable to bearer, proof of mercantile custom to treat these instruments as negotiable was adduced. It was held that this evidence was sufficient to place such debentures in the class of recognised negotiable instruments. Indeed, it is considered that "the time has now passed when the negotiability of bearer bonds, whether Government or trading, foreign or English, can be called into question in the English Courts" (Hart's *Law of Banking*, 4th edition, p. 940).

3. *Estoppel.*—When one person either by words or by conduct induces another person to a course of action, the person inducing the course of action may be *estopped*, i. e. precluded, from making any claim that is not consistent with what he has said or done. The famous judge, Lord Blackburn, has put the doctrine of estoppel very clearly: "When a person," he said, "makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me of the essence of justice that between these two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action, and that is what I apprehend is meant by estoppel."

By the application of this doctrine of estoppel, instruments, which from their nature are not, strictly speaking, negotiable, may become so in particular cases, because the issuer or a holder may be precluded from denying their negotiability in order to make void a transfer effected without his authority. But acquirement of a title by estoppel can only be effectual when the instrument itself, on the face of it, purports to be transferable, either by delivery or by indorsement and delivery. When such an instrument is entrusted to a broker or agent, who is instructed to deal with it in a market where its negotiability is recognised, the agent's principal will be estopped from denying its negotiability against a transferee who has taken it *bona fide* and for value, even though, when dealing with the instrument, the agent went beyond his authority, and perpetrated a fraud on his principal. Or again, if a company issues a debenture described on the face of it as being payable to bearer, the company may be precluded from denying the rights of a *bona fide* transferee as against any claim that the company might have been able to enforce against the previous holder. This title by estoppel is sometimes called "negotiability by estoppel," but this term is likely to be misapprehended. An instrument, not generally recognised by mercantile custom as negotiable, cannot become generally negotiable merely because a particular person, in a particular transaction, by his acts or conduct, is precluded from denying that he represented it to be a negotiable instrument. The instrument has simply acquired the qualities of a negotiable instrument during this particular transaction, and may not retain those qualities outside this transaction.

4. *Good faith.*—When a banker takes as security fully negotiable instruments, and the customer who pledges them is not entitled to do so, the banker has no right to the securities, unless he has taken them in good faith and for value. He takes them for value if he expressly or impliedly agrees to do or not to do something which would be sufficient to induce the customer to deposit the security. For example, forbearance on the part of the banker to sue for a debt already incurred is a sufficient consideration. Whether the banker takes the securities in good faith or not is a question of fact depending on the circumstances of the individual case. Mere negligence in taking the negotiable security will not deprive the banker of his rights, but " negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of *mala fides.*" For example, the mere fact that the customer who pledges the negotiable securities is a stockbroker or other person acting as an agent does not, of itself, put the banker on inquiry as to whether the stockbroker or agent has exceeded his authority in pledging the securities (*London Joint Stock Bank* v. *Simmons*, 1892). But if the circumstances are such as to raise an atmosphere of suspicion, then the banker is bound to satisfy himself that the stockbroker or agent is acting within the scope of his authority. Again, suppose that the banker's suspicions being aroused, he questions the stockbroker or agent, and the answers given are sufficiently good to satisfy an ordinarily prudent man as to the agent's *bona fides*, then, whether the agent is speaking the truth or not, it would appear that the banker cannot be deprived of his right to the negotiable securities.

5. *How charged.*—Mere deposit of a fully negotiable security gives the banker a complete title, but it is the practice to take a memorandum of deposit showing the purpose of the deposit, and containing a clause giving the banker a power of sale in case it should be necessary to realise the security. Bearer bonds must have the coupons attached to them, for deposit of the bonds without the coupons is not a good delivery on the Stock Exchange. Neither should the coupons be deposited without the relative bonds.

6. **Non-Negotiable Securities.**—Mere deposit of non-negotiable securities gives the banker an equitable title only, which may be postponed to a prior equitable title, such as that of a *cestui que trust*, unless before notice of the prior title, the banker gets the legal estate by having the securities transferred either into his own name or into the names of his nominees.

Shares may be fully paid or partly paid, but stock from its nature must be fully paid. Fractions of a share cannot be transferred, but fractions of stock, subject to the particular company's stipulations as to division, may be transferred. The term "Scrip" is often loosely applied to all kinds of Stock Exchange securities, but a Scrip Certificate, "Scrip" for short, is really a document issued by a company or its promoters, or by the agents of a government issuing a loan, entitling the person named, or the holder, to become the proprietor, on payment of the instalments due, of the shares, debentures or bonds named in the scrip certificate. Scrip is usually given in exchange for the letter of allotment upon payment of the instalment due on allotment. When all the instalments due are paid, the scrip is exchanged for the share, bond or debenture certificate. Whether the scrip is a negotiable instrument or not depends upon prevailing mercantile custom and the form in which it is drawn.

Non-negotiable Stock Exchange securities are of two classes. (1) Inscribed, and (2) Registered.

7. *Inscribed Stocks.*—Inscribed stocks are so called because the holders of these stocks and the amount of their holdings are "inscribed," *i. e.* recorded, in the books of the particular bank through which all dealings in the stock are transacted. The holders do not receive a certificate of title but merely a "stock receipt" for the purchase money. This stock receipt has no value, except as a memorandum, and need not be produced when the stock is sold. To this class belong Consols, other British Government Funds, and many Corporation Stocks and Colonial Government Securities.

8. *How a Security is Effected.*—Since the only evidence of title is the record in the registering bank's books, a banker can only effect a security on Inscribed Stocks by having them transferred into his own name or into the names of his nominees. Such transfers must be made in person, or by power of attorney, at the Stock Transfer Office of the registering bank. Certain Government Inscribed Stocks, in the hands of the Bank of England and the Bank of Ireland, may be exchanged for Stock Certificates to bearer, with coupons for the payment of interest attached. Certificates similar to those ordinarily issued by joint stock companies are now issued for certain Government Stocks, which are then transferable by deed in the usual way. This applies to Consols, Local Loans Stocks, Irish Guaranteed Land Stocks and 2½ per cent. and 2¾ per cent. Annuities. The various War Loan

Stocks were issued either as Inscribed or registered Stock. Where either of these methods of dealing with Inscribed Stock is possible it may be advisable for the banker to take advantage of them when accepting such stock as cover for an advance.

9. *Registered Securities.*—This class includes nearly all the securities issued by Joint Stock Companies, except Debentures and Share Warrants payable to bearer.

A certificate is *prima facie* evidence only of the holder's title to the property represented by the certificate, but the company is estopped from disputing the right of a *bona fide* holder for value to be registered.

10. *How a Security is Effected.*—Certificates of registered shares, being non-negotiable instruments, are more appropriately secured by mortgage than by pledge. The mere deposit of certificates will constitute an equitable mortgage. By s. 101 of the Companies Act, 1929, "no notice of any trust, expressed, implied, or constructive, shall be entered on the register [of stocks and shares] or be receivable by the registrar in the case of companies registered in England" [not Scotland]. There is a similar provision in the Companies Clauses Consolidation Act, 1845, which Act affects joint stock companies incorporated under a special Act of Parliament. Hence a certificate of stocks or shares in companies affected by these Acts is evidence only of the legal title, and bears no reference to any equitable interest. If any equitable interest does exist, the banker may be postponed to the prior equitable interest, unless he has, before notice of such interest, had the shares registered in his own name, or in the names of his nominees.

As stated above, the banker may obtain an equitable title by mere deposit of the certificate, or a legal title by having the shares transferred into his own name. In either case, it is desirable to take an agreement. If the shares are not registered in his own name, the banker should take a completed transfer, though, sometimes, a "blank transfer" is taken. Notice is usually given to the company which issued the shares, though in certain cases this is waived. The relative merits and demerits of these methods of effecting a security are treated below.

11. *The Agreement and Transfer.*—The agreement or memorandum of deposit usually taken must bear the same date as the transfer and should contain a clause giving the banker a power of sale in case of default, and where the shares are partly paid up a clause authorising the banker to pay any call and debit the

customer with the amount. If partly paid up shares belonging to a third party are deposited, the customer should authorise the banker to debit his account with any calls necessary to protect the security. An agreement under hand must have an adhesive stamp or stamps (value 6*d.*) signed over by the first signatory, or an impressed stamp placed on the document within fourteen days after execution. An agreement under seal requires an *ad valorem* stamp at the rate of 2*s.* 6*d.* per cent. (to be impressed within thirty days). An agreement should be taken even if the shares are registered in the bank's name. (See Appendix, p. 482, for forms of agreement and transfer.)

Most companies accept the stereotyped form of transfer obtainable from law stationers, but some companies require the transfer to be executed on special forms supplied by themselves. The transfer must be impressed with a 10*s.* stamp within thirty days of execution, and a nominal consideration of 5*s.* or 10*s.* should be inserted in the body of the document. If some of the shares covered by the transfer are sold, a new transfer should be obtained. All transfers, even if it is not intended to register them except as a last resource, should be properly completed and executed.

12. *Legal Title.*—What has to be done to acquire a legal title to registered stocks and shares depends upon the provisions in the Act governing the particular company, and also the provisions in the Articles of Association of that company. If the Articles do not provide for any special mode, then Art. 17, Sched. I, Table A, Companies Act, 1929, governs the procedure. This says : " The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof." In companies, therefore, governed by this or similar regulations, a complete legal title cannot be acquired until registration or, at any rate, until the transferee has " as between himself and the company a present absolute and unconditional right to have the transfer registered " (Lord Selborne in *Société Générale de Paris* v. *Walker*, 1885). To be valid, the registration must be effected before either the company or the transferee has notice of a prior equitable title. A banker, who takes trust property in the shape of stocks or shares from a trustee to cover an advance made to him for his own benefit, will have priority as against the equitable interests of the beneficiaries, provided that the banker took the stocks or shares in

good faith and for value, and had them registered in his own name before receiving notice that the securities were, in fact, trust property. Otherwise the prior equitable title of the beneficiaries will take precedence (*Coleman* v. *London County and Westminster Bank*, 1916). The dividends on securities registered in the bank's name or in the names of its nominees must be paid over to the depositor of the shares, and to assist the allocation of the dividends, as and when received, a book should be kept, showing in a convenient form the real owners of all stocks and shares held by the bank in this way.

13. *Risks of Registration.*—Though essential for the banker's complete protection, registration has its risks. In the case of partly paid up shares, the registered holder is liable for any calls, and his contingent liability to the company does not expire until one year after he has disposed of the stocks or shares by re-transfer to the borrower, or by sale. Where, therefore, the shares are partly paid up, bankers do not have them registered in their own names or in the names of their nominees, but hold the certificates with a completed or blank transfer. A difficulty arises if the banker wishes to sell the security and the borrower will not assist, as by registering himself in order to sell, the banker, as a contributory, becomes contingently liable for a year, if the person to whom the shares are sold is unable to meet the calls. Again, since a transferee warrants to the company that the transfer is a genuine one, the banker, as transferee, is liable for an indefinite period to indemnify the company for any loss incurred by them if the transfer proves to be a forgery. And this liability continues even after the banker has sold the shares (*Sheffield Corporation* v. *Barclay*, 1905). To avoid the latter risk, all transfers should be signed at the bank, and by all the parties interested where the stocks or shares are the property of joint holders.

14. *Risks of Non-registration.*—The chief risk is that the banker's equitable title may be postponed to a prior equitable title, such as, for instance, a trust. Possession of the certificates and a duly executed transfer, accompanied by an agreement or memorandum of deposit, added to the fact that he has given notice of lien to the company (see *post*), puts the banker into a reasonably safe position against any subsequent equitable mortgagee. Moreover, the completed transfer enables the banker to become registered at any time he chooses to do so. The banker's title is that of an equitable mortgagee, and is not affected by the death or bankruptcy of the customer, and this is so even if he has no agreement or transfer,

and no notice of lien has been given by him to the company. (See also "Notice in lieu of *distringas*," *post.*)

15. *Notice of Lien to Company.*—Whenever a banker holds an equitable charge on shares, *i. e.* has not become the registered holder, he should send a notice of his lien to the company. As many companies do not make a practice of acknowledging such communications, the notice should be sent by registered post so as to enable the banker to prove sending it if necessary. The notice should be sent in duplicate with a request that the company should indorse and return the duplicate. Notice of lien does not affect the banker's equitable title and does not obtain for him priority over a prior equitable title, for in equitable charges on stocks and shares, the older equity is always the better, but notice should nevertheless be sent in case the company itself has a lien on the shares (as by their Articles or by Table A (Articles 7–10), Companies Act, 1929, they may have) for debts due to them by the shareholder (see "Company's Lien on Own Shares," p. 184). This will secure priority for the banker over any future advances made by the company to the shareholder. Notice is also advisable in order to prevent any possibility of fraudulent dealing with the certificates on the part of the mortgagor. For instance, the company may have knowledge that the shares are trust property, and notice of lien may bring this to light, or the company may have knowledge of a prior mortgage.

The following is a suitable letter—

..... Bank Ltd.
Date.

To the Secretary
..... Co., Ltd.,
.....

DEAR SIR,

We hereby beg to give you notice that we have a lien on the ..... shares in your Company standing in the name of ..... of ..... and numbered .....

Kindly sign and return to us the enclosed duplicate notice and at the same time be good enough to say whether you have received notice of any prior charges on the above shares.

Yours faithfully,

.....
Manager.

On the enclosed duplicate is indorsed the following certificate—

We hereby acknowledge having received a copy of the above notice and beg to state that we have not received any notice of a prior charge upon the shares.

per pro. ..... Co., Ltd.,

..... Secretary

If notice of lien is given, notice of withdrawal should also be sent when the securities are re-transferred.

16. *Notice in Lieu of Distringas.*—Formerly when any person, such as an equitable mortgagee, claiming to be interested in any stocks or shares standing in the name of another person, wished to restrain the company from transferring the stock or shares, he issued a *Distringas*. By the Rules of the Supreme Court, 1883, this procedure was abolished, and a claimant must apply to the Central Office of the Supreme Court of Judicature for " a notice in lieu of *distringas* " restraining the company from transferring the shares or paying any dividends thereon. If while this notice is in operation " the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company shall not, by force or in consequence of the service of the notice, be authorised, without the order of the Court or a judge, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request." From this extract from Rule 10, it will be seen that, after serving the notice the equitable mortgagee is entitled to an eight days' notice of any intended transfer, and if he wishes to preserve his interest in the security, must proceed at once to obtain a restraining order from the Court, or an injunction in a suit against the person in whose name the shares stand, otherwise the company must carry out their shareholder's request.

17. *Blank Transfers.*—A blank transfer is one lacking in some particulars necessary to make it a complete document, such as the transferee's name. If the date is inserted, it must be stamped within thirty days. The delivery of a blank transfer conveys an authority to fill up the blanks, and if the mode of transfer in the particular case may be by a writing under hand, then the banker can afterwards fill up the blanks, and the document will operate as a legal transfer. But if the transfer must be by deed, *i. e.* a document signed, sealed and delivered, as in the case of companies whose procedure is governed by the Companies Clauses Consolidation Act, 1845, or companies whose Charter or Articles of Association require a special form of transfer by deed, then the delivery of a blank transfer with the certificates does not pass the legal title. A deed to be valid must be complete in form at the moment of delivery, and cannot be validly completed afterwards

without re-delivery by the transferor in the presence of all parties, in which case, it takes effect from the date of re-delivery. Accordingly, if the banker, where re-delivery was necessary, had completed the blanks himself and had got himself registered, his title would still be subject to any prior equitable rights. If, therefore, the mode of transfer is by deed, as with most companies, a blank transfer should not be used.

18. *Deposit Without Transfer.*—A banker may elect to rely for security upon the equitable rights conferred upon him by a deposit of the certificates without a transfer. If the borrower defaults, the banker can call upon him to fulfil his implied obligation to effect a legal transfer of the stock or shares to the banker or his transferee. Should the borrower refuse, the banker must make application to the Court for an order for transfer and foreclosure or sale. He can also issue a notice in lieu of *distringas* (see *ante*), followed by an injunction preventing a fraudulent transfer by the mortgagor. The bankruptcy of the mortgagor does not affect the rights of the banker as equitable mortgagee. From the foregoing it will be seen that mere deposit without transfer has its disadvantages in the event of the borrower's default. It should be noted that mere deposit with a memorandum giving the banker a power of sale does not enable a banker actually to sell; to sell he must have a legal transfer. If he has no transfer he must apply to the Court for a power of sale.

19. **American Share Warrants.**—Some certificates are of a hybrid nature, being registered and deliverable to bearer. The system was first used by American Railways, but it is now largely favoured by other American and Canadian concerns. On the face of the certificates is the name of the registered holder and a statement that the shares are transferable only by him in person or by attorney. On the back is a combined form of transfer and appointment of an attorney. This form is signed in blank by the registered holder, and enables the certificate to be passed from hand to hand until it reaches a holder who desires to be registered. But though passing by mere delivery, these certificates have been held not to be negotiable in this country, since the holder, unless registered, cannot sue in his own name. The dividends are payable to the registered holder and have to be claimed from him by the actual holder, who always has the risk of finding that an attachment or *distringas* has been placed on the shares, and that verification of

the transferor's signature may be necessary in the event of his death before the actual holder has registered. When, therefore, these shares are taken as security, they should be registered in the actual holder's name, or in a recognised "market name," and should not be accepted unless transferred in blank by the registered holder.

20. **Realisation.**—The memorandum signed by the mortgagor usually has a clause giving the banker power of sale, but, apart from any such provision, mere deposit of the certificates implies a power of sale on default. In the absence of express stipulation as to the precise date of repayment, notice demanding repayment at a reasonable future date must be given before exercising the power of sale. A month's notice, or even less, would appear to be reasonable. Even when not legally necessary, the banker should give notice before exercising his right of sale. If the banker has taken a legal mortgage not explicitly giving him a power of sale, he must by s. 103, Law of Property Act, 1925, give the mortgagor three months' notice before selling, or interest must have been in arrears for two months.

21. **Statute of Limitations.**—It has been held that where a banker had an equitable mortgage on stocks and shares, the banker's remedy against the securities was still enforceable, notwithstanding that the remedy against the debtor himself was barred by the Statute (*London & Midland Bank* v. *Mitchell*, 1899).

22. **Debentures.**—A debenture is a document issued by a company acknowledging the indebtedness of the company either to the bearer or to the registered holder of the document. The debt due may be redeemable, (*a*) at a fixed future date, or (*b*) by periodical drawings, or (*c*) not redeemable while the company is a going concern. The last class are called Irredeemable Debentures. The loan is subject to a fixed rate of interest payable at stated periods. A debenture contains, either expressly or impliedly, a mere promise to pay; or a promise to pay fortified either by a mortgage of definite property belonging to the company, or by a "floating charge," *i. e.* a charge on all the property in possession of the company at any time. The person advancing money to a company on a debenture is a creditor of the company, not a shareholder, and ranks with the ordinary creditors if the debenture is not secured upon the whole or part of the company's property.

Any debenture secured by a charge, whether specific or floating, upon the company's property is called a Mortgage Debenture.

Where there is a charge on some specific part of the company's property, the mortgage debenture is often supported by a trust deed, which gives a legal mortgage in favour of trustees over that part of the company's property for the benefit of the debenture holders, with a power to sell the property charged, if that should be necessary.

A floating charge, on the other hand, is "an equitable charge on the assets for the time being of a going concern; it attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may be suspended by agreement, but if there is no agreement for suspension, he may exercise his right whenever he pleases after default."—Lord Macnaghten in *Government Stock Co.* v. *Manila Railway Co.*, 1897. While the equitable charge "floats," or, in Lord Macnaghten's words, "remains dormant," the company may deal with the property in any way it pleases. It may even create a specific mortgage over the property which will have priority over the floating charge. But when the company defaults in the payment of interest or goes into liquidation, the security no longer "floats" but becomes "fixed," and the debenture holders can step in and enforce their security, and are entitled to be paid out of the assets of the company as they stand in priority to the general creditors of the company.

The holders of a floating charge were formerly liable to the risk of losing their priority, even though the floating charge purported to be a first charge on the undertaking and the debenture contained a clause in which the company undertakes not to create any charge ranking in priority of the debentures. Now however, the registration of the debentures under s. 79 of the Companies Act is equivalent to registration under the Land Charges Act, 1925, and registration under this Act is deemed to be actual notice to all. Hence, it would appear that the danger mentioned above should no longer exist. On the other hand, a banker proposing to take a specific charge on any of a company's property should scrutinise carefully the terms of any existing debenture issues. In addition to inspection of the Register of Charges under the Companies Acts kept at Somerset House, if the land is registered land, search should be made at the Land

Registry, and if it comes within the Middlesex or Yorkshire areas, then their respective registers must be searched.

Debentures are choses in action. A *chose in action* is a " thing " to which a person has a right and can enforce that right by action in a court of law, but he does not actually have possession of the " thing." Choses in action are not assignable at common law but *prima facie* only in equity. " 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 " (Lord Cairns in *Ex parte Asiatic Banking Corporation*, 1867).

The answer to the question whether debentures are assignable free from equities or not, depends upon the form and general tenor of the documents. They are *prima facie* assignable free from equities, *i. e.* are negotiable instruments, if they are, when first issued, made payable to bearer without naming any payee, but not when payable to a registered holder. In the latter case, the difficulty is obviated by the inclusion of a condition in the Debenture Bond that " the principal moneys and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder " (see Appendix, p. 484). This condition would stop the company from setting up any such equities against a *bona fide* transferee for value. But if, as in the form of Debenture given in the Appendix, the benefit of the debenture belongs to the registered holder for the time being, then a transferee takes the debenture " subject to equities " until such time as he is duly registered.

A banker taking debentures as security should ascertain whether the debenture merely promises to pay the sum named—often a dubious kind of security—or includes a charge over the company's property, and also whether the company has (1) power to issue debentures, (2) what limit has been fixed, if any, (3) whether the debentures have been duly registered, and if assignable free from equities or otherwise. Another very important matter is that of the nature and value of the assets behind the debentures. Balance sheets should be called for regularly and carefully scrutinised and compared. (See " Borrowing by Companies," p. 258.)

CHAPTER V

LIFE POLICIES

1. **General Considerations.**—The assignment—legal or equitable—of a life assurance policy is a very general form of security for an advance up to the surrender value of the policy, and is, moreover, a security that increases in value the longer it is held. It is also useful as a supplementary security, because in the event of the borrower's death, part or the whole of the debt is liquidated as soon as the policy moneys are paid over by the insurance company. If the borrower has a fixed income terminable at death, or has merely a contingent interest in property, the taking of a policy on the life of the borrower is a necessary precaution that no prudent banker should neglect.

As a general rule, there is no surrender value on a policy until three full premiums have been paid on it. The surrender value depends on the age of the assured and the duration of the policy, and is greater on policies of long duration and on lives where the age is considerably advanced than on those of short duration and on young lives. The surrender value has no direct connection with the number of premiums paid, though it increases—and at a more rapid rate—with the payment of each successive premium. The actual surrender value can always be ascertained from the company.

A banker who has accepted a life policy as security for an advance should get the age of the assured admitted by the company, because the insurance company usually make a condition that, in the event of the age being incorrectly stated, they shall, before paying upon the policy, have the right to adjust the sum assured. The banker should also see that the premiums are duly paid within the days' grace usually allowed. Some policies, however, are "Paid-up," in which case no further premiums are payable.

A policy may be effected on a person's own life, payable at

death or after a term of years, or in the case of persons such as partners, having an insurable interest in one another, a joint policy may be effected payable on the first death. Another kind, called a "Last Survivor Policy," may be effected on two or more lives, and payable on the death of the last survivor. Another form is an "Endowment Assurance Policy," which is a combination of a "Term Policy" and a "Pure Endowment Policy," that is to say, the sum assured is payable if the assured die before a specified age, *or* if he survive to that age.

By the Married Women's Property Act, 1882, s. 11, it is provided that "a married woman may . . . effect a policy on her own life or the life of her husband for her separate use," and further that "a policy effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts." The most usual form of policy issued under this Act is one effected by the husband for the benefit of his wife only, and *vice versa*, and without appointment of a trustee. This is the only policy under the Act that is a fit subject of mortgage, the husband and wife being jointly capable of dealing with it in any way they please.

2. *Validity of the Policy.*—A contract of life assurance is a contract *uberrimæ fidei*, that is to say, the "utmost good faith" is required on the part of the assured, who must, when applying for the policy, disclose all material facts within his knowledge affecting the life. Non-disclosure of a material fact may avoid the policy. "Probably a material fact means for this purpose a fact such that its concealment makes the statement actually furnished, though literally true, so misleading as it stands as to be in effect untrue" (Pollock, *Principles of Contract*, 8th edition, p. 566 *n.*)

Formerly, suicide invariably avoided the policy, but nowadays, while some few companies make no restriction whatever against death by suicide, others limit such restrictions to thirteen months, after which the full sum assured is payable, no matter what the cause of death may be. If the policy has been assigned for value

to a third party, or was originally effected by a third party on the life of the assured, the suicide clause is no longer applicable. If the policy is taken out by a third party, the policy will be void (Gambling Act, 1774) unless the third party has an insurable interest, which must be a pecuniary one, in the life of the assured. A creditor has such an insurable interest in the life of his debtor, so also has a wife in the life of her husband, and a husband has an insurable interest in the life of his wife (*Griffiths* v. *Fleming*, 1909). But, save in exceptional circumstances, a father has not an insurable interest in the life of his son, or a son in the life of his father.

3. **Equitable Mortgage.**—This is a very simple and inexpensive way of taking a life policy as security for an advance All that is necessary is a deposit of the policy, together with a written undertaking on the part of the borrower to assign the policy, if and when called upon to do so. Whether this memorandum should be under hand or under seal will depend on circumstances. If under hand, the banker has to face the risk of the borrower refusing to carry out his undertaking to assign, in which case considerable trouble and expense might be incurred in realising the security. If under seal the banker would have a power of sale by s. 101 of the Law of Property Act, 1925. An equitable mortgage of a life policy has this advantage over a legal mortgage, that when the advance is repaid no formal re-assignment of the policy is necessary. All that is required to re-establish the title of the assured is a letter from the bank to the insurance company stating that the bank has no further claim on the policy. It should be noted, however, that there are some disadvantages to this method of taking a charge over a life policy. The mode of realisation, if the equitable mortgagor does not assist, is very cumbrous, and as such a charge is not within the provisions of the Policies of Assurance Act, 1867, the lender cannot sue the company in his own name, but will require the mortgagor's assistance. The lender must be careful to retain possession of the policy, particularly if no notice is given to the company.

4. **Legal Mortgage.**—From the banker's point of view, the more fitting way of taking a life policy as security is by a deed assigning it to the bank by way of mortgage, subject to a proviso for redemption. The deed should contain a covenant stipulating that the premiums shall be punctually paid by the owner of the policy, and giving the banker power to pay and

power to debit the debtor's account, in the event of non-payment by the owner (see Appendix for specimen form of mortgage).

Under s. 107, Law of Property Act, 1925, a mortgagee has full power to give a valid receipt for any money payable either for the sale or the surrender of the policy without the mortgagor's concurrence, but it is usual to include such a provision in the deed.

All parties having an interest in the policy must sign the deed of assignment. If the policy taken out by the assured is expressed on the face of it to be for the benefit of his wife, then the wife must concur in the charge when it is executed; and if any or all of the children are included, then all those expressed to benefit must also sign. If any of the children interested are under age the policy is not assignable, as a minor has no power to assign.

5. *Stamp Duty.*—The stamp duty on an assignment under seal, whether legal or equitable, is 2*s.* 6*d.* per cent., and on a re-assignment (if a legal mortgage) 6*d.* per cent. For an assignment under hand the duty is 1*s.* per cent. The stamp may be of an amount just to cover the actual surrender value of the policy at the date of assignment, but, as a general rule, it is better to stamp for the whole sum payable under the policy, plus an amount covering any bonuses accruing (see also Stamp Duties under Title Deeds, Chapter VI., s. 35). It is essential that all documents of charge against a policy, including previous mortgages, assignments and re-assignments, duly stamped, should be preserved, because they form part of the title to the policy, and insurance companies, as a rule, require that they shall be produced before any moneys due under the policy are paid over.

With regard to previous charges, the company, when the notice explained in the next paragraph is given, will detail all previous dealings of this nature, so that the banker can see that he has all the relative documents.

6. *Notice of Assignment to Company.*—Under the Policies of Insurance Act, 1867, the banker, immediately the deed is executed, should give written notice to the insurance company at their principal office. The notice should be sent in duplicate with the statutory fee of not exceeding 5*s.* The giving of notice is most important. Until notice of the banker's interest is received by the company, the policy holder may surrender or deal with the policy, and the banker cannot sue in his own name. The following is a suitable form—

..... Bank, Ltd.
Date.

To the ..... Insurance Co., Ltd.,
.....

GENTLEMEN,

I hereby give you notice that, by a Mortgage dated the ..... day of ..... 19 , ... of ....., whose life is assured by Policy No..... in your Society, did assign the said Policy to the ..... Bank, Ltd.

Kindly acknowledge the receipt of this notice and inform me whether you have received notice of any previous charge on this Policy.

I enclose postal order for ..... in payment of the Registration Fee.

I am, Gentlemen,
Yours faithfully,

.....
Manager.

The company, in consideration of the fee, must stamp the acknowledgment of the receipt of notice on the duplicate form and return it to the banker. By s. 3, Policies of Insurance Act, 1867, the date on which a notice of assignment is received by the insurance company regulates the priority of all claims under any assignment. In a decision on this point, Mr. Justice Parker laid it down that in the case of policies of assurance, the priorities of equitable incumbrances are determined, in default of their gaining priority by giving notice, by the order of the dates of their charges, and added "that a mortgagee who gives such a notice cannot thereby gain priority in charge over an incumbrance, prior in point of time, of which he had actual or constructive notice at the time he advanced the money."

There is an exception with regard to this rule of priorities, for it has been held that a Trustee in Bankruptcy, who serves a company with notice of his claim, cannot get priority over an assignee for value, even though the assignee for value has failed to give notice to the company. This is so because a Trustee in Bankruptcy is regarded as a statutory assignee, and not as an assignee for value, and as such he takes over the debtor's property subject to all equities in existence at the time.

7. **Industrial Policies.**—These are of no value as a banker's security, for, apart from the fact that many of them are not capable of being assigned, mortgaged or sold, without becoming void, they are affected with numerous conditions which make them quite unsuitable for the purpose of covering an advance.

CHAPTER VI

TITLE-DEEDS

1. Definition of Land.—The word "land" as a legal term comprises not only the surface of the soil, but everything above, including water, and everything below it. The term also comprises all buildings erected on the land, all timber and other vegetable products growing upon it, and all mineral and other deposits embedded in it, and many kinds of rights connected with land, such as rent charges, rights of way and other easements and rights of pasturage. But this comprehensive meaning of *land* may, in deeds and other instruments, be subject to many express or implied qualifications; for example, where the contract shows that the land is spoken of as distinct from the buildings upon it, or where the grantor reserves the mineral rights when granting an estate in his land.

2. **Tenure Generally.**—In theory all land in England is held by tenure from the Crown. In other words, the Sovereign is the absolute owner and lord paramount, and any subject possessing land is merely a *tenant, holding* an *estate*, i. e. an interest in the land. This theory is a relic of the Feudal System, not, strictly speaking, introduced, but definitely established in this country by William the Conqueror. Under this System, the estate of a tenant of land was known as a *fee*, literally, a reward for services rendered. Land might be held in several ways, sometimes immediately from the King, and sometimes mediately through a mesne—*i. e.* a middle—lord. The chief ways of holding land were:—

(1) By military or other service fit for a free man to perform. The military service was afterwards commutable by money payment, called *scutage*. This kind of tenure became known as *freehold*.

(2) By villein or base service (*e. g.* tilling the lord's land), sometimes defined and sometimes undetermined, but always of that kind fit only for an unfree man. This tenure in

villeinage, so termed because it was the tenure under which the villeins of feudal times held their land, became extinct in time, but its essentials were continued in what is known as *copyhold tenure*, so called because the tenant's title to the land was evidenced by a copy of the entry in the book of the Manor Court relating to his holding.

(3) For a term of years. This tenure developed into what is known as leasehold tenure.

Originally only the freeholder had the right to recover possession of his land by process of law. The tenant in villeinage was deemed to hold his land at the will of his lord, and no specific claim in the King's Court for recovery was allowed; neither could the "termor," if ejected, recover his land, but only damages, and that only if he held the land by deed.

The fact that, under early feudal law, freehold property was the only kind of property that could be recovered in a court of law accounts for it being called *Real property*. "Real" as a term of English law does not mean the opposite of "fictitious," but connotes that which is capable of being restored specifically to the rightful owner by the power of the law. All other interests in land were known as *chattels real*, so called because they had some of the characteristics both of personal property (chattels) and of real estate.

After the lapse of years both the copyholder and the lessee for a term of years were enabled to claim the full protection of the law. By legislation prior to 1926 copyhold tenure, as regards the extent of the holder's interest, had become partially assimilated to a freeholder's interest, and was held to be part of a man's real estate. Leaseholds, however long the terms, had never reached this dignified position (though the principle of enlarging long terms into freeholds was introduced in 1881), and were still regarded, like all movable goods, as personal property. The benefit of a mortgage was also personal estate.

Formerly, the chief distinction between real and personal property was that a man had no power over the disposition of real property after his death. It descended to his heir at law. This distinction was finally abolished by an act of Charles II; other modifications in the procedure were made by the Land Transfer Act, 1897, yet even until 1926, if a man possessing real and personal estate died intestate, the real estate went to his heir at

law, while the personal property was divided amongst his "next of kin" according to the Statutes of Distribution (now superseded by the Administration of Estates Act, 1925). By the latter, which came into force on the 1st January, 1926, this distinction between real and personal property was at last abolished, except in three cases of little importance, and movable and immovable property now devolve on the death of the owner intestate in the same way.

3. **New Property Acts.**—Fundamental changes in the law were made by the following Acts, which came into force on 1st January, 1926—

Law of Property Act, 1922 (part).
" " " " 1924 (part).
" " " " 1925.
" " " (Amendment) Act, 1926.
Settled Land Act, 1925.
Land Charges Act, 1925.
Administration of Estates Act, 1925.
Trustee Act, 1925.
Land Registration Act, 1925.

Some modifications and amendments which have been found necessary in practice have been made by the Law of Property (Amendment) Act, 1926, which was passed on the 16th June, 1926, but which, with two exceptions, is deemed to have come into force on the same date as the other Acts. There is also the Law of Property (Amendment) Act, 1929.

The Law of Property Act, 1925, is referred to in the following pages as L.P.A., the Land Charges Act, 1925, as L.C.A., the Land Registration Act, 1925, as L.R.A., and the Law of Property (Amendment) Acts, as L.P.(A.)A., 1926 or 1929, respectively.

With the exception of certain sections of the Trustee Act, the above statutes apply only to England and Wales. They are designed to assimilate and amend the law of Real and Personal Property, to abolish Copyhold and other special tenures, and to amend the law of Intestacy. It is hoped that the changes will simplify conveyancing and cheapen the transfer of landed property. The new legislation makes many changes, and the preceding section of this chapter has been included as an introduction to the subject, and as being of considerable historical interest. The real property law of this country is a very difficult and technical subject, and, prior to these statutes, was dependent on a large

number of statutes, quite apart from the mass of precedents which form the basis of the Common Law and which date back to feudal times, when the accomplishments of reading and writing were comparatively rare, and land was the most important form of wealth. It will be a great advantage to have the Statute law on the subject collected in a few Acts, but the transition from the old law to the new will take many years, during which conveyancers and those dealing with these matters will need to know both systems. A system of compulsory registration of titles exists in many countries, but though voluntary registration has been in existence in this country for over 50 years and the compulsory system has been applied to London since about 1900, it has met with little success, and it now remains to be seen whether gradually the area of compulsory registration under the Land Registration Act will be extended in preference to the system of private conveyancing which it is hoped will be simplified by the new Statutes. From the nature of the subject, it is not possible to make the purchase and sale of land as simple as that of stocks and shares, but registration of titles is an attempt to make it as simple as possible, and should be cheaper and more secure than unregistered dealings.

With regard to the latter, the main purpose of the new statutes is to make the transfer of land more simple and hence more economical, combined with greater security. As already stated, this is brought about by changes in the law relating to real and personal property, the abolition of copyhold and other special tenures, and the amendment of the Settled Land Acts, Trustee Acts and Conveyancing Acts. The result is that there are now two systems, namely, conveyance with registration and conveyance without registration, subject in the case of the latter to the registration of certain interests and charges, the regulations for which are consolidated in the Land Charges Act. Registration with regard to many interests and rights in land is now an important feature of Conveyancing.

The New Acts have greatly increased the importance of the old distinction between what are known as "legal estates" and "equitable interests." This distinction is bound up with the history of English Law, and dates from the time when there were two systems of jurisprudence, known, respectively, as Common Law and Equity, and administered by different Courts.

A legal estate or interest was one enforced by the Common Law Courts against all the world. The Courts of Equity, however, not only recognised these estates and interests, but also enforced against the owner of the legal estate other estates and interests which the Common Law refused to recognise. Thus the estate of a Trustee of land was a "legal estate" good against the world at law, but Equity insisted that the Trustee should hold his estate for the benefit of the beneficiary under the trust, who was thus recognised as having an "equitable interest" in the land. The chief difference in the distinction now is that the purchaser (which term includes a mortgagee) of a legal interest generally cannot be postponed to an owner of an equitable interest of which he had no notice at the time of the purchase, while the purchaser of an equitable interest will be postponed to any prior interest legal or equitable which existed at the time of purchase. This subject is dealt with at greater length later. Every equitable interest must be attached to a legal estate or interest upon which it may operate. The basis of Conveyancing has always been the legal estate, and one of the methods of simplification introduced by the new law is the curtailment of the number of legal estates and interests coupled with a system of keeping equitable interests off the title or allowing them to be expressly overridden. Thus by s. 1, L.P.A. there are but two estates in land capable of subsisting or of being conveyed or created at law, *i. e.* "legal estates," namely—

(*a*) An estate in fee simple absolute in possession (freehold tenure).

(*b*) A term of years absolute (leasehold tenure).

There are also (s. 1, (2) L.P.A.) certain interests or charges which are capable of subsisting or of being conveyed or created at law, *i. e.* "legal interests or charges," namely—

(*a*) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute, *e. g.* rights of way, drainage or lights.

(*b*) A rent charge in possession issuing out of or charged on land being either perpetual or for a term of years absolute, *e. g.* charges created by deed or Act of Parliament

(*c*) A charge by way of legal mortgage.

(*d*) Land tax, tithe rent-charge, and any other similar charge on land which is not created by an instrument.

(*e*) Rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rent-charge.

All these estates, interests, and charges (when subsisting or conveyed or created at law) are "legal estates," and the owner thereof is an "estate owner." A legal estate may be defined as an interest in land specially recognised and protected at law.

All other estates, interests and charges over land can exist only as "equitable interests."

The object of reducing the number of legal estate owners was to clear the title to land by limiting the number of interests which can exist at law, and which will affect a purchaser with or without notice of them. An increased number of other interests can exist, but only in equity, and, as such, will not generally affect a purchaser of the legal estate with or without notice. In many cases equitable interests have to be registered, and, so far as such interests are concerned, investigation is a simple matter of searching the appropriate registers. Thus investigation of the title on the purchaser's behalf should, in due course, be simplified, and the costs reduced.

4. **Freehold Tenure.**—As a general rule, a freehold estate is not now burdened with the services and liabilities that it had in feudal times. In the case of land which was formerly copyhold, but which has been enfranchised by the effect of the new Acts, certain fines and other incidents remain, but under the new legislation these are all to be extinguished, subject to compensation to the lord of the manor and the steward. Pending compensation, they remain in force for ten years. Apart from these cases, freehold land is sometimes subject to a rent which is called a rent charge, quit rent, a fee farm rent, or by some similar name. The redemption provisions mentioned above do not apply to these. In lieu of the Crown's right of *escheat* for want of natural heirs in the case of a tenant dying intestate, which is abolished, there is given a right to the Crown or the Duchy of Lancaster or the Duke of Cornwall for the time being to take, as *bona vacantia*, the residuary estate of an intestate in default of any person entitled to inherit in exactly the same way as in the case of personal estate.

An estate in fee simple is the utmost interest in land that a subject can hold, and in practice amounts to absolute ownership. It can be disposed of as the tenant wills, either by sale or testamentary disposition. Such an estate, though in legal theory a tenancy (the king being the absolute owner) is in effect an absolute ownership of the land, and the possessor may do what he likes with it, subject to any restrictive covenants entered into by himself or by a preceding possessor or tenant.

There was formerly a freehold estate known as an *estate in fee tail*, i. e. an estate which can only pass to the lineal descendants of the tenant. This is now no longer a *legal* estate though an entailed interest" may exist as an "equitable interest."

If a tenant in fee simple grants a lease for a term of years, he has what is called a *freehold reversion*, and at the end of the term the land, freed from the encumbrance of the lease, reverts to him or his successors in title who may be his executors or administrators, or persons to whom the land has come by transfer.

5. **Leasehold Tenure.**—When a tenant in fee simple grants an estate in his land or in part of it to another person for a term of years, he does so by means of a deed called a lease. The interest in the land thus obtained by the grantee is known as a *leasehold*, and he is called the *lessee*. The grantor of the lease is the *lessor*. Unless prohibited by the covenants in the lease, the lessee may transfer his whole interest in it to another person by *assignment*. If the lessee grants or demises his land to another person for a term shorter than that covered by his own lease, he is said to *sub-lease* or *underlease* it. Thus, if the lessee demises his land for a period equal to the whole remaining term except the last day, the grantee is a *sub-lessee*. At the expiration of the lease the land reverts to the grantor (the *reversioner*) or to his successors in title. A lease for three years or less is sometimes called an *agreement*, and need not be under seal and, if the tenant is in possession at the best rent without fine, may even be made by word of mouth. All other leases must be by deed.

6. **Copyhold Tenure.**—All copyholds were automatically converted into freeholds on the 1st January, 1926. For many years, however, investigation of the title to old copyhold land will depend on the old law. With the abolition of copyholds, many quaint and picturesque ceremonies have also gone, and for some reasons this is to be regretted. Copyholders, or, to be more accurate, their predecessors, tenants in villeinage, were originally

tenants at will and absolutely at the mercy of the lord of the manor, who could eject them whenever he chose to do so. The tenants were, however, protected to some extent by the customs of the manor, varying with particular manors and districts. Gradually these customs developed into rights, and the base services to which the tenants were liable died out—a result mainly due to commutation of base services for money payments. The lord of the manor still retained the freehold interest.

Every copyholder technically held his land by copy of the court roll and according to the immemorial custom of the manor. The latter meant the law which gave the copyhold tenant his estate in the land and defined his duties to the lord—duties of a kind, in many cases, peculiar to a particular manor or district. Copyholds were transferred by a *surrender* of the land to the lord and the *admittance* by him of the new tenant. In future the land will be transferred by the usual deed of conveyance. In regard to mortgages of copyhold land existing on the 31st December, 1925, the effect of the Acts was to give the mortgagee by surrender and admittance, by surrender alone, or by simple covenant to surrender, a long term of years (as is provided in the case of mortgages of freeholds existing on the 31st December, 1925, see p. 375), while the *fee simple* vested in the person (other than a mortgagee) having the best right to be admitted, who would usually be the mortgagor. An equitable mortgagee by deposit was not affected.

Copyhold land formerly could be *enfranchised* by agreement, or under the Copyhold Act, 1894. Certain provisions of this Act may be used for fixing the compensation payable to the lord of the manor on the extinguishment of manorial incidents. Certain of these manorial incidents, such as quit rents, chief rents, fines, reliefs, heriots and dues, including fees payable to the steward, and the lord's rights as to timber, will continue to burden the land as hitherto and unless they are in the meantime extinguished by agreement between the lord and the tenant, voluntary or compulsory, will remain in force for ten years from the commencement of the Act, *i.e.* until 1st January, 1936. If no agreement has been made, or no notice to ascertain compensation has been served during this period, the services lapse, but either party may apply during the subsequent five years, *i. e.* until the end of 1940, to the Minister of Agriculture to ascertain the compensation. If no such application is made before the expiration

of this period, making, in all, fifteen years from the commencement of the Act, all right to compensation is lost (Law of Property Act, s. 140).

A banker lending against land enfranchised under the Act of 1922 must make inquiries as to whether the compensation has been paid or agreed, as this amount may affect the value of his security.

Until manorial incidents are extinguished, all conveyances, mortgages, probates, etc., must be produced to the steward of the manor (who must endorse them with his certificate) within six months, and be subject to the former fines and fees, or they will become void so far as the conveyance of the *legal* estate is concerned. The Court Rolls and manorial documents are under the charge and superintendence of the Master of the Rolls, but may remain in the possession of the lord of the manor, who must not destroy them. They may be transferred to the Public Record Office, or to a public library, museum, or certain other suitable custodians.

7. **Title-Deeds.**—Every time a legal interest in land is transferred from one person to another, it must be done by means of a deed, and, except in the case of Registered Land, every deed forms a link in the chain of title, showing how the land has been dealt with in the past, and how the present owner derives his title.

When title-deeds of any kind of land tenure are offered as security, the first question that the banker should ask himself is: Has the person in possession of the deeds the legal power to deal with the estate free from incumbrances—in other words, has he a *legal estate* and can he transfer or charge that legal estate in priority to all equitable interests? No matter how many transactions may have taken place in relation to any piece of land, a legal estate always subsists in a particular person or persons, whose identity is established by the title-deeds, if they are complete. If the land is freehold a legal estate in *fee simple* is vested in the freeholder, and in the case of estates for a term of years, a legal estate for a term of years subsists in the leaseholder. Such legal estate may be subject to other legal interests, such as legal mortgages or legal terms of years or subterms. If such exist the banker can only take subject to them. There may also be equitable interests of all kinds affecting the legal estate. For instance, the estate owner may be a trustee, or he may only be interested beneficially as tenant for life, or he may not have

paid his purchase money, or he may have given some equitable charge with or without a deposit of his deeds. Generally speaking, provided the banker has no notice of any of these equitable interests, his legal mortgage will take priority over them, and in some cases special machinery is provided to allow trustees and persons acting in a fiduciary capacity to override certain equitable interests when creating a mortgage (L.P.A. s. 28 and Settled Land Act, 1925, s. 71). It must not be forgotten, however, that certain interests may be disclosed on searching the appropriate registers (see later). If the holder of an estate in land of either kind of tenure mortgages his land to another person, that person can mortgage his interests, *i. e.* submortgage, or pledge the deeds to an amount not exceeding the amount of his interest in the land, *i. e.* to the amount of his mortgage.

8. **Mortgagor's Title.**—Mere possession of the deeds does not imply full power on the part of the possessor to charge the property. If the possessor has not only the legal estate, but full beneficial interest in the property, he can mortgage it to the fullest extent, but if he has only a partial beneficial interest, he can only mortgage the property for *his own benefit* to the extent of his own interest. This applies to those executors and trustees who are themselves beneficiaries. It should be noted that a deceased person's landed estate now vests in his executors or administrators, and that a formal assent in writing from them to the devisee or person entitled under the intestacy is necessary before the latter is vested with the legal estate in the property, and the consequent right to mortgage his interest.

In regard to interests in land subject to a trust, if the banker takes a *legal* mortgage without actual or constructive notice of any beneficial or equitable interest, his legal mortgage, generally speaking, ranks before the equitable interests of the beneficiaries, but if he takes an *equitable* mortgage, the older equity of the beneficiaries has priority, but the Acts provide machinery by which trustees for sale and life tenants, who by the Acts are given a legal estate in *fee simple*, whose beneficial interest is limited to the life interest may mortgage the *fee simple* free from the interests arising under the trust or settlement, but only for certain limited purposes. The powers of agents, married women, companies and others to mortgage their interests in land are dealt with under the various headings.

Before advancing money on mortgage the banker should

ascertain, by inquiries, searches and by careful inspection of the deeds, whether the property is subject to any prior incumbrances. If a banker has notice, actual or constructive, of any prior incumbrance, or if, by neglect to make such searches as are open to him, he fails to obtain notice, he will, generally speaking, lose priority in favour of the prior incumbrance. But a mortgagee will not be prejudicially affected by the existence of such interests unless the existence of such interests is within his own knowledge, or would have come to his knowledge, if such inquiries, searches, and inspections had been made as ought reasonably to have been made. And it must not be forgotten that notice to an agent in this connection is notice to the principal, provided that the notice, actual or constructive, came to the agent—solicitor, counsel, etc.—while acting for his principal in the *same* transaction.

Again, the deeds may relate to a property part of which has been conveyed by the owner to other persons, and as there appears to be no legal necessity for an indorsement of such part sales on the deeds relating to the whole property, it may happen that the mortgagor's real interest in the property is much less in extent and value than as described in the deeds. This may arise, for example, when an estate is being cut up into building plots. A good rule for a banker to follow is to inspect personally, where possible, all properties submitted to him as security for an advance, and to check the measurements.

With regard to the examination of the deeds, some banks instruct their branch managers to submit all titles to their solicitors, other banks require them to be submitted to the principal branch manager in a particular district, or to the Head Office, but where a free hand is allowed, a manager will often rely upon his own investigation of the title. The question of the intervention of a solicitor really depends on the circumstances of each particular case. If the bank manager believes his customer to be an honest man, and if the title is not a complicated one, he would, in many cases, hardly think it necessary to support his own judgment by consulting his solicitor. Where the advance is to be made to trustees or to a life tenant, the situation is frequently full of pitfalls, and a solicitor should always be consulted.

It is quite outside the scope of this work to explain fully the perusing of title-deeds, and the following remarks are purely

elementary. The first document to be looked at is the deed conveying the interest in the land to the customer. This will show whether his estate is freehold, or for a term of years, or whether he has only some equitable interest, such as a life interest or an entailed estate; whether the land is subject to the jurisdiction of the Middlesex or Yorkshire Registries Acts, or of the Land Registration Act, and, if registrable, whether it has been duly registered or not. The next document in importance is the *Abstract of Title*. This abstract contains in epitome all the deeds and instruments necessary to show a good title. The document should begin with a good *root of title*, such as a conveyance in fee on sale, or by way of mortgage, as such a deed implies that the title has presumably been investigated before. A will showing how the property was devised, without collateral evidence of the testator's rights in the property, is not a good document with which to start the abstract. After the root of title, there should follow a short recital, usually, but not always, in chronological order, of the material parts of all the deeds, wills, marriage and birth certificates, and other instruments and records affecting the title to the documents. The abstract should also shew that receipts are given for any consideration money, and should mention any indorsements on the deeds. It is not usual for the abstract to show the stamps paid on various documents. A purchaser of freehold, leasehold or enfranchised copyhold land is entitled by law to demand an abstract of title going back for thirty years, subject to any stipulation in the contract of sale. In the case of leasehold property the lease by which the term was granted must also be abstracted however old it may be, but the purchaser is not entitled to see the title to the freehold reversion (s. 44. L.P.A.). Prior to 1926 the period was forty years. Where a purchaser of leaseholds is not entitled, apart from agreement to the contrary, under the Law of Property Act to call for the title to the reversion, he is not affected with notice of any matter or thing which he does not know of, but which would have been discovered had the title to the reversion been investigated (*ibid.*). In the case of enfranchised copyhold land the purchaser is not entitled to call for the title to make the enfranchisement. Where the manorial incidents (which formerly affected the land) have been extinguished, the purchaser cannot call for the title of the person making the compensation agreement and giving the receipt for the compensation money, and shall not

be affected with notice of anything of which he might have had notice had he contracted for such title.

Another sub-section of this important section states that "A purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing of which, if he had investigated the title or made inquiries in regard to matters prior to the period of commencement of title fixed by this Act, or by any other statute, or by any rule of law, he might have had notice, unless he actually makes such investigation or inquiries." If, however, the purchaser agrees to take a shorter title than that fixed by the Act, he would be deemed to have notice of equities appearing against the title during the statutory period.

After examining the abstract, the deeds deposited should be checked off with those mentioned in the abstract, and, if any are missing, it should be seen that a statutory acknowledgment of the right to production of such deeds is contained in some deed produced or in some deed which is itself acknowledged in a deed produced. As a general rule, the banker should insist upon the production of all the deeds relating to the property, but, in some cases, though the customer has a good title, he may not be able, for some valid reason, to produce all the documents. "Several cases reported," says Mr. Bernard Campion in his admirable lectures, *Bankers' Advances on Title-deeds*, J. Inst. Bankers, January 1907, "justify me in saying that even if *some* of the documents of title are not included in the deposit, there may still be a valid equitable charge created. For instance, there is a valid charge if a purchaser of property deposits the receipts for his purchase-money, the receipt embodying the terms of the contract, and the purchaser then not having any title-deeds or conveyance in his possession. . . . But there must be a deposit either of the title-deeds or something equivalent; for example, an attested copy of a deed is not enough." In all cases of the absence of a deed or deeds the banker must use his own judgment, and if in any doubt should submit the matter to his solicitors.

The deeds should be examined to see that the proper stamps are impressed, and that the deeds have been duly executed by the necessary parties thereto. Death duties payable on a death occurring before 1926 are a charge on the property if the purchaser has notice of the death, but those payable on a death

occurring since are only charged on the property if registered under the L.C.A. It must, therefore, be seen that all such death duties have been discharged. Appropriate evidence is a certificate from the Inland Revenue or a letter replying to a specific inquiry on the point. These documents should go with the deeds. If the property has been previously mortgaged a receipt on discharge (or, for the period prior to 1926, a re-conveyance) is essential. All indorsements on the deeds should be carefully scrutinised, as they may put the banker on inquiry as to facts connected with the title not otherwise apparent. Another important point to remember is that all papers and documents which may be with the deeds should be carefully examined, as they may disclose the existence of a trust, easement, or prior charge. The matter of searches is dealt with in detail later.

9. **Freeholds. How Charged.**—There are two ways of charging freehold property: (*a*) By a legal deed of mortgage; (*b*) By an equitable mortgage. The former kind may be effected in two ways: (*a*) By a lease for a term of years absolute, subject to a proviso for cesser (extinguishment) on redemption, or (*b*) by a charge by deed expressed to be by way of legal mortgage (L.P.A., s. 85). An equitable mortgage may be effected in one of three ways: (1) By a deposit of the deeds without any writing at all; (2) By a deposit of the deeds, together with a memorandum showing the object and conditions of deposit; (3) By a memorandum showing an intention to create a charge over the property. The essential difference between an equitable mortgage and a legal mortgage is that, in the former case the mortgagee gets merely an equitable interest, whilst in the latter a *legal estate* is transferred to the mortgagee, the mortgagor retaining the *legal estate in fee simple* with the right to have the lease extinguished upon repayment of the loan (L.P.A., s. 85). Either kind of mortgage—whether equitable or legal—gives the mortgagee a charge over the land and any houses, or other buildings, or fixtures already erected upon the land, or which may thereafter be erected upon it. Leasehold property is dealt with later.

10. **Legal Mortgage (Freeholds).**—A legal mortgage may be defined as the creation by deed of a legal estate or interest in land as a security for the payment of money due, or to become due, in favour of the person who takes the security, subject to the mortgagor's right to have the estate so created extinguished on repayment of the loan with interest. The borrower who gives

the security is called the *mortgagor*, the lender is called the *mortgagee*. The legal estate of the mortgagee in the property is always subject to the mortgagor's right to redeem. That is to say, the mortgagor (or the person entitled through him) has the right to have the mortgage of the property extinguished upon repayment of the moneys advanced, together with interest and any costs and charges properly incurred by the mortgagee in order to protect, preserve, or enforce his security.

A legal mortgage must be by deed, and the documents and the Receipt on Discharge should be carefully preserved, as they form part of the chain of title. It should be noted that a mortgage given as security for a debt is not a sale of the property. A first legal mortgage of freehold property may be effected by (*a*) a demise for a term of say 3000 years from the date of the mortgage, or (*b*) charge by deed by way of legal mortgage. The second form gives the same protection and remedies as the first form, and will probably become more generally used by bankers as the same form of document is applicable also to leasehold property.

Unless the land is registered under the Land Registration Act or is within the jurisdiction of the Yorkshire Deeds Registry Act, there is no need for a banker to register a legal mortgage accompanied by the deposit of the relative title-deeds. All he has to do, therefore, is to see that the title is in order, make the necessary searches in the appropriate registers for other charges and interests, and secure possession of the title-deeds. All the title-deeds in the mortgagor's possession should be handed over to the banker when the mortgage is executed, and he should be careful to *retain them at all times*. In regard to this point all mortgages, whether legal or equitable, or first or subsequent, not protected by the deposit of the relative deeds, rank for priority according to their date of registration under the Land Charges Act, and not according to the dates of creation (L.P.A., s. 97). The position, therefore, of the mortgagee, whether legal or equitable, who is in possession of the title-deeds, has been strengthened. If, on the contrary, the banker has not possession of the deeds (as in the case of a second mortgage), he should register his charge in accordance with the Act to ensure full protection, and to avoid the possibility of losing priority to a subsequent registered charge. Provision is made by s. 4, L.P.(A.)A., 1926, for registering a " priority notice " before execution

of any mortgage which will require registration so as to prevent any subsequent charge being registered between execution and registration.

Legal mortgages not accompanied by the deposit of the relative deeds are termed "puisne mortgages." In the general way such mortgages are second and subsequent charges, and, as it will be seen later (*Second Mortgages*, p. 386), second and subsequent mortgages may be legal mortgages. Prior to 1926 they could normally only be merely equitable mortgages.

Previous to 1926 the legal estate in *fee simple* was conveyed to the mortgagee, leaving the mortgagor only an equitable interest in his property, called the "equity of redemption." On repayment of the mortgage, the legal estate in *fee simple* had to be re-conveyed by the mortgagee to the mortgagor. Now, however, although the legal estate in *fee simple*, which is the greatest interest which can exist in land, remains in the mortgagor, if the mortgagee has to sell under his power of sale, he can nevertheless convey to the purchaser the *fee simple* (L.P.A., s. 88). Since the *fee simple* now remains in the mortgagor, a re-conveyance on repayment is no longer necessary, a mere receipt endorsed on, written at the foot of, or annexed to the mortgage deed, is sufficient to discharge the mortgagee's interest (L.P.A., s. 115). The receipt must state the name of the person paying the money, and be executed by the chargee by way of legal mortgage, or the person in whom the mortgaged property is vested for a term of years, and who is legally entitled to give a receipt for the mortgage money. Where the mortgage security consists of a mortgage and a further charge, or of more than one deed, it is sufficient for the receipt to refer to all the deeds, or the total money secured and owing, and for it to be endorsed on, written at the foot of, or annexed to, one of the mortgage deeds. This form of discharge applies to all legal mortgages, whether on freehold or leasehold properties, and whether created before or after 1925, except charges on mortgages registered under the Land Registration Act, 1925, which must be vacated according to the provisions of that Act.

A form of the receipt referred to above is contained in the Act and may be used with such variations and additions, if any, as may be deemed expedient. The form reads as follows :—

"I, *A. B.*, of ..... hereby acknowledge that I have this ..... day of ..... 19..., received the sum of £..... representing the [aggregate] [balance remaining owing in respect of the] principal money secured by the within [above] written [annexed] mortgage [and by a further charge dated, etc., *or otherwise as required*] together with all interests and costs, the payment having been made by *C. D.* of ..... and *E. F.* of

As witness, etc.

The receipt, in proper form, must, where possible, be indorsed on the mortgage deed itself. Where this cannot be done, it must be annexed to the mortgage deed. Apparently the receipt may be under hand or under seal. The Act provides that a receipt in the proper form operates as a reconveyance, and that where a receipt takes such effect it is liable to the same *ad valorem* stamp duty as if it were a reconveyance under seal. Where the receipt does not operate as a reconveyance, as in the case of one given in respect of an equitable charge under a memorandum of deposit, it would appear that all that is required is a simple receipt indorsed on the memorandum, which is exempt from any stamp duty, though it is the practice of some banks to stamp such receipts with a 2*d.* stamp. In any case, if the form of receipt used for these equitable mortgages omits the name of the person paying the money, it is considered that there can be no question of the reconveyance duty applying. (See *Gilbart Lectures*, 1928.)

In regard to first or only legal mortgages of freeholds existing prior to 1926 (and hence in the old form), or to mortgages made in the old form since the commencement of the Law of Property Act, the legal estate in *fee simple* automatically vested in the mortgagor or tenant for life or other person who would have been entitled to the *fee simple* on repayment of the mortgage, while the mortgagee got a freehold estate for a term of 3000 years from the 1st January, 1926. The mortgagee may, if he wishes, by a declaration in writing, convert his mortgage into a charge by way of legal mortgage. The position of second or subsequent mortgagees is considered later (see p. 386).

A banker's mortgage usually provides for repayment on demand (see Appendix, p. 488, for specimen Legal Mortgage); other mortgages are generally payable three or six months after the date of the mortgage. This does not mean that the mortgagor usually

has to redeem at the end of the period. As a matter of fact, ordinary mortgages are looked upon as permanent investments, and run on for many years, though, in such cases, it is quite a usual occurrence for the mortgagee to call upon the borrower to reduce from time to time the principal amount on mortgage, especially if the property is leasehold property, or freehold property in a decaying neighbourhood. A banker's mortgage should contain a binding promise to repay on demand, and is usually drawn as a continuing security for all moneys due or to become due. There is also a covenant that the mortgagor shall maintain the fire insurance on the property, hand over the policy to the bank, and deposit all receipts for the payment of premiums. The deed should also expressly give the banker power to sell the property immediately upon default of the borrower, but, before selling, the banker should give reasonable notice to the borrower and to any subsequent mortgagee.

Bankers' mortgages are usually continuing securities, but if the deed is not so drawn, the advance must be made on a separate loan account, for if it is made on a running account, the Rule in Clayton's Case would operate, in which case payments in would be treated as payments towards the discharge of the mortgage debt and payments out as fresh and unsecured advances. Mortgages for a fixed sum and not as cover for a fluctuating balance carry, except by express agreement, simple and not compound interest; and when estimating the amount due, the loan account and the current account must be taken not together but separately. If, in the case of a mortgage for a fixed sum, a portion is repaid, the mortgage is not a valid security for a fresh borrowing. A customer is entitled to have income tax deducted by the banker when charging interest on a mortgage for a fixed sum, for a definite period not less than a year, but a customer is not entitled to deduction when the loan is for a shorter period than a year, or is for a fluctuating balance (see also p. 214).

11. **Legal v. Equitable Rights.**—The question of priorities is a very important one to a banker. There are two main rules, both subject to qualifications:—

(*a*) Legal rights prevail over mere equitable rights.

(*b*) Equitable rights, as between themselves, rank in order of date, *i. e.* the older right is the better right.

In this section we shall deal with rule (*a*); for a consideration of rule (*b*) see p. 385, *post*.

A banker who has secured the legal title by taking a legal mortgage, and "makes an advance without notice of a prior equitable title, is a purchaser for value without notice. From such a purchaser a Court of Equity takes away nothing he has honestly acquired" (Stirling, L. J., in *Taylor* v. *London and County Banking Co.*, 1901). It should be noted that the banker, to preserve his priority, must make the advance (1) without notice, (2) in good faith. Even then he must not be guilty of *gross* negligence or his rights may be postponed to a subsequent equitable interest. In *Northern Counties, etc., Fire Insurance Co.* v. *Whipp*, 1884, it was clearly laid down that a Court of law will not postpone a legal charge to an equitable charge, merely because the legal mortgagee has been careless or has lacked prudence. The negligence must be such as to amount to connivance at fraud. For example, the mere fact that the banker has temporarily handed over the deeds to the mortgagor, and by so doing has enabled the mortgagor to raise a subsequent equitable charge (one without actual deposit of the deeds) on the property, will not necessarily postpone the banker's legal mortgage to the subsequent mortgage. If the banker has lent the deeds to the mortgagor upon a "reasonable representation" of his object in borrowing them, the Court of Appeal in the case mentioned above held that he would not be postponed. But what is a "reasonable representation"? It is all a question of fact. A prudent banker, therefore, would not release the deeds to a mortgagor under any pretext, for if he does release the deeds, and a Court of law holds that he did it without a "reasonable representation," he will indubitably be postponed to a subsequent equitable charge.

In regard to the arguments in the preceding paragraph, however, it must not be forgotten that the cases on which they are based were decided before the passing of the Property statutes now in force, and that the present statutes appear to have added rather greater strength to the position of a mortgagee in possession of the title-deeds. Furthermore, mortgages, whether legal or equitable, which are not protected by the deposit of the relative deeds, must be registered under the Land Charges Act, and, subject to any conflict with the rights of the mortgagee in possession of the deeds, take priority according to the dates of registration (L.P.A., s. 97). If they are not registered, notice of them is not prejudicially to affect a purchaser or mortgagee

(L.P.A., s. 199), and if any such mortgages are registered at the date of the banker's mortgage, such registration is equivalent to notice to the banker (L.P.A., s. 197). The mortgagee must, therefore, be particularly careful in making the searches for interests which have to be registered in order to secure full protection.

If a banker, as legal mortgagee, *without notice* of a second charge, makes further advances on the security of the mortgage, he can add these further advances to the sum originally advanced on the mortgage, and it is to be noted that registration of any subsequent mortgage or charge after the date of the original mortgage or the banker's last search will not, for this limited purpose, constitute notice to the banker of such mortgage or charge (L.P.A., s. 94). It should be noted that the benefit of this section applies only to prior mortgages made "expressly for securing a current account or other further advances." But *with notice* he is postponed for all sums advanced after receipt of notice, even though his mortgage provides that it is to be security for any further advances that should be made by him to the customer and it was arranged but not stipulated for in the mortgage that such further advances should be made (see *post*). If, however, the mortgage imposes an obligation on the banker to make such further advances, he can secure priority, even after notice of a second charge, but such a contract is not one a banker is likely to enter into.

12. *Rights of Legal Mortgagee.*—Under the Law of Property Act, 1925, a mortgagee has the following remedies incident to his interest as legal mortgagee. These powers may be varied or extended by the terms of the deed:—

(a) *He may enter and take possession of the property that has been mortgaged to him.*—That is to say, he can cultivate the land himself, and appropriate the rents of the tenants, if there be any. But "the situation of a mortgagee in possession is far from an eligible one."—Davidson, *Precedents*. He is handicapped by the fact that, apart from the payment of interest and principal and out-of-pocket expenses, he must account to the mortgagor for any profits he may make or ought to have made out of the property. He must pay a rent for the occupation of property not let to a tenant, and is liable for any "voluntary waste," such as pulling down houses, or digging for minerals. He is not allowed to charge a commission for collecting rent, nor for any

unreasonable outlay in repairs and improvements done without the mortgagor's consent. As a general rule, therefore, a mortgagee does not take possession except as a last resource.

(b) *He can sell the property.*—After the mortgage money has become due, provided that (1) notice requiring payment of the mortgage money has been served on the mortgagor and default made for three months after such notice; or (2) some interest is in arrears for two months; or (3) there has been a breach of some provision in the deed, or in the Act, other than and besides the covenant for payment of principal and interest (L.P.A., s. 103). Though this power of sale is given by the Act, bankers' mortgages usually expressly provide for the power of sale or the appointment of a receiver to arise on demand for repayment and default, or after a much shorter period than that provided by the Act (see Appendix for specimen form of Banker's Legal Mortgage). The only way to stop the exercise of this power is for the mortgagor to tender payment of the principal, interest, and costs.

When selling, the mortgagee is bound to have reasonable regard for the interests of the mortgagor; that is to say, he must not wilfully and fraudulently sacrifice the property, but he is empowered to sell it either by public auction or by private contract, in one lot or in parcels, whichever he deems the fittest method, and he is not liable to the mortgagor merely because the price fetched is less than the market value of the property. But though he may buy in at the auction, he cannot act at the same time both as vendor and purchaser, and still holds the property subject to the mortgagor's right of redemption. He must also take reasonable care to get a fair price, but, if what he actually receives for the property is not sufficient to cover the mortgage debt, he is entitled to claim the residue from the mortgagor on the personal covenant to repay, and to prove for it in his bankruptcy. The mortgagee is entitled to as much of the proceeds of sale as will cover his principal debt, together with interest and costs, and all charges properly incurred by him, and the residue, if any, he must hold as trustee for the mortgagor, or for the benefit of any subsequent mortgagee of whose charge he has had notice. Since registration under the L.C.A. or local deeds registries is notice, a banker should not hand over any surplus to the mortgagor until he has made the appropriate searches to see if there is a subsequent mortgagee (see also p. 382).

If the banker, as mortgagee, cannot decide who is entitled to the residue, he should pay the money into Court, or invest it in trustee securities for the benefit of those who may be able to prove their right to it.

It should be noted that where the power to sell or appoint a receiver arises by reason of the mortgagor committing an act of bankruptcy or being adjudged a bankrupt, such power shall only be exercisable by leave of the Court (L.P.A., s. 110).

(c) *He may appoint a Receiver* to manage the property and collect the rents and profits, provided one of the three events enumerated in (*b*) has happened. Here the mortgagee is on safer ground than when entering into possession himself. Though the appointment and the removal of the receiver—both acts must be in writing—is in the mortgagee's hands, the receiver, by s. 109 L.P.A. is deemed to be the agent of the mortgagor, and is liable to him for all his acts and defaults, unless the mortgage deed otherwise provides. Hence the mortgagee has all the fruits of possession without its disadvantages and risks. The receiver must apply (*ibid.*) all moneys received (1) in discharge of all rents, taxes, rates, and outgoings affecting the property, (2) in payment of interest on prior charges, (3) in payment of his own commission and of insurance premiums and the cost of necessary or proper repairs as directed in writing by the mortgagee, (4) in payment of the interest accruing due in respect of any principal money due under the mortgage, (5) in or towards discharge of the principal money if so directed in writing by the mortgagee. The last provision is new, and prior to 1926 the residue or surplus had to be paid to the mortgagor unless the mortgage deed provided otherwise. Bankers' mortgage forms usually did so provide.

(d) *He may sue the mortgagor personally for the principal and interest due to him.*—The mortgagee need not rely upon his security alone. The deed should always contain a covenant to pay, so that there is a personal remedy against the mortgagor for the moneys borrowed by him. In the event of the mortgagor's bankruptcy, the mortgagee may value the property and prove on the bankrupt's estate for the residue (if any), or he may abandon the security and prove for the whole debt. He may, if he wishes, merely rest on his security, or, if a proper case has arisen, realise it under his power of sale and prove for any deficiency.

(e) *He may foreclose the mortgage.*—To secure foreclosure the mortgagee must make an application to the Chancery Division

of the High Court of Justice (or to the County Court if the mortgage is not more than £500). The Court appoints a day for the payment of the principal and interest, and taxed costs due. If, on the appointed day, the mortgagor cannot or will not pay the moneys due, the Court makes an order that the mortgagor shall henceforth be absolutely deprived of all right, title, interest in and to the mortgaged property. The effect of this Order is that the mortgagee becomes the absolute owner of the property, *i.e.* vested with the legal estate which was held by the mortgagor. But so jealous is equity of the rights of the mortgagor, that even after the promulgation of this Order, the Court, for a sufficient reason, may order the re-opening of the foreclosure, and give back to the mortgagor his right to redeem his property, and to have the mortgage extinguished (see also s. 18, *post*).

13. *Notice of Second Mortgage.*—Notice of a second charge bars priority for any advances made after receipt of notice, unless an agreement has been made with the second mortgagee allowing further advances up to a stated amount in priority to his charge, or, as mentioned already, unless the mortgage imposes an obligation to make further advances. The rule applies even if the banker had agreed, verbally or outside the mortgage deed, to allow advances on current account up to a stated limit which has not been reached. The granting by the mortgagor of a subsequent mortgage cancels the arrangement, and fixes the amount for which the banker can hold the security. If, in such circumstances, the mortgagor requires a further advance, the banker must either get additional security, or rely for his security upon the residue left after satisfying his own first charge and the subsequent second charge. This also holds good when the banker receives notice of some other disposition of the property. For example, the mortgagor may, after depositing the deeds with the banker, agree to sell to a party who has notice of the deposit. The agreement to sell gives the purchaser equitable rights in the property, which the banker is bound to take notice of as soon as the transaction comes to his knowledge. The security, as against the purchaser, does not cover advances made after receipt of notice.

There are certain modifications in regard to notice brought about by registration under the Land Charges Act and the Land Registration Act. These are explained under *Tacking* (p. 388).

Where a customer is taking advances on overdraft, the banker, as soon as he receives notice of a second charge, should stop the

account, and advise his customer that he intends to pass all future payments in and out through a separate account, which must be kept in credit. He should also ask his customer to give him a written consent to the course he proposes to adopt, though this is not necessary if power to open a new account has been taken in the mortgage (see Specimen Mortgage in Appendix). This course will effectually prevent any question of the application of the Rule in Clayton's Case. If the mortgage is a security for the ultimate balance of account, all the customer's accounts must be combined as from the date of receipt of notice, and the resultant balance is the maximum that can be charged against the mortgage. Where, however, the advance has been made on a loan account, the amount of which has been credited to a current account, and notice of a second charge is received whilst the credit account is in credit, different considerations arise. Sir John Paget in answer to a similar question (See *Journal of the Institute of Bankers*, 1927, p. 168) has given it as his opinion that the accounts need not be combined, even though the banker's document of charge is to secure the " ultimate balance owing on all accounts." He states that there is a definite loan on the one account, whilst once the money has been credited to the current account it is as much the customer's as the proceeds of cheques paid in. He does not see how the banker can combine the accounts or dishonour cheques drawn on the current account. Sir John considers that all the banker must do is to rule off the loan account and charge up interest to date to the current account. Naturally, no further advances can be made on the loan account and the current account must be kept in credit, since the second mortgagee can claim precedence for any advances made after receipt of notice of his charge. If, in due course, the banker calls in his loan or realises his security, then the "ultimate balance on all accounts " will be the balance resulting from the accounts combined (see also p. 201). Sir John states that there is an implied agreement to keep the accounts separate. Hence, if the banker has taken the right to set off the accounts at any time without notice, the position may be different.

After notice of a second charge, the banker must not release the security to the mortgagor, even though he may pay off the advances thereon. If, however, the banker has not received notice of any subsequent charge and the customer pays off the loan, the banker may release the title-deeds to the owner without

first making any search in the Land Charges Register or local deeds registries to see if anything has been registered against the property. This is by virtue of L.P.(A.)A., 1926, and applies only to the handing over of the deeds, and, as stated on p. 379, if the property is sold by the banker, he must search before paying any surplus to the mortgagor.

14. **Equitable Mortgage.**—An equitable mortgage is created by an agreement, express or implied, that an equitable interest in the property shall pass to the mortgagee as security for a debt due or to become due. As already stated, an equitable mortgage is effected by deposit of the deeds, with or without an explanatory memorandum of deposit, or by a memorandum, formal or informal, showing an intention to create a charge over the property. This sort of charge does not affect the legal estate, but an undertaking to grant a legal mortgage, when called upon to do so, is usually included in a banker's memorandum of deposit. Deposit of the deeds alone was held, as long ago as 1783, to be sufficient to create an equitable charge (*Russell* v. *Russel*, 1783), but a *verbal promise* to deposit them is not sufficient—the promise must be in writing. Moreover, to create a charge, it must be clear that the deeds are deposited as security. If left in the banker's hands for another purpose he cannot retain them as cover for a debt due from the person who left them. It is true that possession of the deeds would be *prima facie* evidence of an intention to create a charge, but, in the absence of any writing, this intention is always open to refutation. Hence the importance of some documentary evidence to support the fact that the banker has possession of the deeds as a security.

Equitable mortgages accompanied by the deposit of the title-deeds do not require registration, but if the relative deeds are not deposited, then the charges must be registered under the Land Charges Act, s. 10, as being "general equitable charges." The usual searches should be made.

An equitable mortgage has some advantages over a legal mortgage. It is easily and inexpensively acquired, and since it does not affect the legal estate, the document creating the charge does not form part of the title. It should not be destroyed when the charge is paid off, but handed to the person entitled to the deeds with a receipt endorsed. If taken with circumspection, and from customers whose integrity has never been in question, and the banker is careful to retain possession of the deeds, the protection

to the banker is not far short of that afforded by the more formal legal mortgage.

15. *Risks Incurred by Equitable Mortgagees.*—When a banker makes advances against an equitable mortgage, there are several considerations which may prejudice the value of the equitable mortgage as a security. In the first place, the equitable title may be affected owing to the superior strength of the legal estate. Thus, if a legal mortgage has been executed prior to the banker's equitable charge, and remains undischarged, the legal mortgagee, being in possession of the legal estate, will rank before the banker as equitable mortgagee. But if the prior legal mortgagee, by connivance at fraud or through gross negligence, has enabled the mortgagor to create another charge of the property by means of an equitable mortgage without notice of the legal mortgage, as, for instance, by failing to take possession of the title-deeds, then the equitable mortgagee would have priority over the prior legal mortgagee. It would also *prima facie* be considered negligence if the legal mortgagee, having obtained possession of the title-deeds, later handed them over to the mortgagor, and so enabled him to raise a further sum on the property.

But the mere fact that the legal mortgagee does not make the production of the deeds a *sine qua non* at the time he lends money upon them does not, of itself, necessarily imply such negligence as to postpone his legal charge to a subsequent equitable charge. For example, he will not be postponed if upon asking for the title-deeds he received what appeared to be a reasonable explanation why they were not forthcoming. But see s. 11, *ante*. It must be remembered, however, that under the new law if the mortgagee does not obtain the title-deeds, his mortgage must be registered under L.C.A., or it will be void against a subsequent mortgagee, and that registration is notice.

The principal risk, however, run by a banker as equitable mortgagee is that the borrower may subsequently execute a legal mortgage in favour of another party. Naturally, the Courts are not prone to deprive any person of his legal rights if he has got them honestly. But to get a thing honestly, a person must take all reasonable precautions to ensure that the person from whom he receives anything is entitled to part with it. Hence, if a person lends upon a legal mortgage, without either a sight of the deeds or a reasonable explanation of their non-appearance, he cannot, generally, take precedence of a prior equitable mortgagee

who holds the deeds. Neither must the banker lose sight of the fact that there may be a prior equitable interest. The rule is (see p. 376, *ante*) that, other things being equal, "the older equity is the better equity." But "other things" may make all the difference. For example, if the first equitable mortgagee has, through negligence, failed to obtain possession of the deeds, he will be postponed to a second equitable mortgagee who has the deeds, and who has advanced money without notice of the prior equitable claim. Where, however, a trustee has alienated trust proper for his own benefit, the claim of the beneficiaries will, as a general rule, prevail over any merely equitable right, which, naturally, would usually be posterior to it in order of date. But if the equitable mortgagee of property, which afterwards turns out to be trust property, secures the legal estate in good faith and without notice of the beneficiaries' claim, he will rank before them. Again, if a person makes a binding agreement to sell some property, and before conveyance hands over the deeds to his bankers as security for an overdraft, the banker's equitable charge may be postponed to the purchaser's prior equitable interest, even if the banker did not know of the sale and although he has possession of the deeds.

16. *Precautions taken by Equitable Mortgagees.*—The following are the chief precautions to be observed by a banker as equitable mortgagee: (*a*) He should hold the title-deeds, for, as explained above, possession of the deeds is a very important factor in preventing postponement of the banker's claim; (*b*) He should make the prescribed searches; (*c*) He should obtain a formal memorandum of deposit showing why the deeds were deposited (see Appendix for specimen forms of Memorandums of Deposit); (*d*) He should remember that notice—actual or constructive—of prior claims affects his security, and that suspicious circumstances may put him on inquiry, and if he negligently fails to make inquiry, he may lose his prior claim. Arising out of (*a*) is another point. If it is necessary to send the deeds to the mortgagor's solicitor for examination or other purpose, it is the practice of bankers to get the mortgagor's written authority to part with the deeds, and from the solicitor, a written acknowledgment of delivery and an undertaking to be responsible for their safe custody and return in the same condition as received.

17. *Rights of Equitable Mortgagees.*—Apart from the provisions of the memorandum of deposit, which is generally drafted so as to

give the banker the maximum of protection, there are practically the same remedies open to the equitable mortgagee as if he were a legal mortgagee, but they can only be obtained by means of the costly and slow process of applying to the Court. If the mortgagor will not fulfil his obligation, under the memorandum, of executing a legal mortgage giving the banker a power of sale, the banker must make an application to the Court before he can sell the property or appoint a receiver. Deposit of the deeds without any memorandum implies that the mortgagee has a right to call for a legal mortgage when required. If the memorandum is under seal (which involves the higher stamp duty of 2*s.* 6*d.* per cent. instead of 1*s.* per cent.), the statutory power of sale and appointment of receiver given to mortgagees applies to the security, and no application to the Court is necessary before selling the property or appointing a receiver, but he cannot convey the legal estate on a sale without application to the Court unless the form of charge contains an irrevocable power of attorney to enable this to be done. A memorandum containing an irrevocable power of attorney also enables the banker to proceed to realise the security without application to the Court. Such forms must be under seal. A specimen of a memorandum under hand is given in the Appendix.

18. **Second Mortgages.**—Bankers, as a general rule, are not inclined to look with much favour upon second mortgages as cover for advances. In the first place, to make the security worth the name, the margin between the mortgage and mortgageable value must be considerable, and even that considerable margin may disappear if the first mortgagee, to protect his own interests, elects to make a forced sale of the property. When selling, the first mortgagee is not bound to consider the interests of any other incumbrancer. All that he need do is, in the *mortgagor's* interest, to get a fair price, not necessarily the market price. Even if the banker, as second mortgagee, elects to pay off the first mortgagee, trusting that a sale of the property may produce enough to pay off both charges, he may, in the end, be little, if any, better off.

Moreover, any arrears of interest due to the first mortgagee may be added to his debt in priority to the second incumbrancer. In like manner the first mortgagee may foreclose his security, in which case the second mortgagee will be forced to redeem the first mortgage or lose his security. Another defect is that as the

first mortgagee is entitled to the title-deeds the second mortgagee never gets them. Apart from these defects the second mortgagee is exposed to the risks of *Tacking* and *Consolidation*, which are dealt with below. Where, therefore, a banker lends on second mortgage, he must at once give notice to the prior incumbrancer to prevent tacking and, as he has no deeds, he must at once register under the Land Charges Act.

There is another important reason for giving direct notice to the first mortgagee, as by s. 96 (2) L.P.A., as amended by L.P.(A.)A., 1926, a mortgagee whose mortgage is extinguished is not responsible for surrendering the deeds to the person not having the best title thereto, unless he has had notice thereof, but notice in this section does not include notice implied by reason of registration under the Land Charges Act or any local Deeds Registry. Hence, when an advance is repaid, the banker, in the absence of direct notice of other interests, is quite safe in delivering up the deeds to the mortgagor and need not make a search before doing so. The banker should also give notice to the Fire Insurance Company. The procedure which should be adopted, in regard to the first mortgagee, by a banker who has taken a second mortgage is explained in the following section.

Second mortgages may be legal or equitable. In the case of the former, the first legal mortgagee acquires over freehold property a demise for a term of, say, 3000 years from the date of the mortgage, whilst the second or subsequent mortgagee gets a term, say, one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of such second or subsequent mortgagee (L.P.A., s. 85). As each legal mortgagee gets a demise for a term of years absolute, each has a legal estate. To ensure protection against a purchaser or a subsequent mortgagee, without notice of the second or later charges, all subsequent mortgagees should register their charges under the L.C.A. as puisne mortgages (*i. e.* legal mortgages not protected by the deposit of the title-deeds). Priority as between second and subsequent mortgagees will rank according to date of registration and not date of creation. The charge may be in the form of a charge by way of legal mortgage, and will have the same effect as if a demise for the terms stated above had been given.

In the case of leasehold property, a second or subsequent mortgagee gets a sub-demise for, say, one day longer than the term vested in the first or other mortgagee whose security ranks

immediately before that of such second or subsequent mortgagee (L.P.A., s. 86). As the mortgagee will not be in possession of the title-deeds, registration is necessary.

Second mortgages may also be taken under hand. Registration is necessary under the Land Charges Act as "general equitable mortgages."

The above remarks regarding registration do not apply to registered land or land in the County of Yorkshire (L.P.A., s. 97). In the case of limited companies, registration under s. 79 of the Companies Act is sufficient without further registration under the Land Charges Act.

19. **Tacking and Consolidation.**—*Tacking.*—Tacking before 1926 was the second mortgagee's bugbear. A first legal mortgagee who made further advances without notice of the second mortgage could tack his further advances to his first mortgage and so squeeze out the intervening mortgagee. Moreover, the doctrine was so extended that a third mortgagee, who did not know of the second mortgage at the time of making his loan, could, as soon as he discovered it, buy up the first mortgage and tack his third mortgage to it. But tacking has now lost most of its terrors, for the method of tacking by a third or subsequent mortgagee is now abolished, and a prior mortgagee can only obtain priority for further advances—

(*a*) If an arrangement has been made to that effect with the subsequent mortgagees; or

(*b*) If he had no notice of such subsequent mortgages at the time when the further advance was made by him; or

(*c*) Whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances.

The first case (*a*) calls for no comment. In regard to (*b*), if a banker has taken a second mortgage, he should be careful not only to register his mortgage as a land charge, but also give notice direct to the first mortgagee and, before making the advance, obtain an acknowledgment, stating the amount owing, and whether any other notices affecting the property have been received, and, to cover (*c*), a statement as to whether or not the first mortgagee is under obligation to make further advances. If possible, the banker should get the notice of his second charge endorsed on the first mortgage. The above regulations apply

whether or not the prior mortgage was made expressly for securing further advances.

Where the prior mortgage is made expressly for securing a current account or other further advances, L.A.P., s. 94, as amended by L.P.(A.)A., 1926, provides that the mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the time when the first mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, whichever happened last. This proviso is added because by L.P.A., ss. 197 and 198, registration constitutes notice, so that but for this saving clause the position of a mortgagee advancing on current account would have been an impossible one. It should be noted that the protection of the proviso applies only against the incumbrances not registered at the date of the original mortgage, and emphasises the need for the banker, when making an advance, to search, create and register his mortgage as simultaneously as possible. Direct notice by the second mortgagee will, of course, at once take effect, and a banker receiving such a notice should stop the account immediately so as to avoid the application of the Rule in Clayton's Case.

The regulations in the foregoing paragraph apply to mortgages whether made before or after the commencement of the Act (1st January, 1926), but they do not apply to charges registered under the Land Registration Act, which are provided for by a system of special notices.

20. *Consolidation.*—Consolidation of mortgages must be distinguished from tacking. Tacking arises where there are different mortgages on one property; consolidation can only occur where there are different mortgages on *different* properties belonging to the same mortgagor. If, for example, a mortgagee, having already advanced money on one property, afterwards advances money to the same mortgagor upon another property belonging to him, the mortgagee, previous to the Conveyancing Act, 1881, could consolidate both mortgages, that is to say, he had the option of refusing redemption, unless *both* mortgages were redeemed at one and the same time. This was an advantage to the mortgagee when the margin of security was greater in the one case than in the other, owing, perhaps, to one property appreciating and the other depreciating. The right was abolished by the Conveyancing Act,

1881, s. 17, which is reproduced in L.P.A., s. 93, except where a contrary intention is expressed in the mortgage deeds or one of them. Bankers' mortgage forms usually have a clause granting them this right to consolidate.

21. **Sub-Mortgages.**—Mortgage deeds are often offered as security for an advance. Prior to 1926, the banker took from the mortgagee an absolute assignment of the mortgage debt and a transfer of the securities for the same, but from the 1st January, 1926, the method was altered to that given below. In the case of sub-mortgages of freeholds in the old form by conveyance of the fee simple, existing on 1st January, 1926, the security held by the principal mortgagee was automatically converted into a term of 3000 years, subject to a provision for cesser on redemption, whilst the sub-mortgagee obtained a similar term less by one day (L.P.A., Sched. 1, Part VII, 4).

A sub-mortgage, *i.e.* a mortgage of a mortgage, may be equitable or legal. An equitable sub-mortgage may be created by the deposit with the banker (the sub-mortgagee) of the original mortgage and the deeds held by the original or principal mortgagee (the sub-mortgagor) together with a memorandum of deposit. The banker, as sub-mortgagee, should at once give notice of his charge to the original mortgagor, who should be requested to acknowledge receipt of this notice in writing, and to state the amount still owing on the mortgage. After notice the mortgagor must pay all sums in reduction of the mortgage direct to the banker. Any sums paid by the mortgagor, before or after the sub-mortgage, but before receipt of notice, will discharge him *pro tanto* from his liability to the banker as sub-mortgagee. The banker should make the usual searches, and be guided accordingly as to whether or not his advances are to be upon current or loan account.

In the event of the banker taking a charge on equitable interests, *i. e.* an equitable mortgage of an equitable mortgage, he should obtain the original memorandum of deposit as evidence of the equitable mortgagee's right to deposit the deeds. The usual notice to the equitable mortgagor and searches are necessary.

The manner of taking a legal sub-mortgage on freeholds depends on the form of the original mortgage. If the latter is in the form of a demise for a term of years (whether created in this form or converted by the Act in the way mentioned already), the method

of creating a legal mortgage is by sub-demise of the original term less a few days. If the original mortgage is in or has been converted into a Charge by way of Legal Mortgage, the banker may take a transfer of the original mortgage. As in all cases, he must obtain the original mortgage and the accompanying deeds, and should bear in mind that although the form executed by the sub-mortgagor may contain the usual banking clauses and provide for repayment on demand, the banker's remedies against the security are subject to the terms of the original mortgage deed.

In regard to leasehold properties, the original or principal mortgagee obtains, either by the deed itself or automatically under the Act, a demise for a derivative term equal to the original mortgagor's term less the last ten days, or the derivative term created by his mortgage (as the case may require), whilst the sub-mortgagee takes the same term less by one day.

Before advancing on mortgage deeds the banker should satisfy himself that the value of the property mortgaged justifies the amount lent by the original mortgagee. This inquiry is specially necessary in the case of mortgages on leasehold properties, for the market value of such properties rapidly diminishes as the unexpired term of the lease gets shorter. To counterbalance this depreciation, cautious mortgagees of leasehold properties periodically call for a reduction of the principal debt.

22. **Ground Rents.**—Ground rents are charges on land let on a long building lease, and are payable by the lessee to the reversioner. Upon the expiration of the lease, the land with all buildings originally upon it, or erected upon it during the lease, reverts to the lessor. When a banker advances money on the security of ground rents, he should, where possible, personally inspect the property, in order to satisfy himself that the buildings erected are adequate to secure the ground rents. He should also obtain possession of the title-deeds and the counterpart lease. Ground rents may be freehold or leasehold.

23. **Leaseholds.**—A prudent banker should always be cautious in accepting the deeds of leasehold property as security for an advance. Many leases contain onerous and restrictive covenants which, in certain circumstances, may press so hardly upon the lessee or anyone claiming title through him as to make the lease practically unsaleable and therefore worthless as a security. Where the lease is granted for a short term, it is not uncommon

for a provision to be inserted that bankruptcy or liquidation of the lessee, or the taking in execution of his goods, shall be a sufficient ground for the forfeiture of the lease. The Law of Property Acts, 1925 to 1929, and the Landlord and Tenant Act, 1927, give the lessee a considerable measure of protection. The lessee may now apply to the Court to be relieved of the consequences of the breach of certain covenants. He may also on the termination of the lease make application for compensation for improvements made, or for a goodwill which has become attached to the premises through his occupation. In some cases the Court may order a renewal of the lease of trade or business premises on terms settled by the Court. This is often of great importance to a lessee who has built up over a long term of years a valuable goodwill attached to his place of business.

Before accepting this kind of security, it is essential that the banker should carefully examine the lease to see what are the provisions respecting underleasing, and for what the tenant is liable in the way of repairs, insurances, rates, taxes and assessments, and what defaults and omissions may lead to a forfeiture of the lease. And the banker should not forget that if any or all of the words "duties, charges, impositions and outgoings" are added to the words "rates, taxes and assessments," then the lessee may be liable for his share in the expense of abating a nuisance and of paving, making up and sewering the thoroughfare in which the property is situated. But if the paving, making up and sewering have already been done by the local authority and all charges therefor paid, the "frontagers" have no further personal liability in respect of repairs to the roadway and sewers.

It is also desirable that the banker should see the receipt for the last rent due, because the receipt affords some evidence that the lessee has performed and observed the covenants and provisions of the lease up to the date of the receipt. At any rate, the receipt absolves the lessee for any breach known to the lessor at the time he signed the receipt, so far as forfeiture is concerned. The receipts should be handed to the banker periodically.

A legal mortgage over leaseholds may be obtained by (1) a subdemise for a term of years absolute less by one day at least than the term vested in the mortgagor (the lessee), and subject to a provision for cesser on redemption, or (2) by a charge by deed

expressed to be by way of legal mortgage (L.P.A., s. 86). In regard to a legal mortgage by sub-demise, if the freeholder's licence or consent to sub-demise by way of mortgage is required, the Act provides that such licence shall not be unreasonably refused. If the banker sees such a clause to the lease, he should require the production of the licence. The new property statutes have made little difference in the method of dealing with leasehold properties, and, prior to 1926, a sub-demise or under-lease for the lessor's term less the last few days was a frequent way of taking a mortgage over leaseholds. In a sub-lease, the sub-lessee is the tenant of the sub-lessor and not of the lessor (the original landlord), and thus escapes the direct liabilities of the lessee to the lessor. Mortgages were sometimes taken by assignment of the whole term, and all such mortgages in existence on the 1st January, 1926, became on that date sub-demises for the term assigned less the last ten days, whilst a second or subsequent mortgagee obtained a term one day longer than that vested in the mortgagee immediately prior to him, subject in all cases to cesser on redemption.

A charge by way of legal mortgage is a new method of creating a legal mortgage over leasehold or freehold land (L.P.A., s. 87), and gives the mortgagee the same protection in each case as if a sub-demise or demise, respectively, had been taken. This form will probably become the general form in use by bankers, and the same form is applicable to both freehold and leasehold property. If a lease stipulates for the lessor's consent to any assignment or sub-demise, such consent is not required to a charge by way of legal mortgage, as such a charge is not an assignment or sub-demise.

An equitable charge over leasehold land may be obtained by a deposit of the title-deeds, with or without a memorandum explaining the object and conditions of the deposit. In this case the banker does not need the lessor's licence.

When taking a mortgage on leasehold property, the banker should get possession of the lease and any assignments of it. If only part of the property leased is mortgaged, an attested copy of the lease should be obtained, and the usual acknowledgment of the right to production of the original lease when required. In cases where the land originally leased has been divided up, the question of the apportionment of the rent and covenants to the several parts is a matter of great importance. If the rent

reserved by the lease is not legally apportioned, the security, unless there is a very wide margin of value, should be refused, as the property will not be readily saleable, owing to the liability of the portion forming the security to the whole of the rent reserved by the original lease and not merely to the apportioned part. The same applies to the covenants if they are not also legally apportioned. If the lessor joins in the document severing the land and agrees to the apportionment, there is a legal apportionment and the severed land is only liable for its apportioned share. If the property, or any part of it, has been sub-leased, the counterparts, *i.e.* the copies of the sub-lease or sub-leases executed by the sub-lessees, should accompany the superior lease or assignment.

A rack-rent lease is one in which the rent reserved approximates to the full net annual value of the property out of which the rent arises. It is valueless as a banker's security.

On realisation by a legal mortgagee under his statutory or express power of sale, the conveyance by him will operate to convey not only the mortgage term (if any) but also the leasehold reversion. If the lessor's licence to assign is required on a sale by a mortgagee the Act provides that it shall not be unreasonably refused. Similar rights may be given by the Court on sale by an equitable mortgagee.

24. **Registration of Charges and Searches.**—*Registration of Charges.*—Apart from the registration of charges on land subject to the Land Registration Act and under the Yorkshire and Middlesex Registries, the group of statutes which came into force in 1926 provide for the registration of a number of other charges and interest in land, with the result that the present system may be described as a compromise between the old system and universal compulsory registration. By these registrations many equitable interests are compelled to disclose themselves or risk being postponed to a purchaser, mortgagee or lessee who, for valuable consideration, takes an interest in the land or in a charge on the land. Except for reasons of safety, there is no compulsion to register.

The regulations relating to registration and searches have been consolidated under the Land Charges Act, 1925. Registration under the Act at the Land Registry or elsewhere of any registrable instrument or matter constitutes actual notice of such instrument or matter, and of the fact of such registration to all persons and for all purposes connected with the land affected,

as from the date of registration or other prescribed date, and so long as the registration continues in force, but without prejudice to s. 94, L.P.A., respecting the making of further advances by a mortgagee under a mortgage made expressly for securing a current account or other further advances (L.P.A., s. 198).

The registrations under the Land Charges Act (except Local Land Charges) are made at the office of the Land Registry in London, where five registers and an alphabetical list of the estate owners against whom there are entries are kept for the following charges affecting lands :—

(1) *A Register of Pending Actions.*—A pending action is any action, information or proceeding pending in Court relating to land or any interest in or charge on land, and a petition in bankruptcy filed after 1925 is now also registrable as a pending action. A pending action will not bind a purchaser, mortgagee or lessee without express notice thereof unless registered, provided, in the case of a bankruptcy petition, that the provision only applies in favour of a purchaser, mortgagee or lessee of a legal estate in good faith, for value, without notice of an available act of bankruptcy. The registration of a pending action ceases to have effect at the expiration of five years, but may be renewed.

(2) *A Register of Annuities.* Certain annuities not created by will or marriage settlement were formerly registered in this register which is still kept at the Land Registry, but no new entries will be made therein.

(3) *A Register of Writs and Orders affecting Land.*—This section includes writs of execution, orders appointing receivers or sequestrators of land, and any receiving order in bankruptcy (made after 1925), whether or not it is known to affect land. Unless registered, a writ or order is void against a purchaser, mortgagee or lessee, except that in the case of a receiving order the same conditions apply as in the case of a bankruptcy petition. Registration continues for five years, but may be renewed.

(4) *A Register of Deeds of Arrangement affecting Land.*—Similar conditions to those set out above regarding a purchaser if not registered, and continuance for five years and renewal, apply also to this section. The above, except with reference to bankruptcy petitions and receiving orders and the closing of the Register of Annuities, is old law. The vital alterations brought about by the new statutes are contained in the following provisions.

(5) *A Register of Land Charges.*—These come under five headings. Classes A and B include land charges arising under an Act of Parliament, *e.g.* the Land Drainage Act, 1861, Agricultural Holdings Act, 1923. These are for the most part matters which are already registrable.

Class C is the most important one for bankers, and is entirely new. It includes—

(*a*) A "puisne mortgage," *i.e.* any legal mortgage not protected by the deposit of the relative deeds, and, if the whole of the land affected is within the jurisdiction of a local deeds registry, not being registered in the local deeds registry.[1]

(*b*) A "limited owner's charge," *i.e.* an equitable charge in favour of a tenant for life or statutory owner who has paid death duties or other liabilities in respect of the estate in which his interest lies.

(*c*) A "general equitable charge," *i.e.* any other equitable charge not protected by the deposit of the relative deeds and not being an equitable interest arising under a trust for sale or a settlement.

(*d*) An "estate contract," *i.e.* a contract to convey or create a legal estate.

By means of this Register, a banker, who has taken a first legal mortgage or an equitable mortgage without getting the title-deeds, can register his charge and thus put everyone on actual notice of his interest. And this applies also to a second legal or equitable charge. Hence, provided the requisite searches are made, followed by registration, the position is protected, but failure to register involves the risk of loss of priority through a subsequent mortgagee registering his charge. In the general way, the banker will have possession of the deeds, but there are occasions when the borrower cannot give the deeds to a first mortgagee, as, for example, when they relate also to another property which is already charged elsewhere.

Class D includes charges in favour of the Commissioners of Inland Revenue for death duties, and also restrictive covenants and equitable easements. This class is also new.

[1] The term "puisne mortgage" was formerly applied to all second and subsequent mortgages: it is used in L.C.A. in the special sense given above. It should be noted that it does not include legal mortgages of land in any of the ridings of Yorkshire.

Class E includes certain annuities not included in the Register of Annuities.

With regard to these Land Charges the following should be noticed:—

(1) Generally speaking they are void against a purchaser (including a mortgagee or lessee) if they are not registered before the transaction is completed, and actual notice of their existence will not affect priorities. But

(*a*) In the case of Class A a charge created before 1889 need not be registered until the expiration of one year from the first transfer of it after 1888.

(*b*) In the case of Classes B or C a charge created before 1926 need not be registered until the expiration of one year from the first transfer of it after 1926.

(*c*) In the case of Class D, and also in the case of an "estate contract," the avoidance is only effective against a purchaser of a *legal estate for money or money's worth.*

(2) As mentioned above with regard to registration under L.C.A., generally registration is equivalent to actual notice, but this operates without prejudice to the provisions of s. 94 L.P.A. with regard to further advances. (L.P.A. s. 198.)

(3) All mortgages, legal or equitable, other than mortgages accompanied by the deposit of the relative documents, affecting the legal estate rank for priority according to the date of registration. (L.P.A. s. 97.)

(4) As regards the mortgages of Companies, registration at Somerset House under s. 79 of the Companies Act, 1929, is compulsory and is equivalent to registration under L.C.A. (L.C.A. s. 10(5)), except in the case of land which comes within the Yorkshire Deeds Registry, when additional registration in that Register is necessary.

(5) As regards general equitable charges, restrictive covenants, equitable easements and estate contracts, and as regards any other land charge (not a "local land charge," for which see below), where the documents creating it shows that it affects land in any of the three Ridings, registration is to take place in the proper deeds register in Yorkshire. (L.C.A. s. 10 (6) as amended by L.P.(A.)A. 1926 Sch.).

(6) Legal Mortgages of land in any of the Ridings of Yorkshire

are registered in the Yorkshire Deeds Registry, and are therefore excluded from the operation of L.C.A., and it will be noted they are not included in the term "puisne Mortgage." This formerly applied to land in Middlesex also.

(6) *Local Land Charges, i.e.* charges in favour of Local Authorities for such purposes as road-making, paving of streets, and also town planning schemes and restrictions imposed by Local Authorities, must be recorded in a register kept by the Local Authority, or they will be void against the purchaser, mortgagee or lessee of a legal estate for value in the land affected thereby. These matters are often of great importance to a mortgagee, especially if his margin of security is not very great. Hitherto the mortgagee has had to make enquiries of the Local Authority, but after the end of 1926, all unregistered local land charges will be void as against him, and all he has to do is to search the register of Local Land Charges. An official search can be obtained. Search should be made not only of the rural or district authority, but also of the appropriate County Council.

The regulations with respect to pending actions, writs, orders, deeds of arrangements and land charges (but not including local land charges) required to be registered or re-registered under the Land Charges Act do not apply to registered land, if and so far as they can be protected under the Land Registration Act by lodging or registering a creditor's notice, restriction, caution, inhibition or other notice (L.C.A., s. 23).

25. *Searches.*—The nature and place of registration of the various charges have been given very fully in the preceding section, and it will be sufficient in this section to summarise briefly the registers which should be searched by a banker in connection with advances on landed property.

Any person may search the registers or index kept under the provisions of the Land Charges Act on payment of the prescribed fee of 1*s.* per name. An official search will be made by the registry for a fee of 2*s.* (or 7*s.* if expedited) and, if necessary, the result may be telephoned or telegraphed for an additional fee of 1*s.* 6*d.* The certificate of the result issued by the registrar is conclusive evidence, affirmatively or negatively, in favour of a purchaser, mortgagee or lessee. Similar provisions exist in respect to land under the Yorkshire Deeds Registry except in regard to expediting the result and the amount of the fees. Every

requisition for a search must be in writing, signed by the person making the search, and shall specify the name against which he desires search to be made, or in relation to which he requires a certificate of result of search, and other sufficient particulars. As the search is against an alphabetical list of proprietors' names, and not properties, it is essential that the proprietor's full names, description and all known addresses be given, so as to ensure identification.

Owing to the possibility of interests being registered in the interval between search and registration, the banker should obtain his mortgage and, where necessary, register it, as soon as possible after his search. Provision, however, has been made by the L.P.(A.)A., 1926, s. 4, to overcome this difficulty, and it is possible to search the Register at least two days before the mortgage is ready for completion, and having found it clear of charges, to lodge a priority notice in the prescribed form. If the application for registration of the mortgage is presented within 14 days thereafter and refers to the notice, registration will take effect as from the date of the priority notice. This will prevent any charges gaining priority over the banker's mortgage by being registered between the date of search and the date of registration. The same section contains another important provision affording protection against intervening registrations. Where a purchaser obtains an official certificate of the result of search, any entry made in the Register after the date of the certificate and before the completion of the purchase, unless made pursuant to a priority notice registered before the certificate is issued, will not, if the purchase is completed before the end of the second day after the date of the certificate, affect the purchaser.

No doubt more experience of the system will overcome the initial difficulties. Searches are required as under:[1]—

[1] It should be remembered when dealing with individuals and partnerships that the mortgagor may have had a receiving order made against him before 1926. Such an order is not registrable under L.C.A., and to afford full protection a search should be made at Bankruptcy Buildings, Carey Street, London, for receiving orders and adjudications made against him from the time he acquired the property or 12 years back (whichever is the shorter) up to 31st Dec. 1925. Bankers, however, usually omit this search in view of the fact that they are generally dealing with customers they know. Furthermore, as the bankruptcy of a firm means that of each general partner, search should be made against each member of the firm. And in the case of charges in the names of trustees or other joint names, search should be made against each name.

Unregistered land.

At the Land Registry, Lincoln's Inn Fields, London, under the Land Charges Act.

And also

At the office of the Local Authority for Local Land Charges (*e. g.* charges for street and other improvements) if considered necessary.

And also

At the Lands Registry (Middlesex Deeds Department) if the land is situated in the County of Middlesex.

Or also

At the Deeds Registries at Wakefield, Northallerton or Beverley, Yorkshire, if the land is situated in West, North or East Ridings, respectively. (The City of York is exempted from the operation of the Yorkshire Registry Acts.)

And also

At the office of the Registrar of Joint Stock Companies, Bush House, London, if the mortgagor is a company registered under the Companies Act, 1929.

Registered land.

If the land is registered land, it will be sufficient in most cases if the title in question is searched at the Land Registry under the Land Registration Act, and at the office of the Local Authority for Local Land Charges.

A very informative article on searches appears in the *Journal of the Institute of Bankers* for November and December 1928, and January 1929.

26. **Land Registration.**—The subject of title-deeds has been considered in the foregoing paragraphs without special reference to the system of Land Registration under the Land Registration Act, 1925. This Act does not make registration compulsory, except with regard to land situated in the compulsory areas, and then only in the event of a sale of the land or a grant of a lease thereof. From 1936 the area may be extended by an Order in Council, subject to certain conditions and safeguards. The Act applies to England and Wales only, and takes the place of the Land Transfer Acts, 1875 to 1897. (See note, p. 552*d*).

Only the legal estates and legal interests and charges recognised by the Law of Property Act, 1925, as "legal estates" are capable of registration, but certain equitable interests (called

"minor interests"), though not registrable, can be protected by inhibitions, restrictions, cautions or notices. In regard to leaseholds it is compulsory to register leases granted for forty or more years and leaseholds which have forty or more years to run at the time of sale, and provided that the property is situated within the compulsory areas. Leaseholds having less than forty but not less than twenty-one years to run at the time of grant or sale *may* be registered, but those determinable within twenty-one years are not registrable, neither are leaseholds of any length which contain an absolute prohibition against alienation. Leases include sub-leases but not terms created for mortgage purposes (except where there is no subsisting right of redemption and the lessee is entitled in equity to the nominal reversion, in which case he is registered as proprietor of the superior term). Lands that come under the jurisdictions of the Middlesex and Yorkshire Registry Acts (see *post*) are taken out of those jurisdictions when registered under the Land Registration Act. "Minor interests" mean those not capable of being disposed of or created by registered dispositions, and capable of being overridden by the proprietors unless protected, *e. g.* the interest of a beneficiary under a settlement.

The main object of Land Registration is to facilitate dealings in land by giving a simple, registered, State-guaranteed title, unassailable where possible, but a title subject to reservations in some cases, as a substitute for the cumbrous chain of title as evidenced by the usually formidable bundle of deeds. This is effected by means of entries in the Register kept at the Office of Land Registry, Lincoln's Inn Fields, London. The Register contains particulars of the land, with the name of the proprietor, and of the mortgages and other incumbrances that affect the registered property. This Register is kept up to date by the entry of all changes of ownership as soon as they occur, and its correctness is guaranteed to the purchaser or mortgagee by the State.[1] The Register is strictly private—no one being allowed to inspect it, except a registered proprietor or chargee, or person authorised by him in writing. An intending purchaser or mortgagee of registered land has no need to make any inquiry into the title, but if the title is possessory only, it may be

[1] The State has to some extent a right to be recouped by the person whose act, neglect, or default contributed to the loss, *i. e.*, in most cases the first proprietor registered with Absolute Title.

necessary to investigate the title prior to registration; all he has to do is to obtain the vendor's permission to inspect the register in order to see that the person he is dealing with is the registered proprietor. A mortgage of registered land, or a sale of it, may be effected, where the title is absolute or good leasehold, with less delay or uncertainty, and at reduced cost. The entries in the register are simple; the forms of transfer are short and many of them easily understandable by the average person. The advantages of the system of registration, as claimed by its advocates, are security, cheapness, expedition, clearness and simplicity.

When registration is completed a *Land Certificate* containing complete copies of the entries in the register is delivered to the proprietor or deposited in the Registry if the proprietor so prefers. The proprietor may at any time apply for the delivery of the Land Certificate, and may re-deposit it at any time. No transfer or charge can be registered without production and indorsement of the Land Certificate at the Registry. When registered land is transferred or charged, the proprietor executes an instrument of transfer or charge. The purchaser brings or posts this to the Registry with the prescribed fee; in the case of a transfer, the old proprietor's name is cancelled, and the new proprietor's name entered in its place, and, in the case of a charge, short particulars of the amount, interest, etc. are entered in the Charges Register with the name of the creditor. Charges can be transferred and otherwise dealt with in the Register in the same manner as the land; those charges which are paid off are cancelled altogether by the registration of a properly executed discharge.

There are four ways in which land may be registered under the Land Transfer Act, with (*a*) Absolute Title, (*b*) Good Leasehold Title, (*c*) Possessory Title, (*d*) Qualified Title.

27. *Absolute Title.*—The Land Registry carefully examines the proprietor's title and then confers on him an absolute right to the property, guaranteed (subject to the reservation already referred to) by the State against all the world. The proprietor's title is subject only to the registered incumbrances and other entries, if any, on the Register, and subject to any "overriding interests." The latter are such as easements (*i. e.* rights of way, light, etc.) land-tax, tithe rent-charge, leases for less than twenty-one years, and similar rights which cannot be registered.

28. *Good Leasehold Title.*—Leasehold land cannot usually be registered with an absolute Title owing to the inability of the leaseholders, generally, to produce evidence of the Freehold Titles, and so to prove the original validity of the lease itself. Good Leasehold Title amounts to a guarantee by the State of the leaseholder's title to the lease, but does not guarantee the validity of the lease itself. For all practical purposes registration with Good Leasehold Title confers the same advantages as registration with Absolute Title, except that the covenants of the lease and the rights of the lessor have been considered.

29. *Possessory Title.*—Registration with Possessory Title is effected on *prima facie* evidence merely, and is consequently easier to obtain than Absolute Title. In regard to security from fraud, simple forms of conveyance, accurate plans and other incidental matters, it has the same effect as Absolute Title, but it does not immediately confer on the proprietor and those who deal with him an indefeasible right to the land against all the world. Registration with Possessory Title keeps the title clear for the future, but is no bar to possible adverse claims dating from a time prior to its first entry on the Register. Dealings subsequent to the first registration are guaranteed, but not prior dealings. Hence, if the land has to be sold soon after its registration with Possessory Title, almost the same investigation must be made into the prior title as would have been made if the land were unregistered. The result is that usually the transaction is more troublesome and expensive than if the land were unregistered. As at present the great bulk of titles registered are Possessory only, the aim of the Act of 1925 has been to enable the Registrar to grant Absolute and Good Leasehold Titles whenever practicable, and to facilitate the conversion of existing Possessory Titles as much as possible. Thus, on a transfer for value all deeds have to be lodged and, in the case of freehold land, if it has been registered with Possessory Title for fifteen years (or in the case of leasehold for ten years) and the registered proprietor is in possession, the Registrar may, after giving the prescribed notices, convert the title into Absolute (or Good Leasehold).

29*a*. *Qualified Title.*—Where an Absolute or Good Leasehold Title is required, but the title cannot be proved fully, the title may be registered subject to the defect particularly described in the Register. These titles are not very common.

30. *Compulsory Registration.*—Registration is compulsory in the Counties of London and Middlesex and the County Boroughs of Eastbourne and Hastings, for a conveyance on sale of any freehold land, and for a grant or assignment on sale of leasehold land having forty or more years to run. When land is once registered, the legal estate on a sale can only be obtained through a registered transfer, and, in the case of land not already registered, the purchaser must apply for registration within two months of the sale to get the legal title. Registration is optional in the case of leaseholds having less than forty years but not less than twenty-one years to run. (See note, p. 552*d*.)

31. *Deposit of the Land Certificate.*—When a Land Certificate is issued, the Registrar, to prevent concealment of the fact of registration, indorses the deeds with the denoting mark of the Registry. If the deeds are so marked, the banker should insist upon the production of the Land Certificate as well as the deeds. When the owner borrows on the security of his land, and the charge or mortgage has been registered or protected by a priority caution, the Registrar holds the Land Certificate, but in the case of certain other dealings, the Land Certificate is retained by the owner, subject in certain cases to the indorsement of the Certificate. The banker, therefore, should see that the Land Certificate is in order, and compare it with the Register. For this purpose it may be sent to the Registry, and will be brought up to date without charge.

Deposit of the Land Certificate is a good security for a temporary loan, and creates a lien equivalent to a lien created by the deposit of title-deeds of unregistered land (L.R.A., s. 66). As in the case of the latter, the banker should be careful to retain possession of the Land Certificate and the other deeds (if any). Where the land is registered with Absolute Title, the banker needs no document other than the Land Certificate, though he should insist on them all being handed over, but if the title is Possessory only, the certificate must be accompanied by the title-deeds, which should be investigated, for the reason that a Possessory Title does not bar adverse claims dating prior to registration. A deposit of the Land Certificate may be made with or without a memorandum of deposit, and, if desired, may be protected by the banker giving notice of the deposit to the Registrar. This notice will operate as a caution, the effect of

which will be that the banker will get fourteen days' notice of any attempted dealing with the land, during which he can take what action he considers requisite. It is desirable also to have the Land Certificate brought up to date or a search made, in case there may have been notices registered which have not yet been indorsed on the Certificate.

The Proprietors' Register is private, so that a letter of authority to search the register should be obtained from the mortgagor, and armed with this the banker may search the register under the title number, which will show all charges and incumbrances subject to which his charge will take effect, except "overriding interests," most of which are unimportant from the banker's point of view. This should be done before the advance is made. The deposit of the Land Certificate may be made with or without a memorandum in exactly the same manner as in the case of an equitable mortgage by deposit of the deeds of unregistered land. It is not necessary, but it is very advisable, to give notice to the Registrar, by registered letter or otherwise, of such deposit, with the name and address of the bank, describing the land by county, parish or place, and the title number. Whereupon the Registrar for a fee of 1*s*. enters the notice in the charges register and gives a receipt for the notice. This operates to give notice to any purchaser, and will prevent the issue of a new Certificate.

In the case of advances which are made on current account, the account should be stopped on notice that another charge has been given by the mortgagor. Where a banker, who is making advances on current account, relies upon mere deposit of the Land Certificate there is a danger of his being postponed to a subsequent registered incumbrancer by the operation of the Rule in Clayton's Case. Naturally, the banker will not advance against a simple deposit unless he relies to a great extent on his customer rather than on the security.

There are two ways of taking a legal mortgage over registered land, whether freehold or leasehold, and the registered proprietor may either give a *registered charge*, or a mortgage (by deed) as if the land were not registered. A registered charge, unless made or taking effect by demise or sub-demise, and subject to its provisions, takes the same effect as a charge by way of legal mortgage over unregistered land under the Law of Property Act (L.R.A., s. 27, and L.P.A., s. 87). It must be by deed, but may

take any form so long as the land charged can be identified in the Register. A form of Charge by way of Legal Mortgage is given in the Appendix, and is suitable for registered land, but the property should be described not only by reference to the postal address but also by reference to the Title number. These particulars are sufficient in themselves, and it would appear undesirable to schedule the title-deeds, as it might be contended that this would be notice of any prior interest mentioned in the deeds which is not registered or protected on the Register, in which case the form would not be accepted. They should therefore be listed separately, and an ordinary receipt given for them. The charge must be produced, together with a copy and the Land Certificate, to the Registrar, who will retain the original deed of charge and the Land Certificate, and issue a *Certificate of Charge*. Priority dates from registration, not from creation, and the usual searches for incumbrances must be made before advancing. Where a registered charge is made for securing further advances, the Registrar must, before making any entry on the Register which would prejudicially affect the priority of any further advances thereunder, give notice to the chargee (L.R.A., s. 30). On receipt of such a notice, the banker must stop the account as subsequent advances would be postponed to the new incumbrancer. But if the charge contains an *obligation* to make further advances and this fact is noted on the Register, the further advances may be made in priority to any subsequent incumbrancer, registered or not, and whether or not the banker has notice of them (L.P.(A.)A., 1926, s. 5). The remedies of a chargee are similar to those of a legal mortgagee of unregistered land. The fees payable on a registered charge are 1*s*. 6*d*. per £25 plus the usual mortgage duty of 2*s*. 6*d*. per cent.

In the case of an ordinary mortgage by deed the mortgagee should protect himself by lodging a *mortgage caution* in the specially prescribed form (L.R.A., s. 106). This mortgage caution enables the mortgagee to convert his mortgage into a registered charge at any time, with the same priority as that of the caution and with the same powers as a registered chargee. The fees payable are, however, the same as in the case of a registered charge, so that there appears to be little advantage in this method. As in the case of a registered charge, the Land Certificate must be deposited at the Registry until the charge or mortgage is cancelled (L.R.A., s. 65).

Equitable charges under land not protected by deposit of the relative Land Certificate and off the Register may be taken and protected by *cautions* or *restrictions*. A caution against dealings may, for a fee of 10*s*., be entered on the register by any person who proves his interest. When this has been entered, the Registrar may not register any dealing or enter notice of deposit of the Land Certificate without first giving notice to the cautioner, who will usually have 14 days to take action before the Registrar and, if necessary, by injunction in the Court to prevent the dealing being registered. It has no greater effect than this, but does not require the consent of the registered proprietor. A restriction (fee 10*s*.), which has to be entered by the registered proprietor, whose consent in the case of a mortgage it should not be difficult to obtain, is a much more effective method, since it may be worded to prevent any dealing without the consent of the person mentioned. The restriction is not intended to protect mortgagees, but although unauthorised for the purpose it would appear to be effective.

A Certificate of Charge may be taken as a security in the same way as a mortgage deed of unregistered land. The banker may get himself registered as proprietor or may take the Certificate of Charge with or without a memorandum of deposit protected by notice to the Registrar, or take the Certificate of Charge alone, and rely on his lien.

Mortgages and charges over registered land by limited companies must be registered or protected by a caution under the Land Registration Act as well as registered under the Companies Acts at Bush House, W.C. 2 (L.R.A., s. 60). Hence, before lending to limited companies, searches should be made at both places.

32. *Middlesex*[1] *and Yorkshire Registries Acts.*—Land situated in Yorkshire (except in York City) is subject to the jurisdiction of the local Registry Act, which provides that deeds of conveyance and mortgages, to prevent avoidance, must be registered in the county register. It should be noted that this local Act requires registration of *deeds*, not, like the Land Registration Act, registration of *titles*. This local Registry was established to minimise the risk of fraud through unauthorised dealings, and to provide a record that would protect property owners against the loss or destruction of their deeds. Though registered, the title-deeds and records of events themselves still constitute the title.

[1] See note, p. 552*d*.

A banker taking a legal mortgage on land within the jurisdiction of the local Deeds Registry should register a memorial of it, but, if his charge is an equitable one, he need not register his memorandum of deposit, as by ss. 11 and 197, L.P.A., only instruments which affect the legal estate have to be registered, when they will operate as actual notice to all persons, except for the limited purpose of further advances mentioned elsewhere.

In the case of limited companies, charges over land have to be registered with the Registrar of Companies and with the respective local Deeds Registry, so that both sets of registers should be searched.

In regard to other interests in the case of land in Yorkshire, those constituting a general equitable charge, estate contract, restrictive covenant and equitable easement are now, by the L.P.(A.)A., 1926, registrable in the appropriate local registries for the Riding concerned in the Charges Register. There are, however, still other registrable interests, and these are registered under the L.C.A. in London. Hence, the following searches are necessary to establish complete knowledge of the position; (*a*) the local Deeds Register for prior legal interests, (*b*) the special local Land Charges Register for prior equitable interests, and (*c*) Land Charges Register in London for certain other registrable interests.

Similar regulations, except those in the preceding paragraph, formerly applied under the Middlesex Deeds Registry Act, the registers of which had to be searched by a banker before making advances against land in Middlesex. Search had also to be made in the Land Charges Register where certain other interests were registrable. Since 1st January, 1937, however, land in the County of Middlesex has been brought under the Land Registration Act. The present position is explained on p. 552*d*.

33. **Statutes of Limitations.**—The period during which actions for the recovery of land may be brought is regulated by the Real Property Limitation Act, 1833, and the amending Act, 1874. By the provisions of these Acts, no person can enter into possession, or bring an action to recover any land, except within twelve years next after the right of action first accrued to him or to some other person through whom he claims the right. But in the case of a written acknowledgment, given to him or his agent, by the person in possession, the time of action is extended to twelve years from the date of such acknowledg-

ment. A payment of part of the principal or of interest will, in like manner, extend the time of action. By s. 7 of the amending Act, if the mortgagee is in possession, the mortgagor can only exercise his right of redemption within twelve years of the date of possession. And by s. 9, a mortgagee can obtain a possessory title to land if he has remained in undisturbed possession of the land for twelve years, without giving a written acknowledgment of the mortgagor's title or right of redemption. So also the mortgagee loses his rights if he allows the mortgagor to remain in possession for twelve years, without obtaining from him any payment on account of principal, or of interest, or any written acknowledgment of the mortgagee's rights. In regard to actions against the debtor personally the limit, if the agreement is *under hand*, is six years after the right of action first accrued, or six years after the last written acknowledgment, or payment of principal or interest, but where the charge is a legal mortgage, or on agreement or memorandum under seal, the limit is twelve years. It should be noted that where the banker's charge is a memorandum under hand, the personal remedy is barred in six years, but the remedy against the security exists for twelve years.

34. **Fire Insurance.**—When the mortgaged land comprises buildings erected upon it, a fire insurance policy effected with an Insurance Office approved by the banker, should be lodged with the deeds, and, to protect himself, the banker should get the insurance company to indorse the policy with a note of his interest, or have the policy in the joint names of himself and the mortgagor. If the policy covers stock in trade as well as buildings, the banker should see that the buildings are adequately covered, for it is the buildings in which the banker is interested. A note of the due date for any premiums payable should be made, and the renewal receipts placed with the policy; and in this connection it should be noted that the usual fifteen days' grace is not allowed on short term policies, *i. e.* policies for a term shorter than a year. The insurance company only pays compensation for the actual damage incurred through the fire, and that only up to an amount not exceeding the sum for which the property is insured. If a policy is subject to "average," it means that if the property is not insured up to its full value, the insured is deemed to be carrying a proportion of the risk equal to the amount short insured, *e. g.* if a house worth £1000 is in-

sured for £500 and a loss to the extent of £400 occurs, only £200 will be paid by the underwriters, leaving £200 to be borne by the insured. If property is insured in more than one office, each company interested contributes *pro rata* in the event of loss by fire. The Conveyancing Act, 1881, s. 23 (3), enacts that all money received on an insurance effected under the mortgage deed shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. In the event of a fire the banker should give the company notice of his interest, if the policy is in the customer's name only, and no note has been indorsed on the policy.

35. **Stamp Duties.**—By the Stamp Act, 1891, Sched. I, a mortgage under seal, "being the only or principal or primary security," is chargeable with duty at the rate of 1*s.* 3*d.* for each £50 up to £300, after which the duty is 2*s.* 6*d.* for every £100 or fraction of £100. The duty is payable on the amount of the consideration, *i. e.* the whole of the debt secured, not upon the market value of the security. Where the security is collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further security to a primary security duly stamped as above, such collateral security must be stamped on the full amount secured at 6*d.* for each £100 or fraction of £100, with a maximum of 10*s.*

An "equitable mortgage" is liable to a duty of 1*s.* per £100 or fraction of £100 on the full amount secured. By s. 86 (2) of the Stamp Act, 1891, an equitable mortgage "means an agreement or memorandum under hand only, relating to the deposit of any title-deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security) or creating a charge on such property." This definition rules out, for the purposes of the Stamp Act, an equitable mortgage under seal, or a first or second mortgage by deposit of the deeds with a memorandum under seal. Such instruments are chargeable with the full mortgage rate, though such mortgages are held to be equitable in law. Moreover, if the memorandum *under hand* contains a clause giving the mortgagee a power of attorney, or of sale, or of appointment of a receiver, the stamp duty is 2*s.* 6*d.* per cent. The 1*s.* per cent. duty is therefore confined to a memorandum, formal or informal, stating the object and conditions of deposit, with or without a

clause undertaking to execute a legal mortgage whenever that is deemed to be necessary. In the case of equitable mortgages, every security, whether primary or collateral, is chargeable with the duty of 1*s.* per cent. on the total amount secured (*Memorandum No.* 15 *A*, Inland Revenue Office).

The Memorandum just quoted goes on to say that as the instruments given to bankers by their customers to secure overdrafts on current account are, whether legal or equitable mortgages, almost invariably worded as securities for all sums due or to become due to the banker, the mortgage or memorandum must be stamped 2*s.* 6*d.* per cent. or 1*s.* per cent., as the case may be, on the highest amount at any one time due to the banker, and that in no case can the value of the security assigned, deposited, or charged, be taken as the basis of assessment for duty. This ruling applies to all collateral securities, each of which must be stamped for the highest amount of overdraft reached at any one time. Whenever the mortgage or memorandum requires additional stamping this must be done within thirty days of the date when the advance reached a higher total than the security was stamped to cover. The banker must also furnish a certificate giving the previous highest total of the advance and the date when it was exceeded (see Appendix, p. 496, for specimen form). If the thirty days' grace has expired, the banker, to avoid the penalty for not stamping, may take out a fresh memorandum for the total amount advanced and stamp it accordingly, care being taken to ascertain that no intervening mortgages have been created.

The following example will make the foregoing clear. A customer gets an overdraft of £2,500, and gives, as security, the title-deeds of three freehold properties, each worth £500. Each property is separately charged by legal mortgage to the banker, and each deed is so drawn up as to cover the whole amount of the overdraft. The banker must treat one of the mortgages as a primary security, and stamp it 2*s.* 6*d.* per cent. for the full amount of the overdraft, £2,500, viz. £3 2*s.* 6*d.*, each of the other mortgages being stamped as a collateral security at 6*d.* per cent. Here the maximum amount of 10*s.* each is all that is necessary, instead of 12*s.* 6*d.* each. The collateral securities should also bear a "duty paid" stamp, as an indication that the full rate has been paid on the primary security. If the charges had been equitable, each memorandum would be stamped 1*s.* per cent.

for £2,500, a total of £3 15*s*. 0*d*. in all. This method of stamping is in accordance with the instructions sent out by the Board of Inland Revenue in their Circular of 1905, but their interpretation has not yet received judicial recognition, and has been questioned by competent authorities. Still, until the matter has been decided in a Court of law, the banker must not do otherwise than follow the Inland Revenue directions.

Sometimes a banker accepts as security a property which he values, say, at £700, and agrees to advance £400 on it. In the document of charge he inserts a clause to the effect that the amount for which the security is to be available is the amount to be advanced, viz. £400. He then has the document stamped to cover £400. If, at a later period, he elects to advance, say, another £200, on the security of the property, he cannot further stamp the document, but he may take a fresh memorandum of deposit and stamp it to cover the additional £200. In advances of this kind, should the customer become bankrupt the position is this: (1) If the document of charge had been drawn to cover continuing advances, unlimited in amount (and not, therefore, as in the example given above), he can further stamp the document to cover the additional advance if thirty days has not elapsed since the advance was made, and prove as a secured creditor for the whole debt. If more than thirty days have elapsed he can pay the stamp duty and a penalty of £10 and prove as a secured creditor for the whole debt. (2) If, however, as in the example quoted above, the document of charge limits the amount for which the security is available, he cannot stamp for an additional advance under penalty, and as the customer is bankrupt, he cannot obtain a further memorandum, but must prove as a secured creditor for £400, and as unsecured creditor for £200. It would also appear that if the document of charge limits the amount of the advance covered, the customer could pay off the £400 and claim the £700 security, even though he, for example, owed a further £200 on general account. The reason for this is that by fixing a definite limit, the banker's general lien is barred on the ground that it would be inconsistent with the terms of the special agreement between the parties. If the banker proposes to take a further charge, he must first make the appropriate searches to see whether any subsequent charge has been registered, to which he will be postponed.

All documents of charge must be stamped within thirty days

of their execution, and all further stamping, if allowable, must also be done within thirty days. As a general rule, the lack of a stamp does not invalidate the document of charge, but, if unstamped, it cannot be produced as evidence in a Court of law without payment of the duty and an assessed penalty.

On discharge of a legal mortgage, the duty on any receipt which operates as a re-conveyance is 6*d.* per cent., calculated either (*a*) on the highest amount advanced on the security of the instrument, or (*b*) on the fixed sum named in the mortgage, according to the nature of the instrument. The receipt on discharge of a collateral security (as defined by the Stamp Act, 1881, Sched. I., viz. additional security), the duty is 6*d.* per cent. with a maximum of 10*s.* By the same Act, the duty on transfers of mortgages is 6*d.* per cent. of the amount transferred or assigned. A memorandum of deposit does not need re-conveying and should be discharged by a simple receipt indorsed on the memorandum (see also p. 375).

36. **Valuations.**—It is not possible competently to value property merely by capitalising the annual rent value at so many years' purchase. The work, for its due performance, requires technical training and much practical experience, coupled with considerable powers of observation and deduction, and is very properly left, in the usual way, to highly-trained professional valuers. A banker, however, when lending money against property, does not always find it convenient or practicable to call in this professional assistance, but has to rely on his own judgment. The object of the present article is to give a brief outline of the main principles upon which such a judgment must rest if it is to be worth anything at all. And here it must be noted that estimating what sum of money can safely be lent upon mortgage is a different proposition from estimating what is the market value of the same property. The reason is that the mortgagee, with unpaid interest rapidly accumulating, generally desires to sell very soon after the mortgagor makes default, whereas the owner desirous of getting rid of his property can often afford to wait for a favourable offer, enjoying in the meantime the income from the property. As regards the latter, the mortgagee can take possession, but the dangers of such a course have already been pointed out. The banker, therefore, in estimating the value of property must consider what it would

be likely to fetch in the open market at a forced sale without reserve.

When landed property is offered as security the banker should, where possible, personally inspect the property, and make certain that the property he is viewing exactly tallies with the detailed description to be found in the title-deeds. Having identified the property, the next thing to determine is its saleable value. The proper basis for this calculation is not necessarily the purchase money, plus the money spent by the owner on improvements. Many persons freely spend money on property bought by them, merely to gratify their own tastes, or for the purpose of carrying on particular pursuits or hobbies. Such expenditure may add nothing to the value of the property in the eyes of most possible purchasers. The borrower's estimate of the cost, however, forms a useful check on the banker's estimate of its value, provided that he is careful to eliminate any extraneous items that the borrower may have included, such as the charges of solicitors and professional valuers, cost of unnecessary alterations, decorations and fittings, which do not add to the market value of the property. It should not be forgotten, too, that the property at the time the owner bought it may have been really worth the price he paid for it; but the value in the meantime may have been seriously affected by changes in environment and fashion. It is very important to note whether the neighbourhood is an improving or a depreciating one. For example, improved means of transit often tend to depreciate considerably the values of residential property in the centre of large towns. A new tram or bus service will often cause rents to fall, and houses to remain unoccupied on its route, while, at the same time, having a stimulating effect on outlying property, which the service brings into communication with shopping and business centres, etc. A similar disturbing effect will be created by the encroachment of shops on residential properties, or the turning of neighbouring properties, formerly let at a good rental, into flats at small rentals. Houses let at rentals, say, of £120 to £150, may rapidly fall in value if, on vacant land in the same road, some enterprising builder erects a row of small self-contained flats. There are various other contingencies which may happen, but sufficient has been said to show how many factors have to be considered before a true estimate can be made.

The next thing to do is to calculate the net rental produced

by the property. This is done by deducting from the gross rental all outgoings and charges, such as ground rents and tithes, where payable, land taxes, and insurances, allowances for repairs, for parts of the property not occupied, and for rent collection. With regard to the allowances for the last three items, the percentages will vary according to the class of property. Usually the percentage of deduction will be greater on weekly and small property than on large property. Local rates must also be deducted if paid by the landlord, as they usually would be in the case of weekly properties and self-contained flats.

To be suitable as a mortgage security, a property should produce a net income considerably in excess of the amount required for interest. This would leave a margin in hand should the property remain unlet for a time, or its rental value depreciate. And due note must be taken of any ground rents or other charges, for if the property is unoccupied the mortgagee will have to pay them in order to preserve his security. If these charges on the property amount to a large sum, his margin of security may be seriously depleted, as well as his cash resources.

Having carefully estimated the net rental, the capital value of the property is obtained by multiplying the net rental by so many years' purchase. The multiplier used depends on the circumstances of each case. Freehold land justifies a higher figure than long leasehold, and long leasehold a higher figure than short leasehold. Any restrictive covenants in a lease have to be duly considered when fixing the figure. For example, a restrictive covenant in the lease of a house that it must not be let for professional purposes, where most houses in the same street are so let, might seriously impede the letting of it when empty. Other important facts to take into account are the state of repair, and nature of any buildings, and the margin of receipts over outgoings.[1]

In normal times, bankers would consider fifteen years' purchase for freehold and ten years' purchase for leasehold with a long

[1] The value of house property has increased enormously. During the War building operations were at a standstill; this has resulted in a serious shortage of housing accommodation, which, owing to the greatly increased cost of materials and labour, cannot now be made good as cheaply as before the War. How much of the higher value of house property, due to these causes, will remain when the supply of houses has overtaken the demand, and rents, prices, and wages have become stabilised, it is impossible to say. Meanwhile it may be considered that the methods of valuation outlined err on the side of caution.

term still to run to be sufficiently conservative when valuing for mortgage purposes. It must be noted that valuing in this way produces a figure much below that which the property should realise when sold in ordinary circumstances. But the banker's aim should be to fix a value which approximates to what would be obtained at a forced sale in unfavourable times. As a general rule, it is more difficult to fix the figure for leasehold than for freehold property. The number of years' purchase on leasehold property essentially depends upon the unexpired term of the lease, and the value of the lease declines as the period of tenure diminishes. Re-valuation of all property should be made periodically, especially in the case of leasehold property.

In estimating the value of residential property, not only must it be seen that the property is in good repair and well let, but also that the class of house is suitable for the district. Modern houses, though not nearly as well built as many of the houses of thirty or forty years ago, often let or sell much more easily, owing to the fact that modern builders follow designs that produce houses much more attractive in appearance than the heavy-looking structures of a generation ago. Other considerations of great importance are the situation of the property in regard to means of transit, shopping centres and schools, etc., the nature of the soil (gravel being preferable to clay), the water supply, and the condition and age of the drainage system and sanitary arrangements. If the property is newly-built, due allowance should be made for the costs of paving and drainage to which each owner in the new road must contribute his quota. If the road has been drained or paved, it should be ascertained whether the owner has paid his contribution or not.

The value of some property depends very largely upon the continuance in the neighbourhood of naval and military establishments, and of large manufacturing concerns. The possibility of the removal of these large establishments should be duly considered, especially in the case of small property, which might prove difficult to let if the employees of the works had to move.

As regards shop property, it is essential, before capitalising the rent, to fix the true annual worth of the property. The rent actually paid by the tenant is frequently not a sure guide. For example, a tenant may have got together a good connection and be well-established in business at, say, a rental of £150 a

year. His lease may fall in, and to get a renewal he has to pay £200 a year. This probably he will be able to do, but should he for any reason give up business, the landlord may have to fall back to the old rent of £150, or even less. The banker, in estimating the rent value, should allow for such contingencies. The rents of adjacent shops would afford some sort of guide as to value, but it should not be forgotten that one side of a market street is often more valuable than the other side, and one particular section better than other parts of the same street. This is especially the case if the street is a long one.

The valuation of engineering shops, mills, factories and similar buildings can only be done properly with expert assistance. In many cases, the value, from the banker's point of view, is bound up with the prosperity of the manufacturing business carried on in the premises. If the business goes wrong, the premises are not always easy to dispose of, and, consequently when estimating their value for mortgage purposes, this fact merits careful consideration, especially as nowadays the tendency is to move manufacturing businesses from congested areas, where local rates are heavy, to rural districts where land is cheaper and rates are light. The value of premises licensed for the sale of intoxicating liquors depends almost entirely upon the retention of the licence, and, consequently, such premises are not desirable as bankers' securities, especially as, in many cases, their structure makes them not easily adaptable for purposes other than that for which they were built. The risk of loss of the licence can be covered by insurance, and such a policy is generally desirable.

The valuation of agricultural land is another highly technical matter. A knowledge of local farming conditions is essential, and due allowance must be made for the personal element. Good land farmed badly will often produce a less return than poor land farmed on scientific principles. And badly-farmed land will need a lot of money spent on it before it is brought back to standard. The net rental value should be calculated in the ordinary way by deducting all outgoings from the gross rental. In fixing the gross rental the rent paid by the present tenant should be compared with that paid for neighbouring farms. Important points to consider are: (1) Kind of soil and what proportion of it available for farming purposes; (2) Condition of the necessary farm buildings, fences and drainage; (3) Contour

of the land. Hilly ground adds to the expenses; (4) Nature of crops, including special crops, such as hops, mustard seed, fruit trees, beet, etc.; (5) Nature and quality of water supply; (6) Proximity of railways, good roads and market facilities; (7) Quantity, nature, and condition of live stock; (8) Housing accommodation of farm workers.

Great caution should be exercised in advancing money on uncovered building land. If there is a demand for housing accommodation in the district, the land may sell without much difficulty, but in those times of depression which are recurrent in the building trade, the land is worth little or nothing. And, as a general rule, a banker is well advised not to advance money to speculative builders on the security of houses in course of construction. If he does do so, he is always faced with the possibility of having to advance more money to enable the mortgagor-builder to complete the houses, in the hope of selling them; or, if he decides not to advance more money, he may find himself saddled with half-built houses that he cannot get rid of except at a considerable loss.

The preceding remarks on valuation are intended to be merely suggestive and cautionary, it being quite outside the scope of this work to deal fully and adequately with such an intricate subject. When all is said, the task of valuing and surveying property is outside a banker's business, and though his personal knowledge of the borrower may, in particular cases, justify his taking such security on his own judgment, he should, where there is any doubt, call in a professional valuer, especially when the advance is a large one.

CHAPTER VII

DOCUMENTS OF TITLE TO GOODS

1. Definitions.—Goods may be taken as security for advances. This is effected, not by taking actual delivery of the goods, but by deposit of the documents of title to the goods. The chief Acts regulating these documents are the Factors Act, 1889, and the Sale of Goods Act, 1893. S. 1 (4), Factors Act, 1889, defines documents of title as including " any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." The Bills of Sale Act, 1878, s. 4, expressly excludes all documents of title, so that they do not require registration as bills of sale.

A Bill of Lading is a document issued and signed by, or by the authority of, a ship's captain, acknowledging that the goods

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BILL OF LADING (*Simple Form*).

(Stamp 6*d*.).

SHIPPED in good Order and well conditioned by ..... in and upon the good Steam Ship called the ..... whereof ..... is Master for this present Voyage and now lying in ..... and bound for .....

.....

.....

.....being marked and numbered as in the Margin, and are to be delivered in the like good Order and well conditioned at the aforesaid Port of ..... (The Act of God, the King's Enemies, Fire, Machinery, Boilers, Steam, and all and every other Dangers and Accidents of the Seas, Rivers and Steam Navigation, of whatever nature and kind soever excepted) unto ..... or to ..... Assigns ..... Freight for the said Goods ..... with primage and Average accustomed.

IN WITNESS whereof the Master or Purser of the said Ship hath affirmed to ..... Bills of Lading all of this Tenor and Date the one of which Bills being accomplished the others to stand void.

Dated in London, ... 19...

Weight and contents unknown. For the Master.

described in the bill have been duly received on board, and undertaking to deliver the goods in the like order and condition as received, to the consignee, or to his order or assigns, provided that the freight and any other charges specified in the bill of lading have been duly paid. A bill of lading for goods to be *exported* or carried coastwise must be stamped 6*d*. before execution. The penalty for non-observance of this regulation is £50 (Stamp Act, 1891). Bills of lading for goods imported are not subject to stamp duty.

A Dock Warrant is a document given by a dock company, warehouse-keeper or wharfinger, in exchange for goods deposited. The document describes the goods, acknowledges the receipt of them, and undertakes to deliver them to the order of the depositor. A dock warrant, and all similar documents signed by persons having the custody of goods, must be stamped with a threepenny stamp, impressed or adhesive.

DOCK WARRANT.

(Stamp 3*d*.)
No. .... Docks, Co.
19....

Warrant for ..... imported in the ship .....
Master ....., from ..... entered by .....
on the ..... deliverable to ..... or assigns by indorsement hereon. Rent commences on the ..... and all other charges from the date hereof.

Rate charged.

MARK.	NUMBERS.	WEIGHT.	
		GROSS.	TARE.

Ledger No. ..... Folio.....
....., Clerk.
....., Warrant Clerk.

A Warehouse-Keeper's Certificate is a document given by a warehouse-keeper, certifying that he holds certain goods described in the certificate, and awaits instructions for their disposal from the person to whom the certificate is addressed. This kind of

document must be distinguished from a Delivery Order. It is simply a receipt for the goods, and indicates on the face of it that it is not transferable. If the owner wants to get the goods out of the warehouse, he must send delivery instructions to the warehouse-keeper, or he must obtain a warrant from the warehouse-keeper, by which the goods are deliverable either to the owner or to his assigns by indorsement.

WAREHOUSE-KEEPER'S CERTIFICATE.

No. ..... (Stamp 3*d.*).
Not transferable.

MESSRS. .....

We hold at your disposal in our warehouse as per conditions on back hereof ..... ex S.S. .....

.....
Warehouse-Keepers.

(Conditions as to issue of delivery orders, payment of rent, etc., indorsed.)

A Delivery Order is a document containing the owner's instructions respecting delivery, addressed to the proprietors of the warehouse where the goods are lodged. The owner fills in the name of the person—either himself or his assigns—who is authorised to receive the goods. The document does not require stamping.

DELIVERY ORDER.

London,
No. .... 19.. .

To .....

Please deliver to ..... the undernoted goods, entered by ..... on ..... in the ship ..... Captain ..... from .....Charges from ..... to be paid.....

Mark.
No. .....
Contents.

2. **General Considerations.**—In dealing with documents relating to goods, it is necessary to distinguish between (1) those documents that give a title to the goods named in them, and (2) those documents which are merely receipts acknowledging that the goods have been lodged in the warehouse. Documents in the first class are bills of lading, dock and warehouse-keeper's transferable *warrants* [1]; documents in the second class are warehousekeeper's certificates, and delivery orders. The *bona fide* possession of bills of lading and warrants gives a complete title

[1] See Note F on p. 431.

to possession of the goods, whereas possession of the certificates and delivery orders is merely a means to an end, viz. delivery of the goods, or the issue of a document of the former class, which will give a complete title to the goods. The distinction is important, for, in the event of bankruptcy, the *bona fide* possession of a bill of lading or a dock warrant by a banker is sufficient to take the goods out of the " order and disposition " of the bankrupt (see s. 38, Bankruptcy Act, 1914), but unless the goods have been *registered* in the banker's name, possession of a delivery order or a warehouse-keeper's certificate is of no avail against the claim of the trustee in bankruptcy to possession of the goods.

When a banker takes a document of title as security for an advance, he does not obtain what could be considered a security of the premier class, for, in addition to the disadvantages dealt with later, the fact must not be lost sight of that they are only documents of title to goods; they do not guarantee the value of the goods described in them. Hence the banker is dependent upon the word of the shipper that they represent the kind and quantity of goods they purport to represent.

Documents of title being non-negotiable instruments, a title to the goods cannot, under any circumstances, be acquired through a thief who has stolen the documents of title. But since they are transferable, there are three classes of persons from whom they may be taken as security: (1) the owner of the goods; (2) his transferee; (3) a mercantile agent in possession of the documents as agent.

A seller, who has sold goods and has not been paid for them, has a lien on the goods if they are still in his possession, and the right, so long as the goods are *in transit* to the buyer, to stop delivery of them, provided that the buyer has become insolvent. This is called the right of stoppage *in transitu*. This right is lost if the goods have passed into the possession of the buyer. It is not necessary, in order to defeat the right, that the goods shall have reached the destination intended. If the buyer gets possession of them on the way to the destination, the right is lost. So also, if by arrangement between the carrier and the buyer, the goods are held by the carrier in his warehouse as bailee for the buyer. But if the carrier has only delivered part of the goods, he is, as a rule, bound to stop delivery of the remainder as soon as he receives notice.

This right of the seller to stop *in transitu* is not affected if the buyer re-sell the goods without his consent, but if the seller has given to the buyer a bill of lading, or other document of title to the goods, and the buyer transfers the document to a person who takes it *bona fide* and for value, so that he becomes a buyer of the goods, then the seller's right of stoppage *in transitu* is gone (Sale of Goods Act, 1893, s. 47). But the banker is not usually affected by the unpaid seller's right of stoppage *in transitu*, since he has the protection of s. 47, Sale of Goods Act, 1893, which says: "Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

But in order that the unpaid seller's rights may be defeated, it is essential that the original buyer shall have obtained the document of title from the unpaid seller *with his consent*.

"There is authority for saying that where the bill of lading has been obtained by what is known as larceny by a trick, the statutory protection [to the *bona fide* transferee] does not exist, though it is admitted that it does exist if the possession has been obtained by false pretences" (Wallace, K. C., *J. Inst. B.*, April 1911). In larceny by a trick, the owner of the stolen property does not intend to part with his property. In false pretences the owner intends to part with his property, and does so voluntarily, being induced to do so by the fraudulent statements made to him. The second buyer, to get a good title, must also be "without notice of any lien or other right of the original seller in respect of the goods" (Sale of Goods Act, 1893, s. 25 (2)). S. 25 (1) of the same Act also says that if the owner gives out that an agent of his has authority to transfer the goods, the transfer will be binding on the owner, even though done without his authority.

When the seller sends the documents of title to the buyer, it is quite usual to send with them a bill of exchange for the price of the goods. If this is done the buyer must accept or

pay the bill, according to the terms of the contract, or he is bound to return the documents. If he refuses the bill but retains the documents, the property in the goods does not pass to him (s. 19 (3), Sale of Goods Act, 1893). At the time the contract was made, the buyer may not have had any intention of paying for the goods, yet being, it is considered, in possession of the documents *with the consent* of the owner, he can give a good title to a transferee who takes them in good faith and for value, in spite of the fact that the transferor fails to fulfil his bargain with the original seller, viz. to accept or pay, as the case may be, a bill of exchange for the price of the goods (*Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, 1899).

By s. 5, Factors Act, 1889, the consideration necessary for the validity of such a disposition of goods as we have been considering, is the same as is necessary to make a bill of exchange valid, but by s. 4 of the same Act, an antecedent debt is not a good consideration when the transaction is carried through with a mercantile agent. A mercantile agent is defined by the Act as a person "having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." Again, by s. 2, where a mercantile agent is *with the consent of the owner* in possession of the documents of title to goods, any pledge or other disposition of the goods made by him when acting in the *ordinary course* of his business as agent, shall be as valid as if he were expressly authorised by the owner to make the same, provided that the person taking the goods acts in good faith and was not aware of the absence of authority. As regards antecedent debts, s. 4, *ibid.*, says that "where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge." This would amount to nothing more than what the agent could have claimed for commission and expenses.

When documents of title are lodged as security, a letter of hypothecation should always be taken, which it is the practice to stamp sixpence. This is specially necessary where the bills of lading are not, as they usually are, drawn "to order or assigns." The omission of these words prevents the documents being in any sense negotiable, and a letter of hypothecation is necessary

as evidence of pledge. The banker for his protection should see that the goods are adequately insured. Where the banker holds the documents, but is not registered as owner of the goods, he may sometimes find it necessary, in order to prevent dealings in the goods without his consent, to lodge a "stop order" with the warehouse-keeper or dock company.

Bills of lading are, as we have seen, (1) contracts between the shipowners and the shippers of goods, (2) documents of title to the goods. They are symbols of the goods while at sea, and until the goods are delivered to the person entitled to receive them. As a general rule, they are issued in triplicate, one being retained by the shipper and the other two being sent by different mails to the consignee. As soon as the consignee gets possession of the bill of lading, he is entitled to sell or otherwise deal with the goods, even while they are at sea. This he does by indorsing the bill of lading and transferring it for value to the buyer of the goods. When the goods arrive at the port of destination the person rightfully entitled to the goods, whether as consignee, or as indorsee, or holder of the bill of lading, should be ready to receive the goods. He proves his right to the goods by presenting the bill of lading to the captain. If two parts of a bill of lading are transferred to two different parties, the first transferee for value has the legal title to the goods. To avoid any difficulty for the ship's captain, should the first *presenter* of one part of the bill of lading happen not to be the legal owner of the goods, bills of lading drawn in a set always contain the clause, "one of which being accomplished, the others to stand void." This clause enables the ship's master to hand over the goods to the first presenter, provided always that in so doing he acts in good faith and without notice of an alleged prior claim. If he does receive notice of a prior claim before he has delivered the goods, he may interplead, *i. e.* claim the protection of the Court and force the opposing parties to prove to the satisfaction of the Court who has the right to the goods.

The possibility of such a twofold claim to the goods makes it necessary that the banker should get all the parts of the bill of lading into his own hands. If this is not possible he should give notice to the shipowner as soon as possible. If the goods have been warehoused, notice of his claim should be sent to the warehouse-keeper.

Each part of a bill of lading must be stamped with an impressed

sixpenny stamp at the time of execution, under a penalty of £50, but "copies" and foreign bills of lading do not require stamping. A Through Bill of Lading is one given when the goods in transit have to pass through the hands of more than one carrying company. The contract is made with the first carrying company, and there are clauses and conditions in the bill of lading, limiting the liability of each company to loss or damage incurred while the goods are actually under the control of the company. The cotton bills of lading from the United States of America are of this class. A bill of lading is issued when the cotton is delivered to the railway company, and thus a document of title is obtained, which can be negotiated at once, although the cotton may pass over one or more railways before being finally shipped.

A bill of lading is a peculiar document in that it has (when drawn "to order or assigns") some of the qualities of a negotiable instrument and yet is not really negotiable, for the person transferring it can, as a general rule, give no better title to the goods than he has himself. In some cases he can indeed give a better title, that is, when he fails to accept the accompanying bill of exchange yet transfers the bill of lading to a *bona fide* transferee for value. But if he has stolen the bill of lading, or has obtained it from the seller by larceny amounting to a trick, he cannot confer any title to the goods, even to an innocent transferee for value. But the bill of lading is similar to a negotiable instrument, in that possession of it by a *bona fide* transferee for value defeats the lien of the unpaid vendor and his right of stoppage *in transitu*, but this may be said to be due to the peculiar nature of the unpaid seller's right, rather than to any truly negotiable quality in the bill of lading, and it may be stated definitely that a bill of lading is not a negotiable instrument (see also *Gilbart Lectures*, 1918).

Another drawback to a bill of lading as a security is to be found in the provisions safeguarding the interests of the shipowner and limiting his liability. In addition to the ordinary clauses, another clause, viz. "and all other conditions as per charter party," frequently introduced, may involve the payment of possibly heavy charges for dead freight and charter party demurrage—charges incurred through no fault on the part of the banker or the shipper. The banker, therefore, before lending on this kind of security, should ascertain what the "other

conditions " are. Another point to be considered is that though the goods as described on the bill of lading are signed for by the ship's captain, it does not follow that these are the actual goods shipped. But, by s. 3, Bills of Lading Act, 1855, " every bill of lading in the hands of a consignee or indorsee for valuable consideration . . . shall be conclusive evidence of such shipment as against the master or other person signing the same . . .," but the master is entitled to disprove this evidence if he can. The onus rests upon him. Moreover, the bill of lading usually has a note to the effect that " weight and contents are unknown," and all that the shipowner contracts to do is to deliver them in the same condition as when they were received. If the bill of lading states that the goods are shipped " in good order and condition," without any qualifying indorsement, it is termed " clean." As already stated, the actual value of the goods depends upon the honesty of the person shipping the goods. The value stated in the invoice and the amount for which the goods are insured are, as a general rule, a very fair guide as to the value of the shipment. After all, as Lord Bowen once said: " Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication are no more based on the supposition of fraud than on the supposition of forgery." If this were not so the relationship of banker and customer would be an impossible one.

S. 1, Bills of Lading Act, 1855, says that " every indorsee of a bill of lading to whom the property in the goods shall pass . . . shall have transferred and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the bill of lading had been made with himself." But it has been held (*Sewell* v. *Burdick*, 1884) that the indorsement and pledge of a bill of lading, by way of security, does not render the pledgee liable for freight and other charges. This decision is an important one for bankers, since, in the case quoted, the lender had advanced £300 on a bill of lading indorsed in blank. The goods were landed in Russia, and by Russian law the lender had no power to sell the goods to pay the shipper's charges—the cause of action—amounting to nearly £180. As it turned out, when the goods were actually sold by the Russian authorities, they only realised sufficient to pay customs duties and other charges. It was decided that the shipper retained " the real and substantial

property in the goods, subject to the security." If the lender had lost the action, he would have had to pay the freight and charges, plus the costs of the action, besides being, as he still was, an unsecured creditor for the £300 he had lent the shipper. But if the lender, whether he has actually indorsed the bill of lading or not, wishes to obtain delivery of the goods in order to sell them, then he must pay all outstanding freight and charges.

To avoid all possible risk of liability, the better course is for the bills of lading to be indorsed in blank, and for the banker's name not to appear in them at all. The banker's claim in such circumstances would have to be supported by a memorandum or letter of hypothecation.

The insurance policy or certificate of insurance should always accompany a bill of lading. In the case of a c.i.f. (cost, insurance and freight) contract, it was held in *Wilson, Holgate & Co., Ltd.*, v. *Belgian Grain & Produce Co., Ltd.*, 1919, that the buyers were entitled to demand that a *policy* of insurance be produced, and that a broker's note or certificate of insurance was not sufficient.[1] It should be carefully noted whether the description of the goods in the bill of lading tallies with that in the policy. "Policies issued abroad and made payable in the United Kingdom are by law required to have a Government stamp for duty affixed to them within ten days after their first receipt in the United Kingdom" (Templeman's *Marine Insurance*, 3rd edition, p. 14). If the policy is a "floating policy," it should be ascertained that the particular shipment has been "declared," and indorsed and initialled by the underwriter to show that it has been noted and approved. This kind of policy is often called an "Open Policy." The appellation is not strictly accurate, since an open policy is really a policy in which the value of the subject-matter of the insurance is not stated, but left to be ascertained and proved.

Inasmuch as the customer cannot get the goods without producing the bill of lading, it is the practice in some cases to release that document against what is called a "Trust Receipt." A Trust Receipt is a document in which the customer acknowledges the banker's lien on the goods, and practically hypothecates the proceeds of sale in discharge of the lien. The banker sometimes also takes the precaution of handing the bill of lading, not to the customer himself but to a wharfinger, and sometimes, still

[1] Cited with approval in *Scott* v. *Barclay's Bank, Ltd.*, 1923 (Court of Appeal).

further to protect himself, has the goods warehoused in his own name. The Trust Receipt, being an agreement, must be stamped with a sixpenny stamp.

A specimen Trust Receipt taken by a banker when releasing shipping documents which have been held against a bill accepted by the banker on behalf of his customer is given below. The validity of such letters has recently been confirmed in the Courts (*in re David Allester, Ltd.*, 1922).

TRUST RECEIPT.

.....19...

To .....Bank, Ltd.,

.....

In consideration of the Bank handing to me Shipping Documents for goods, as per particulars at foot, hypothecated to the Bank as collateral security for the due payment of the undermentioned draft drawn upon their .....
Office in .....by .....
and accepted by their said Office, I hereby engage to land, store and hold the said goods as Trustee for and on behalf of the Bank, and the proceeds of sales shall be received by me as Trustee for the Bank, and paid to the Bank as and when received, I at the same time specially advising the Bank of the account on which such payment is made, and I undertake to provide the Bank, by this or other means, with sufficient funds to meet the said draft together with all charges and commission, not less than three days before maturity.

I also undertake to keep the goods fully insured against fire, and to hand over to the Bank all amounts received from the Insurers, the Policies of Insurance being, in the meantime, held by me as Trustee for and on behalf of the Bank.

Without prejudice to anything herein contained I will, on the Bank's written demand to be made at any time forthwith, either return to the Bank the said Shipping Documents, Fire Insurance Policies, or any of them, or deliver up to the Bank the said goods or any part thereof.

.....

PARTICULARS OF DRAFTS AND GOODS.

Amount of Bill.	Due.	Description of Goods.	Marks and Nos.	Vessel.

3. **Documentary Bills.**—A documentary bill is a bill of exchange accompanied by the documents of title to goods. The bill of exchange is drawn for the price of the goods. The document of title is usually a bill of lading, together with the marine insurance policy and the invoice. If the marine insurance policy is taken out abroad, it must be stamped within the ten days' limit prescribed by law (see *ante*). The banker should examine the documents to see that they purport to be what they ought to be, but he is not responsible for the genuineness of the documents.

Bankers deal with documentary bills in three ways: (1) Collect the proceeds; (2) Discount them; (3) Accept them under a letter of credit. The bills sometimes contain an explicit reference to the goods against which they are drawn, but no reference of the kind can create a lien over the relative goods, unless the bill is duly accompanied by the documents of title to the goods. This instrument, if properly drawn up, is still a regular and fully negotiable bill.

If a documentary bill is sent to the banker for collection he does not, by presenting the bill to the drawee for acceptance, thereby warrant to the drawee that the accompanying bill of lading or other document of title is genuine or represents actual goods, and he is not liable if the bill of lading proves to be forged. And if the banker accepts a bill at his customer's request, he is entitled to debit his customer with the amount of the paid bill, even though the accompanying documents of title prove to be forged. The whole question as to these points was thoroughly examined in *Guaranty Trust Co.* v. *Hannay*, 1918.

Documentary bills are sometimes marked "Documents upon acceptance" (D/A) or "Documents upon payment" (D/P), *i. e.* the documents are to be given up upon acceptance or upon payment of the bill. Such instructions must be strictly followed. These phrases inserted in a documentary bill do not infringe s. 3, Bills of Exchange Act, 1882, which says that the order to pay must be unconditional, being regarded merely as memoranda addressed to the holder. When a documentary bill is presented for acceptance, the drawee is entitled to inspect the documents. If it is a D/A bill, it is usual to leave the documents with him for 24 hours, but he must not retain them longer unless he accepts the bill. If it is a D/P bill, the practice is to leave a notice saying that the documents may be inspected at the bank. Should the drawee retain the documents without accepting or paying the bill, as the case may be, he does not acquire the property in the goods, but if he releases the documents to a *bona fide* purchaser for value, his transferee gets a good title against the unpaid seller. If the drawee accepts the bill in the following form, "Accepted payable on delivery of the bill of lading," he accepts it conditionally, and by s. 44, Bills of Exchange Act, 1882, the drawer and any indorser prior to acceptance, who does not expressly or impliedly authorise the banker to take a qualified acceptance, or does not subsequently do so, is discharged from

all liability on the bill. Hence the consent of prior parties to such an acceptance must be obtained.

If the documents of title are to be released only on payment of the bill, it is the custom to hand them over on payment of the bill under rebate, calculated at half per cent. above the current deposit rate of the London Joint Stock Banks (*Q. B. P.*, No. 1578). The bill should be indorsed with a receipt stating at what rate per cent. rebate has been allowed. The rebate is calculated from the date when the draft is cleared to the due date of the bill. In regard to the latter, it is the practice to calculate both discount and rebate up to the nominal due date of the bill, making no allowance for the fact that the bill may actually be payable on the preceding or succeeding business day, owing to the due date being a non-business day.

If a banker discounts a documentary bill, he does so on the security of the goods, which are pledged to him by a letter of hypothecation or a memorandum of deposit (each stamped 6*d.*). The letter should contain a clause giving the banker power to sell the goods if necessary. Documentary bills payable abroad are frequently sold to (or negotiated by) bankers.

We have already dealt with the granting of Letters of Credit (see pp. 160–4), wherein the banker undertakes to accept bills of exchange drawn for the price of goods, and accompanied by the documents of title to the goods.

NOTE F (See p. 421)—In regard to transferable warrants, it should be noted that only those issued by dock companies and warehouse-keepers who have obtained authority to do so under special Act of Parliament pass, strictly speaking, a complete title. Those issued by other companies not so authorised belong to the second class of documents and should not be held by the banker, who should have himself at once registered as holder for the reason explained on p. 422. In many cases, however, it is not the practice to make any distinction.

CHAPTER VIII

MISCELLANEOUS SECURITIES

1. Ship Mortgages.—By s. 2 (1) of the consolidating Merchant Shipping Act, 1894, every British ship must be registered, except certain ships of 15 to 30 tons. By s. 5 (1) the property in a ship is divided into sixty-four shares. A registered ship or any share therein shall be transferred by *bill of sale*, but the purchaser does not get a complete title until the bill of sale has been registered at the ship's port of registry. A registered ship or a share therein may be made a security for a loan. The Act prescribes the form of the mortgage, which must be duly registered by the registrar at the ship's port of registry (s. 31 (1)). The prompt registration of the mortgage deed is essential for the security of the mortgagee, because the mortgage takes its priority from the date of production for registration, and not from the date of the instrument. By s. 35 every registered mortgagee has power to dispose of the ship, or share, in respect of which he is registered, but except under the order of the Court, a subsequent mortgagee cannot sell without the concurrence of the prior mortgagee.

Before taking a charge, the banker should search the register (fee not exceeding 1*s.*) to ascertain whether any prior charges exist. When the mortgage is discharged, the registrar on production of the mortgage deed, with a receipt for the mortgage money indorsed thereon, must enter the fact of discharge in the register book (s. 32). The certificate of registry, which by s. 15 can only be used for the lawful navigation of the ship, is of no value to the mortgagee. Instruments used in connection with the registry, ownership, or mortgage of a British ship are exempt from stamp duty.

Though, by s. 56, no notice of any trust can be entered in the register book, equitable interests are recognised, but a registered legal mortgagee has priority over every equitable charge, even though the equitable charge was prior in order of date. This is so because, by s. 33, priority is determined by order of date in the register, and equitable charges cannot be registered. But

if a second mortgagee gives notice of his charge to the banker, he can claim priority over any advance made by the banker to the legal mortgagee after receipt of the notice.

It should be noted that under s. 79 of the Companies Act, 1929, a charge given by a company on a ship or any share in a ship must also be registered with the Registrar of Companies.

The value of a ship's mortgage as a security is seriously diminished by the priority over the mortgage of certain maritime liens, such as seamen's wages, master's wages, a bottomry bond, and salvage, which, generally speaking, rank in the order named.

When a ship is owned by several persons, one of them is usually entrusted with the control and management of the ship. This person is called the " managing owner." Where the controller of the ship is not one of the owners he is called the " ship's husband." The powers of a managing owner or a ship's husband include the borrowing of money for purposes necessary for the ship, but the borrowing must not be on the credit of the shipowners, except in circumstances of necessity (*Pringle* v. *Dixon*, 1896). The managing owner (or ship's husband) is entrusted with the management of the ship, but he cannot bind his co-owners unless he is in fact their agent (*Frazer* v. *Cuthbertson*, 1880). The name of the managing owner or other person to whom the management of the ship is entrusted must be entered on the register at the ship's port of registry (s. 59). Unless expressly or impliedly authorised, the co-owners will not be liable for any overdraft created by the managing owner or ship's husband, since the latter are acting as agents, and to avoid all risk, the co-owners should join in a mandate respecting the opening of the account and the borrowing powers of the signatories.

The banker who advances money on this kind of security should obtain possession of the marine insurance policy (or policies), the assignment being indorsed on the policy, or, preferably, the banker should transfer the policy into his own name or into the names of his nominees. The fact that ships heavily depreciate in value year by year should be carefully borne in mind by the banker when, as frequently happens, he is periodically asked to lend money on the same ship.

2. **Assignment of Debts.**—Debts due or accruing due to a person may be assigned by him to another person. Money due to the assignor under a will or under a contract, money to be received from the sale of property, interest in trust funds and similar choses in action, can thus be made security for an advance.

The assignment must be made in such a way that it does not amount to a bill of sale (see *post*), which must be registered. By s. 43, Bankruptcy Act, 1914, if a person engaged in any trade or business makes a general assignment of his existing or future book debts, it is void against the trustee in bankruptcy as regards any book debts not paid at the commencement of the bankruptcy, unless the assignment has been registered as a bill of sale. But this section does not affect any assignment of book debts due from specified debtors, or of debts growing due under specified contracts. A charge, therefore, on book debts taken by a banker as security should cover only those debts due from named debtors at the time the charge is executed, or growing due under specified contracts (Bankruptcy Act, 1914, s. 43). A cheque or bill does not, except in Scotland, operate as an assignment of funds in the hands of the drawee-bank. But if the banker receives due notice of an assignment by a customer of the balance standing to his credit, then the banker must not pay away the balance except to the assignee.

3. *Absolute Assignment.*—At common law, with some exceptions, such as negotiable instruments, choses in action were formerly not assignable unless the consent of the debtor to the assignment had first been obtained. Now by the Law of Property Act, 1925, s. 136, any *absolute* assignment (and not by way of charge only) of any debt or other legal chose in action is effective, provided (1) it is in writing, and (2) written notice of it is sent to the debtor or trustee of the funds assigned. This section also gives the assignee power to sue in his own name, and to give a good discharge for the debt without the concurrence of the assignor. A deed assigning the whole of a debt may contain a proviso preserving the mortgagor's equity of redemption, and yet be an absolute assignment within the Act, and it does not matter whether the deed has been executed to cover a fixed sum or a fluctuating balance of account. It is no business of the debtor, when paying the assignee, to inquire into the state of accounts between the assignor and assignee. Payment to the assignee effectually discharges his debt. But if the assignor gives him notice not to pay, he is entitled by the section already quoted, either to pay the money into the High Court or to call upon the parties to interplead. The stamp duty on an absolute assignment is £1. per cent. *ad valorem.*

4. *Equitable Mortgage.*—The Act cited above does not affect the validity of equitable assignments. A good equitable assign-

ment may be created in one of two ways: (1) By a specific undertaking given by the customer to the banker agreeing to pay over to him, either the whole, or part of a particular debt or fund, to which the customer is entitled; (2) By giving the banker a written order addressed by the customer to his debtor, requiring the debtor to hand over to the banker a certain sum out of a specific debt or fund to which the debtor is entitled. The written order should be so worded as not to amount to a bill of exchange not properly stamped. No particular form of words is necessary to make the equitable assignment valid. All that is essential "is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril. If the assignment be for valuable consideration and be communicated to the third person, it cannot be revoked by the creditor" (Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, 1905). A valid equitable assignment may be made by word of mouth save in those cases where the Statute of Frauds is applicable. Unless the terms of the Property Act are complied with, the security obtained is not very satisfactory, as the lender cannot sue in his own name, and if the debtor will not assist, he must apply to the Court for power to enforce his rights.

5. *Notice to Debtor.*—Written notice of the assignment should always be promptly given by the banker to the debtor, for if the banker fails to give notice he, in the first place, cannot sue the debtor in his own name, and secondly, there is nothing to prevent the debtor from effectually discharging the debt by payment to the assignor. In the latter case, it is true, the assignor is bound to hand over the money to the assignee, but direct payment avoids all risk. Again, if the banker fails to give notice, and the assignor subsequently assigns the debt to another party, who, without notice of the previous assignment, gives notice to the debtor, the banker's claim will be postponed to that party. Priority as regards more than one assignment of the same debt takes effect from the date of notice to the debtor, not the date of creation, except when the notices are received at the same time, when the date of creation is the determining factor. Notice is also necessary to prevent the trustee in bankruptcy from claiming the debt under s. 38, Bankruptcy Act, 1914, as being property within the "order and disposition" of the bankrupt. Notice should be given to all joint debtors or joint trustees, and if the

debtor is dead, to his executors or administrators. Since the debtor or trustee is not legally bound to acknowledge receipt of the notice, the banker should be in a position to prove the sending of it. By s. 79 (*e*) of the Companies Act, 1929, a mortgage or charge of the book debts of a limited company must be registered with the Registrar of Companies.

Before taking an assignment of debts as security, it is advisable for the banker to make inquiries of the debtor or trustee: (1) As to the value of the debt or fund; (2) Whether a prior charge exists; (3) Whether the debtor has any right of set-off against the debt. The debtor or trustee is not bound to answer such inquiries, but if an answer is given it must be an answer consistent with the facts within his knowledge.

6. *Equities.*—The well-known legal maxim, *Nemo dat quod non habet* (no one can give what he has not got), applies to assignments. The assignee takes the assignment subject to equities, *i. e.* he has exactly the same rights as the assignor and no more, and the debtor whose debt has been assigned has the same rights of set-off and counter-claim against the assignee as he had against the original creditor at the time of notice of the assignment. This fact emphasises the necessity, before taking such a security, of making the inquiries referred to in the last paragraph. An example will illustrate one of the possible risks. Sometimes the debt assigned to the banker is to be paid in instalments contingent on the amount of work done. If, while the work is in progress, the assignor becomes bankrupt, the banker is only entitled to that part of the debt covered by the work done up to the commencement of the bankruptcy. Another disadvantage of this kind of security is the difficulty and delay in realising it. Again, owing to the conditions of the contract, the assigned debt may never become due, because the contract has not been completed, or, if completed, not properly carried out. Even if the work has been properly carried out, the quality of it may be disputed by the debtor, with the result that the debt may only be recoverable by action in a Court of law.

7. **Bills of Sale.**—A Bill of Sale is a document under seal which, for consideration, transfers the title to personal chattels from one person to another. The person giving the bill of sale is called the *grantor*, and the person to whom it is given is called the *grantee*. Bills of sale are of two kinds (1) Absolute, (2) Conditional. Absolute bills of sale pass the property absolutely

to the transferee; conditional bills of sale pass it by way of security for the payment of money. Conditional bills of sale, the only kind with which we are concerned, are in the nature of a mortgage of personal chattels, *i. e.* goods, animal stock, household furniture and "other articles capable of complete transfer by delivery" (Bills of Sale Act, 1878, s. 4). By s. 5 of the same Act, trade machinery is also deemed to be personal chattels.

A banker taking this kind of security must see that the bill is registered at the Central Office of the Supreme Court, within seven days of its execution, and, if the loan is continued, must re-register it every five years (*ibid.*, ss. 8 and 11). The amending Act of 1882 enacts that a bill "given by way of security for the payment of money" must be *in accordance with* the form prescribed in the schedule to the Act, and also that the consideration must not be less than £30 (Bills of Sale Act, 1882, ss. 9 and 12). It must be duly stamped at the rate of 5*s.* for each £50 or fraction thereof. Every conditional bill must truly set forth the consideration. It was held that where the consideration was stated to be "£90 now due and owing" whereas £50 was advanced at the time of execution, the consideration was not truly stated (*Davies* v. *Jenkins*, 1900). The amount secured must be a definite sum, not, for example, the fluctuating balance of an account. It is not necessary that the bill of sale should be drawn up in the statutory form, but if it is not drawn up substantially in accordance with the statutory form, it is void. But though such a bill is void, if the right to possession of the goods can be proved without reference to the bill of sale, then the fact that the bill of sale is not expressed in the statutory form, or in substantially the same form, will not vitiate the right to possession. If two or more bills of sale are given comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration (Bills of Sale Act, 1878, s. 10). Provided a bill of sale is duly registered, any subsequent assignment or transfer does not require registration.

The grant of a bill of sale does not affect the right of the tax or rate collector [or the landlord] to levy distress on the goods included in the bill of sale, for rates, taxes [and rent] (Bills of Sale Act, 1882, s. 14). Subject to these prior claims, the grantee may seize the goods assigned to him provided that (1) the grantor makes default in payment of the sum secured, or (2) becomes bankrupt, or (3) fraudulently removes the goods, or (4) fails

to produce (without reasonable excuse) his last receipts for rent, rates and taxes, or (5) has had execution levied against the goods under any judgment at law (Bills of Sale Act 1882, s. 7). A bill of sale is not valid if it is executed (1) by a bankrupt, (2) by a person who has to the knowledge of the grantee committed an act of bankruptcy within three months from its date, (3) in fraudulent preference over other creditors.

Bills of sale are not, as a rule, acceptable to bankers as security, and when a bill of sale is registered against one of his customers, the banker should regard it as a warning that the customer is probably at the end of his tether, at any rate so far as personal efforts at extrication from his financial difficulties are concerned.

An agricultural charge given under the Agricultural Credits Act, 1928, is not a bill of sale within the meaning of the Bills of Sale Acts.

CHAPTER IX

AGRICULTURAL CREDITS

1. **Introduction.**—This chapter is concerned with the Agricultural Credits Act, 1928, which, according to the preamble, is "An Act to secure, by means of the formation of a company and the assistance thereof out of public funds, the making of loans for agricultural purposes on favourable terms, and to facilitate the borrowing of money on the security of farming stock and other agricultural assets, and for purposes connected therewith." It applies only to England and Wales, and came into force on October 1st, 1928.

The two purposes outlined in the preamble are, briefly, (*a*) long-term credits by means of loans on mortgage of agricultural land, and (*b*) short-term or seasonal credits secured by a charge on farming stock and other agricultural assets. These are covered by Parts I and II, respectively, of the Act. The Act is given in full in the Appendix.

The Agricultural Credits Act is of particular importance and interest to bankers, since the shareholders of the company formed in pursuance of Part I are all banks, while Part II creates a security available only to banks. Its success depends mainly on its operation by the shareholding banks.

It will be observed that the Act separates very distinctly long-term credit and short-term credit, the former being made by the Agricultural Mortgage Corporation, Limited, and the latter by the banks. Thus, the Act has made easier the application of the sound principle that permanent loans should be raised against permanent assets.

2. **Long-Term Mortgages.**—The mortgage company formed under the authority of Part I of the Act is called The Agricultural Mortgage Corporation, Limited, and has commenced business at Stone House, Bishopsgate, London, E.C. The shareholding banks are :—Bank of England, Barclays Bank Limited, District Bank Limited, Glyn, Mills & Co., Lloyds Bank Limited, Man-

chester and County Bank Limited, Martins Bank Limited, National Provincial Bank Limited, Westminster Bank Limited, and Williams Deacons Bank Limited.

The essential motives for establishing this Corporation were the provision of facilities by which farmers could obtain long-term loans at favourable rates, secured by first mortgages on their farms and repayable over an agreed number of years, and the provision of the necessary finances to make these loans. Accordingly, the Corporation has power to issue debentures secured by a first floating charge on the whole of its undertaking, property and assets.

To increase the security behind the debentures, the Minister of Agriculture and Fisheries with the approval of the Treasury, is authorised to advance up to an amount not exceeding £750,000 (and not exceeding the amount of the paid-up capital of the Corporation at the time) for the purpose of establishing a guarantee fund. These advances are free of interest for a period of sixty years. The Minister is empowered also to contribute £10,000 per annum for ten years towards the cost of the administration of the Corporation. The Treasury is empowered to procure the underwriting of the debentures up to a sum not exceeding £5,000,000, and may itself subscribe to an amount not exceeding one-fourth of any issue, or £1,250,000 in all. In the event of the Corporation being wound up, the liability to the Minister of Agriculture and Fisheries for any outstanding advances ranks after the liabilities to the debenture holders and other creditors.

Advances by the Corporation on agricultural mortgages must not exceed two-thirds of the estimated value of the property and must be repayable by equal yearly or half-yearly instalments of principal and interest spread over a period not exceeding sixty years. Thus, these mortgage advances are automatically being reduced. Loans may also be made under the Land Improvement Acts.

The debenture stock is a trustee security, and it will be seen that adequate measures have been taken to ensure its safety and make it an attractive security. It should, therefore, become a useful channel by means of which the capital of the private investor may become available for agriculture.

At the time of writing the Corporation has an issue of £8,500,000 of 5 per cent. Debenture Stock, 1959–1989. The Guarantee

Fund contributed by the State amounts to £650,000 and the Paid-up Capital is £650,000. The Guarantee Fund has to be invested in British Government stocks. The Corporation's Memorandum of Association provides that issues of debentures and the like securities shall be restricted so that the total of the Guarantee Fund, Paid-up Capital and Reserves shall never be less than 10 per cent. of the aggregate amount of such issues.

The Corporation commenced operations in January 1929, and has already transacted a considerable volume of business. Its present terms for mortgages of agricultural lands are :

For loans for the maximum period of 60 years, the half-yearly payment on account of principal, interest and all charges (other than cost of valuation and stamp duty on the mortgage) is

£2 15*s.* 0*d.* per £100.

For shorter periods, the payment is adjusted accordingly, thus :—

50 years	.	£2 17*s.* 3*d.*	per £100 half-yearly.
40 ,,	.	£3 0*s.* 11*d.*	,, ,,
30 ,,	.	£3 7*s.* 11*d.*	,, ,,
20 ,,	.	£4 3*s.* 9*d.*	,, ,,
10 ,,	.	£6 13*s.* 8*d.*	,, ,,

Valuations, at the borrower's cost, must be made by the Corporation's own valuer, and two-thirds of this valuation is the maximum amount that may be advanced. No charges are made in connection with a loan other than for the valuation and stamp duty on the mortgage. Applications must be made through the local branch of a shareholding bank on Application Form A.M.C. No. 1.

In the case of loans made for the purposes of the Land Improvements Acts, *i.e.* for the purposes of effecting major improvements to agricultural land and buildings, the maximum statutory period is forty years, for which the half-yearly payment on account of principal and interest is £3 per £100. For shorter periods the half-yearly payment will be adjusted accordingly. The present rates are :

30 years	.	£3 6*s.* 6¾*d.*	per £100 payable half-yearly.
20 ,,	.	£4 1*s.* 4¼*d.*	,, ,, ,,
10 ,,	.	£6 9*s.* 9¾*d.*	,, ,, ,,

Loans must be approved by the Ministry of Agriculture and Fisheries, which should be satisfied that the proposed improvements will effect a permanent increase in the annual value of the land in excess of the annual payment to be made thereon. These improvement loans are made against rent charges, forming a first charge on the land improved, and may be made for the whole amount expended. They will, therefore, rank before any existing mortgage. Applications for improvement loans must be made through the local branch of a shareholding bank on Application Form A.M.C. No. 2, which should be accompanied by plans and specifications of the proposed improvements.

For use with both forms Nos. 1 and 2, the borrower must complete Form A.M.C. No. 4, which contains a schedule and description of the lands to be charged. Applications should be forwarded by the receiving branch to its Head Office for transmission to the Corporation.

As will have been observed, the rates of repayment are very favourable, and the farmer has also the certainty that his loan will not be called in, as in the case of a private mortgage, by the death of the mortgagee, or because the money is wanted for other purposes. The cost of administration has been kept down, and the efficiency of the scheme has been greatly increased by the fact that the shareholding banks and all their branches act as agents of the Corporation for the supply of information, the receipt of applications and the collection of the half-yearly payments. The farmer can thus deal with a local bank manager familiar with local conditions.

If a borrower finds himself able to repay his advances in full before the due date, the Corporation will accept payment in the form of their own Debentures taken at par. In the case of a borrower desiring to make a part payment, the Corporation will doubtless meet him as reasonably as possible.

In regard to a proposed borrower's costs, the only expense which he incurs when a loan is not granted by the Corporation or is refused by him is that of the cost of valuation, which is usually rebated to about half the following scale:

14*s* per £100 on first £1,000 valued,
7*s*. „ „ on next £9,000 valued,
3*s*. 6*d*. „ „ on remainder,

plus travelling and other out-of-pocket expenses of the valuers. The full scale is payable if a loan is taken.

If a loan is granted, the borrower must pay the stamp on the mortgage, namely, 2*s*. 6*d*. per cent. The Corporation pays the legal expenses. A statement is issued to each borrower immediately he pays an instalment showing the reduction in the loan and the amount of interest paid. This statement serves as a voucher for the recovery of income tax. Arrangements have been made with the Inland Revenue under which the Corporation advises the local Inspector of Taxes of the interest paid by each borrower, so that the appropriate relief will be allowed in the current assessment. It should be noted that income tax must not be deducted from the yearly or half-yearly payments.

3. **Short-Term Credits.**—Part II of the Agricultural Credits Act, 1928, is entitled "Agricultural Short-term Credits," and is of direct interest to bankers, as it authorises the creation of a charge, called an "agricultural charge," on farming stock and assets, which is available only to banks.

Prior to this Act it was only possible to give a charge on such assets as crops, live-stock, etc., by means of a Bill of Sale, a form of security generally associated with the last efforts of an impecunious debtor, and hence fatal to the borrower's credit. In many other countries, however, as, for example, Canada, Australia, and the British West Indies, special legislation has existed for many years, under which the farmer has been able to pledge his crop, live-stock, etc., to secure the money required to sow, cultivate and harvest his crop, or maintain his livestock. By means of these facilities the farmer can borrow part of the floating capital required for investment in his floating assets on the appropriate security of those assets, thus leaving his other resources free to provide for his more permanent assets, or to enable him to operate on a larger or more economical scale. These agricultural statutes have undoubtedly been of immense benefit to the farming community and materially assisted in the agricultural development of these countries.

In the absence of any appropriate form of giving a legal security, many farmers are unable to use the resources locked up, either permanently in implements and plant, or for the season in crops. Probably, in the majority of cases, this represents by far the greater part of their capital. They have, therefore, to rely on getting unsecured credit from their bankers or suppliers, or going without, to the detriment of their farms due to the starving of the land, and of themselves and the community in

general, due to the fact that their farms are not being operated at their maximum efficiency. It is, of course, appreciated that farmers, whether owners or tenants, have been supported by the banks, probably more generously than is usually admitted, but the Agricultural Credits Act gives wider opportunities for credit facilities and creates a form of borrowing which, in time, should become as recognised as being in the usual course of business, as it is for industrial enterprises to borrow. It is better, cheaper and more economically sound for the farmer to get all his credit from his bank, where the cost can be definitely ascertained.

It will probably take some time for the full benefits of the system to become known and appreciated. In a few cases, the giving of an agricultural charge to his bank may result in a farmer's creditors calling for payment and bringing to light the fact that the farmer is, and has been for some time, practically insolvent. The author has had experience with this class of legislation in other parts of the Empire and feels that the Act should prove a distinctly beneficial measure. It has the advantage of having been drawn up in consultation with the majority of the banks and has their active support.

It has been stated elsewhere that the personal character of the borrower is one of the banker's first considerations when examining an application for an advance. In no case is this more important than with agricultural advances. Another essential point is that of the farmer's capability, since so much depends on his knowledge and energy. With well-selected borrowers, agricultural advances possess certain features attractive to bankers. The advances gradually increase up to the harvest, when they are at the highest, while, at the same time, the security is also at its maximum. Another favourable feature is that the advances are seasonal, and should run off each year on sale of the produce. To watch this, it is the practice in some countries to make each crop year's advances on a separate account. This system, however, is more suited to one large crop, such as wheat or sugar, than to mixed farming.

The following paragraphs define the terms used in the Act.

For the purposes of this Part of the Act, a "farmer" means any person (not being an incorporated company or society) who, as tenant or owner of an agricultural holding, cultivates the holding for profit; and "agriculture" and "cultivation" include horticulture and the use of land for any purpose of

husbandry, inclusive of the keeping or breeding of live-stock, poultry or bees, and the growth of fruit, vegetables and the like. " Farming stock " means crops or horticultural produce, whether growing or severed from the land, and after severance whether subjected to any treatment or process of manufacture or not; live-stock, including poultry and bees, and the produce and progeny thereof; any other agricultural or horticultural produce whether subjected to any treatment or process of manufacture or not; seeds and manures; agricultural vehicles, machinery and other plant; agricultural tenant's fixtures and other agricultural fixtures which a tenant is by law authorised to remove. " Other agricultural assets " means a tenant's right to compensation under the Agricultural Holdings Act, 1923, for improvements, damage by game, disturbance or otherwise, and any other tenant right.

A farmer may create by an instrument in writing in favour of a bank an agricultural charge on all or any of his farming stock and other agricultural assets as security for sums advanced or to be advanced to him or paid or to be paid on his behalf under any guarantee by the bank, together with interest, commission and charges. An agricultural charge may be either fixed, or floating, or fixed and floating. In the case of a fixed charge, the property affected shall be such part of his farming stock and other agricultural assets belonging to the farmer at the date of the charge as may be specified therein. It may include, in the case of live-stock, any progeny born after the date of the charge, and, in the case of agricultural plant, any plant substituted for that specified in the charge. The property affected by a floating charge shall be the farming stock and other agricultural assets from time to time belonging to the farmer, or such part thereof as is mentioned in the charge.

The principal sum secured may be either a specified amount, or a fluctuating amount advanced on current account not exceeding at any one time such amount (if any) as may be specified in the charge. In the latter case the charge is not deemed to be redeemed by reason only of the current account having ceased to be in debit. No specific form of charge is required. Sureties may be made parties to the charge.

4. *Form and Effect of Charge.*—No statutory form of charge is laid down in the Act, and bankers will, as is usual, use their own standard forms prepared by their solicitors. The

specimen form given in the Appendix contains both a fixed and a floating charge, and it is probable that this will become the standard practice.

In regard to the fixed charge, the Act states that it shall confer on the bank the right, upon the happening of any event specified in the charge as being one authorising the seizure of the property, to take possession thereof, and, where possession has been so taken, the right, after an interval of five clear days (or such less time as the charge provides) to sell the property by auction (or by private treaty if the charge allows), either for a lump sum payment or payment by instalments. The farmer is under an obligation, whenever he sells any of the property or other agricultural assets subject to the charge, forthwith to pay to the bank the proceeds, except to the extent allowed by the charge or the bank. The farmer is under a similar obligation in regard to moneys received from any insurance policy or by way of compensation under statutory provisions for the destruction of animals or crops, so far as the sums so received relate to property covered by the charge.

It should be noted that a fixed charge does not prevent a farmer selling any of the property, and third parties are not concerned with the fact that there is a charge on the property. In the event of the proceeds being paid to some other person, the bank cannot recover the money from such person unless it proves that the person knew the proceeds were being paid to him in breach of the obligation to pay such proceeds to the bank. And for this purpose, notice of the charge is not sufficient evidence of knowledge of any contemplated breach. Hence, in special cases, it may be desirable to serve express notice in writing of the charge and to demand payment of the proceeds to the bank, as, for example, on an auctioneer, who is selling property the proceeds of which the bank wishes to ensure receiving.

The Act states that the effect of a floating charge is similar to one created by a duly registered debenture issued by a company, a description not entirely apposite, but sufficient to convey the general idea. A floating charge becomes a fixed charge on the property comprised therein as existing at the date of the charge becoming fixed :—

(i) upon a receiving order in bankruptcy being made against the farmer;

(ii) upon the death of the farmer;
(iii) upon the dissolution of partnership in the case where the property charged is partnership property;
(iv) upon notice in writing to that effect being given by the bank on the happening of any event which by virtue of the charge confers on the bank the right to give such a notice.

The farmer is under the same obligation in respect of proceeds of sales as in the case of a fixed charge, except that instead of paying the proceeds to the bank, he can expend the money in the purchase of other farming stock, which, on purchase, becomes subject to the charge.

The previous paragraphs have detailed the provisions of the Act in regard to fixed and floating charges. The bank's form should make the moneys payable on demand, and cover all liabilities now due or to become due in the usual exhaustive style of bank forms. There is no need to specify any amount in the charge. The form should create a fixed charge on the farming stock and other agricultural assets specified in the charge, and also a floating charge on the farming stock and other agricultural assets from time to time, belonging to the farmer. The following conditions and covenants should be incorporated :—

(1) To cover, in the case of the fixed charge, the progeny of any live-stock born after the date of the fixed charge, and any agricultural plant substituted for the charged plant.
(2) To enable the bank to seize the property subject to the fixed charge without any further notice on the happening of the following events :—

(*a*) Any demand for repayment.
(*b*) The death of or the making of a Receiving Order in Bankruptcy against the farmer.
(*c*) Any failure or refusal of the farmer to perform or observe the conditions and obligations imposed by the Act or the charge.
(*d*) If a distress or execution be levied or attempted on any of the farmer's property.
(*e*) On the dissolution of any partnership.

(*f*) The expiration or determination, or threatened determination of the farmer's lease or tenancy.

(*g*) If the farmer shall cease or threaten to cease to farm the land subject to the charge or, in the bank's opinion, cease or neglect to farm the land in a husbandlike manner.

(3) The happening of any of the above events to confer on the bank the right to give the requisite notice fixing the floating charge.

Amongst the usual clauses of a well-drawn bank form there should be included a covenant to keep in effect all proper insurances, the receipts for which the bank should be entitled to have produced. The bank should be permitted to sell by private treaty either for a lump sum payment or payment by instalments. The usual clause regarding the appointment of a Receiver should also be included.

Another important clause is one in which the farmer should covenant to cultivate his land in a good and husbandlike manner, to look after, keep up and replace all live farming stock and maintain in good condition and replace all dead farming stock, and generally to maintain the same in the condition as when charged. Since the Act is silent on the subject of the mortgagee's right to inspect the property charged, it would not be unreasonable to include a clause allowing inspection and valuation at any time and at the borrower's expense.

The Act makes reference to the farmer's obligation forthwith to pay to the bank the proceeds of any sale or other receipts relating to the property charged. It is obvious that unless some limit, below which the farmer need not account to the bank, is named, the farmer's position would be very irksome, since he would render himself liable to penalties if he sold, for example, a fowl and omitted to pay the proceeds to the bank.

If the farmer is operating more than one farm, his farming stock and other agricultural assets on all the farms he occupies should be included in the charge, as otherwise there is danger of controversy or evasion arising.

If a farmer is adjudged bankrupt on a bankruptcy petition presented within three months of giving an agricultural charge, then, unless it is proved that the farmer was solvent immediately after the execution of the charge, the charge is only available for

advances made after the execution thereof. This is to prevent a bank taking a charge to secure present indebtedness to the detriment of the other creditors. The bank can in such circumstances claim for any balance as an unsecured creditor.

Where there is a mortgage on the land created prior to 3rd August, 1928, conflict of interests may arise between the mortgagee and the bank. It was possible and not unusual for mortgages to include also growing crops and the tenant right valuation. A mortgagee, therefore, selling under his power of sale can include any growing (but not severed) crops. This would conflict with any agricultural charge given subsequently. A bank, therefore, must ascertain if a mortgage is in existence. If there is, endeavour should be made to get the mortgagee to release the growing crops and tenant valuation, and since the bank is providing the money to keep up his security, the request is not unreasonable. In regard to mortgages created after the passing of the Act, namely, 3rd August, 1928, an agricultural charge, whether created prior or subsequent to the mortgage, takes priority over the crops. This exception, however, does not apply to the tenant right valuation.

The Act provides that if, with intent to defraud, a farmer, who has given an agricultural charge, fails to make payment over to the bank of any sums received by him by way of proceeds of sale, or in respect of other agricultural assets, or under a policy of insurance or by way of compensation, he shall be guilty of a misdemeanour and liable on conviction to penal servitude for a term not exceeding three years. The penalty is the same if with intent to defraud he removes or suffers to be removed from his land any property subject to the charge. Such a clause is not unusual in legislation of this kind.

5. *Registration of Charge.*—An agricultural charge must be registered within seven clear days after its execution. If not so registered, it is void as against any person other than the farmer. Registration must be effected against the name of the farmer giving the charge with the Registrar of the Land Registry, Red Lion Street, London, W.C. 1. The fee is 1*s.* for the registration or cancellation of an entry, both of which have to be made on the official forms. The fees must be prepaid by the adhesive Land Registry stamps. The register is open to inspection and a certified copy of any entry can be obtained. Registration of a charge is deemed to constitute actual notice of the charge, but where

it has been created expressly to secure a current account or other further advances, the bank is not deemed to have notice of another agricultural charge registered later, so long as the register was clear when its charge was created or the last search (if any) was made on its behalf. This is a reproduction of a similar provision of the Law of Property (Amendment) Act, 1926. Since registration of charges is necessary, it follows that search should be made before taking a charge. (See also Title Deeds, sections 24 and 25.)

In relation to one another, agricultural charges have priority in accordance with the times at which they are respectively registered.

An instrument creating an agricultural charge is exempt from stamp duty.

In connection with registration, it should be noted that the Act prohibits the publication of any list of agricultural charges or of the names of the farmers concerned. This restriction, however, does not preclude the confidential notification by trade protection societies to their members carrying on business in the district in which the property charged is situated.

Whilst in all other cases the Act applies only to farmers trading either as individuals or in partnership, a provision is made in favour of agricultural societies. Section 14 states that a debenture issued by a society registered under the Industrial and Provident Societies Acts, 1893 to 1928, creating in favour of a bank a floating charge on "farming stock," may be registered as an agricultural charge and under the same regulations. The secretary of the society must also send notice of any registration of a charge to the central office established under the Friendly Societies Act, 1896, for registration there.

PART VII

BANKRUPTCY AND DEEDS OF ARRANGEMENT

CHAPTER 1

BANKRUPTCY

1. **Definition.**—A bankrupt is a person who, after committing a statutory act of bankruptcy, has been deprived of the possession and control of his property by a decree of a Court competent to exercise jurisdiction in such matters. A person may be insolvent, *i. e.* unable to pay his debts as they fall due, but no person, however insolvent, is a bankrupt until so adjudicated by the Court. All classes of persons, whether in trade or not, may, with some exceptions, be made bankrupt. The exceptions are infants (including infant partners), see pp. 235–7, and lunatics (see pp. 231–2), and even these classes of persons may be made bankrupt in some circumstances. When a man is made bankrupt his property is put under the control of the Official Receiver or a trustee in bankruptcy, who, after discharging all liabilities and all expenses incurred in winding up the estate, shares out the surplus *pro rata* among the creditors. Bankruptcy procedure is now governed by the Bankruptcy Act, 1914, which came into force on January 1st, 1915.

2. **General Principles.**—When a man is made bankrupt his banker is naturally concerned in the matter, but before proceeding to point out what a banker must do in such circumstances, the effects of bankruptcy must first be explained. When a debtor commits one or more of the statutory acts of bankruptcy (Bankruptcy Act, 1914, s. 1 (1)), the Court may, on a Bankruptcy Petition being presented by a creditor or by the debtor himself, make a Receiving Order for the protection of the debtor's estate (*ibid.*, s. 3). S. 4 declares the conditions under which a creditor may petition and will be referred to later. The receiving

order having been made, and the debtor adjudicated bankrupt, all the debtor's property vests in a "fit person" appointed to act as trustee in bankruptcy (*ibid.*, s. 19), and his control of the debtor's property starts from the very moment when the act upon which the petition is grounded was done, or, if more than one act of bankruptcy has been committed, then his control starts from the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within the three months prior to the date of the petition (*ibid.*, s. 37). This doctrine of "relation back," as it is called, would have serious consequences for every creditor who had dealings with the bankrupt after the commission of the act of bankruptcy, were it not that by ss. 45 and 46 the effects of the doctrine are mitigated in certain directions.

The transactions protected by s. 45 include (*a*) any payment by the bankrupt to any of his creditors; (*b*) any payment or delivery to the bankrupt; (*c*) any conveyance or assignment by the bankrupt for valuable consideration; (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration; provided in all these cases that the payment, delivery, conveyance, etc., took place before the date of the receiving order *and* that the person claiming the benefit of the section was unaware that the debtor had committed an available act of bankruptcy. S. 46 allows certain payments of money or delivery of property *to* the debtor or to his assignee *before* the date of the receiving order, provided that the person making such payment or delivery was unaware that a bankruptcy petition had been presented against the debtor. Moreover, the payment or delivery must have been made *bona fide*, and in the ordinary course of business. It will be noted that s. 46 says nothing about notice of an act of bankruptcy. This is important, because it relieves the persons who are affected by this section from having to decide whether or not some act that the debtor has committed was or was not an act of bankruptcy within the meaning of the Act.

The wording of s. 46 raises the question whether a banker is protected in paying cheques drawn on his credit balance by the debtor in favour of third parties. He is undoubtedly protected in paying cheques payable to the debtor himself. The section says that the payment must be made "to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him." Since by s. 53 (1) a cheque is not an assignment of the

funds in the banker's hands, it has been contended that a payee or holder of the cheque cannot be considered as a person claiming by assignment. If that is so, then the banker must fall back on s. 45. Some writers say that the wording of this section does protect the banker provided that he had no notice of an act of bankruptcy, but Paget (pp. 52–5) is of the opinion that neither s. 45 nor s. 46 protects the banker for cheques payable to third parties, and that, consequently, a banker who pays such cheques after the commission of an act of bankruptcy, to which the trustee's title relates back, may be liable to the trustee for all such sums, even though the banker was unaware that a statutory act of bankruptcy had been committeed. On the other hand, Hart (pp. 408–9) argues that payment of cheques to third parties is apparently protected by s. 46. Hence, in these circumstances, until this point has been judicially determined, it is advisable for the banker to follow the procedure indicated below.

3. Procedure on Notice of Act of Bankruptcy.—On receipt of notice of an act of bankruptcy, it has not been necessary, since the Bankruptcy Act, 1914, for the banker to stop all operations on the debtor's account. Until the receiving order is actually made, the customer is entitled to draw out his credit balance by cheques payable to himself.[1] Such transactions are covered by s. 46, provided that they are done in the ordinary course of business, are otherwise *bona fide*, and are carried out before a receiving order is made, and without knowledge of the presentation of a bankruptcy petition. For the reason stated in the last paragraph, the banker should only pay cheques made payable to the customer himself, and not those made payable to third parties. To put matters upon a proper footing, the banker should, immediately on receipt of notice of a statutory act of bankruptcy (see *post*), advise his customer that he intends to pay only those cheques made payable to the customer himself. By s. 48 (6) Bankruptcy Act, 1914, " subject to the provisions of this Act with respect to property acquired by the bankrupt after adjudication, any . . . banker . . . shall pay and deliver to the trustee all money and securities in his possession or power . . . which he is not by law entitled to retain as against the bankrupt or the trustee." Therefore, when a customer who has a credit balance is adjudicated bankrupt, the banker should inform the trustee or the Board of Trade of the fact by registered post,

[1] See also p. 461.

unless the account is a trust account, or held by the bankrupt in a fiduciary capacity. (See note, p. 471.)

4. Acts of Bankruptcy.—The following are the acts of bankruptcy enumerated in s. 1 (1), Bankruptcy Act, 1914. A few notes are appended in explanation of the various clauses:

(*a*) "If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."

A conveyance or assignment to one or more creditors, not being *all* the creditors, cannot be construed as an act of bankruptcy under this heading, neither can an assignment for the benefit of a particular class of creditors, *e. g.* the *trade* creditors, to the exclusion of the *private* creditors. Under s. 4 (*c*), a creditor has usually three months in which to present his petition, but where the debtor has made an assignment of the whole, or substantially the whole, of his property to a trustee for the benefit of his creditors generally, the trustee by s. 24 (1), Deeds of Arrangement Act, 1914, may send to any creditor, by prepaid registered post, a notice in writing of the execution of the deed, and of the filing of the certificate of creditors' assents to the deed of arrangement. The notice is sent on Form 14, and states that after the expiration of *one month* from the date of posting the notice, the creditor will not be entitled to present a bankruptcy petition founded on the execution of the deed or on any other act connected with the proceedings preliminary to the execution of the deed. This notice of the trustee binds the creditor unless the deed of assignment becomes void. By s. 3 (1), Deeds of Arrangement Act, 1914, such a deed is void if not duly registered and if not assented to within the prescribed time by a majority in number and value of the creditors.

(*b*) "If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

Any conveyance is fraudulent which is intended to defeat or delay creditors (L.P.A., s. 172). The assignment of the whole or substantially the whole of the debtor's property as security for a past debt is fraudulent, and is an act of bankruptcy under this clause. But an assignment, partly in consideration of a past debt and partly in consideration of fresh advances, is not of itself fraudulent. For example, if the fresh advances were made *bona fide* in the hope of preventing the debtor from stopping

payment, and thus enabling him to continue his business on the chance of recovery, it is not fraudulent, but if it is shown that the real intention of the creditor in making the fresh advances was to obtain security for the past debt, then it is fraudulent. If the debtor sells the whole of his property that is not, *of itself*, an act of bankruptcy, for by doing this he is merely exchanging one kind of property for another kind of property, but if, after selling, he bolts with the money, then it is an act of bankruptcy, though even in that case the buyer acting in good faith and without knowledge is covered by s. 45, Bankruptcy Act, 1914.

(c) "If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt."

A preference to be fraudulent must be made by a person when insolvent, and it must be voluntary and done with intent to favour some particular creditor. If the creditor, not knowing at the time that the debtor was about to become bankrupt, browbeats the debtor, and forces him to pay by threatening him with an action, the preference would not be fraudulent. But if the debtor says to the creditor, "I am going to file my petition next week," and thereupon the creditor forces him to pay the debt, then the preference is a fraudulent one, for the creditor, through the debtor's confession, has knowledge that by getting the money he is defrauding the other creditors. In every case the burden of proving that the preference is fraudulent lies upon the trustee in bankruptcy. Fraudulent preference is dealt with in s. 44 (1), Bankruptcy Act, 1914, substantially as follows, so far as it concerns a banker: "Every conveyance or transfer of property [and] every payment made . . . by any person unable to pay his debts as they become due . . . with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making . . . the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making . . . the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

(d) "If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his

dwelling-house, or otherwise absents himself, or begins to keep house."

The acts enumerated in this clause, to be acts of bankruptcy, must be done with the purpose of delaying or avoiding creditors. It is a question of fact whether the debtor, by absenting himself, had any such intention or not. If, for example, the debtor is in bad health, and goes abroad or to the seaside to recuperate, or if he goes on a business journey, he is not necessarily delaying or defeating his creditors, but if, before going away, he makes no provision for meeting bills he has accepted, the inference, generally speaking, would be that his intention was to avoid payment. Moreover, if he vacates his usual place of business without notifying his change of address to his creditors, it is an act of bankruptcy. A debtor is said to keep house when he has issued orders that he will not see any creditors who may call, and a creditor upon calling is denied admittance. But if the creditor calls at an unreasonable hour and is refused admittance, that would not be accepted as evidence that the debtor was keeping house.

(*e*) "If execution has been levied by seizure of his goods under process in any action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days: Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled, or abandoned, shall not be taken into account in calculating such period of twenty-one days."

This act of bankruptcy occurs if the sheriff either sells the goods or holds them for twenty-one days, not counting the day of seizure, except where an interpleader summons has been taken out. The sheriff takes out an interpleader summons when two or more adverse parties claim goods in his possession, in order that the claimants may interplead, *i. e.* fight out their claims in a Court of law. After the expiration of the twenty-one days, the act of bankruptcy is complete, and any petition based on it must be presented within three months of that date. By s. 40 (3), Bankruptcy Act, 1914, "an execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy."

(*f*) "If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself."

This clause requires no explanation.

(*g*) "If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counter-claim set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained. For the purposes of this paragraph and of Section 2 of this Act, any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order."

Any creditor may, within the statutory three months, serve on the debtor a bankruptcy notice founded on this act of bankruptcy. The judgment on which it is based must be a *final* judgment, and includes such an order as a garnishee order absolute (but not a garnishee order *nisi*). The judgment debt, or sum ordered to be paid, may be for any amount. The debtor is given seven days, after the service of the notice, to pay or give satisfactory security for the judgment debt or sum ordered to be paid, or within the same time must enter a counter-claim equal or greater in amount. If he does not do any of these things, he has committed an act of bankruptcy on which a petition may be based.

(*h*) "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

The absence of definition as to what amounts to notice has created considerable difficulty. From the decisions it is clear that no special form of words is necessary. The vital point is that, whether the notice is verbal, or written, or by means of a circular, or transmitted by the debtor's agent to the creditor's agent, it must be so expressed, that the creditor who hears or reads it must be in no doubt that the debtor has suspended or is about

to suspend payment. Even the offer by the debtor of a composition does not necessarily bring him within the sub-section, but if, when making the offer, he leads his creditors to believe that suspension of payment is the alternative to acceptance, then he does come within the sub-section.

These are the acts of bankruptcy as enumerated in s. 1 (1) of the Act. The banker's difficulty is not that he does not know what are the acts of bankruptcy, but that he cannot often be certain that his customer has actually committed one of these acts. Information does not always come from the customer himself. It is often conveyed in the form of hints and rumours of impending disaster. If he takes notice of the information, coming to him, as it often does, in roundabout ways, and refuses to honour his customer's cheques payable to third parties, he may, should the information prove false or exaggerated, have to defend an action for damages to credit. If, on the other hand, he does not consider the information conveyed to him is sufficient to constitute an act of bankruptcy, and bankruptcy does in fact occur within three months, he may have to refund to the trustee all such payments made after receipt of the notice. "It has been held that information by a stranger that he has filed a petition against a man is notice of an act of bankruptcy, though the informant did not actually say on what alleged act of bankruptcy the petition was based" (*Gilbart Lectures*, 1912). In cases like the foregoing, when the information does not come direct from the customer, the banker should, if possible, get into touch with him before paying or dishonouring his cheques. And it should not be forgotten that the onus of proving absence of notice lies upon the person benefiting, where, without notice actual or constructive, the transaction is protected by the sections of the 1914 Act.

5. The Bankruptcy Petition.—The petition may be presented by a single creditor, or by two or more creditors acting jointly, or by the debtor himself (ss. 3, 4 (*a*)). If the debtor himself presents the petition, he must allege that he is unable to pay his debts, and the Court will thereupon make a receiving order. If a creditor or creditors present a petition the following conditions are essential to make it valid: (*a*) The debt owing (or the aggregate of the debts where there are joint petitioning creditors) must not be less than £50. If the petitioning creditor is a secured creditor, the balance of debt must not be less than

£50 after deducting the value of the security; (*b*) The debt must be a liquidated sum (*i. e.* a clear or agreed upon sum) payable either immediately or at some certain future date; (*c*) The act of bankruptcy upon which the petition is founded must have occurred within the three months preceding the presentation of the petition; (*d*) The debtor must be domiciled in, or within a year before the presentation have ordinarily resided in, or have had a dwelling-house or place of business in, England. Clause (*b*) gives a creditor who has taken a bill (£50 or over) for a debt, power to present a petition, if the debtor has committed an act of bankruptcy, even though the bill be not due (*Re Raatz*, 1897).

By s. 126, a receiving order cannot be made against any corporation, partnership, association, or company registered under the Companies Acts. These corporate bodies are wound up under the last-mentioned Acts. Ordinary partnerships and limited partnerships (*q. v.*) are not affected by s. 126. Foreigners are now subject to the bankruptcy laws equally with British citizens, if any of the conditions enunciated in s. 1 (2) are applicable. That is to say, the foreigner must at the time when any act of bankruptcy was done or suffered by him have been (*a*) personally present in England; or (*b*) ordinarily resident or had a place of residence in England; or (*c*) was carrying on business in England, personally, or by means of an agent or manager; or (*d*) was a member of a firm or partnership which carried on business in England.

If the foreigner, having a place of business here, is resident abroad, he is naturally beyond the jurisdiction of the English courts, but he can be adjudicated bankrupt here and his property in this country seized and administered. A bankruptcy petition cannot be presented against a deceased person, but by s. 34 of the Administration of Estates Act, 1925, an insolvent estate is to be administered in accordance with the rules in bankruptcy, subject to the priority of the funeral, testamentary and administration expenses. The effect of bankruptcy upon partnerships, joint and other accounts, is dealt with under the appropriate headings (see pp. 224–74).

If the debtor is in the London Bankruptcy district, or is not resident in England, or his place of business or residence cannot be ascertained, the place of presentation of the petition is the High Court of Justice. In any other case the petition must be presented at the County Court for the district in which the debtor has resided,

or carried on business, for the greater part of the six months preceding the presentation of the petition (s. 98). Where the debtor has both private and business addresses, preference is to be given to the latter (Bankruptcy Act Rule, No. 147). The person presenting the petition must pay the stamp duty and costs and lodge a deposit, but he is entitled to the repayment of these items out of the assets in the priority stated in Rule 117.

Under the Land Charges Act, 1925, every petition in bankruptcy, and every receiving order should be registered at the Land Registry, the former in the Register of Pending Actions, and the latter in that of Writs and Orders affecting land, whether or not it is known to affect land. If not so registered, a purchaser of the legal estate in the land, in good faith, for value, and without notice of an available act of bankruptcy, is protected against the title of the trustee in bankruptcy. If necessary, registration must be renewed every five years. In the case of registered land, on registration of the bankruptcy petition as a Pending Action, a *creditors' notice* must be entered in the Register, followed by a *bankruptcy inhibition* when the receiving order has been registered.

The above regulations emphasise the need for search before completing a purchase, or advancing under a mortgage.

6. Receiving Order.—The effect of making a receiving order is that an Official Receiver—appointed by and under the direction of the Board of Trade—becomes the receiver of the debtor's property, and thereafter no creditor, except as directed by the Act, has any remedies against the person or property of the debtor (s. 7 (1)). This section does not affect the power of secured creditors to realise or otherwise deal with their securities, but no secured creditor may receive more than 20*s*. in the pound (Sch. II., 18), any surplus being handed over by him to the official receiver. The rights of secured creditors to deal with their securities are restricted by s. 59, which gives the trustee power to exercise his right of redemption.

After a receiving order has been made the debtor must draw up and submit to the official receiver a Statement of Affairs in the prescribed form, giving full particulars of his assets, debts, and liabilities, creditors and securities held by them (s. 14 (1)). Not later than fourteen days after the making of the receiving order (unless a later day is fixed for some special reason) there must be a general meeting of creditors (Sch. I., (1)) which decides

whether any proposal for a composition or scheme of arrangement shall be accepted, or whether the debtor shall be made bankrupt (s. 13 (1)). Every creditor whose debt has been admitted provable in bankruptcy (see *post*) is entitled to vote at the meeting either in person or by proxy. A secured creditor votes for the balance (if any) of the debt after deducting the value of his security, but if he elects to surrender his security he may vote in respect of his whole debt. The official receiver or trustee has the power, within twenty-eight days of the secured creditor's voting, to buy him out for the benefit of the creditors generally, at the proof value plus 20 per cent. The creditor also has some right of amending his estimated value, but if he does so he loses the 20 per cent. increase should the trustee require the security to be given up (see Sch. I., 12). If at this first meeting of creditors (or at any adjournment thereof), they do not adopt a scheme or accept a composition satisfactory to the Court, the debtor is adjudicated bankrupt (s. 18).

Notice of all receiving orders and adjudication orders must be advertised in the *Gazette* and in a local newspaper (ss. 11, 18), and such notice is deemed to be sufficient notice to all persons concerned. Registration of receiving orders under the Land Charges Act, 1925, is dealt with at the end of the previous section.

It should be noted that a receiving order commences from the first moment of the day on which it is made. Hence, for example, if a banker pays the debtor's cheques in the morning and a receiving order is made in the afternoon of the same day, he gets no protection, and is responsible to the trustee in bankruptcy for the amounts paid. Another serious danger arises from the fact that frequently a considerable delay elapses before a receiving order is advertised. The banker gets no protection whatever should he have dealings with the debtor after the date of the receiving order, and in ignorance of the making of it. This danger may be further increased by the postponement by order of the Court of the advertisement of the receiving order. In the case of *In re Wigzell, ex parte Hart*, 1921, the advertisement of a receiving order was postponed pending an appeal by the debtor, who, in the meantime, paid in and drew out of his account. A month later the appeal was heard and dismissed, and the receiving order was later advertised. Even though the banker was entirely ignorant of the making of the receiving order, or even of an available act of bankruptcy, it was held by the Court

of Appeal that the banker was responsible for all sums paid in, and could not take credit for any sums drawn out. (See also Appendix, p. 500.)

7. **Compositions and Arrangements (under Bankruptcy).** —S. 16 (1) says that " where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he shall, within four days of submitting his statement of affairs, or within such time thereafter as the official receiver may fix, lodge with the official receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme . . . and setting out particulars of any sureties or securities proposed." A copy of this proposal, and a report thereon, is sent to each creditor, and if, at the meeting that follows, a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept the proposal, the same, when approved by the Court, is binding on all the creditors. The Court, whose approval is essential, will not assent to any scheme, unless it provides reasonable security for the payment of not less than 5*s*. in the pound on all unsecured debts provable against the debtor's estate (s. 16 (10)).

Acceptance of the composition or scheme involves discharge of the receiving order. The debtor (or the trustee appointed under the scheme) is then put into possession of his property and thereby released, subject to the provisions of the composition or scheme, from all debts from which a discharge in bankruptcy would have released him. The Court may annul any scheme which in practice, owing to legal or other difficulties, fails to be workable, or if the debtor default in payment of any instalment, and may adjudge the debtor bankrupt, but without affecting the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme (s. 16 (16)). A banker, therefore, is protected if he pays a credit balance to a trustee appointed to carry out a scheme or composition authorised by the Court.

It should be noted that the foregoing remarks apply to compositions or deeds of arrangement made *after* a receiving order has been made. The rules of bankruptcy do not apply to deeds of arrangement or compositions made *before* a receiving order is made. (See under *Deeds of Arrangement*, post.)

8. The Debtor's Property.—Where a receiving order is made against a debtor, and no approved composition or scheme is made and accepted within the time prescribed by the Court, the debtor is made bankrupt and his property becomes divisible amongst his creditors and vests in his trustee (s. 18 (1)). A committee of inspection is appointed by the creditors to superintend the administration of the estate by the trustee. By s. 38 the debtor's property under the control of the trustee comprises—

(*a*) All property belonging to the bankrupt at the commencement of the bankruptcy, or that may be acquired by or devolve upon him before his discharge.

(*b*) All goods which, at the commencement of the bankruptcy, were in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, in such circumstances as 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 to be goods within the meaning of this section. But the trustee shall not have any control over property held by the bankrupt in trust for any other person. By the same section, the trustee has the right to exercise all powers in respect of property which might have been exercised by the debtor himself.

By s. 37, the title of the trustee to the debtor's property is deemed to relate back and commence, not from the date of his appointment, but from the time of the commission of the act of bankruptcy on which the receiving order was made, or, if more acts than one have been committed, to relate back to the first act of bankruptcy committed within the three months preceding the date of presentation of the bankruptcy petition. This rule of relation back, as it is called, is mitigated by ss. 45 and 46, which protect certain transactions from the operation of the rule. These have been already dealt with.

All the debtor's property, whether belonging to him at the time of his bankruptcy, or acquired by him afterwards and before his discharge, is divisible among his creditors. But the two kinds of property are treated differently. The former kind, subject to the provisions of ss. 45 and 46, vests in the trustee immediately after the adjudication order. In regard to the latter kind (called "after-acquired property"), the rule (s. 47

(1)) is that *until the trustee intervenes* all transactions by a bankrupt after his adjudication with any person dealing with him *bona fide* and for value, in respect of this after-acquired property, are valid against the trustee. This section applies to both real and personal property. Wages earned by the bankrupt, after adjudication, by his own personal labour, do not pass to the trustee, at least such part of the personal earnings as is deemed necessary for the support of himself and his family (see also "Account with undischarged bankrupt," *post*).

From s. 38, already mentioned, it follows that not only property of which the debtor is the *true owner*, but also property of which he is the *reputed owner* passes to the trustee. Whether a man is or is not the reputed owner of goods in his possession is a question of fact. Reputation of ownership may be excluded by trade custom commonly known and recognised. For example, it is a well-known custom for persons to have pianos on the three years' system, and it is a common occurrence for a manufacturer's agent to be in possession of valuable articles of machinery exhibited by him as specimens of the manufacturer's products, but not for sale. In such cases, though the bankrupt is in possession of the goods, if the true owner can prove that the bankrupt is not the reputed owner, then the property in question would not pass to the trustee. But in every case of the kind the onus of proof lies upon the true owner. Farming stock subject to an agricultural charge is excluded from this section.

The expression "things in action" (more commonly "choses in action") used in s. 38 has been defined as follows: "On the whole, it may, I think, be said, that according to modern usage, the phrase 'chose in action' includes only money due, whether under a contract or not, and contracts of every nature except contracts for the sale of goods, where the word contract is used in its widest meaning, so as to include shares in companies. The phrase is never at the present day used in the meaning of a right of action in respect of a tort [*i. e.* an injury done to a person independent of a contract]; and it is, perhaps, doubtful whether it includes patents, copyrights, and trade marks" (H. W. Elphinstone, *Law Quarterly Review*, v. ix., p. 315). A bill, a promissory note, and any other negotiable instrument are examples of things in action. So also are debentures and life assurance policies. Any banker, therefore, who has a

mortgage on such things in action need not give notice to the company in order to protect himself against the trustee in bankruptcy. But neglect of an assignee of book debts to give notice of the assignment to the debtors will, as a general rule, be taken to mean that he has consented to the debts remaining in the order and disposition of the bankrupt, and the assignee in that case will not be protected. By s. 43 (1), a general assignment of book debts will be void against the trustee as regards any debts which have not been paid at the commencement of the bankruptcy, unless the assignment has been registered as if it were a bill of sale given otherwise than by way of security for the payment of money. But nothing in this section shall render void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made *bona fide* and for value, or in any assignment of assets for the benefit of creditors generally. It should be noted that, with regard to an assignment of specified debts taken as a security, notice should be served on the debtors in order to take the debts out of the "order and disposition" of the bankrupt.

9. **Proof in Bankruptcy.**—By s. 30, a creditor may prove for all debts and liabilities, present or future, certain or contingent, to which the debtor was subject at the date of the receiving order, or to which he may be subject before his discharge by reason of any obligations incurred before the date of the receiving order. The trustee shall estimate the value of any contingent liability, but if the creditor disagrees with his estimate, the creditor has the right of appeal to the Court. A creditor cannot prove for a debt or liability contracted by the debtor after notice of an act of bankruptcy has been received by the creditor, or contracted after a receiving order has been made. By s. 31, if there have been mutual dealings between the bankrupt and a creditor proving for a debt, an account must be taken of what is due from one party to the other in respect of such mutual dealings, and the balance shall be provable, or paid, as the case may be. But the creditor cannot claim the benefit of any set-off against the debtor's property in respect of a debt incurred after notice of an available act of bankruptcy. A debtor is released from any further liability on all debts provable in bankruptcy (s. 28 (2)). S. 28 (1) details certain kinds of liabilities

from which a bankrupt will not be discharged save by the written consent of the Treasury or by an order of the Court.

A banker "holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor" is a secured creditor (s. 167), and as a secured creditor he may either (*a*) realise the security and prove for the balance; (*b*) surrender the security and prove for the whole debt; (*c*) assess the value of the security and prove for the balance. If he elects to assess the value, the trustee may, at any time, redeem the security at the assessed value, or, if dissatisfied with the assessed value, may require the security to be offered for sale. The banker may, at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be sold, and if the trustee does not, within six months, signify in writing his intention to exercise the power, then he loses his right to exercise that power, and the equity of redemption and any other interest vests in the banker, the amount of his debt being reduced by the assessed value of the security (Sch. II., 10–13). But where a banker has assessed the value of his security, he may, at any time, amend his valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bona fide* on a mistaken valuation, or that the security has diminished or increased in value since its previous valuation. In these circumstances, the secured creditor must forthwith repay any surplus dividend he may have received in excess of that appropriate to the amended valuation, or, as the case may be, is entitled to be paid out of any moneys available for further dividends any amount he has not received by reason of the inaccuracy of the original valuation, but he cannot disturb the distribution of any dividend declared before the date of the amendment. If a valued security is subsequently sold, the net amount realised is substituted for any previous valuation, and treated as an amended valuation (Sch. II., 14–16). It is advisable for the banker to consult the trustee before dealing in any way with the bankrupt's securities. (See also p. 500.)

Where a policy of life assurance is taken as security, the banker cannot prove for the value of future premiums, even though the bankrupt, in the memorandum of deposit, covenanted to pay the future premiums (*Deering* v. *Bank of Ireland*, 1886).

Security belonging to and deposited by an outside party to secure an account, need not be valued, for this is not "the property of the bankrupt" (s. 38), but the property of the third party, and can be treated as collateral security. The banker, therefore, can claim on the bankrupt's estate for the full amount of the debt, and after receiving a dividend fall back on the collateral security to make up any deficit. The proceeds of any collateral security realised by the banker while the bankrupt's estate is being administered should be placed to a suspense account pending final settlement of the estate. These remarks apply to security belonging to and deposited by an individual partner to secure his firm's account and to a guarantee or other security given by a third party to secure the bankrupt's account. Every memorandum of deposit or guarantee taken by a banker should contain a clause, renouncing in favour of the banker the depositor's right of proof against the principal debtor's estate. A surety may (provided the creditor himself does not) prove for his contingent liability in respect of a debt which he has not paid, and, in the same way, a banker can prove on a bankrupt surety's estate in respect of the contingent liability.

Bankruptcy breaks the relationship of banker and customer, and consequently the banker is unable to charge compound interest after the date of the receiving order, and can only prove for interest up to the date of the order, or where there is a deed of assignment, up to the date of the deed. S. 66 (1) says that "where a debt has been proved, and the debt includes interest . . . . such interest . . . shall for the purposes of *dividend*, be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

The proof of debt must be made on the regulation form No. 60, and must state the amount of the debt, when contracted, particulars of securities held (if any), and, in the case of bills, the dates on which they were drawn and due to be paid, and the names of the drawers and acceptors. A proof intended to be used at the first meeting of creditors must be lodged with the official receiver not later than the time specified in the notice convening the meeting. An affidavit of proof of debt must be sworn, and should specify the vouchers (if any) by which the claim can be substantiated (Sch. II., 4). The affidavit may be

sworn before an assistant official receiver, or any clerk of an official receiver duly authorised in writing by the Court or the Board of Trade, or by any registrar of a Bankruptcy Court, or justice of the peace for the county or town where it is sworn, or by any commissioner of oaths. Any interlineations, alterations and erasures must be authenticated by the person taking the affidavit. The affidavit may be made by the creditor himself or by his duly authorised agent. Where the creditor is a limited company, the agent must be authorised under the seal of the company. Every proof of debt above £2 (other than proofs of workmen's wages) must be stamped with a one shilling and six-penny bankruptcy stamp.

10. *Proof on bill.*—If a banker holds bills indorsed by the bankrupt as security for an overdraft, he is not, so far as regards the bills, a secured creditor bound to value them in his proof, though he must name them. The banker, therefore, can prove against the estate for the whole of the overdraft, and, when the bills become due, can claim against the other parties to the bills, provided that in the aggregate he does not receive more than 20*s.* in the pound. But if the bankrupt has not indorsed the bills he has deposited with the banker as security, the property in the bills remains in the bankrupt, the banker having a lien or charge on them—that is to say, he is a secured creditor, and must value them in his proof. If a bill held by the banker as security for the account of the drawer is an accommodation bill, he can, on the bankruptcy of the acceptor, prove for the whole amount of the bill, even though it exceeds in amount the balance of the account, but he cannot retain more than is due to him in respect of the overdraft granted to the party accommodated.

If the banker has discounted bills for a customer who has become bankrupt, he may prove against the customer's estate for the amount of the bills, but if they are paid in full on maturity by the acceptors he must return all moneys received out of the customer's estate to the trustee for the benefit of the estate. If both drawer and acceptor of such bills become bankrupt, the discounting banker can prove against each estate for the whole amount of the discounted bills, but he cannot receive more than 20*s.* in the pound. If he receives a dividend from one estate before sending in his proof against any other estate, he can only prove for the balance after deducting the dividend received.

The holder of a bill is simply a creditor, not a secured creditor,

but in certain circumstances the holder may be entitled to securities deposited by one party liable on the bill with another party liable on the bill as security for payment. But this can only happen when the one party has specifically lodged the securities with the other party as cover for the bills, and when *both* parties to the bills have become bankrupt. This rule is known as the rule in *Ex parte Waring*, 1815. The rule would be applicable where the drawer of bills gets another party to accept them by depositing some of his property as security. The rule would only apply if both parties became bankrupt, and the holder had therefore a double right of proof.

By the application of s. 31, Bankruptcy Act, 1914, a banker is entitled to retain either the whole or a part of a bankrupt customer's credit balance, in order to meet the contingent liability on bills discounted for the customer. By Rule 269, Bankruptcy Rules, 1915, every bill of exchange, promissory note, or other negotiable instrument or security, on which proof has been made, must be exhibited to the trustee before payment of any dividend thereon. If the bill or other instrument has been lost, s. 70, Bills of Exchange Act, 1882, gives the Court or a judge power to order that the loss shall not be set up, provided that a satisfactory indemnity is given by the party claiming on the lost instrument.

Where the banker is a holder for value of a bill received from a customer who has become bankrupt, and the bill is dishonoured on maturity, the banker must give notice of dishonour either to the customer himself or to his trustee (s. 49 (10), Bills of Exchange Act, 1882). If he fails to give due notice (except for sufficient reasons, s. 50), the customer's estate will not be liable. If, in such circumstances, it is the acceptor that fails, and the banker becomes a party to a deed of assignment without the knowledge and consent of the customer, the latter will be discharged from all liability, unless the deed of assignment contained a clause expressly reserving the banker's rights against the other parties (see *Q. B. P.*, No. 1351).

11. **Account with Undischarged Bankrupt.**—S. 47 (1), Bankruptcy Act, 1914, says that "all transactions by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee. . . .

For the purposes of this sub-section, the receipt of any money, security, or negotiable instrument from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of, a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value." This section only applies to *after-acquired property*, i. e. property acquired after adjudication, but not, it would appear, to property acquired between the date of the act of bankruptcy and the date of the adjudication. And it is clear that provided the property dealt with comes within the section, a banker's dealings with it (until the trustee intervenes) are protected. But in spite of the protection afforded by this section, the risk of opening an account with an undischarged bankrupt is a very real one. For how is the banker to know what is after-acquired property and what is not? If it is proved not to be after-acquired property or personal earnings, he may be held liable to refund it to the trustee (see also "The Debtor's Property," *ante*).

There is another difficulty in regard to an undischarged bankrupt's account, for by s. 47 (2), *ibid.*, "where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then, unless the banker is satisfied that the account is on behalf of some other person [*e. g.* a trust account], it shall be his duty forthwith to inform the trustee in the bankruptcy or the Board of Trade of the existence of the account, and thereafter he shall not make any payments out of the account, except under an order of the Court or in accordance with instructions from the trustee in the bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee." Since it is a statutory obligation on the part of a banker to stop all payments out of the account upon discovering that his customer is an undischarged bankrupt, the banker cannot be mulcted in damages for dishonouring his customer's cheques immediately after the discovery. The statutory notice to the trustee or Board of Trade should be sent by registered post in order to prove delivery, if necessary. The banker should also advise his customer that he has sent the statutory notice.

Before opening an account with the wife or other nominee of an undischarged bankrupt, who is continuing the business

formerly carried on by the bankrupt, the banker should give notice to the trustee and obtain his written consent, otherwise he may be called upon to refund to the trustee all moneys paid out. An undischarged bankrupt is guilty of a misdemeanour if he engages in any trade or business under a name other than that under which he was adjudicated bankrupt, without disclosing to all persons with whom he enters into any business transaction, the name under which he was adjudicated bankrupt (Bankruptcy Act, 1914, s. 155 (*b*)). Unless acting prior to 3rd August, 1928, or unless he has obtained the leave of the Court, an undischarged bankrupt is prohibited from acting as a director of, or directly or indirectly taking part in or being concerned in the management of, any company.

It may be added that a banker should not pay open cheques drawn in favour of and presented by a person known to be an undischarged bankrupt. Such a payment would not be "payment in due course," which means payment in good faith and without notice of any defect in the title of the presenter. The paying banker, in such circumstances, would not be able to debit his customer, and would be responsible to the trustee in bankruptcy should it be proved that the money belonged to the bankrupt's estate, and that it had been misappropriated by him.

NOTE (see p. 454).—S. 46 (which covers the period between an available act of bankruptcy and the receiving order) protects the banker when the customer draws against his credit balance, but it does not appear to cover the feeding of the account by the collection of cheques, the proceeds of which are subsequently drawn out by the customer. Owing to the doctrine of relation back, cheques paid in for collection do not belong to the customer but to the trustee in bankruptcy when he is appointed. If, therefore, it is necessary to collect such cheques, the proceeds should be credited to a suspense account where the money can remain until it is known definitely whether or not the customer is to be made bankrupt.

If the debtor's account is overdrawn, the banker cannot, of course, after notice of an act of bankruptcy, apply any cheques for collection in reduction of the overdraft.

It should be noted that there are two acts of bankruptcy which immediately stop the customer's account, namely, the execution of a deed of assignment which involves holding any credit balance at the disposal of the assignee, and the presentation of a petition by the customer against himself, which, though classed as an act of bankruptcy, operates in the same way as a petition presented by a creditor, knowledge of which at once stops all operations on the account.

CHAPTER II

DEEDS OF ARRANGEMENT

1. Deeds of Arrangement compared with Bankruptcy.— By means of a deed of arrangement, a debtor may assign all his property to a trustee for the benefit of his creditors generally, in consideration of their releasing him from the debts he owes to them, the trustee under the deed being directed to realise the estate and distribute the proceeds among the creditors *pro rata*. By thus assigning his property the debtor commits an act of bankruptcy, but that does not necessarily make him a bankrupt. Before that can happen there must be the presentation of a bankruptcy petition against him by a duly qualified creditor or creditors within three months of the commission of the act. If, therefore, all the creditors agree to accept the deed of arrangement, the costly and slow-moving official proceedings in bankruptcy may be avoided. But if a cantankerous or dissatisfied creditor or combination of creditors for £50 or over, objects to the private arrangement, then the estate may be forced into bankruptcy.

It is necessary to emphasise the fact that these private arrangements are not compositions or schemes under the Bankruptcy Act; they are arrangements made between debtors and their creditors quite outside the provisions of the Act and are regulated by another Act, the Deeds of Arrangement Act, 1914. The object of such private arrangements is to avoid the publicity and expense unavoidable in bankruptcy proceedings. They have another advantage from the debtor's point of view, viz. that none of the disabilities of an undischarged bankrupt attach either to the debtor or to those dealing with him. The creditors, generally speaking, also benefit by such an arrangement, inasmuch as the debtor's estate can usually be wound up more quickly and less expensively than by official proceedings in bankruptcy. There is also less chance, under this arrangement, of a forced realisation

of assets. The disadvantage of a private arrangement as compared with bankruptcy proceedings is that it is of no effect unless all the creditors agree to it; one dissentient, claiming for £50 or over, can wreck the whole scheme, unless, indeed, the assenting creditors decide to pay him out in full. Moreover, the absence of penalty for concealment of available assets makes the chance of this kind of fraud happening greater than it would be in the publicity of the Bankruptcy Court and in face of the stringent regulations of the Act. The bankruptcy law also provides effective punishment for such serious offences as indulgence in gambling or in hazardous speculation, which are the proximate causes of so many bankruptcies. The chief disadvantage of bankruptcy proceedings as compared with a private arrangement is the less speedy, less profitable, and more costly realisation of the assets.

2. **Legal Requirements.**—The Deeds of Arrangement Act, 1914, s. 2, says that a deed of arrangement shall be void unless registered with the Registrar of Bills of Sale under the Act within seven clear days of its execution. And it will also become void unless, before or within twenty-one days after it has been registered, or within such extended time as the Court may allow, it has received the assent of a majority in number and value of the creditors. The assent of a creditor must be established by his executing the deed or by sending to the trustee his written consent attested by a witness. In calculating a majority in number and value of the creditors, a creditor holding security upon the debtor's property shall be reckoned as a creditor only for the balance (if any) due to him after deducting the value of his security. Creditors for sums not exceeding £10 are reckoned in the majority in value but not in number. A deed of arrangement is only binding on those that assent to it, but by s. 24 a trustee may serve on any creditor, who has not assented, a written notice of the execution of the deed and the filing of the certificate of creditors' assents, with the intimation that the creditor shall not, after one month from the service of the notice, be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed or any other act connected with the proceedings preliminary to the execution of the deed. Unless the deed becomes void, the trustee's written notice is binding upon the dissenting creditor. If bankruptcy intervenes, the deed becomes void. When such a deed becomes void, the fact that

a creditor has assented to the deed shall not disentitle him to present a bankruptcy petition founded on the execution of the deed as an act of bankruptcy. By s. 20, when a deed becomes void, the trustee must give notice of the avoidance to every creditor, and file a copy of the notice with the Registrar of Bills of Sale.

Since any assignment for the benefit of creditors generally is an act of bankruptcy, the banker, as soon as he hears of the deed, must only pay cheques made payable to the customer himself or to his assignee. If he receives notice that creditors not assenting to the deed have presented a bankruptcy petition, all transactions on the account must be stopped and any credit balance retained for the trustee in bankruptcy.

By s. 11, the banking account of the trustee or assignee of the estate must be opened in the name of the debtor's estate. It is desirable to treat such an account as a paying-in one only until the three months for presentation of a bankruptcy petition have elapsed. The actions of the trustee are controlled by the provisions of the deed of his appointment. The banker should see this deed, and satisfy himself as to its due registration, and its continuing validity, before allowing withdrawals.

Under the Land Charges Act, 1925, s. 8, any deed of arrangement affecting land should be registered in the register of deeds of arrangement affecting land, in the name of the debtor, and re-registered every five years if necessary to preserve its effect. Unless so registered, a deed of arrangement is void against a purchaser of any land comprised therein.

3. **Composition with Creditors.**—Another method by which a debtor may avoid bankruptcy proceedings is to call his creditors together privately, and offer them a composition, *i. e.* so much in the pound, in full satisfaction of the moneys owing to them. It is usually arranged that the composition shall be payable by instalments upon agreed dates. Sometimes the debtor is asked to provide sureties who will guarantee the due payment of the instalments. The agreement may be under seal or under hand. An agreement not under seal to pay so much in the pound is not of itself an act of bankruptcy, but as, when carrying out the arrangement, the debtor may make statements which can be construed into an act of bankruptcy, the banker should act with great caution in regard to all operations on the debtor's account. If the debtor defaults in the payment of the instalments when due the creditors have the power to take bankruptcy proceedings.

APPENDIX

AUTHORITY TO PAY DIVIDENDS DIRECT TO BANKER

(See Part III, Chapter IV, p. 176)

To the Secretary of the .....

.....

..... request you will, until further notice, pay the Dividends and Interest from time to time falling due, and becoming payable on the Stocks or Shares now or which may hereafter be registered in ..... name to

..... Bank, Ltd.,

..... Branch,

whose receipt shall be your full and sufficient discharge.

Yours faithfully,

Proprietor's Signature .....

.....

.....

.....

Name in full .....

Address .....

Date .....

a creditor has assented to the deed shall not disentitle him to present a bankruptcy petition founded on the execution of the deed as an act of bankruptcy. By s. 20, when a deed becomes void, the trustee must give notice of the avoidance to every creditor, and file a copy of the notice with the Registrar of Bills of Sale.

Since any assignment for the benefit of creditors generally is an act of bankruptcy, the banker, as soon as he hears of the deed, must only pay cheques made payable to the customer himself or to his assignee. If he receives notice that creditors not assenting to the deed have presented a bankruptcy petition, all transactions on the account must be stopped and any credit balance retained for the trustee in bankruptcy.

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..... Branch,

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Yours faithfully,

Proprietor's Signature .....

.....

.....

.....

Name in full .....

Address .....

Date .....

MANDATE OR AUTHORITY FOR SOCIETY OR CLUB

(See Part IV, Chapter III, pp. 250–4)

To the ..... Bank, Limited.

Copy of Resolutions passed by the [1] ..... of the [2] ..... at their meeting held on the ..... day of .....19...

(1) "That the ..... Bank, Limited, be and are hereby appointed Bankers to the [3] .....

(2) "That all cheques on the banking account be signed and all bills, notes, and other negotiable instruments be drawn, accepted, and made on behalf of the [3] ..... by or any [4] ..... or more of them.

(3) "That cheques, bills, notes, and other negotiable instruments payable to the [3] ..... may be endorsed for the [3] ..... by any one or more of the persons mentioned in the Resolution No. 2 or by the Secretary of the [3] ..... for the time being.

(4) "That a copy of these Resolutions,[5] (under the Common Seal and) signed by the Chairman, be handed to the Bank, together with specimens of the necessary signatures."

I certify that the Resolutions, of which the above are copies, were duly passed at a meeting of the [1] ..... held on the .... day of ..... 19...

As WITNESS [5] (the Common Seal of the [2] ..... and) the signature of myself as Chairman of the said meeting, this ..... day of ..... 19...

.....Chairman.

Countersigned.

.....Secretary.

SEAL

The following are the signatures of the persons mentioned in the above Resolutions—

.....

.....

.....

[1] Committee or other Governing Body.

[2] Full name of the Club, or Society.

[3] Club or Society.

[4] Here insert smallest number allowed to sign.

[5] Strike out words in brackets in cases where there is no Seal.

GUARANTEES

(See Part VI, Chapter III)

(Forms of guarantee are frequently more elaborate than the specimen given below, but a simple form has been chosen as being more suitable for purposes of illustration.)

Form for One Customer by One Surety

To the ..... Bank, Limited.

(Clause 1.) In consideration of your *opening* [*or continuing*], an account with ..... of ..... (hereinafter called "the customer") I ..... of ..... hereby agree to pay and satisfy to you two days after demand up to the amount hereinafter mentioned all moneys and liabilities already advanced, paid, or incurred on such account, or which you may at any time advance, pay, or incur to or for the use, or accommodation of or on the credit of the customer (whether on current account, or by way of opening or continuation of any new account special or otherwise, or by the discount of, or otherwise in respect of, bills of exchange, promissory notes, or other negotiable securities, drawn, accepted, or indorsed by him, or otherwise howsoever), together with all interest, discount, commission, and other banking charges, law and other costs, charges and expenses, which may be or become payable in connection therewith: Provided nevertheless that my liability on this guarantee shall not exceed in the whole the sum of ..... pounds and interest thereon at the rate of five per cent. per annum from the date on which demand for payment shall have been made by you upon me.

And I further agree as follows—

(Clause 2.) This guarantee shall be a continuing guarantee, and in full force until three calendar months after I shall have given or sent to you notice in writing of my intention to discontinue and determine the

same, and shall have paid to you all moneys up to the limit of my liability due at the expiration of such notice, and in the event of my dying or becoming under disability the liability of my executors, administrators, or legal personal representatives and of my estate shall continue until the expiration of three calendar months' notice in writing given you by such legal personal representatives to determine this guarantee; and you shall be at liberty on receipt of such notice at any time within the three calendar months to open a fresh account with the customer, and to appropriate thereto all payments subsequently made to you by him and not expressly appropriated by him to the old account without prejudice to my said liability to the extent aforesaid.

(Clause 3.) You shall in any case be at liberty, and without my further assent or knowledge, at any time to grant to the customer or any person liable with or for him, whether as guarantor or otherwise, any time or indulgence, and to determine, enlarge or vary his credit, and to vary, exchange or release any other securities held or to be held by you for or on account of the moneys intended to be hereby secured or any part thereof, and to renew any bills, notes, or other negotiable securities, and to compound or make any other arrangements with him, or any person so liable with or for him, as you may think fit, without discharging or in any manner affecting my liability under this guarantee.

(Clause 4.) If the customer shall become bankrupt or insolvent or enter into any arrangement or make any composition with his creditors, you may (notwithstanding payment to you by me or any other person of the whole or any part of the amount hereby guaranteed) rank as creditors and prove against his estate for the full amount of your claim, or agree to and accept any composition in respect of the same, and you may and shall receive and retain the whole of the dividends, composition or other payments thereon, to the exclusion of all my rights as

guarantor for the customer in competition with you, until your claim is fully satisfied; and I will not, by paying off the sum guaranteed or any part thereof, or upon any other ground, prove or claim to prove in respect of the sum guaranteed or any part thereof, until the whole of your claim against the customer has been satisfied.

(Clause 5.) To the intent that you may obtain satisfaction of the whole of your claim against the customer I agree that you may enforce and recover upon this guarantee the full amount hereby guaranteed and interest thereon notwithstanding any such proof or composition as aforesaid, and notwithstanding any other guarantee, security or remedy, guarantees, securities or remedies which you may hold or be entitled to in respect of the sum intended to be hereby secured or any part, thereof, and notwithstanding any charges for interest which may be debited in your account current with the customer, or in any other account upon which he may be liable.

(Clause 6.) Notwithstanding anything hereinbefore contained this guarantee shall extend to all accounts of the customer whether the same are his solely, or are accounts on which he is or may become liable jointly, in any manner whatsoever, with any company or person or persons, and in whatever name or firm the same may stand; and this guarantee shall not be affected by any change in the constitution of the bank, its successors or assigns, or by its absorption of or by, or its amalgamation with, any other bank or banks.

As Witness my hand this ..... day of ..... 19...

Witness to the signature of the ..... above named .....

Name and address and occupation of Witness.

Joint and Several Form for One Customer by Two or More Sureties.

(Clause 1.) As before, except that it commences—

"We hereby jointly and severally agree ....."

(Clause 2.) This guarantee shall be a continuing guarantee, and in full force until three calendar months after each of us shall have given or sent to you notice in writing of our intention to discontinue and determine the same, and shall have paid to you all moneys up to the limit of our liability due at the expiration of such notice, and in the event of all or any of us dying or becoming under disability, the liability of our estates and of our executors, administrators, or legal personal representatives shall continue until the expiration of three calendar months' notice in writing to determine this guarantee shall have been given to you by each of us or by the executors, administrators or legal personal representatives of the person or persons so dying or becoming under disability; and you shall, etc., etc.

(Clauses 3, 4, 5 and 6.) The same, with the necessary modifications.

(Clause 7.) You shall also be at liberty to release or discharge any of us from the obligations of this guarantee, or to accept any composition from or make any other arrangements with any of us without thereby prejudicing or affecting your rights and remedies against the other or others of us.

Form to cover a Firm's Account.

(Clauses 1 to 5.) As above, with the necessary modifications. Clause 1 should contain all the names of the members of the firm.

(Clause 6.) Notwithstanding anything ..... and in whatever the name or firm the same may stand, and this guarantee shall continue in force

and be applicable, notwithstanding any change in the partners composing the firm, by the death or retirement of any of the present or any future partners, or by the accession of any new partner or partners; and this guarantee shall not be affected .....

SHARE CERTIFICATE

(See Part VI, Chapter IV, p. 345)

Certificate No. .....Shares.

John Jones and Company, Limited.

(Incorporated under the Companies Act, 1929.)

SHARE CAPITAL £.....

divided into

£..... in Preference Shares of ..... each, Nos. 1 to .....

£..... in Ordinary Shares of ..... each, Nos. 1 to .....

This is to certify that ..... of ..... is the Registered Holder of ..... of the above named Ordinary Shares of £1 each, numbered ..... to ....., all inclusive, in John Jones & Company, Limited, subject to the Memorandum and Articles of Association of the Company, and that each of the said shares is fully paid up.

Given under the Common Seal of the Company

This ..... day of ....., 19...

.....
.....
.....
} Directors.

....., Secretary.

Note.—No transfer of any of the Shares comprised in this Certificate will be registered until the Certificate has been delivered at the Company's Office.

Registered Office.....

SHARE TRANSFER UNDER SEAL

(See Part VI, Chapter IV, p. 346)

I, ... in consideration of the Sum of ..... paid by ..... hereinafter called the said Transferee.

Do hereby bargain, sell, assign and transfer to the said Transferee ..... of and in the undertaking called .....

To HOLD unto the said Transferee, ... Executors, Administrators, and Assigns, subject to the several conditions on which ..... held the same immediately before the execution hereof; and .... the said Transferee do hereby agree to accept and take the said ..... subject to the conditions aforesaid.

As WITNESS our Hands and Seals this ..... day of ..... in the year of our Lord One thousand nine hundred and .....

Coupon for £ ..... Stock forwarded to the Company's Office by

Signed, sealed, and delivered by the above-named .....

Witness's { in the presence of
Signature .....
Address .....
Occupation .....

SEAL

SHARE TRANSFER UNDER HAND

I, ... in consideration of the Sum of ..... paid to .... by .....

Do hereby transfer to the said ..... Share, numbered ..... standing in ..... name .... in the books of the ..... Company, Limited.

To HOLD unto the said ..... Executors, Administrators, and Assigns, subject to the

several conditions on which ..... held the same at the time of the execution hereof; and ..... the said ..... do hereby agree to take the said Share subject to the same conditions.

As Witness our Hands this ..... day of ..... in the year of our Lord One thousand .... hundred .....

Signed by the above-named .....

Witness's { in the presence of
Signature .....
Address .....
Occupation .....

STOCK EXCHANGE SECURITIES

(See Part VI, Chapter IV)

Agreement accompanying Deposit of Shares by a Customer to secure his own Account.

To the ..... Bank, Limited.

In consideration of your *opening* [*or continuing*] an account with me I the undersigned ..... of ..... hereby deposit with you the certificates of ..... shares of and in the undertaking called ..... for the purpose of securing payment to the Bank on demand of all moneys now owing or which shall at any time hereafter be owing from me, either solely or jointly with any other person or persons, whether on balance of account, or by the discount or otherwise in respect of bills of exchange, promissory notes, cheques, and other negotiable instruments, or in any manner whatsoever, and including interest with half-yearly rests, commission and other banking charges, and any law or other costs incurred in connection with the account, and I hereby authorise you to sell such shares by public auction or private contract, at such times and prices, to such person or persons, and under such conditions, as you in your absolute discretion shall think fit, and thereupon to register the transfers of such shares which I have this day signed and deposited in your hands, and to apply the proceeds (after

payment of costs attending such sale and transfer) in or towards the satisfaction of the said advances, and all other moneys and liabilities as aforesaid which may at any time be owing by me; meanwhile, until such transfer shall have been actually made I hereby declare that the said shares will be held upon trust for you for the purpose and to the extent of the security above agreed to be given. And I further agree and declare that the said shares are within my own disposition and control and free from any prior charge or incumbrance.

Dated this ..... day of ..... 19..

Witness to the signature of .....

REGISTERED DEBENTURE

(See Part VI, Chapter IV)

No. ..... £.....

The ..... Company, Limited.

SHARE CAPITAL—£.....

Offices:

.....

.....

Issue of £..... Mortgage Debenture Bonds.

Ranking *pari passu.*

Issued pursuant to Clause—of the Company's Memorandum of Association and Article—of the Company's Articles and a Resolution of the Board (or Company in General Meeting) passed on the ..... day of ..... 19.....

The ..... (hereinafter called the Company), in consideration of the sum of ..... pounds paid to them by ..... of ..... hereby covenant with the said ..... his executors, administrators and assigns, to pay to the said ..... his executors, administrators or assigns, on demand, or without any demand, if and when the principal moneys hereby secured shall, in accordance with the conditions contained herein, become payable without demand, the sum of £..... on presentation of this Debenture at the registered office of the Company, and the Company will in the meantime

pay interest thereon to the registered holder for the time being at the rate of £..... per centum per annum by equal half-yearly payments on the ..... day of ..... and ..... day of ..... in each year, the first payment of interest to be made on the ..... day of ..... next. And the Company do hereby charge with such payments the undertaking, stock in trade, lands, premises, works, plant, property, and effects (both present and future) of the Company, and its uncalled Capital for the time being, to the intent that this security and the other securities forming part of the above-named issue of £..... may rank equally as a first charge upon the said undertaking, stock in trade, lands, premises, uncalled Capital and other property and effects, and such charge is to be a floating security, but so that the Company is not to be at liberty to create any mortgage or charge or to confer any lien to rank equally with or in priority to the Debentures of this series, or to sell, mortgage, or deal with its Book or other Debts, or Securities for money otherwise than for the purpose of getting in and realising the same in the ordinary course of business. If this Debenture shall at any time hereafter be redeemed or paid off or satisfied, the same shall not be re-issued, while any of this series of ..... Debentures, each for securing the principal sum of £..... shall remain outstanding or unsatisfied.

A Register of these Debentures will be kept at the Company's Registered Office, wherein there will be entered the name, address, and description of the Registered Holder or Holders, and particulars of the Debentures held by him or them respectively and of the date of registration. Such Register shall at all time during business hours be open to the inspection of the Registered Holder hereof, or his personal representatives, or any agent of such Holder or of such representatives.

The Registered Holder or Holders will be regarded as exclusively entitled to the benefit of this Debenture, and all persons may act accordingly, and the Company shall not be bound to enter in the Register notice of any trust, or to recognise any right in any other person save as herein provided.

The principal money and interest hereby secured will be paid without regard to any equities between the Company and the original, or any intermediate Holder or Holders hereof, and the

receipt of the Registered Holder or Holders hereof for such principal money and interest shall be a good discharge to the Company for the same.

The Company may at any time hereafter give notice in writing to the Registered Holder or Holders hereof, his or their executors or administrators, of its intention to pay off such principal moneys hereby secured, and immediately after the service of any such notice, such principal moneys shall become payable.

The principal money hereby secured shall (without any demand being made therefor) become immediately payable in each of the following events, namely—

(*a*) If the Company makes default for a period of one calendar month in the payment of any interest hereby secured;

(*b*) If an Order be made, or if a Resolution, whether requiring confirmation or not, be passed for the winding-up of the Company;

(*c*) If an execution or distress is levied or enforced upon or against any of the chattels or property of the Company and the same is not paid out within two days of the levying of the same;

(*d*) If the Company shall stop payment or shall cease to carry on its business;

(*e*) If a Receiver of the Company's undertaking or any part thereof shall be appointed.

At any time after the principal moneys hereby secured, or any part thereof, shall have become payable, the Registered Holder or Holders of this Debenture may, with the consent in writing of a majority in value of the Registered Holders of this series of Debentures, or of such of them as shall be outstanding, appoint by writing under his or their hand or hands, or in the case of a Corporation, under its Seal, some person or persons to be a Receiver or Receivers of the property charged by these Debentures, and may fix his or their remuneration, and such appointment shall be as effective as if all the Holders of Debentures of the same issue, or of such of them as shall be outstanding, had concurred in such appointment, and a Receiver or Receivers so appointed shall, except so far as may be mentioned otherwise in his or their appointment, have power—

1. To take possession of the property charged by these Debentures;
2. To carry on or concur in carrying on the business of the Company;
3. To sell, lease, or let, or concur in selling, leasing or letting any of the property charged by these Debentures; and as to fixtures to sell or concur in selling the same, either attached to or separated from the hereditaments to which they are fixed;
4. To make any arrangement or compromise which he or they shall think expedient in the interests of the Debenture Holders;
5. To make calls, conditionally or unconditionally, on the Members of the Company, in respect of the uncalled Capital, with such and the same powers for that purpose, and for the purpose of enforcing payment of any so made, as are by the Articles of Association of the Company conferred on the Directors thereof in respect of calls authorised to be made by them and in the names of the Directors or in that of the Company or otherwise, and to the exclusion of the Directors' power in that behalf.

And all moneys received by such Receiver or Receivers shall, after providing for the matters specified in the first three paragraphs of Clause 8 of Section 109 of the Law of Property Act, 1925, be applied in or towards satisfaction *pari passu* of the said Debentures and the foregoing provisions shall take effect as and by way of variation and extension of the provisions of Sections 101, 104, 105, 106, 107, 108 and 109 of the said Act, which provisions, so varied and extended, shall be regarded as incorporated herein, and the provisions of Section 103 of the said Act shall not apply hereto. Any Receiver appointed under this Clause shall be the Agent of the Company, who alone shall be responsible for his acts and defaults.

Given under the Common Seal of the said Company this ..... day of ..... One thousand nine hundred and .....

..... } Directors.
..... }

..... Secretary.

CERTIFICATE OF THE REGISTRATION OF A SERIES OF DEBENTURES WHERE THERE IS NO TRUST DEED

Pursuant to S. 82 (2) of the Companies Act, 1929 (19 and 20 Geo. 5. Ch. 23)

Application having this day been made for the entry on the Register of the particulars required by Sub-section 1 of Section 82 of the Companies Act, 1929, in relation to a series of Debentures (containing a charge to the benefit of which the Debenture Holders of the said series are entitled *pari passu*) created by.....Limited, and the issue of the series having been authorised by resolution.....passed on the ..... day of ..... 19... (and one of such Debentures having been duly produced) I hereby certify that the total amount secured or intended to be secured by the said series is £..... and that all the particulars required by Sub-section 1 of Section 82 of the said Act in relation to the said series have been this day entered on the Register.

Given under my hand at London, this ..... day of One thousand nine hundred and .....

Companies Act, 1929, S. 82 (2).

.....

Registrar of Joint Stock Companies.

A copy of this certificate must be endorsed on each Debenture.

CHARGE BY WAY OF LEGAL MORTGAGE.

(See Part VI, Chapter VI.)

Legal Charge of Title Deeds by a Customer to secure his own Account. (*Applicable to Freehold or Leasehold property.*)

THIS LEGAL CHARGE is made the.....day of.....
One thousand nine hundred and.....BETWEEN.....
.....
(hereinafter called "the Mortgagor" which expression shall include his personal representatives and the persons deriving title under him or them where the context so requires or admits) of the one

part and.....BANK LIMITED whose registered office is situate at.....in the City of London (hereinafter called "the Bank" which expression shall include the persons deriving title under them where the context so requires or admits) of the other part. WHEREAS the Mortgagor keeps a current or other account or accounts with the Bank and whereas advances are or may be made from time to time by the Bank to the Mortgagor and whereas it has been agreed that all moneys which now are or hereafter shall become owing on balance of such account or accounts or in respect of advances now or hereafter to be made or otherwise from the Mortgagor to the Bank with interest and other usual charges in respect thereof shall be secured by a mortgage of the hereditaments hereinafter described or referred to and intended to be charged hereby in the manner hereinafter appearing NOW THIS DEED WITNESSETH that in consideration of the premises the Mortgagor hereby covenants with the Bank that he the Mortgagor will on demand made to the Mortgagor pay to the Bank the sum which shall then be owing on the balance of the banking account or accounts of the Mortgagor (including in such account or accounts interest and other usual charges) and such other sum or sums of money as the Mortgagor shall then be indebted in or liable to pay to the Bank upon or in respect of any Bill of Exchange or other instrument in the possession or power of the Bank from or for whomsoever received or taken (and whether actually matured or not) and for other loans credits or advances made to or for the accommodation or at the request of the Mortgagor or upon or in respect of any other matter and whether the Mortgagor shall be so indebted or liable solely or jointly with any other person or persons or Company and whether as principal or surety. And also if the aforesaid moneys shall not be paid on demand as aforesaid will pay interest after the rate of £5 per cent per annum upon the balance of the said Banking account or accounts from the date of such demand and as to the other moneys from the time or respective times the same became or in the absence of such demand would have become payable. Provided always that where any money hereby secured is or shall be also secured to the Bank by any bill or other instrument reserving a higher rate of interest than the rate hereby reserved nothing herein contained shall affect the right of the Bank to recover by virtue of any such bill or other instrument such higher rate of interest or as the case may be the difference between such higher

rate and the rate which shall have been paid hereunder. AND THIS DEED ALSO WITNESSETH that the Mortgagor as Beneficial Owner hereby charges by way of legal mortgage ALL the hereditaments and premises described or referred to in the Schedule hereto with payment of the principal money interest and other money hereby covenanted to be paid. IF the Mortgagor shall on demand or without any demand being made pay to the Bank the moneys which shall for the time being be owing as hereinmentioned with interest thereon pursuant to the covenants herein contained then and in such case the Bank shall at the request and cost of the Mortgagor duly discharge this security. AND the Mortgagor hereby covenants with the Bank that so long as the security constituted by these presents shall remain in force he the Mortgagor will keep all buildings which shall from time to time be standing upon the hereditaments hereby charged in good and substantial repair and also insured against loss or damage by fire in their full value for the time being in such Office or Offices as the Bank shall approve and will punctually pay every sum from time to time payable for keeping on foot every such insurance or within seven days after the first day upon which it becomes payable and will from time to time when required produce to the Bank the Policy or Policies of such Insurance or other proper evidence of the subsistence thereof and also when required deliver to the Bank the receipt for or other sufficient evidence of payment of every sum payable as aforesaid. And will apply all moneys which may be received by virtue of any such Policy either in making good the loss or damage in respect of which the same has been received or (at the option of the Bank and without prejudice to any obligation in the Policy of Insurance) in discharge or reduction of the money hereby secured. And that if default shall be made in effecting any repair or in keeping up such insurance or in producing any such Policy or receipt to the Bank on demand the Bank may effect such repairs or insure and keep insured the premises or any part thereof in such sum as the Bank shall think fit and that all money received by the Bank for the purposes aforesaid together with interest thereon at the rate of £5 per cent. per annum from the time of the same having been expended shall on demand be paid to the Bank by the Mortgagor and until such repayment shall be a charge upon all the mortgaged property. And it is hereby further agreed and declared that the Bank shall be at liberty from time to time to give time for payment of any bill or bills of exchange promissory note or promissory

notes or other security or securities which may have been discounted for or received on account of the Mortgagor by the Bank or on which the Mortgagor shall or may be liable as drawer or endorser or otherwise to any party or parties liable thereon or thereto as the Bank shall in their discretion think fit and may vary any credit to any person for whom the Mortgagor may be or become surety to the Bank and vary release and exchange any securities held or to be held by the Bank in such last-mentioned matter without in any manner releasing the Mortgagor or affecting the security hereby made. And that at any time on receiving notice that the Mortgagor has incumbered any of the mortgaged property the Bank may close the Mortgagor's then current account and open a new account with him and no money paid or carried to the credit of such new account shall be appropriated towards or have the effect of discharging any part of the amount owing on this security at the date of such notice. And that these presents shall constitute and be a continuing security to the Bank notwithstanding any settlement of account or other matter or thing whatsoever and shall be in addition to and shall not operate so as in any way to prejudice or affect the security created by any deposit which may have already been made with the Bank of the title deeds and documents relating to the hereditaments and premises hereby charged or any other securities which the Bank may now or at any time hereafter hold for or in respect of the moneys hereby secured or any part thereof. AND IT IS HEREBY FURTHER AGREED AND DECLARED that the Bank shall be entitled to apply all or any moneys received by them from the Mortgagor or any person or persons liable to pay the same on his account to any account of the Mortgagor with the Bank to which the same may be applicable. And it is hereby also agreed that the power of Sale conferred on Mortgagees by the Law of Property Act 1925 shall apply to this security but without the restrictions therein contained as to giving notice or otherwise and so that for the purpose of a sale of the said premises hereby mortgaged or any part thereof under such statutory power the whole of the moneys hereby secured shall notwithstanding anything herein contained be deemed to have become due immediately on demand for payment being made by the Bank. And it is hereby also agreed and declared that any demand hereunder may be effectually made verbally or by notice in writing either served personally on the Mortgagor or left for him at his usual or last known place of abode in England or Wales or affixed

to any part of the said hereditaments hereinbefore charged. And further that (in addition to all other protection afforded by Statute) every purchaser or other third person dealing with the Bank shall be entitled and bound to assume without inquiry that some Mortgage money is owing on the security hereof and that a demand therefor has been duly made and that the Mortgage money has accordingly become due and the said power of sale exercisable. And it is hereby also agreed that Section 93 (1) of the Law of Property Act 1925 shall not apply to these presents or the security hereby made and that the Mortgagor shall not except with the consent in writing of the Bank exercise the power of leasing or of agreeing to lease conferred by Section 99 (1) of the Law of Property Act 1925 on a Mortgagor while in possession but it shall not be necessary to express such consent in any such lease or agreement.

IN WITNESS whereof the Mortgagor hath hereunto set his hand and seal and the Bank have hereunto affixed their Common Seal the day and year first above written.

THE SCHEDULE ABOVE REFERRED TO

All and singular the hereditaments and premises comprised in the following Deeds or Documents.

Date of Documents.

Signed sealed and delivered by the said
in the presence of

(L.S.)

NOTE.—In the case of registered land the Schedule should contain a description of the land as set out in the "Property Register" contained in the Land Certificate and continue "which said premises are comprised in Title No.... registered under the Land Registration Act 1925."

RECEIPT ON DISCHARGE OF CHARGE BY WAY OF LEGAL MORTGAGE

WE.....BANK LIMITED of.....hereby acknowledge that we have this.....day of.....19... received the sum of £.....representing the whole of the moneys secured by the within written Legal Charge the payment having been made by.....of..... The Common seal of.....BANK LIMITED was affixed hereto in the presence of—

.....Director.

.....Secretary.

MEMORANDUM OF DEPOSIT

(See Part VI, Chapter VI.)

Memorandum of Deposit by a Customer of Title Deeds to secure his own Account.

MEMORANDUM that I, the undersigned ..... of ..... hereby acknowledge that I have this day deposited with the ..... Bank, Limited (hereinafter called "the Bank," which expression shall include their successors and assigns), the documents specified in the Schedule hereto, with intent to create an equitable mortgage upon all my estate and interest in the property to which such documents relate, for the purpose of securing the payments to the Bank on demand of all moneys now owing or which shall at any time hereafter be owing from me, either solely, or jointly with any other person or persons, to the Bank, whether on balance of account, or by the discount or otherwise in respect of bills of exchange, promissory notes, cheques, and other negotiable instruments, or in any manner whatsoever, and including interest with half-yearly rests, commission and other banking charges, and any law costs incurred in connection with the account. AND I hereby further agree whenever requested by the Bank at my own cost to execute to the Bank a valid legal mortgage or charge by way of legal mortgage of such property in such form and with such power of sale and other provisions as the Bank may require for securing the repayment on demand of all moneys secured by this equitable mortage. AND I hereby also

agree that so long as any moneys remain owing from me to the Bank to pay interest thereon to the Bank after the rate of £5 per cent. per annum. AND I hereby declare that the documents now deposited are all that are in my possession or control, and that the property is not charged or encumbered in any way whatsoever.

AS WITNESS my hand this ..... day of ..... 19..

The Schedule above referred to.

(Customer's Signature and Witness.)

Memorandum of Deposit of Title Deeds by a Person to secure the Account of Another Person.

MEMORANDUM that I, the undersigned ..... of ....., in consideration of the ..... Bank, Limited, hereinafter called "the Bank," *opening* [*or continuing*] an account with ..... of ..... hereinafter referred to as "the Debtor," hereby acknowledge that I have this day deposited with the Bank the documents specified in the Schedule hereto as a security for the payment on demand by the Debtor to the Bank of all moneys and liabilities already advanced, paid or incurred to or for the Debtor by the Bank, or which the Bank may at any time advance, pay, or incur to or for the Debtor, either solely or jointly with any other person or persons as partners or otherwise, whether on balance of account, or by the discount or otherwise in respect of bills of exchange, promissory notes, cheques, and other negotiable instruments, or in any manner whatsoever, and including interest with half-yearly rests, commission and other banking charges, and any law costs incurred in connection with the account. AND I hereby further agree with the Bank, their successors and assigns, that whenever requested by the Bank at my own expense to execute to the Bank a valid legal mortgage or charge by way of legal mortgage of the property comprised in and affected by the said documents or any of them and intended to be included in this equitable mortgage unto the Bank, the said legal mortgage or charge by way of legal mortgage to include such power of sale and other provisions as the Bank may require for securing the payment on demand of the principal moneys and interest to be thereby secured. AND I also agree that so long as any moneys advanced to the debtor remain

unpaid to pay interest thereon to the Bank at the rate of £5 per cent. per annum. If the debtor shall become bankrupt or insolvent or enter into any arrangement or make any composition with his creditors, the Bank shall be at liberty (notwithstanding payment to the Bank by me or any other person of the whole or any part of the sum secured) to rank as creditors and prove for the full amount of their claim, and the Bank shall be at liberty to renew any bills, notes, or other securities, which the Bank may then or thereafter hold or be entitled to, against the estate of the debtor, or to agree to and accept any composition in respect of the same. AND I will not by paying off the sum secured or upon any other ground prove, or claim to prove, in respect of the sum secured or any part thereof, until the whole of the Bank's claim against the debtor has been satisfied, and the Bank may and shall receive and retain the whole of the dividends, compositions, or other payments thereon, and I shall not be entitled to claim or have the benefit of any such proof, dividends, compositions, or payments, or the benefit of any other security held by the Bank in reduction of the amount secured by me or other wise until they have received the full amount due from the said debtor. AND the Bank may enforce and recover upon this security the full amount hereby secured and interest thereon notwithstanding any such proof or composition as aforesaid. and notwithstanding any other security or remedies which they may hold or be entitled to in respect of the sum intended to be hereby secured or any part thereof, and notwithstanding any charges for interest which may be debited in the account current with the debtor, or in any other account upon which he may be liable.

Dated this ..... day of ..... 19...

	THE SCHEDULE ABOVE REFERRED TO.
Date.	

Signatures of Depositor and Witness.

MORTGAGE (STAMP DUTIES)

(a) If the amount has not yet been exceeded cancel these words.

(b) If the advance has already been exceeded cancel these words.

I hereby certify that the amount at any time owing by ..... to ..... (a) (did not exceed £..... until the ..... day of ..... 19..), (b) (or has not at any time exceeded the sum of £.....) and I request that further stamp duty may be impressed on the instrument of ..... day of ..... 19.., to cover a total advance of £.....

*..... *Signature.*
..... *Address.*
..... 19.. *Date.*

* To be signed by the Mortgagee or by the Manager of the Bank making the advance.

MORTGAGE OF LIFE POLICY TO SECURE THE MORTGAGOR'S OWN ACCOUNT

(See Part VI, Chapter V)

THIS MORTGAGE, made the ..... day of ..... 19.. BETWEEN .....
(hereinafter called "the Mortgagor" which expression shall include his executors, administrators, and assigns where the context so requires or admits) of the one part, and ..... Bank, Ltd. (hereinafter called "the Bank," which expression shall include their successors and assigns where the context so requires or admits) of the other part.

1. WITNESSETH that in consideration of the Bank *opening* [*or continuing*] a banking account with the Mortgagor, the Mortgagor doth hereby as beneficial owner assign unto the Bank ALL that Policy of Assurance effected by .....
..... on the life of .....
..... in the .....
..... for the sum of .....
pounds, dated the ..... day of ..... 19.. and numbered ..... and subject to the ..... premium of £..... and all moneys assured or to become payable by or under the same Policy and the full benefit thereof.

2. To HOLD the same unto the Bank by way of mortgage for the purpose of securing the payment by the Mortgagor to the Bank on demand of all and every sums and sum of money not exceeding £..... in which the Mortgagor is now or shall at any time hereafter be or become indebted to the Bank anywhere and whether for moneys paid or advanced by the Bank to or for the use or on behalf or at the request of the Mortgagor either solely or jointly with any other person or persons in partnership or otherwise, and whether as principal or surety upon banking account or upon any discount or other account, or for any other matter or thing whatsoever, including interest, commission, law, and other costs, and other usual banking charges, such interest to be computed at all times at the current banking rate according to the usual mode of the Bank with current accounts, notwithstanding that any account intended to be hereby secured may have ceased to be carried on as a current account (all which moneys are hereinafter referred to as "the moneys hereby secured"), and all which moneys the Mortgagor hereby covenants to pay to the Bank on demand, and upon the full payment on demand of all which moneys the policy and premises hereby assigned shall be re-vested in the Mortgagor or as he shall direct at his cost.

3. PROVIDED ALWAYS that it shall be lawful for the Bank at any time or times hereafter of their own absolute authority, without the consent or concurrence of the Mortgagor, and notwithstanding that no formal demand may have been made for payment of the moneys hereby secured, to sell and surrender the said Policy, moneys, and premises to the Society or Company granting the same, or absolutely to sell or otherwise dispose of the same to any other person or persons whomsoever and for the purpose of such surrender or sale to exercise all the powers of sale and other ancillary powers conferred upon mortgagees by the Law of Property Act, 1925, but free from the restrictions or limitations imposed upon a mortgagee's powers by Section 103 of the said Act.

4. AND the Mortgagor doth hereby covenant with the Bank that the said Policy of Assurance is a valid and subsisting Policy and not forfeited or otherwise become void or voidable.

5. AND FURTHER that in case the said Policy shall at any time become void the Mortgagor shall forthwith at his own cost effect a new Policy on the life of the said .....

..... in lieu thereof in the name of the Bank or their nominee or nominees in some office chosen by the Bank in a sum not less than the sum assured by the Policy which shall have become void, including any bonus or bonuses declared thereon, and in case he shall make default in so doing then it shall be lawful for the Bank to effect and keep on foot any such new Policy as aforesaid.

6. And it is hereby declared that any such new Policy, whether effected by the Mortgagor or by the Bank, shall be subject to the terms and conditions of the security hereby created in the same manner as the Policy hereby assigned.

7. And the Mortgagor doth hereby further covenant with the Bank that he will at all times punctually pay the premiums and all other moneys which may become payable in respect of the said Policy hereby assigned or any other Policy for the time being subject to this present security, and observe all the conditions necessary for keeping the same on foot, and that he will from time to time deliver to the Bank the receipt for each payment of premium at least fourteen days before the expiration of the days of grace allowed for payment of the same. And it is hereby agreed that if the Mortgagor shall make default in paying such premium, or in delivering such receipt to the Bank within such time as aforesaid, the Bank may, if they shall think fit so to do, but not otherwise, pay the premium then due and debit any account of the Mortgagor therewith, and all premiums so paid shall be a charge upon the Policy for the time being subject to this present security.

8. And it is Hereby Further Declared and Agreed that the Bank shall, in the event of their receiving notice that the Mortgagor has incumbered or disposed of his equity of redemption in the said policy, moneys, and premises, or any part thereof, be entitled to close the then current account and to open a new account with the Mortgagor, and that no money paid in or carried to the credit of the Mortgagor in such new account shall be appropriated towards or have the effect of discharging any part of the amount due to the Bank on the said closed account at the time when they received such notice as aforesaid.

9. And it is Hereby Also Agreed by and between the said parties hereto that this security shall not be in any wise prejudiced or affected by any collateral or other security now or hereafter held by the Bank for any part of the moneys hereby secured. nor shall such collateral or other security or any lien

to which the Bank may be otherwise entitled, or the liability of any person or persons (not parties hereto) for all or any part of the moneys hereby secured be in any wise prejudiced by these presents. But that the Bank shall have full power at their discretion to give time for payment to any such other person or persons without prejudice to the liability of the Mortgagor, his Executors or Administrators hereunder. And that all moneys received by the Bank from him or them, or any person or persons liable to pay the same may be applied by the Bank to any account or item of account or any transaction to which the same may be applicable. And further that notwithstanding the provisions of Section 93 of the said Law of Property Act the Mortgagor shall not be entitled to redeem the security created by these presents without at the same time all other securities given by him to the Bank, nor to redeem any of such other securities without at the same time redeeming the security created by these presents.

IN WITNESS whereof the Mortgagor has hereunto set his hand and seal the day and year first above written.

Signed, sealed, and delivered by the before-named Mortgagor in presence of

SEAL

FINANCE BILL, 1918

Stamps

36. (1) Twopence shall be substituted for one penny as the stamp duty on all bills of exchange and promissory notes chargeable under the First Schedule to the Stamp Act, 1891, with duty at the rate of one penny and drawn on or after the first day of September, nineteen hundred and eighteen, and twopence shall accordingly be substituted for one penny in sections 34 and 38 of the Stamp Act, 1891.

(2) The provisions of subsection (2) of section 38 of the Stamp Act, 1891, shall apply so as to enable an adhesive penny stamp to be fixed on any such bills of exchange as are mentioned in that subsection which are liable to a duty of twopence under this section and are stamped only with a penny stamp, as they

apply with respect to the fixing of a stamp on an unstamped bill.

(3) Subsection (1) of section 38 of the Stamp Act, 1891, shall not operate so as to render any bill of exchange which is liable to a duty of twopence under this section and is stamped with a penny stamp invalid for any purpose until the first day in December, nineteen hundred and eighteen, if the person who takes or receives the bill fixes thereto an adhesive stamp of one penny and cancels the stamp.

BANKRUPTCY

(See page 462)

The following clause is included in the Bankruptcy Law (Amendment) Act, 1926, S. 4:

> "Where any money or property of a bankrupt has, on or after the date of the receiving order but before notice thereof has been gazetted in the prescribed manner, been paid or transferred by a person having possession of it to some other person, and the payment or transfer is under the provisions of the principal Act void as against the trustee in the bankruptcy, then, if the person by whom the payment or transfer was made proves that when it was made he had not had notice of the receiving order, any right of recovery which the trustee may have against him in respect of the money or property shall not be enforced by any legal proceedings except where and in so far as the court is satisfied that it is not reasonably practicable for the trustee to recover in respect of the money or property or of some part thereof from the person to whom it was paid or transferred."

It is hoped that it will protect bankers in such cases as that of the Wigzell case referred to at p. 461. It will not, however, protect them against payments made in the interval between the time when the receiving order is gazetted and when the *Gazette* can reach the banker.

APPOINTMENT OF BANKERS BY COMPANY.

To THE BRITISH BANK, LIMITED.

_____

_____

_____ 19

Dear Sirs,

_____ COMPANY, LIMITED.

(Registered Office_____).

My Directors request you to open an account with the above-mentioned Company, and I hand you herewith :—

1. Certificate of Incorporation (for inspection and return).
2. Copy of the Memorandum and Articles of Association.
3. Certificate of Registrar of Companies, that the Company is entitled to commence business (for inspection and return).
4. Certified Copy of a Resolution of the Board of Directors regulating the conduct of the Account, together with specimens of the signatures of the authorised signatories.

(3) This Certificate is not required in the case of a private company.

Yours faithfully,

_____ Secretary.

_____ COMPANY, LIMITED.

APPOINTMENT OF BANKERS.

At a Meeting of the Board of Directors of _____ Limited, whose Registered Office is at _____ held the _____ day of _____ 19____

IT WAS RESOLVED :—

1. That *BRITISH BANK LIMITED* be appointed the Bankers of the Company and that they be and are hereby authorised to honour and comply with all Cheques, Drafts, Bills, Promissory Notes, Acceptances, negotiable instruments and orders expressed to be drawn, accepted, made or given on behalf of this Company at any time or times whether the banking account or accounts of this Company are overdrawn by any payment of or in relation thereto or are in credit or otherwise, and to act on any instruction relating to the accounts, affairs or transactions of the Company provided they are signed by _____

_____

and countersigned by _____

_____

2. That the Bank be and they are hereby authorised to treat all Bills, Promissory Notes and Acceptances as being endorsed on behalf of the Company and to discount or otherwise deal with the same provided they purport to be signed by _____

_____

We hereby certify the above to be a true copy from the Minutes.

_____ Chairman.

_____ Secretary.

Date _____ 19____

SPECIMEN SIGNATURES.

_____ will sign _____

_____ " _____

_____ " _____

_____ " _____

_____ " _____

_____ " _____

GARNISHEE ORDER NISI (ATTACHING DEBT).

(See pp. 201–4).

No. .....

In the High Court of Justice,
King's Bench Division.

District Registry.

Between

.....Judgment Creditor.
.....Judgment Debtor.
.....Garnishee.

Upon hearing Mr. ..... as Solicitor for the above named Judgment Creditor, and upon reading the affidavit of the said ..... filed the ..... day of ....., 19 .

It is ordered that all debts owing or accruing due from the above-named Garnishee to the above-named Judgment Debtor be attached to answer a judgment recovered against the said Judgment Debtor by the above-named Judgment Creditor in the High Court of Justice, on the ..... day of ....., 19 for the sum of £....., debt and costs on which Judgment the said sum of £..... remains due and unpaid.

And it is further ordered that the said Garnishee attend the District Registrar in chambers, at the County Court offices, ... on ..... day, the ..... day of ..... 19 at ..... o'clock in the ..... noon, on an application by the said Judgment Creditor that the said Garnishee pay the debt due from ..... to the said Judgment Debtor or so much thereof as may be sufficient to satisfy the Judgment.

Dated this ..... day of ..... 19 .

District Registrar.

GARNISHEE SUMMONS

In the County Court of.....
Holden at.....

No. of Plaint.
No. of Garnishee Summons.

Between

.....Plaintiff
.....Defendant

and

.....Garnishee

WHEREAS the Plaintiff at a Court holden at.....on the.....day of.....19.., recovered judgment, or obtained an Order against..... of.....for the sum of £...for debt [or damages] and costs [or for the payment of the sum of £...and £...for costs] which judgment [or order] remains unsatisfied, as to the sum of £....

AND WHEREAS the Plaintiff has filed an affidavit stating that you are indebted to the said.....in the sum of £..., you are hereby SUMMONED to appear at a Court to be holden at.....on the.....day of.....of 19.., at the hour of....in the.....noon, to shew cause why an order should not be made upon you for the payment to the Plaintiff of the amount of the debts due and owing and accruing from you to the said.....or so much thereof as will satisfy the debt due under the said Judgment [or Order] and the Plaintiff's costs of this proceeding.

AND TAKE NOTICE that from and after the service of this Summons upon you all such debts are attached to answer the said Judgment [or Order].

AND FURTHER TAKE NOTICE that if you pay to the Registrar of this Court the amount of such debts or so much thereof as will satisfy the debt due under the said Judgment [or Order] [and the fees and solicitors' costs indorsed on this Summons] five clear days before the day upon which you are required to appear, you will incur no further costs.

Dated this.....day of.....19...

(Signed).....

Registrar.

To the Garnishee.

	£	s.	d.
Amount remaining due under Judgment [or Order]			
Costs of this Summons			
Solicitors' costs			
Total amount	£		

This Summons is issued at the instance of the above-named Plaintiff [or Solicitor for the above-named Plaintiff] whose address is.....

NORTHERN IRELAND
IRISH FREE STATE

(See pp. 11, 91, 144)

By virtue of the Government of Ireland Act, 1920, these Governments have power to impose stamp duties on deeds and other instruments. Arrangements have, however, been made to avoid double taxation.

In regard to Northern Ireland the present position is, that where an instrument is chargeable with stamp duty in Great Britain and in Northern Ireland and has been stamped in one of those countries, the instrument shall, to the extent of the duty it bears, be deemed to be stamped in the other country: provided that, if the stamp duty chargeable on any instrument in such other country exceeds the stamp duty chargeable in respect of that instrument in the country in which the instrument has previously been stamped, the instrument shall not be deemed to have been duly stamped unless and until stamped with a stamp denoting an amount equal to the excess, and may be so stamped without penalty at any time within thirty days after it has first been received in Northern Ireland or the other part of the United Kingdom, as the case may be.

In regard to the Irish Free State the position, as between that country and Great Britain, is the same as given above, and the arrangement applies also between the Irish Free State and Northern Ireland until the Government of the latter have withdrawn their consent to such application.

It should be noted that a bill drawn in the Irish Free State and payable in England is a foreign bill within the meaning of

the Bills of Exchange Act and must, on dishonour, be noted or protested to preserve recourse against the drawer and indorsers. In regard to stamp duty, however, there is no alteration, as the two Governments have made the arrangements quoted above.

LAND REGISTRATION ACT, 1925.

MEMORANDUM BY THE CHIEF LAND REGISTRAR ON OFFICIAL SEARCHES OF THE REGISTER.

1. The Land Certificate (or Charge Certificate in the case of a Charge) is conclusive evidence of the several matters set out therein. It contains a facsimile of the entries in the register subsisting at the date of its issue and also a copy of the official plan identifying the land contained in the Title. The date on which it was last examined in the Registry, and made to correspond with the register, is clearly endorsed thereon.

2. Up to that date there is no need to inspect the register in addition to the Land Certificate, as the Land Certificate is, up to that date, conclusive evidence of the state of the register. Land Certificates are officially examined, and (where necessary) made to correspond with the register at any time without fee if sent to the Registry for this purpose. As a result a registered proprietor is in a position to obtain evidence of the state of the register without cost a day or two before he enters into negotiations for the sale or otherwise of the land.

3. To enable a purchaser, or other person authorised by the registered proprietor to inspect the register, to ascertain, *without attendance at the Registry*, whether any entry has been made in the register subsequent to such date, an official certificate will be issued on application without fee stating whether such an entry has been made, and, if so, giving an office copy of such entry in the register.

4. Application for this certificate may be made by telephone or a reply-paid telegram, giving the title number to be searched and the date when the Land Certificate was made to correspond with the register. In both cases (so as not to compromise the privacy of the register) the reply is limited to a statement whether such an entry has been made or not.

If no entry has been made since that date, the dealing may be completed forthwith. If an entry has been made, the vendor or borrower should be called upon to have it removed or satisfactorily explained.

5. Possession of the Land Certificate is a sufficient authority to enable the register to be inspected.

H.M. LAND REGISTRY,
28th June, 1926.

INCOME TAX CERTIFICATE

(See p. 215)

British, Foreign and Colonial Securities

DIVIDENDS AND INTEREST PAYABLE TO BEARER

(To be used only by Bankers in the United Kingdom.)

We hereby certify that Coupons or Dividends of the various Securities specified at the back hereof were collected by us on behalf of _____, and that we received payment or were credited with the proceeds thereof (*less* Income Tax as stated on the other side [1]), amounting to £ : :

Signature of Banker or Bank Agent _____

Address _____

Date _____

[1] If in any case tax has been deducted at a rate reduced to allow relief in respect of Dominion Income Tax, this fact should be noted in Column 6 on the other side.

TO BE SIGNED BY CLAIMANT.

I hereby declare that the Coupons or Dividends above mentioned relate to stocks which are my own property, and that the Bonds from which the Coupons were taken are in the possession of _____

Signature _____

Date _____

N.B.—The Bonds to be produced when required in support of any claim.

(On the back is a schedule of the Coupons.)

AGRICULTURAL CREDITS ACT

(See Part VI, Chapter IX)

Form of Fixed and Floating Charge under the Agricultural Credits Act 1928—*Part* 2.

This Agricultural Fixed and Floating Charge

dated the..... .....day of.....One thousand nine hundred and.....is given by.....

.....

of .....

.....

(hereinafter called " the Farmer ") who cultivates for profit the Holding(s) shortly described in the First Schedule hereto

WHEREBY IT IS WITNESSED AGREED AND DECLARED AS FOLLOWS :—

1. The Farmer hereby covenants with..... (hereinafter called " the Bank ") that the Farmer will on demand or upon the death of the Farmer without demand pay to the Bank the balance of all monies now or hereafter owing by the Farmer upon any account current or other account with the Bank and all other monies and liabilities now or hereafter due or to become due from the Farmer to the Bank in respect of any advance made or to be made by the Bank to the Farmer or upon any account or in any manner whatever and whether owing by the Farmer to the Bank as principal or surety and whether alone or jointly with another or others and whether otherwise secured or not including (but without prejudice to the generality of the foregoing) all proper and customary charges for interest discount or commission and all costs charges and expenses which the Bank may pay or incur or be entitled to charge to the Farmer by virtue of the Agricultural Credits Act 1928 (hereinafter called " the Act ") or any other Statute or by virtue of this Charge or otherwise in registering perfecting or enforcing this Charge or in obtaining payment of any monies hereby secured.

2. The Farmer as Beneficial Owner hereby charges FIRST by way of fixed charge ALL THAT farming stock and ALL THOSE Agricultural assets belonging to the Farmer which are at the date of this Charge or shall hereafter be upon or about or shall appertain to the Agricultural Holding(s) referred to in the First Schedule

hereto or any other Agricultural Holding(s) from time to time farmed by the Farmer or which shall be in or under his control or disposition which said Farming Stock (but not so as to hereby limit the extent of this Charge and without prejudice to the generality of the foregoing) is shortly described in the Second Schedule hereto. AND SECONDLY by way of floating charge ALL THAT the Farming Stock and ALL the other Agricultural Assets whatsoever and wheresoever for the time being belonging to or to belong to the Farmer in relation or appertaining to the said Agricultural Holding(s) described in the First Schedule hereto (or any other Agricultural Holding(s)) from time to time cultivated or farmed by the Farmer which are or may become in or under the control or disposition of the Farmer wherever situate both present and future.

3. This Charge is subject to and the Bank shall have the benefit of the subjoined conditions and covenants on the part of the Farmer which shall be deemed to be incorporated herein.

CONDITIONS.

(1) The expressions " Farmer " " Farming Stock " " other Agricultural Assets " " fixed charge " and " floating charge " shall have the meanings (if any) assigned to them respectively by the Act and the expression " the Farmer " herein shall wherever the context so admits or requires include the Farmer or Farmers (if more than one) his or their executors administrators assigns or successors in title to the property hereby charged and the expression " the Bank " shall include the Bank its successors in title and assigns.

(2) In the case of any live stock hereby charged any progeny thereof which may be born after the date of the fixed charge herein contained and in case of any Agricultural Plant hereby charged any plant which may whilst this Fixed Charge is in force be substituted for the Agricultural Plant the subject of this Fixed Charge shall be included in this Fixed Charge.

(3) The events following shall so far as regards the Fixed Charge hereby constituted be events authorising the seizing forthwith by the Bank within the meaning of Clause 6 of the Act without any further notice of all or any part of the property subject to this Charge that is to say :—

(*a*) Any demand for payment made in accordance with the provisions of this Charge.

(*b*) The death of, or the making of any Receiving Order in Bankruptcy against the Farmer.

(*c*) Any failure or refusal by the Farmer to perform or observe any condition of this Charge or any obligation imposed on him by the Act or by this Charge.

(*d*) If a distress or execution or attempted distress or execution be levied or enforced upon or against any of the property hereby charged or any other property whatsoever belonging to the Farmer.

(*e*) The dissolution of any partnership between the Farmer and any person or persons with whom the Farmer is carrying on business in partnership relating to the property hereby charged or any part thereof.

(*f*) The expiration whether by effluxion of time or otherwise or the determination or threatened determination of any tenancy or lease or other agreement whereunder the Farmer is the Tenant or occupier or in possession of any Agricultural Holding(s) mentioned in the First Schedule hereto.

(*g*) If the Farmer shall cease or threaten to cease to farm any Agricultural Holding herein mentioned or shall in the opinion of the Bank (which opinion shall be evidenced by writing under the hand of any Director Manager or Officer of the Bank and shall be final) cease or neglect to farm the same in a husbandlike manner and the Bank shall serve a notice on the Farmer to that effect.

(4) The happening of each and every event which would under the last preceding condition have the effect of authorising seizure in respect of the property subject to the Fixed Charge herein contained shall in addition to the events in that behalf in the Act mentioned confer upon the Bank the right to give a notice in writing to the Farmer to the effect that the Floating Charge herein contained shall become fixed and forthwith upon the giving of such notice without any further notice the Foating Charge herein contained shall become a Fixed Charge under the Act.

4. Any demand or notice required or authorised to be given or served by the Act or by this Charge may be given or served on the Farmer by any Director Manager or Officer of the Bank in the manner in which a notice may be given or served under Section 196 of the Law of Property Act 1925 and if so given or served shall be deemed to have been sufficiently given or served and this condition shall extend to notices served in proceedings in any Court.

5. The Bank may part with or release or make any arrangement which they think fit with regard to any other security or securities held or to be held by the Bank and may at any time refuse any credit or to make any advances or further advance to the Farmer or may grant any indulgence to the Farmer or compound with him or any surety or any other person without in any way discharging or affecting this or any substituted security in respect of any monies hereby secured.

6. The Farmer will during the continuance of this Charge cultivate the Holding(s) mentioned in the First Schedule hereto in a good and husbandlike manner and manage look after and keep up and replace all live farming stock and maintain in good condition repair keep up and replace all dead farming stock which may at any time and from time to time whether by reason of casualties damage wear and tear or otherwise need such repair keeping up and replacement so as to maintain such live and dead farming stock at the same value and in the same condition as the same now is.

7. The Farmer shall keep all such Farming Stock as is hereby from time to time charged and which is of an insurable nature insured to the full value thereof to the satisfaction of the Bank

against all risks against which according to good farming practice the same ought to be insured and (without prejudice to the Farmer's liability so to do without request) shall forthwith upon being required so to do by the Bank effect any such insurance as aforesaid to such value as the Bank shall think fit and the Farmer shall upon such and every request produce to the Bank the receipt for the payment of the last premium which shall have become due in respect of any such insurance as aforesaid and in default of all such insurances being effected and maintained by the Farmer as ought to be effected and maintained by him under the provisions of this Clause the Bank shall be entitled at the discretion of the Bank to effect and maintain such insurances and all premiums paid for any such insurances shall be a fixed and floating Charge on the property hereby charged and shall bear interest as from the date of payment thereof at the rate of 5 per centum per annum.

8. Without prejudice to all obligations of the Farmer under the Act the Farmer shall forthwith upon any sale or upon the loss or destruction of any Farming Stock hereby charged exceeding in value the sum of £ forthwith upon any such sale or upon the discovery of such loss or destruction notify the same in writing to the Bank.

9. Any sale by the Bank under the power in that behalf contained in the Act or under any other power the Bank thereto authorising may be by private treaty and either for a lump sum payment or payment by instalments and subject to such conditions and otherwise as the Bank shall think fit and the provisions of Sections 104, 106 and 107 (1) of the Law of Property Act 1925 shall apply to any power of sale conferred upon the Bank by the Act or by this Charge.

10. The Bank shall be entitled at any time after the happening of any event authorising the seizure of any property subject to this Charge or at any time after the monies hereby secured shall have become due to appoint a Receiver of the property or any part thereof being charged and of the income thereof and all the provisions of Section 109 (except sub-section (1)) of the Law of Property Act 1925 shall apply to any Receiver appointed by the Bank under this Clause and in particular any Receiver so appointed shall be the Agent of the Farmer and the Farmer shall be solely responsible for the acts and defaults of such Receiver and for his remuneration which shall become an additional Charge on the property hereby charged.

11. If there are two or more charging parties hereto the expression " the Farmer," in this Charge appearing shall throughout include such two or more parties and shall where the context so requires or admits be read and construed in the plural and in such case all covenants herein expressed or implied on the part

of the Farmer shall be deemed to be joint and several by such parties respectively and their respective executors administrators or assigns.

IN WITNESS whereof the Farmer hath hereunto set his hand and seal the day and year first above written.

Signed Sealed and Delivered by the Farmer in the presence of

L.S.

THE FIRST SCHEDULE ABOVE REFERRED TO

All that Agricultural Holding of which the Farmer is the Owner in fee simple (is the Tenant under) known as Farm in the Parish(es) of in the County of comprising in all acres or thereabouts.

THE SECOND SCHEDULE ABOVE REFERRED TO

N.B.—These Schedules must be signed by the Principal Debtor(s) and such signatures must be witnessed.

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BILLS OF EXCHANGE ACT, 1882.

(45 & 46 VICT. c. 61)

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:

PART I.—PRELIMINARY.

1. This Act may be cited as the Bills of Exchange Act, 1882. Short title.

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

"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.

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

PART II.—BILLS OF EXCHANGE.

Form and Interpretation.

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

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.

(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 re-imburse 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.

(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;

(*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.

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.

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.

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

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.

(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.

(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.

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.

(*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.

(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.

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.

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

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.

nte-dating nd post-ating.

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.

(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.

omputation f time of ayment.

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 proclamation as a public fast or thanksgiving day, the bill is, except in the case herein-after 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.

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

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.

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:

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

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.

(*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:

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

(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.

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:

(*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:

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:

(*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 *prima 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 *prima facie* authority to fill up the omission in any way he thinks fit.

(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.

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.

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.

(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.

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.

(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.

(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 indorsements entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Signature essential to liability.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: 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.

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.

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.

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.

(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.

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.

(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.

(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.

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:

(*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.

(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.

(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.

Presumption of value and good faith.

30.—(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *prima 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.

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.

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

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

(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.

(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.

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

(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.

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.

(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.

(4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, 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.

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. **Conditional indorsement.**

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

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

(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.

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." **Restrictive indorsement.**

(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 authorises him to do so.

(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.

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.

(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.

(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.

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

(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.

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.

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:

(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:

(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.

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.

(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.

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

(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.

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.

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

(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.

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:

(*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:

(*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.

(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.

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

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.

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.

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.

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.

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 herein-after 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.

(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.

(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.

(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.

(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.

(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.

(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.

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.

(2) Presentment for payment is dispensed with,—

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

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.

(b) Where the drawee is a fictitious person.

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

(d) As regards an 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.

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.

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; 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.

(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.

(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.

(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.

(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.

(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.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(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.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(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.

(12) 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.

(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.

(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.

(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.

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.

(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:

(*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:

(*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:

(*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.

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.

(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.

(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:

(*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.

(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.

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.

(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.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or the notice of dishonour should be given to him.

(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.

Liabilities of Parties.

Funds in hand 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.

(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;

(*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;

(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.

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;

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(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;

(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;

(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.

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.

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:

(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.

(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.

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.

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.

"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.

(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 re-issue the bill.

(*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.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

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.

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.

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.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(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.

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.

(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.

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.

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.

(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.

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.

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.

(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.

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.

(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.

(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.

(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.

(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.

(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.

If the drawer on request as aforesaid refuses to give such 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.

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.

(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.

(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.

(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 supra 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.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.

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.

(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.

(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.

(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.

Part III.—Cheques on a Banker.

Cheque defined.

73. A cheque is a bill of exchange drawn on a banker payable on demand.

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.

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.

(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.

(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.

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:

(2) Notice of the customer's death.

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.

(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.

Crossing by drawer or after issue.

77.—(1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

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

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.

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.

(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.

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.

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.

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.

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.

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.

(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.

(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.

(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.

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.

(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.

(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.

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.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(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.

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.

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.

(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.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

(*a*) Presentment for acceptance;

(*b*) Acceptance;

(*c*) Acceptance suprà protest;

(*d*) Bills in a set.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

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.

(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.

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 purpose 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.

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.

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.

(Repealed by the *Statute Law Revision Act*, 1898).

[**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—

33 & 34 Vict. c. 97.

(*a*) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue:

25 & 26 Vict. c. 89.

(*b*) The provisions of the Companies Act, 1862, 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, etc.

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 suspen-

sion 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.

SCHEDULE I.

Form of protest which may be used when the services of a notary cannot be obtained — Section 94.

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., *J.K.* } Witnesses.

N.B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

BILLS OF EXCHANGE (CROSSED CHEQUES) ACT, 1906.

An Act to amend section eighty-two of the Bills of Exchange Act, 1882. [4th August, 1906.]

BE it enacted, etc.

1. A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

2. This Act may be cited as the Bills of Exchange (Crossed Cheques) Act, 1906, and this Act and the Bills of Exchange Act, 1882, may be cited together as the Bills of Exchange Acts, 1882 and 1906.

BILLS OF EXCHANGE (TIME OF NOTING) ACT, 1917.

(7 & 8 GEO. 5, c. 48).

An Act to amend the Bills of Exchange Act, 1882, with respect to the time for noting Bills. [8th November, 1917.]

BE it enacted, etc.

1. In sub-section (4) of s. 51 of the Bills of Exchange Act, 1882 (which relates to the time of noting a dishonoured bill), the words

" it must be noted on the day of its dishonour " shall be repealed, and the following words shall be substituted therefor, namely, " it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day."

2. This Act may be cited as the Bills of Exchange (Time of Noting) Act, 1917, and shall be construed as one with the Bills of Exchange Act, 1882, and the Bills of Exchange Acts, 1882 and 1906, and this Act may be cited together as the Bills of Exchange Acts, 1882 to 1917.

BILLS OF EXCHANGE ACT (1882) AMENDMENT ACT, 1932.

1. Sections seventy-six to eighty-two of the Bills of Exchange Act, 1882 (which relate to crossed cheques), as amended by the Bills of Exchange (Crossed Cheques) Act, 1906, shall apply to a banker's draft as if the draft were a cheque.

For the purposes of this section, the expression " Banker's draft " means a draft payable on demand drawn by or on behalf of a Bank upon itself, whether payable at the Head Office or some other Office of the Bank.

REGULATIONS RELATING TO BANK OF ENGLAND NOTES, ETC., ALLEGED TO HAVE BEEN LOST, MISLAID, OR STOLEN.

1. Any Person desirous of tracing Bank Notes, Post Bills, etc., lost, mislaid, or stolen, with a view, if possible, of recovering the property, may, upon payment of a registration fee of 2*s*. 6*d*., cause the Numbers, Dates and other Particulars of such Notes, etc., to be entered, together with the Name and Address of the Applicant, in a Book kept in the Secretary's Office at the Bank of England for that purpose :—Bank Notes, however, being payable to bearer on demand, the Bank cannot hold themselves under any responsibility should Notes so entered be paid on presentation, whether from inadvertence of the Clerks of the Establishment, under an order from the Governors, or from any cause whatever.

2. The proper Officers of the Bank will endeavour, if the circumstances of the case permit, to delay payment of the Notes, etc., and to give information of their presentation to the Person who has given notice, and paid the registration fee ; but such Notice shall not be in force for more than twelve months from its date.

3. Many Bank Notes, etc., the subject of notice, are presented at the Bank by Bankers and other undoubted holders for value, and must be paid on presentation ; in these cases the Bank cannot do more than endeavour to give the earliest information to the giver of the Notice.

AGRICULTURAL CREDITS ACT, 1928.

[18 & 19 GEO. 5. CH. 43.]

An Act to secure, by means of the formation of a company and the assistance thereof out of public funds, the making of loans for agricultural purposes on favourable terms, and to facilitate the borrowing of money on the security of farming stock and other agricultural assets, and for purposes connected therewith.

(3rd August, 1928.)

BE it enacted by the King'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 :—

PART I.—LONG TERM CREDITS.

Power to make advances, etc. to agricultural mortgage loan company.

1.—(1) With a view to the incorporation of a company having for its principal objects—

(*a*) the making of loans on mortgages of agricultural land;

(*b*) the making of loans under the Improvement of Land Acts, 1864 and 1899, for agricultural purposes;

and with a view to securing that loans by such a company shall be made on terms most favourable to the borrowers, it shall be lawful for the Minister of Agriculture and Fisheries (hereinafter referred to as the Minister) with the approval of the Treasury to undertake that, if such a company having such objects and complying with the provisions hereinafter contained is incorporated, he will—

(i) make advances to the company (for the purpose of establishing a guarantee fund), not exceeding in the aggregate seven hundred and fifty thousand pounds, and not at any time exceeding in the aggregate the amount at that time of the paid-up share capital of the company; such advances—

(*a*) to be payable in instalments so, however, that the aggregate amount paid shall not exceed—

On incorporation of the company . .	£250,000
By 30th April, 1929	£500,000
By 30th April, 1930	£750,000

(*b*) to be free from interest for a period of sixty years, and thereafter to carry interest at such rate, not exceeding the average yield of such Government funded stocks, as the Treasury from time to time may determine;

(ii) make payments of ten thousand pounds per annum for ten years as contributions towards the cost of the administration of the company.

(2) The Treasury may agree to procure the underwriting of debentures to be issued by the company as hereinafter mentioned to such aggregate amount as may be necessary to raise a sum not exceeding five million pounds.

(3) The Treasury may subscribe to debentures to be issued by the company to an amount not exceeding one fourth of each issue of debentures, and not exceeding in the aggregate one million two hundred and fifty thousand pounds, and any such subscriptions shall be deemed to be a local loan within the meaning of the National Debt and Local Loans Act, 1887, and that Act shall apply accordingly.

50 & 51 Vict. c. 16.

(4) Such sums not exceeding in the whole the sum of eight hundred and twelve thousand five hundred pounds as may be required for the purpose of making such advances as aforesaid or for procuring the underwriting of debentures as aforesaid shall be issued out of the Consolidated Fund or the growing produce thereof at such times and to such amounts as the Treasury think fit.

(5) The sums payable towards the cost of the administration of the company shall be paid out of moneys provided by Parliament.

(6) Any sums paid by the company by way of repayment of or interest on advances made by the Minister shall be paid to the Exchequer.

Provisions as to company.

2.—(1) The company to be so formed as aforesaid shall be a company limited by shares and registered under the Companies Acts, 1908 to 1917.

(2) The Memorandum and Articles of the company shall be subject to the approval of the Minister, and shall contain such provisions as are hereinafter mentioned, and shall not be alterable without the approval of the Minister.

(3) The Memorandum or Articles of the company shall make provision—

(*a*) for securing that, of the directors, one shall be a person nominated by the Treasury, so long as any part of the advances made by the Minister remains outstanding;

(*b*) for restricting the dividends on the share capital of the company to five per cent. per annum;

(*c*) for regulating the loans to be made by the company on mortgage, so that a loan shall in no case exceed two-thirds of the estimated value of the mortgaged property at the time of the loan, and that the loans shall be repayable by equal yearly or half-yearly instalments of capital and interest spread over a period not exceeding sixty years, or repayable on such other terms as may be authorised by the said Memorandum or Articles;

(*d*) for empowering the company for the purpose of making loans to raise money by means of the issue of debentures;

(*e*) for the creation of suitable reserve funds, and as to the investment and application of the sums standing to the credit of those funds;

(*f*) for regulating the use of the guarantee fund to which the advances made by the Minister are to be carried;

(*g*) for requiring the company to supply to the Minister copies of balance-sheets and profit-and-loss accounts;

(*h*) for the repayment of the advances made by the Minister; so however that provision shall be made—

(i) that, if at the expiration of fifteen years from the incorporation of the company, the advances made by the Minister to the guarantee fund exceed seven-and-a-half per cent. of the aggregate amount of the loans made by the company on mortgages and land charges up to that date, the excess shall, if the Minister so requires, be repaid;

(ii) that in any year, after thirty years from the incorporation of the company, in which the total reserves including the guarantee fund (but excluding the share capital) exceed seven-and-a-half per cent. of the liabilities (other than share capital and guarantee fund), there shall be allocated to the repayment of the guarantee fund one-half of the profits remaining after paying the maximum dividend on the share capital;

(*i*) for providing that in the event of the company being wound up, the liability of the company to the Minister for the amount of the advances outstanding shall rank after other liabilities of the company to creditors, and that if, after the discharge of such other liabilities, the sum available is insufficient to pay the sums so outstanding and the paid up share capital in full, the sum so available shall be divided between the Minister and shareholders in the proportion which the amount of the outstanding advances of the Minister bears to the amount of the paid up share capital of the company.

(4) For the purposes of this Part of this Act references to debentures shall include references to debenture stock and references to shares and share holders shall include references to stock and stock holders.

Debentures of the company to be authorised trustee investment. 15 Geo. 5. c. 19 11 & 12 Geo. 5. c. 58.

3. Debentures issued by the company shall be included amongst the securities in which a trustee may invest trust funds under the powers of section one of the Trustee Act, 1925, or section ten of the Trusts (Scotland) Act, 1921.

Application of excess reserves.

4. If after the repayment of the advances made by the Minister to the guarantee fund the reserves increase more rapidly than is required for the maintenance of the reserves as provided for in the Memorandum or Articles of the company, the company shall apply such part of the excess reserves for the benefit of borrowers in accordance with a scheme or schemes to be prepared by the company to the satisfaction of the Minister.

PART II.—AGRICULTURAL SHORT-TERM CREDITS.

Agricultural charges on farming stock and assets.

9.—(1) It shall be lawful for a farmer as defined by this Act by instrument in writing to create in favour of a bank as so defined a charge (hereinafter referred to as an agricultural charge) on all or any of the farming stock and other agricultural assets belonging to him as security for sums advanced or to be advanced to him or paid or to be paid on his behalf under any guarantee by the bank and interest, commission and charges thereon.

(2) An agricultural charge may be either a fixed charge, or a floating charge, or both a fixed charge and a floating charge.

(3) The property affected by a fixed charge shall be such property forming part of the farming stock and other agricultural assets belonging to the farmer at the date of the charge as may be specified in the charge, but may include—

(*a*) in the case of live stock, any progeny thereof which may be born after the date of the charge; and

(*b*) in the case of agricultural plant, any plant which may whilst the charge is in force be substituted for the plant specified in the charge.

(4) The property affected by a floating charge shall be the farming stock and other agricultural assets from time to time belonging to the farmer, or such part thereof as is mentioned in the charge.

(5) The principal sum secured by an agricultural charge may be either a specified amount, or a fluctuating amount advanced on current account not exceeding at any one time such amount (if any) as may be specified in the charge, and in the latter case the charge shall not be deemed to be redeemed by reason only of the current account having ceased to be in debit.

(6) An agricultural charge may be in such form and made upon such conditions as the parties thereto may agree, and sureties may be made parties thereto.

(7) For the purposes of this Part of this Act—

"Farmer" means any person (not being an incorporated company or society) who, as tenant or owner of an agricultural holding, cultivates the holding for profit; and "agriculture" and "cultivation" shall be deemed to include horticulture, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit, vegetables, and the like;

"Bank" means any firm, incorporated company, or society, carrying on banking business and approved by the Minister;

"Farming stock" means crops or horticultural produce, whether growing or severed from the land, and after severance whether subjected to any treatment or process of manufacture or not; live stock, including poultry and bees, and the produce and progeny thereof; any other

agricultural or horticultural produce whether subjected to any treatment or process of manufacture or not; seeds and manures; agricultural vehicles, machinery, and other plant; agricultural tenant's fixtures and other agricultural fixtures which a tenant is by law authorised to remove;

"Other agricultural assets" means a tenant's right to compensation under the Agricultural Holdings Act, 1923, for improvements, damage by game, disturbance or otherwise, and any other tenant right. 13 & 14 Geo. 5. c. 9.

Effect of fixed charge.

6.—(1) A fixed charge shall, so long as the charge continues in force, confer on the bank the following rights and impose upon the bank the following obligations, that is to say :—

(a) a right, upon the happening of any event specified in the charge as being an event authorising the seizure of property subject to the charge, to take possession of any property so subject;

(b) where possession of any property has been so taken, a right, after an interval of five clear days or such less time as may be allowed by the charge, to sell the property either by auction or, if the charge so provides, by private treaty, and either for a lump sum payment or payment by instalments;

(c) an obligation in the event of such power of sale being exercised, to apply the proceeds of sale in or towards the discharge of the moneys and liabilities secured by the charge, and the cost of seizure and sale, and to pay the surplus (if any) of the proceeds to the farmer.

(2) A fixed charge shall, so long as the charge continues in force, impose on the farmer the following obligations :—

(a) an obligation whenever he sells any of the property, or receives any money in respect of other agricultural assets comprised in the charge, forthwith to pay to the bank the amount of the proceeds of the sale or the money so received, except to such extent as the charge otherwise provides or the bank otherwise allows; the sums so paid to be applied, except so far as otherwise agreed, by the bank in or towards the discharge of moneys and liabilities secured by the charge;

(b) an obligation in the event of the farmer receiving any money under any policy of insurance on any of the property comprised in the charge, or any money paid by way of compensation under the Diseases of Animals Acts, 1894 to 1927, in respect of the destruction of any live stock comprised in the charge, or by way of compensation under the Destructive Insects and Pests Acts, 1877 to 1927, in respect of the destruction of any crops comprised in the charge, forthwith to pay the amount of the sums so received to the bank, except to such extent as the charge otherwise provides or the bank otherwise allows; the sums so paid to be applied, except so far as otherwise

agreed by the bank, in or towards the discharge of the moneys and liabilities secured by the charge.

(3) Subject to compliance with the obligations so imposed, a fixed charge shall not prevent the farmer selling any of the property subject to the charge, and neither the purchaser, nor, in the case of a sale by auction, the auctioneer, shall be concerned to see that such obligations are complied with notwithstanding that he may be aware of the existence of the charge.

(4) Where any proceeds of sale which in pursuance of such obligation as aforesaid ought to be paid to the bank are paid to some other person, nothing in this Act shall confer on the bank a right to recover such proceeds from that other person unless the bank proves that such other person knew that the proceeds were paid to him in breach of such obligation as aforesaid, but such other person shall not be deemed to have such knowledge by reason only that he has notice of the charge.

Effect of floating charge.

7.—(1) An agricultural charge creating a floating charge shall have the like effect as if the charge had been created by a duly registered debenture issued by a company:

Provided that—

(*a*) the charge shall become a fixed charge upon the property comprised in the charge as existing at the date of its becoming a fixed charge—

(i) upon a receiving order in bankruptcy being made against the farmer;

(ii) upon the death of the farmer;

(iii) upon the dissolution of partnership in the case where the property charged is partnership property;

(iv) upon notice in writing to that effect being given by the bank on the happening of any event which by virtue of the charge confers on the bank the right to give such a notice;

(*b*) the farmer, whilst the charge remains a floating charge, shall be subject to the like obligation as in the case of a fixed charge to pay over to the bank the amount received by him by way of proceeds of sale, in respect of other agricultural assets, under policies of insurance, or by way of compensation, and the last foregoing section shall apply accordingly: Provided that it shall not be necessary for a farmer to comply with such obligation if and so far as the amount so received is expended by him in the purchase of farming stock which on purchase becomes subject to the charge.

Supplemental provisions as to agricultural charges.

8.—(1) An agricultural charge shall have effect notwithstanding anything in the Bills of Sale Acts, 1878 and 1882, and shall not be deemed to be a bill of sale within the meaning of those Acts.

(2) Agricultural charges shall in relation to one another have priority in accordance with the times at which they are respectively registered under this Part of this Act.

(3) Where an agricultural charge creating a floating charge has been made, an agricultural charge purporting to create a fixed charge on, or a bill of sale comprising any of the property comprised in the floating charge shall, as respects the property subject to the floating charge, be void so long as the floating charge remains in force.

(4) Farming stock subject to an agricultural charge shall not, for the purposes of section thirty-eight of the Bankruptcy Act, 1914, be deemed to be goods in the possession, order, or disposition of the farmer, in his trade or business, by the consent and permission of the true owner thereof, under such circumstances that he is the reputed owner thereof. 4 & 5 Geo. 5. c. 59.

(5) Where a farmer who is adjudged bankrupt has created in favour of a bank an agricultural charge on any of the farming stock or other agricultural assets belonging to him, and the charge was created within three months of the date of the presentation of the bankruptcy petition and operated to secure any sum owing to the bank immediately prior to the giving of the charge, then, unless it is proved that the farmer immediately after the execution of the charge was solvent, the amount which but for this provision would have been secured by the charge shall be reduced by the amount of the sum so owing to the bank immediately prior to the giving of the charge, but without prejudice to the bank's right to enforce any other security for that sum or to claim payment thereof as an unsecured debt.

(6) Where after the passing of this Act the farmer has mortgaged his interest in the land comprised in the holding, then, if growing crops are included in an agricultural charge, the rights of the bank under the charge in respect of the crops shall have priority to those of the mortgagee, whether in possession or not, and irrespective of the dates of the mortgage and charge.

(7) An agricultural charge shall be no protection in respect of property included in the charge which but for the charge would have been liable to distress for rent, taxes, or rates.

(8) An instrument creating an agricultural charge shall be exempt from stamp duty.

Registration of agricultural charges.

9.—(1) Every agricultural charge shall be registered under this Act within seven clear days after the execution thereof, and, if not so registered, shall be void as against any person other than the farmer:

Provided that the High Court on proof that omission to register within such time as aforesaid was accidental or due to inadvertence may extend the time for registration on such terms as the Court thinks fit.

(2) The Land Registrar shall keep at the Land Registry a register of agricultural charges in such form and containing such particulars as may be prescribed.

(3) Registration of an agricultural charge shall be effected by

sending by post to the Land Registrar at the Land Registry a memorandum of the instrument creating the charge and such particulars of the charge as may be prescribed, together with the prescribed fee; and the Land Registrar shall enter the particulars in the register and shall file the memorandum.

(4) The register kept and the memoranda filed under this section shall at all reasonable times be open to inspection by any person on payment (except where the inspection is made by or on behalf of a bank) of the prescribed fee, and any person inspecting the register or any such filed memorandum on payment (except as aforesaid) of the prescribed fee may make copies or extracts therefrom.

(5) Any person may on payment of the prescribed fee require to be furnished with a copy of any entry in the register or of any filed memorandum or any part thereof certified to be a true copy by the Land Registrar.

(6) Registration of an agricultural charge may be proved by the production of a certified copy of the entry in the register relating to the charge, and a copy of any entry purporting to be certified as a true copy by the Land Registrar shall in all legal proceedings be evidence of the matters stated therein without proof of the signature or authority of the person signing it.

15 Geo. 5. c. 22.

(7) The provisions of the Land Charges Act, 1925, as to official searches under that Act, shall apply as if they were herein re-enacted and in terms made applicable to this Part of this Act.

(8) Registration of an agricultural charge under this section shall be deemed to constitute actual notice of the charge, and of the fact of such registration, to all persons and for all purposes connected with the property comprised in the charge, as from the date of registration or other prescribed date, and so long as the registration continues in force:

Provided that, where an agricultural charge created in favour of a bank is expressly made for securing a current account or other further advances, the bank, in relation to the making of further advances under the charge, shall not be deemed to have notice of another agricultural charge by reason only that it is so registered if it was not so registered at the time when the first-mentioned charge was created or when the last search (if any) by or on behalf of the bank was made, whichever last happened.

(9) The Lord Chancellor may make regulations prescribing anything which under this section is to be prescribed, subject as respects fees to the approval of the Treasury, and generally as to the keeping of the register and the filing of memoranda, the removal of entries from the register on proof of discharge, and the rectification of the register.

Restriction on publication of agricultural charges.

10.—(1) It shall not be lawful to print for publication or publish any list of agricultural charges or of the names of farmers who have created agricultural charges.

(2) If any person acts in contravention of this section, he shall

in respect of each offence be liable on summary conviction to a fine not exceeding twenty pounds:

Provided that no person other than a proprietor, editor, master printer, or publisher, shall be liable to be convicted under this section.

(3) No prosecution for an offence under this section shall be commenced without the consent of the Attorney-General.

(4) For the purpose of this section, "publication" means the issue of copies to the public, and "publish" has a corresponding meaning, and without prejudice to the generality of the foregoing definition the confidential notification by an association representative of a particular trade to its members trading or carrying on business in the district in which property subject to an agricultural charge is situate of the creation of the charge shall not be deemed to be publication for the purposes of this section.

Frauds by farmers.

11.—(1) If, with intent to defraud, a farmer who has created an agricultural charge—

(*a*) fails to comply with the obligations imposed by this Act as to the payment over to the bank of any sums received by him by way of proceeds of sale, or in respect of other agricultural assets, or under a policy of insurance or by way of compensation; or

(*b*) removed or suffers to be removed from his holding any property subject to the charge;

he shall be guilty of a misdemeanour and liable on conviction on indictment to penal servitude for a term not exceeding three years.

15 & 16 Geo. 5. c. 86.

(2) Section twenty-four of the Criminal Justice Act, 1925, shall have effect as if offences under this section were included amongst the offences specified in the Second Schedule to that Act.

Temporary provision as to advances outstanding at passing of Act.

12.—Until the first day of January, nineteen hundred and thirty-one, the foregoing provisions of this Part of this Act shall be subject to the following modification:—

Where a bank has before the passing of this Act made advances to a farmer, whether by means of an overdraft or otherwise, an agricultural charge created in favour of the bank shall be enforceable only in respect of moneys advanced in addition to and in excess of a sum equal to the amount of such advances outstanding at the passing of this Act.

Rights of tenants.

13. Any farmer being the tenant of an agricultural holding shall have the right to create an agricultural charge notwithstanding any provision in his contract of tenancy to the contrary.

Provisions as to agricultural societies.

14.—(1) A debenture issued by a society registered under the Industrial and Provident Societies Acts, 1893 to 1928, creating in favour of a bank a floating charge on property which is farming stock within the meaning of this Part of this Act, may be registered in like manner as an agricultural charge, and section nine of this Act shall apply to such a charge in like manner as it applies to an agricultural

charge, and the charge if so registered shall as respects such property be valid notwithstanding anything in the Bills of Sale Acts, 1878 and 1882, and shall not be deemed to be a bill of sale within the meaning of those Acts:

Provided that, where any such charge is so registered, notice thereof signed by the secretary of the society shall be sent to the central office established under the Friendly Societies Act, 1896, and registered there.

59 & 60 Vict. c. 25

(2) Any such debenture may create a floating charge on any farming stock the property in which is vested in the society.

PART III.—GENERAL.

Short title, commencement and extent.

15.—(1) This Act may be cited as the Agricultural Credits Act, 1928.

(2) This Act shall come into operation on the first day of October, nineteen hundred and twenty-eight.

(3) This Act shall not (except as otherwise expressly provided) extend to Scotland or Northern Ireland.

SOLICITORS ACT, 1933.

(See p. 276.)

Section 8 is of special interest to Banks and reads as follows:

8.—(1) Subject to the provisions of this section no bank shall, in connection with any transaction on any account of any solicitor kept with it or with any other bank (other than an account kept by a solicitor as trustee for a specified beneficiary) incur any liability or be under any obligation to make any enquiry or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it:

Provided that nothing in this subsection shall relieve a bank from any liability or obligation under which it would be apart from this Act.

(2) Notwithstanding anything in the preceding subsection, a bank at which a solicitor keeps an account for clients' moneys shall not, in respect of any liability of the solicitor to the bank, not being a liability in connection with that account, have or obtain any recourse or right, whether by way of set off, counter claim, charge, or otherwise, against moneys standing to the credit of that account:

Provided that nothing in this subsection shall deprive a bank of any right existing at the time when the first rules made under this Act come into operation.

STATUTORY RULES AND ORDERS.

The following are the Rules made under the authority of the Act. The Act and Rules do not extend to Scotland and Northern Ireland.

RULE 1.

Every solicitor shall keep such books and accounts as may be necessary to show and distinguish in connection with his practice as a solicitor (*a*) moneys received from or on account of and the moneys paid to or on account of each of his clients and (*b*) the moneys received and the moneys paid on his own account.

RULE 2.

Every solicitor, who holds or receives money on account of a client (save money hereinafter expressly exempted from the application of this Rule) shall without undue delay pay such money into a current or deposit account at a bank, to be kept in the name of the solicitor in the title of which the word "Client" shall appear (hereinafter referred to as "a client account"). Any solicitor may keep one client account or as many such accounts as he thinks fit:

Provided that when a solicitor receives a cheque or draft representing in part money belonging to the client and in part money due to the solicitor, he may where practicable split the cheque or draft and pay to the client account that part only which represents money belonging to the client. In any other case he shall pay the whole of such cheque or draft into the client account.

RULE 3.

No money shall be paid into a client account other than:—

(*a*) money held or received on account of a client;
(*b*) such money belonging to the solicitor as may be necessary for the purpose of opening or maintaining the account;
(*c*) money for replacement of any sum which may by mistake or accident have been drawn from the account in contravention of Rule 4 of these Rules;
(*d*) a cheque or draft received by the solicitor representing in part money belonging to the client and in part money due to the solicitor, when such cheque or draft has not been split as provided by Rule 2 hereof.

RULE 4.

No money shall be drawn from a client account other than:—

(*a*) money properly required for payment to or on behalf of a client or for or towards payment of a debt due to the solicitor from a client or money drawn on the client's authority, or money in respect of which there is a liability of the client to the solicitor, provided that the money so drawn shall not in

any case exceed the total of the money so held for the time being for such client;

(*b*) such money belonging to the solicitor as may have been paid into the account under Rule 3 (*b*) or 3 (*d*) of these Rules;

(*c*) money which may by mistake or accident have been paid into such account in contravention of Rule 3 of these Rules.

RULE 5.

Rules 2, 3 and 4 shall not apply to money which :—

(*a*) the client for his own convenience requests a solicitor to withhold from a client account;

(*b*) a solicitor pays into a separate account opened or to be opened in the name of a client or some person named by that client or the duly authorised agent of that client;

(*c*) in the ordinary course of business upon receipt is paid on behalf of the client to a third party;

(*d*) is upon receipt paid to the client;

(*e*) is paid to a solicitor expressly on account of costs;

(*f*) the Council upon an application made to them in writing by a solicitor specifically authorises to be withheld or withdrawn from a client account.

RULE 6.

In order to ascertain whether these Rules have been complied with the Council, acting either on their own motion or on written complaint lodged with them, may require any solicitor to produce at some convenient time and place, his books of account, bank pass books, statements of account, vouchers and any other necessary documents for the inspection of any person appointed by the Council, and such person shall prepare for the information of the Council a report on the result of such inspection.

Such report may be used as a basis for proceedings under Section 2 of the Solicitors Act, 1933.

Before making any such appointment the Council shall consider any objection made by any such solicitor to the appointment of a particular person on personal or other proper grounds or on the ground that such person practises in the same locality.

Before instituting an inspection on a complaint made by a third person, the Council shall require *prima facie* evidence that a ground of complaint exists, and may require the payment by such person to the Council of a reasonable sum to be fixed by them to cover the costs of the inspection, and the costs of the solicitor against whom the complaint is made. The Council may deal with any sum so paid in such manner as they think fit.

RULE 7.

Every requirement, authorisation and notification to be made or given by the Council to a solicitor under these Rules shall be made

in writing under the hand of such person as may be appointed by the Council for the purpose and sent by registered post to the last address of the solicitor appearing in the records of The Law Society, and when so made and sent shall be deemed to have been received by the solicitor within forty-eight hours of the time of posting.

RULE 8.

In these Rules, unless the context otherwise requires, "Solicitor" means a solicitor of the Supreme Court practising on his own account or a firm of solicitors and includes a solicitor acting as an agent, bailee, stakeholder, or in any capacity in connection with his practice as a solicitor. "Client" means any person or body of persons, corporate or unincorporate, on whose behalf a solicitor in connection with his practice receives money. Other expressions in these Rules shall have the meanings assigned to them by section 81 of the Solicitors Act, 1932.[1]

Words importing the masculine gender shall include females, and words in the singular shall include the plural, and words in the plural shall include the singular.

RULE 9.

Nothing in these Rules shall deprive a solicitor of any recourse or right, whether by way of lien, set-off, counter-claim, charge or otherwise, against moneys standing to the credit of a client account.

RULE 10.

These Rules may be cited as the Solicitors' Accounts Rules, 1935, and shall come into operation on the 1st day of January, 1935.

GARNISHEE ORDERS AND SOLICITOR'S ACCOUNTS.

NOTE (see p. 204).—The case of *Plunkett and another* v. *Barclays Bank, Ltd.*, 1936, arose out of the above Rules. A garnishee order *nisi* was served on the bank where a solicitor had his accounts, and it was held that the order attached also his client's account, since the debt was due by the Bank to the solicitor who alone could draw off the balance. The judge stated that it was the duty of the Bank to inform the Court of the nature of the account, and to inform his customer at once of the service of the order, and the fact that cheques on the account could not be honoured. The judge also stated that judgment creditors obtaining garnishee orders against practising solicitors might well have the form modified to avoid the useless attachment of the trust account.

LIMITED STATUTORY POWER TO BORROW (see p. 277).

TRUSTEE ACT, 1925.

POWER TO RAISE MONEY BY SALE, MORTGAGE, ETC.

16.—(1) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and

[1] 22–3 G. 5. c. 37.

shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.

(2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the Settled Land Act, 1925, not being also the statutory owners.

Protection to Purchasers and Mortgagees Dealing with Trustees.

17.—No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

Devolution of Powers or Trust.

18.—(1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or the other trustees or trustee for the time being of the trust.

(3) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

(4) In this section "personal representative" does not include an executor who has renounced or has not proved.

LAND REGISTRATION.

Extension of Compulsory Registration of Land to the Administrative County of Middlesex.

(See Title Deeds, pp. 359–408.)

The Administrative County of Middlesex is the first county to be brought within compulsory registration under the powers given by the Land Registration Act, 1925. Registration of land in this county became compulsory on sale on and after 1st January, 1937. This does not mean that every owner of land not at present registered has forthwith to register it. Registration is only compulsory in the cases explained on p. 404, para. 30. The position in this county is rendered somewhat complicated owing to the fact that there was already in existence a Middlesex Deeds Registry.

No instrument made after 1st January, 1937, affecting land in Middlesex, can in future be registered at the Middlesex Deeds Registry. Instruments dated before that date, but so far unregistered, must be registered within two years or suffer the old consequences of non-registration. Discharges of encumbrances can be recorded for the same period, *i.e.* to 1st January, 1939. After this date the Register is to be closed.

A mortgage, legal or equitable, of unregistered land in Middlesex, will not require registration (save in the case of limited companies) if the title deeds are held. If the deeds are not held, then registration is necessary under the Land Charges Act (see p. 396). Until the title of land in Middlesex offered as security is registered, searches will be necessary in the Middlesex Deeds Registry as well as in the Land Charges Registry. Hence it may be some years before the Middlesex Deeds Registers can finally be dispensed with.

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