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PRINCIPLES OF BANKING

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BY

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PREFACE

I have prepared this book with the express object of meeting the requirements of those who are embarking for the first time on the study of the Practice and Law of Banking, either for the purpose of their daily work or with the intention of taking the examinations of the Institutes of Bankers in this subject.

In view of its great importance from both a practical and an examination standpoint, the law relating to Bills of Exchange has received detailed treatment, and the Bills of Exchange Act, 1882, is reproduced in the Appendix with cross references to the text which I hope the reader will find specially useful.

During the process of compilation, I have necessarily made constant reference to the recognised authorities and standard works on the subject, but my acknowledgments are specially due to the works of Sir John Paget, Sir MacKenzie Chalmers and Dr. Heber Hart, and, of course, to those abecedaries of the banking student, *Questions on Banking Practice* and *Legal Decisions Affecting Bankers*.

I wish to thank the publishers of my book, "*Banker and Customer*," for their permission to embody certain material from that volume in the text of this book.

July, 1931. S. E. T

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PRINCIPLES OF BANKING

PART I

THE BANKER

CHAPTER 1

THE RISE AND GROWTH OF ENGLISH BANKING

Banking in this country may be said to have originated many centuries ago in the business of money-lending or usury conducted by certain wealthy Jewish merchants in London These early financiers were, however, subject to much interference, and ultimately they were expelled from the country. Later, in the fourteenth century, a similar type of business was carried on by merchants from the Lombard States in Italy, and to them is attributed the name of that famous thoroughfare, Lombard Street, E C.

These early money-lenders were not really bankers, as we understand the term They were simply usurers They made profits by loaning their own private capital, and performed only one side of the modern banker's characteristic function, *i e*, that of borrowing from some in order to lend to others

It was not until about 1645 that any organisation similar to that of a modern bank began to take shape About this time London merchants began to leave their surplus wealth for safe-keeping with the *Goldsmiths*, who issued in return signed receipts, called " goldsmiths' notes ", embodying an undertaking to return the money to the bearer on demand

The goldsmiths soon discovered that they could safely lend out a part of the funds left with them in this way, for experience showed that only a comparatively small proportion of gold was required to meet current withdrawals and probable demands This loaning of other people's money at interest proved to be a very profitable operation. Hence the more enterprising mer-

chants began to pay interest as an inducement for the deposit of money with them, at a lower rate, of course, than they charged for loans, while some of the goldsmiths abandoned their original functions and applied their whole energies to this new business: At the same time, competitors sprang up who were bankers first and last, and who performed no function other than that of dealing in money.

The Rise of the Bank of England.

It is in the foundation of the Bank of England in 1694, however, that we find the first step in the direction of joint-stock banking as it exists to-day in this country.

The Bank of England owes its foundation to a Scotsman, William Paterson, who was responsible for the scheme under which an amount of £1,200,000 was subscribed as a loan at 8 per cent to the Government of William III, then in financial difficulties. In return for the loan the subscribers were granted a charter incorporating them as the Bank of England, with the privilege of issuing notes to the extent of the sum lent. This loaning of capital to the Government, rather than the issue of notes, was the primary object of the Bank, although its notes now constitute the greater part of the legal tender currency of the country.

The new bank proved an immediate success, and in order to prevent the formation of rival institutions, an Act was passed in 1708 forbidding the issue of notes by joint-stock banks other than the Bank of England.

The Beginnings of the Cheque System.

The Act of 1708 gave the Bank a virtual monopoly of joint-stock banking which contributed essentially to its predominance in succeeding years By forbidding joint-stock banks to issue notes,—the essential function of all banks in those days,—it had the practical effect of restricting the growth of joint-stock banking and of confining the function of note issuing in England and Wales to a multitude of small private banks, which were subject to no legal regulation, and were in many cases totally unfitted to bear their responsibilities.

Another important result was the effect of the Act on the functions of bankers in London. Here, and in the surrounding district, the Bank of England note was supreme, and its predominance eventually caused the London private bankers to abandon the issue of notes, and to develop *deposit banking* ; *i.e.*, the acceptance of deposits, withdrawable at first by letter and later by cheque.

The London private bankers soon realised the immense pos-

sibilities of this new business, especially as it enabled them to compete far more effectively with the Bank of England, and, about 1780, they gave up the issue of notes in favour of the issue of printed forms of *cheques*, by which depositors could withdraw upon demand such amounts as they required, or instruct their bankers to make payments to third parties.

While these early cheques were largely similar to those which exist to-day, they differed in the important respect that they were invariably made payable to *bearer* on demand, a clear indication of the fact that the cheque had its origin in the desire of the London banks to circumvent the growing strength of the Bank of England, so largely dependent upon its practical monopoly of the right of note issue in London.

Financial Difficulties Created by the Napoleonic Wars.

Early in the nineteenth century, therefore, banking in this country was in the hands of three different types of institution First, there was the Bank of England, supreme by virtue of its charter and its monopoly of the issue of notes in and around London. Then there were the London private banks, struggling to establish the system of deposit banking and the issue of cheques Finally, there was the heterogeneous group of small private note-issuing banks throughout the country, instituted and conducted by people in almost every walk of life—cheesemongers, miners, grocers, and innkeepers

It is not surprising that a sequence of disturbing factors should entirely disorganise such a weakly-knit fabric England's participation in the Napoleonic Wars towards the close of the eighteenth century had involved her in serious financial difficulties The Bank of England's gold reserve had been seriously depleted, and, when rumours of a French landing brought about a panic and a demand for gold, an Order in Council had to be issued in 1797 permitting the Bank to suspend payments in cash Extra notes were issued to meet the deficiency in the currency, but the issue was in excess of actual requirements, with the result that the notes became depreciated in value, while gold coins disappeared from circulation. The price of gold rose to such a height that in 1810 a House of Commons Committee was appointed to consider the whole question of the high price of bullion

The famous report of this Committee, the *Bullion Report* of 1810, set forth a number of important conclusions in regard to currency and exchange and proposed that cash payments should be resumed by the Bank, in order to make its notes once more convertible into gold at their face value, thereby ensuring stability of the foreign exchanges.

Banking and Currency Troubles.

Although the House of Commons did not adopt the recommendations of the Committee, the views expressed in the Report were upheld by subsequent events Violent speculation and disaster followed the declaration of peace with Napoleon in 1814, and hundreds of private note-issuing banks failed. The collapse of the note issues meant a reduction in the volume of the paper currency, so gold fell in price, and the exchanges moved above par In 1816 the system of gold monometallism was adopted and the Bank attempted to resume cash payments This attempt failed on account of large withdrawals of gold to France, but in 1821 the bank-note currency was finally established on a convertible basis

In some quarters, the currency and banking difficulties were attributed to the monopolistic privileges of the Bank of England, and in subsequent years, a number of Acts were passed with the object of mitigating the effects of this monopoly.

An Act of 1826 permitted the establishment of joint-stock banks of issue with *unlimited* liability provided they did not conduct business within a radius of sixty-five miles of London. This was an important departure, for it not only lessened the monopoly of the Bank so far as joint-stock banking was concerned, but also strengthened the provincial banking fabric, hitherto made up of a large number of weak private bankers

It was the Bank Act of 1833, however, which marked the beginning of the present banking system This Act permitted the establishment in London itself of joint-stock banks for the transaction of *all* banking business other than the issue of notes to bearer on demand In this respect the Act still further modified the power of the Bank of England, although, in another direction, the Bank's prestige was increased, for, by the same Act, its notes were made legal tender in England and Wales for all payments over £5 (except by the Bank itself or its branches)

The Act of 1833 marked the beginning of a new and prosperous era for banking in this country. It was followed immediately by the establishment in London of several joint-stock banks,—the forerunners of the great institutions of to-day,—and it gave rise to an entirely new class of banking institutions, best described as *banks of deposit* in contradistinction to the old-established class of *banks of issue.*

By many people, the incessant currency troubles and the repeated banking failures at this period were attributed to the over-issue of notes by the Bank of England and the small private banks Considerable controversy arose as to the best method of controlling such issues, and ultimately two opposing schools of

thought were identified, advocating the *Banking Principle* or *Theory* and the *Currency Principle* or *Theory* respectively.

The Banking and Currency Principles.

The Currency Theorists held that bank notes should be issued merely to provide convenient and economical substitutes for metallic money. They maintained that the issues should be limited to the amount of gold held against the notes, and that the circulation of notes should be regulated according to the flow of gold into and out of the national reserves The Banking School, on the other hand, took the view that the issues of notes could safely be left to the discretion of the bankers, so long as the circulating currency was limited by them to the [illegible] demands of business and trade They held that any notes in excess of trade requirements would be presented for encashment, and that, so long as an *adequate* reserve was maintained, strict convertibility would be ensured and inflation prevented without the necessity of holding gold to cover every note issued.

The Bank Charter Act, 1844.

The Government, however, was influenced by the views of the Currency School, led by the famous Lord Overstone (then Mr. S J. Loyd), and many of the latter's recommendations were embodied in the Bank Charter Act, 1844 In some respects the Act was a compromise, for it did not altogether exclude the ideas of the Banking School although it ensured the maintenance of adequate gold reserves behind the Bank of England note, it provided also for a limited issue against securities

The Act laid down that the Bank of England was to be divided into two distinct departments, called the Issue Department and the Banking Department respectively The Issue Department was authorised to issue notes against securities (the *Fiduciary Issue*) to the amount of £14,000,000, and was required to cover all issues in excess of this amount by gold and silver in reserve, the silver not to exceed one-fourth of the gold held Any person was to be entitled to demand notes from the Issue Department in return for gold bullion at the rate of £3 17s 9d. per ounce standard, *i e*, 1½d. per ounce below the legally fixed mint price of gold, while, in order to ensure full publicity regarding its position, the Bank was required to publish, in the *London Gazette*, a Weekly Return of the assets and liabilities of both Departments

Those responsible for the Act were determined that the English issue of bank notes should be ultimately concentrated in the hands of the Bank of England. Hence it was provided that no further banks of issue were to be established, and that any exist-

ing bank losing the right of issue [1] should not be entitled to resume such issue It was also decreed that if, after the passing of the Act, any country bank ceased to issue notes, the Bank of England could obtain an Order in Council empowering it to increase its fiduciary issue by two-thirds of the lapsed issue.

The Act of 1844 aimed at ensuring the absolute convertibility of note issues in this country, together with full publicity regarding the amount of the issues and of the reserves held against them It aimed also at so regulating the paper currency that inflation would be prevented, speculation and crises obviated, and the foreign exchanges stabilised Its object of centralising the English note issues in the hands of the Bank of England was attained in 1923, when the Bank took over the remnant of the private bank note issue

The Growth of the Joint-Stock Banks.

The Bank Charter Act established the Bank of England as the supreme institution in English banking, and succeeding years saw a great increase in its power and influence Its note issues were the sole legal tender paper currency until the outbreak of war in 1914, it acted as the banker to the British Government and, in course of time, to all the other joint-stock banks in the country, an arrangement which proved of vital significance in its relation to the structure of the English banking system.

But during this time the joint-stock banks were by no means at a standstill Faced from the outset with jealousy and even open hostility on the part of the Bank of England and the private bankers, hampered by the difficulties which necessarily attended inexperience, and forced to develop the comparatively new system of deposit banking, these early joint-stock banks nevertheless made great progress, and the half-century following 1844 witnessed two important amendments of banking law which did much to strengthen their position and to facilitate their development

The first of these was *The Extension of Limited Liability to Banks* by an Act of 1858 The shareholders in the first joint-stock banks were liable *in full* for all debts of the companies, and it was not until 1858 that the principle of *limited* liability, which had already been applied to other corporations, was extended to banking concerns. The removal of this anomaly gave a further impetus to the expansion of banking, as it widened the area of investment in bank shares by attracting a new class of investor.

In 1879, the principle of *Reserve Liability* was legalised, and

[1] *E.g.*, by opening an office in London, or by becoming bankrupt, or amalgamating with an existing London bank.

limited companies were empowered either to increase the nominal amount of their shares so that a certain amount over and above that paid up on each share could be called up only in the event of liquidation of the company; or to resolve that a portion of the existing uncalled amount of each share should be callable only in the event of the company's winding-up. The adoption of this principle by the more important banks gave depositors and creditors an added security by creating a reserve which could be called upon only in the last resort (see also page 22).

The English System of Note Issue.

Between 1844 and 1914 the fiduciary issue of the Bank of England was rigidly fixed under the Bank Charter Act, 1844, and no provision existed for its automatic increase either in times of exceptional pressure or to meet the demand for additional currency arising from normal economic progress of the community.

Serious crises occurred in 1847, 1857 and 1866, which were relieved, not by the aid of the provisions of the Act, but by their *suspension*, thereby enabling the Bank to increase its fiduciary issue of notes, supply currency to those who required it, and, at the same time, make its own position secure Similarly, during the 1914 crisis, at the outbreak of the Great War, when the issue of Bank of England notes proved entirely inadequate to fill the gap in the currency caused by the withdrawal of gold, the Government, which stood prepared to suspend the Bank Act, if necessary, met the emergency by issuing Treasury notes of £1 and 10s

Critics of the Act pointed to these difficulties as justifying their contention that the fiduciary circulation was too small, and that no provision existed for its increase to meet increasing demands for currency It was argued that the note circulation could not be increased in times of pressure except by the uncertain interference of the Government, whereas a modern note issue should be elastic and capable of automatic expansion, when necessary, to provide adequate currency for legitimate trade requirements

In the difficult War and post-War years, 1914–1928, the position was to some extent modified by the circulation of Treasury notes, but well-known authorities suggested that the stringent provisions of the Bank Charter Act had proved a failure, and contended that the inelasticity of our currency system partly explained the prolonged post-War depression in this country, particularly as compared with the prosperous conditions in the United States, where the more elastic system, which was

advocated for adoption in this country, made possible the expansion of credit to keep pace with business demands.

The Amalgamation of the English Note Issues.

It came to be recognised in the years immediately after the War that the dual system of note-issue control then existing in this country in consequence of the issue of currency notes by the Treasury was not without its disadvantages, and that amalgamation of the issues would sooner or later be necessary. Towards the middle of 1928 conditions made the proposed change possible, and the necessary legislative sanction for the amalgamation of the note issues was embodied in the Currency and Bank Notes Act, 1928

The Currency and Bank Notes Act, 1928

This Act provided that *as from an appointed day*, fixed subsequently as 22nd November, 1928, all outstanding currency notes were to be deemed to be Bank notes, and the Bank was made responsible for their repayment The existing restriction on the Bank's power to issue notes below £5 was removed, and the Bank was given authority to issue notes for £1 and 10s , which were made legal tender for the payment of any amount in England, Wales, Scotland, and Northern Ireland, even by the Bank itself or any of its branches, in payment of its notes of higher values The £5 Bank note was made legal tender in England and Wales for payment of *any amount*, except by the Bank itself or its branches, and not, as under the Act of 1833, legal tender for payments *above* £5 only.

The Bank was also authorised to issue notes against the Issue Department's total holding of gold coin and gold bullion (and not gold *or silver*, as under the Bank Charter Act, 1844), and in addition, to issue notes against securities to an amount of £260,000,000. The securities so held may include silver coin to an amount not exceeding £5,500,000

The Act of 1928 thus retained the principle of a *fixed fiduciary issue* established by the Bank Charter Act, but it replaced the clumsy and uncertain method of suspending the Bank Act, and met the demand for a more elastic note issue, by clearly prescribing the method by which the fiduciary issue of £260 millions may be increased to meet unusually heavy demands for currency and credit. The Bank of England may now increase the fiduciary issue above the fixed limit, provided the sanction of the Treasury is first obtained. But any authority so given must be immediately communicated to Parliament and shall apply only for a period not exceeding six months, though it may thereafter be

renewed for a further period of six months, provided that no expansion of the fiduciary circulation shall exist for more than two years without express parliamentary sanction, *i e.*, the passing of an Act of Parliament authorising the excess.

FEATURES OF MODERN ENGLISH BANKING.

Since 1833, the development of the joint-stock banks has never faltered. Their progress has naturally been bound up with that of the country as a whole, and their organisation has been constantly improved to keep pace with modern conditions Striking features of that development include the concentration of the banks by amalgamation and absorption into a small number of very large institutions , the establishment by the larger institutions of branches throughout the country ; the extension of the activities of English banks to other countries, and the development of the Central Reserve System

Amalgamation in English Banking.

The process of amalgamation between the banks has resulted in the development of vast organisations, notably the " Big Five,"—the Midland, Lloyds, Barclays, the Westminster, and the National Provincial These great banks, which have at their disposal almost incredible resources and facilities for the convenience of customers, have achieved their present size by a variety of methods, including (*a*) *The Absorption of Private Country Banks by Joint-Stock Banks* —Some of the largest banks of to-day are mainly amalgamations of large numbers of small private and local banks, *e g* , Lloyds Bank and Barclays Bank (*b*) *The Absorption of Smaller London Banks by Large Provincial Banks.* (*c*) *The Amalgamation of Large Joint-Stock Banks* — This process was particularly active during 1918–1920, when the five leading institutions assumed their present proportions mainly as a result of amalgamations between joint-stock banks which had already attained considerable dimensions.

The Economic and Social Effects of Bank Amalgamations.

The unceasing growth in the size of English banks has occasioned a certain amount of uneasiness among statesmen and business leaders. Some maintain that the concentration of enormous resources under the control of a small number of men constitutes a danger to the community. Some fear the harmful effects of monopoly, whilst others are concerned with the more obvious danger that such large institutions may become unsound

So far as the customer is concerned, the process of amalgamation is attended by the disadvantages involved in the disap-

pearance of the personal element. The centralisation of control at Head Office introduces an element of " red-tape " which denies the local manager any right to work on his own initiative, while there is a tendency for both the manager and the head office to have less of that essentially specialised knowledge of local occupations, industries, customs and prejudices so characteristic of the old private banker. Furthermore, there is some danger that the continual growth of the banking institutions may result in the inadequate supervision of loans, and the granting of more accommodation than is strictly justified The " Big Five " have to some extent counteracted these tendencies by the formation of local directorates.

In spite of these objections, and though the process of amalgamation has been the subject of widespread criticism, the balance of opinion is that it has, on the whole, been advantageous both to the banking system itself and to trade But in 1924, and again in 1925, the Chancellor of the Exchequer announced that no further amalgamations of the large joint-stock banks would be favoured, so that, as far as the great banking institutions are concerned, the limit of expansion by amalgamation has apparently been reached.

Expansion Both at Home and Abroad.

Practically the whole of the banking business of England is now centralised in the hands of a few large institutions, operating chiefly from London The local banks are controlled by branch managers, who are subject to the direction of officials at the various head offices, advised in many instances by local boards of directors.

This remarkable expansion of the branch banking system is traceable to the intensity of competition between the leading institutions, the desire to provide every convenience for customers, the endeavour to increase business and profits by tapping new resources, and the wish to effect greater economy by saving agents' commissions and expenses.

For a long period of years foreign banks have had branches in London and other world centres, but prior to 1911 the interests of English banks in places outside this country were entirely served through the agency of foreign institutions. In the past this policy applied even to the neighbouring countries of Scotland and Ireland, and it was, consequently, a marked departure from established practice when certain leading English banks opened branches in important continental towns, and also acquired interests in or established working agreements with banks in Scotland, Ireland, and other countries.

These developments are productive of certain advantages.

The essential function of gathering deposits and directing them into productive channels of employment must become more efficient by the widening of the sphere of operations. Those banks which have entered the foreign banking field claim that the possibility of securing precise and regular information from foreign branches constitutes a valuable asset to trade, and that foreign connections enable banks in this country to share in the prosperity of other areas. On the other hand, those banks (notably the Midland) which are definitely against the policy of extension overseas, claim that the restriction of direct operations to the home field makes for greater safety. And there is little doubt that banks operating abroad have had to face considerable difficulties, as for example, those arising from exchange depreciation, price fluctuations, political disturbances, opposition from local banking interests and interference by foreign governments.

The Development of the Central Reserve System.

The last important feature of modern English banking which calls for notice is the arrangement whereby the liquid cash reserves of the great banks are concentrated in the hands of the Bank of England, which thus acts as the banker's bank, and, largely by virtue of this fact, occupies a position of pre-eminent importance.

The branches of the joint stock banks in London and throughout the country maintain on hand only sufficient cash to meet their ordinary requirements for till money, and transfer the bulk of their surplus funds to the head offices, which maintain a current account with each local branch. On the same principle each head office retains only sufficient cash on hand to meet its estimated requirements, leaving any surplus funds on current account with the Bank of England, whence they may be withdrawn in legal tender on demand; and as the account of the Clearing House is also kept at the Bank, the maintenance by each clearing banker of a current account with the central institution facilitates the large transfers necessary for clearing purposes

The Bank of England is thus liable to be drawn upon at any time to meet heavy demands for legal tender in any part of the country. The customer depends on the branch bank for supplies of currency ; the branch banks look to their London offices, and these, in turn, depend on the Bank of England. But in spite of this, the Bank conducts its business in the same way as any other banking institution, and is under no legal obligation to make special provision to meet demands from the banks as distinct from its ordinary customers. Nevertheless, its moral

obligation to safeguard the nation's ultimate cash reserve is not unrecognised, and, accordingly, special precautions are taken to prevent any undue depletion of its resources.

The vast responsibility thus resting upon the Bank of England is accentuated by the fact that in normal times London is a free gold market, and any gold required for export is most easily obtained from the Bank's Reserve. Foreign nations are not slow to take advantage of this ready availability of gold supplies, so that the Bank is liable to be drawn upon, not only to satisfy the needs of a multitude of bank branches within the country, but also to meet the requirements of a foreign nation for gold bullion, whether for currency or for other purposes.

CHAPTER 2

FUNCTIONS OF THE BANKER

Banking institutions are an essential part of the credit mechanism of a present-day community. They organise and control the issue and circulation of credit instruments, they regulate the granting of bank credit in the form of advances and loans, they facilitate the movement of loanable capital, and make possible its distribution and use to the best advantage In supplying funds for productive purposes, the banks discharge an economic function of the first importance. In effect, if not in name, they are traders in loanable capital, buying that capital from depositors in order to sell it to borrowers

Definition of a Bank.

It is a surprising fact that English law contains no definition of the term " bank ", though Section 2 of the Bills of Exchange Act, 1882, contains the statement that " a banker includes any body of persons, whether incorporated or not, who carry on the business of banking " This statement, however, gives no indication of what is comprised in " the business of banking ", and so we find that, in spite of the unique power and opportunities to defraud the public afforded by the business of banking, practically any individual, or group of individuals, may set up an ordinary deposit and banking business in this country and be subjected to comparatively little interference or legal restriction.

In the absence of legislative guidance, well-known banking authorities have from time to time sought to provide a precise definition of the term " banker ", and possibly the most widely recognised of such definitions is that of Hart,[1] which is as follows —

> " A banker is one who, in the ordinary course of his business, receives money, which he repays by honouring the cheques of the persons from whom or for whose account he receives it."

This definition clearly regards as an essential function of a banker the acceptance of deposits of funds withdrawable on

[1] *Law of Banking*, page 1

demand by cheque. Indeed, the development in this country of the use of the cheque is a feature which has until recently distinguished English banking from banking in all other countries Hence the frequently-used definition of a banker as " a dealer in money and credit " is not entirely satisfactory, for there are many other forms of financial business which involve dealings in money and credit, as, for example, the business of a money-lender, or of a bill broker.

The Banker's Functions.

The receipt of money from customers, subject to their right to withdraw such money on demand by cheque, is, of course, the usual arrangement under which *current accounts* are opened and conducted in this country, but, in addition to accepting vast sums of money on these terms, English banks sometimes receive even more on *deposit account*, undertaking to pay the customer an agreed rate of interest upon the balance outstanding in return for the right to demand from him an agreed period of notice for all withdrawals The bulk of the funds so deposited are accepted subject to seven days' notice of withdrawal, and, although banks rarely insist on fulfilment of this condition, except in the case of very large sums, the stipulation is nevertheless an important safeguard in case the bank should have to face exceptional withdrawals.

The banker utilises the funds deposited with him in various ways, as by granting overdrafts on current account or fixed loans on loan account, or by discounting bills of exchange and promissory notes Thus it will be seen that the main function of a modern banker is actually a dual one—he borrows with one hand in order to lend with the other He functions both as lender and borrower and makes his profit out of the difference between the rate at which he borrows and the rate at which he lends This essential feature of banking business remains the same whether the bank is a vast joint-stock organisation, with a wealth of resources and a network of branches and agencies, or a comparatively small private bank And though both aspects of his business are highly important, it is no doubt true to say that the banker's solvency and the successful conduct of his business depend essentially upon the judgment which he displays in lending to others that which he himself has borrowed

In addition to this primary function of linking up lenders and borrowers of liquid capital, the modern banker performs a host of other functions which are of considerable utility to his customers and to the community generally. The majority of such functions were originally undertaken by banks solely for

the convenience and benefit of their extensive clientèle, but they have naturally reacted to the greater efficiency and greater profit of the banks themselves

• We may usefully divide these additional functions into two main groups, *viz.* : (1) *Agency* services, and (2) *General Utility* services.

The Banker as an Agent of his Customers.

The services of the banker as an agent include those rendered in collecting and paying cheques, bills, promissory notes, coupons, dividends, subscriptions, and insurance premiums , in conducting stock and share transactions (in respect of which he divides the commission with the stockbroker) , in acting in various other agency capacities, such as those of trustee, attorney or executor, and as agent, correspondent or representative of his customers, and of other banks and financial houses either at home or abroad

General Utility Services of British Banks.

The general utility services which the banker performs are even more numerous, and include (*a*) the issue of various forms of credit instruments such as bank notes (now confined in England and Wales to the Bank of England), letters of credit, travellers' cheques and circular notes, all of which, in effect, enable the customer to benefit from the banker's reputation for solvency and prompt payment , (*b*) the transaction of foreign exchange business—the modern counterpart of the ancient business of money changing—which, while it brings considerable profit to the banker, provides the business community with invaluable facilities for its dealings with foreign nationals , (*c*) the acceptance of bills of exchange, whereby the banker lends his name in return for a commission and thus enables his customers to "trade" on the banker's superior credit ; (*d*) the safeguard against fire and theft of valuables and important documents in his specially constructed strong rooms, a function which makes the banker a *bailee* of the goods entrusted to his keeping , (*e*) the distribution throughout the country of supplies of legal tender currency, with the related duties which banks have assumed of withdrawing from circulation light coins and defaced notes , and, finally, (*f*) the giving of opinions as to the respectability and financial standing of his customers, a function which is of considerable value not only to the banks themselves but also to business men generally, since it furnishes them with reliable and speedy information as to the general standing of people with whom they are dealing, and enables them to avoid losses due to giving credit to persons of little or no financial worth.

The Utility of Banking.

A consideration of the functions rendered by the banks will indicate at once that they must be of inestimable value to the trade and industry of the country. In acting as intermediaries between large numbers of depositors or lenders on the one hand and numerous borrowers on the other, banks mobilise capital and make its use effective They may be regarded as great reservoirs of loanable money into which flow a myriad small streams of liquid funds, and from which supplies of productive capital are distributed throughout the country, at the times when they are most needed and in the places where they can be most efficiently used Countless small sums of money are rendered productive which would otherwise remain in " idle hoard," and the wealth of large and small capitalists in a rich locality is rendered mobile and transferred to areas where that wealth can be efficiently and profitably employed, to the ultimate benefit of the community as a whole

The facility with which loans can be obtained from banks acts as a stimulus to production and an incentive to industrial enterprise Manufacturers and traders know that they can rely upon the banks for sound advice and financial accommodation at difficult periods, while there is little doubt that the banks, by a judicious regulation of credit, can perform an economic function of first importance in checking speculation and preventing financial crises.

Moreover, the existence of a sound and competitive banking system is in itself an encouragement to saving, thrift and economy The small depositor is brought to appreciate the facilities for safe investment which the banks provide, and, in a modern community, even the poorer classes become imbued with feelings of security and prosperity and are encouraged to develop the " saving habit ".

Conditions such as these must ultimately react to the general well-being of the community, and when it is remembered to what extent time, money and labour are saved by the cheque system, and by the general utility services of our banking institutions, it will be readily conceded that a country with a sound banking system is possessed of one of the firmest foundations of prosperity.

The Classification of Banks according to Functions.

The functions which we have described are common to nearly all banks operating in Great Britain, but it is possible to distinguish a certain degree of specialisation based on the transaction of a special type of business.

THE BANK OF ENGLAND.—The Bank of England, by virtue of

the circumstances of its foundation and of its subsequent rise to predominance, is in a class of its own. In addition to conducting all the usual functions of a modern bank (except the acceptance of bills), it acts as banker to the State and to all the other banks in the country, assumes responsibility for the safeguarding of the nation's ultimate cash reserve, undertakes the control of the currency and the regulation of the prevailing rate of discount and of the foreign exchanges, and, finally, enjoys a monopoly of the right of issuing bank notes throughout England and Wales.

THE "BIG FIVE"—In the second class are included the five leading joint-stock banks with head offices in London, already referred to as the "Big Five" Each of these is characterised by the wealth of its resources and the vast extent of its business.

JOINT-STOCK BANKS WITH SPECIALISED FUNCTIONS—There are in this country several notable instances of the performance by certain banks of a specialised kind of business, as, for example, the well-known banks of Lancashire and Yorkshire, which cater for the special needs of our great cotton and woollen industries,[1] and the Scotch and Irish banks, specialising in business with Scotland and Ireland respectively, and characterised by the power which most of them possess to issue notes in denominations of one pound and upwards

Mention may also be made of such institutions as the British Overseas Bank and the British Bank for Foreign Trade, specialising in the financing of overseas trade; the Yorkshire Penny Bank, catering for the poorer classes in the Yorkshire manufacturing centres, the Birmingham Municipal Bank, accepting small deposits from the working-class population and applying the funds for municipal purposes, and the Trustee Savings Banks, whose deposits, though mainly of small amount, now exceed £150,000,000

PRIVATE BANKS—The fourth class is now mainly of historical importance, as there remain only two important representatives—Messrs Glyn, Mills & Co and Messrs Charles Hoare & Co—of the once numerous class of old-established private banking firms which conducted business either as private bankers in the country, or in London itself as West End bankers or Army agents, or which conducted a city business very similar to that of the joint-stock banks, as in the case of Glyn, Mills & Co.

THE DOMINION AND COLONIAL BANKS IN LONDON.—In this group there are, first, the banks which specialise in business with the self-governing Dominions—Canada, Australia, New Zealand

[1] *E g*, Williams Deacon's Bank, The District Bank and The Manchester and County Bank, all with head offices in Manchester, and Martins Bank, with its head office in Liverpool.

and South Africa—acting as financial agents for the Dominion Governments and undertakings, and conducting most of the exchange business between London and the Dominions. Some of these banks, such as the Bank of Australasia and the Bank of New Zealand, have their head offices in London, although their branches and the bulk of their business are located in one or more of the Dominions overseas.

In this section are also included banks, such as the Bank of British West Africa, whose business is primarily with our colonies and dependencies.

Then there are the Eastern Exchange Banks, such as the Chartered Bank of India, Australia and China, and the Hong-Kong and Shanghai Banking Corporation, which are engaged primarily in the conduct of banking business (particularly bullion and exchange operations) with our Indian Empire and other Eastern countries.

MERCHANT BANKERS —In a sixth class are the various concerns in the City which are known as " merchant bankers " or "merchant banks". Most of these function mainly as " accepting houses ".

FOREIGN BANKS —The final class embraces a large and cosmopolitan group of foreign banks, the existence of which is evidence of the financial supremacy of London and the consequent need for representation therein of most of the important banks in the world As is natural, the foreign institutions transact business mainly with or on behalf of their own nationals, but they also play an important part in the cosmopolitan sphere of London banking

Classification of Banks according to their Mode of Incorporation.

Banks in this country may also be classified according to their mode of incorporation, although this aspect has necessarily become less important with the growing supremacy of the joint-stock institutions and the almost complete disappearance of the old-established private bankers.

First in order of historical importance must be placed the *banks established by royal charter*, among which are the Bank of England, the Bank of Ireland and the Bank of Scotland, together with certain colonial institutions such as the Chartered Bank of India, Australia and China The powers and constitution of such banks are clearly defined by their charters, while the liability of each shareholder therein is limited to the amount of his holding of capital

The second class comprises the *joint-stock banks with limited*

liability registered under the Companies Acts. Most British banks, including, of course, the "Big Five," now belong to this group, and the limitation of the liability of the shareholders has resulted in the distribution of the capital of such concerns among shareholders of almost every section of the community.

The third class, comprising *private joint-stock banks with unlimited liability*, is now practically obsolete, and, in fact, only one representative—Glyn, Mills & Co —remains as an independent institution at the time of writing Another representative of this class—Coutts & Co —although still retaining its separate character, is now controlled by the National Provincial Bank.

Finally, there is a heterogeneous class of banks, including the merchant bankers in the City (many of whom trade as private partnerships), and the banks incorporated under dominion or foreign laws.

Advantages of Joint Stock Constitution.

This brief recapitulation indicates that the most important of our existing banks are formed as corporate bodies under the Joint-Stock Companies Acts, in just the same way as a large proportion of other trading concerns. This method of incorporation is of advantage both to the bank itself and to the public The former benefits directly by the absence of the formalities and delays which accompany the incorporation or the alteration of the constitution and powers of an institution formed by Royal Charter, and also obtains the advantages of limited and reserve liability and of free transferability of its shares Indirectly the bank benefits also from that wide publicity regarding its affairs which forms the public's strongest safeguard The insistence by the judicature on the periodical publication of bank balance sheets constitutes the public's most certain protection against those weaknesses which characterised our earlier private banks, at the same time, such publicity encourages every banker to rely for the extension of his business and for the enhancement of his reputation largely upon the strength of his position as evidenced by his half-yearly figures.

CHAPTER 3

THE BANKER'S FUNDS

In the exercise of his principal functions—in accepting deposits on current account and in granting loans to his customers—the banker incurs a liability to pay legal tender on demand, but in making a large proportion of his advances and in discounting bills he acquires the right to demand repayment only at some future time It is, therefore, of vital importance that the banker should not run even the slightest risk of being unable to meet any demand likely to be made upon him at a moment's notice

Unquestionably, the reputation of British banks is attributable in no small degree to their punctuality of payment and to their ability and judgment in deciding how much they can lend and how best they can lend Modern joint-stock banking has been built up and is still based upon the principle, discovered long ago by the early goldsmith-bankers, that only a small proportion of the money left by depositors with a banker is demanded at any one time, and that, provided a sufficient reserve of legal tender is maintained for the satisfaction of all current and probable demands, the remainder of such money can be lent out at interest or invested in various forms of securities yielding a profitable return

A Bank's Balance Sheet.

These statements can be illustrated by an analysis of the items in the balance-sheet of one of our large joint-stock banks (see opposite page).

The law prescribes that all limited joint-stock banks shall draw up a balance-sheet *twice* in every year, and that they shall exhibit a copy at the Head Office and every branch, and file a duly audited and authenticated copy with the Registrar of Companies on the First Monday in February and the First Tuesday in August each year.

Such a provision is clearly of the greatest importance and utility to all connected with a joint-stock bank, as it ensures not only a careful and punctual preparation of its figures, but also that any reputable bank will aim at placing before the public a

NATIONAL PROVINCIAL BANK, LTD.

BALANCE-SHEET AS AT 31ST DECEMBER, 1929.

Liabilities.	£	s	d	Assets.	£	s	d
Capital —				Coin, Notes and Balances with the Bank of England	31,626,945	1	5
Registered, £60,000,000, subscribed, £43,617,080				Balances with, and cheques in course of collection on other banks in the United Kingdom and Ireland	10,257,758	9	6
Paid up —				Money at call and short notice	19,413,496	8	2
120,000 Shares of £25 each, £3 10s paid	420,000	0	0	Bills discounted — British Government Treasury bills, £14,970,000, bills payable by British firms and institutions in the United Kingdom, £11,282,876 9s 1d, other bills, £1,937,733 10s 1d	28,190,609	19	2
1,972,354 Shares of £20 each, £4 paid	7,889,416	0	0	Investments—British Government securities, £30,162,686 1s 8d, Indian and Colonial Government securities, stocks of British and Indian railways, British Corporation and water-works stocks, £4,085,656 17s 11d, canal, dock and other investments, £1,575,285 12s 10d	35,823,628	12	5
234,000 Shares of £5 each, fully paid	1,170,000	0	0	Investments in other banking companies at cost or less than market value*	938,750	0	0
	9,479,416	0	0	Investments in subsidiary companies at cost or under*	2,514,000	0	0
Reserve Fund . .	9,479,416	0	0	Advances to customers and other accounts	156,678,357	1	4
	18,958,832	0	0	Bank premises at cost, less amounts written off	6,076,878	3	11
Current, deposit and other accounts	271,712,336	17	6	Liabilities of customers for acceptances, indorsements, engagements, etc, as per contra	15,174,188	6	8
Liabilities for acceptances, indorsements, engagements, etc, as per contra	15,174,188	6	8				
Balance of Profit and Loss Account carried forward to 1930 . .	849,254	18	5				
	£306,694,612	2	7		£306,694,612	2	7

* Details of these holdings are given in the published Balance Sheet

statement which can be challenged neither on its merits as a model of clearness and correctness, nor by reason of its disclosure of any weakness in the financial position of the institution concerned.

THE LIABILITIES OF A BANKER.

In analysing the balance-sheet reproduced above, we will consider first the items on the left or *liabilities* side, for this side is not only the less imposing and therefore the more easily understood, but may also be regarded as the side from which the business of the banker originates, inasmuch as most of the liabilities represent the sums received by the banker for employment in his essential business as a lender of capital.

Capital Paid up.

This item represents the amount invested in the bank by its shareholders. In banking, as in any other business, the investors or shareholders, by providing the capital, are in the

nature of proprietors of the concern, and the amounts owing to them cannot be paid in the event of liquidation until all other claims have been satisfied.

The words " paid up " are of vital significance, for they distinguish only one of the various ways in which the capital of a joint-stock bank may be described. Thus the *Authorised*, or *Nominal*, or *Registered* Capital is the *total* amount of capital which the bank has power to issue (£60,000,000 in the balance-sheet given), and is to be distinguished from the *Issued* Capital, *i e*, the amount actually offered for public subscription, and from the *Subscribed* Capital, which is that sum applied for by the public and allotted by the directors of the company to sundry applicants, who thereafter become shareholders in the concern

It is not unusual for only a part of the Subscribed Capital to be " called up ". Thus, for each £10 share taken up, the original shareholders may be asked to pay the bank only £3 in cash, in which case the *Paid up* Capital would represent only three-tenths of the Subscribed Capital The remaining seven-tenths is then described as *Uncalled* Capital, and this may be further subdivided into (*a*) *Callable* Capital, *i e*, a proportion (for example, three-tenths of the original Subscribed Capital) which the directors may call at any time they deem fit, subject to any conditions in the Company's Articles of Association, and (*b*) *Reserve* Capital, *i e*, the remaining balance of four-tenths which may be called up by the directors only in the event of the liquidation of the bank. Most English joint-stock banks have established such a Reserve Capital, and by so doing have materially strengthened the security available to the bank's depositors

Reserve Fund.

This must be carefully distinguished from the Reserve Capital described in the preceding paragraph, for whereas the latter is a contingent fund to be drawn from the *shareholders* only in the event of liquidation, the Reserve Fund is actually an accumulation in the hands of the *Company* of sums allocated from the bank's profits and invested from time to time in first-class securities.

The Reserve Fund is, of course, available to be drawn upon at any time in the event of the bank's incurring heavy unexpected losses, and, although it thus provides an additional safeguard for the bank's customers, it nevertheless belongs to the shareholders or proprietors of the bank and is sometimes drawn upon for their benefit to permit of the issue to them of shares on bonus terms or to equalise the dividends paid as between one year and another. This fund may, in fact, be regarded as a surplus gradually built up by careful management and representing the excess of the

value of the bank's assets over its total liabilities, including its liability to its shareholders for capital paid up and for undivided profits.

Current, Deposit, and Other Accounts.

This item is by far the largest, and represents the total sum deposited with the bank by its many customers on current and deposit accounts, the latter bearing interest and being subject to an agreed notice of withdrawal, while the former usually earn no interest and are repayable upon demand

In addition, the item includes as "Other Accounts" any other credit balances in the bank's ledgers, such as the balances of its Unclaimed Dividend Account and Unclaimed Interest Account, together with any hidden "Reserve Accounts" which the bank may choose to maintain for its own purposes In some cases, the item includes the balance of the bank's Profit and Loss Account

Liabilities for Acceptances, etc.

The total under this heading represents the liability of the bank in respect of bills of exchange which it has accepted or indorsed for the accommodation of its customers As, however, the latter are liable to recoup the bank for any loss it may suffer by thus lending its name, the amount is "offset" by a corresponding item on the other side of the balance-sheet.

In many bank balance-sheets, the total hereunder also includes the bank's contingent liability in respect of confirmed credits, forward exchange contracts and other engagements entered into by the bank on behalf of customers Sometimes, however, these are shown separately as "*Engagements*".

THE ASSETS OF A BANKER.

The particulars on the right or *assets* side of the balance-sheet indicate how the bank employs the sums entrusted to its keeping by its customers and shareholders.

The assets are always arranged in order of *liquidity* or realisability, so that customers and others interested in the concern can estimate its strength and stability almost at a glance by observing the proportion of liquid assets maintained by the management. Thus "Cash" always appears first, while the item "Bank Premises", representing assets which are least readily convertible into money, usually figures last.

Coin, Bank Notes, etc.

Every bank maintains at its head office and at each branch a sufficient reserve of legal tender to meet all probable demands.

These cash holdings are the bank's " first line of defence ", and with them, as a rule, is lumped the bank's " Balance at the Bank of England ", which is generally regarded as equivalent to cash.

Until recent years the amount shown in the second item as " Balances with Other Banks, etc ", was also so regarded and was generally included in one sum with the cash holdings. The present practice is clearly an improvement, although in ordinary circumstances there is little doubt as to the complete and instant realisability of the sum shown under this heading

The item " Balance at the Bank of England " is one which is to be found in the balance-sheets of all joint-stock banks, and represents that portion of the bank's surplus funds which is held on deposit with the central institution This practice of depositing surplus liquid balances with the Bank of England is the essential feature of the Central Reserve System, and is attended by a number of advantages, not the least of which is that it enables large transfers of funds between the banks, and particularly the heavy daily settlements arising from the " Clearing System ", to be effected with the minimum of trouble and delay.

Money at Call and Short Notice.

The keeping of an adequate cash reserve is, of course, as necessary to a banker's daily business as it is to the maintenance of his stability But cash kept in a safe or on current account with another bank earns nothing, and bankers naturally had to seek some method of loaning which, while it ensured that the funds would be readily available if required, would provide at least some profitable return on the money employed.

Happily, such an outlet was found in that intricate but remarkably efficient organisation known as the London Money Market, where numerous bill brokers, discount houses and stock exchange operators are ready to borrow large sums of money, for short periods, at a low rate of interest, and subject to repayment at call, or after not more than seven days' notice.

Bills Discounted.

A bank's " third line of defence " consists of the bills of exchange which it has discounted or negotiated for customers, or which it has purchased in the open market.

It should be explained that " discounting a bill " simply means purchasing the bill at its face value (*i e.*, the sum for which it is drawn) *less* the amount of interest on the bill for the time to elapse before it falls due for payment. Thus a bill for £100 which is not payable until the expiration of three months

would be worth £99 to the banker if interest is reckoned at 4 per cent. per annum.

A large part of a joint-stock bank's holding of discounts consists of ordinary trade or commercial bills drawn on British firms and purchased by the bank from customers (including bill brokers) A further proportion comprises " bank paper ", *i e.*, bills drawn, accepted or indorsed by reputable banks in this country, while a considerably smaller amount (included no doubt as " other bills " in the above balance-sheet) represents bills drawn on firms and banks in other countries

In addition, the total of Bills Discounted in the balance-sheet of an English bank always includes a considerable sum in British Government Treasury Bills, *i e* , promises by the Treasury to repay stated sums at the expiration of a given period, usually three or six months During and after the Great War the amount so invested by each bank increased considerably, and there is little doubt that in the case of most banks the holding of Treasury bills is now greater than the holding of bank and trade bills

First-class bills of exchange are frequently described as an ideal form of investment for a banker's surplus funds The truth of such a statement is apparent when it is remembered that bills are payable *in full* at the expiration of comparatively short periods, and, provided the financial stability of the parties responsible for payment is undoubted, the banker is reasonably sure of an automatic return of his cash as the bills fall due.

Furthermore, although bills are not immediately realisable assets in that their date of maturity cannot be hastened, first-class bills can always be rediscounted if funds are urgently required, while the fact that they can be obtained for varying sums, large and small, and for varying periods before they fall due, enables the banker to choose such bills as will suit him best. He can without difficulty increase his cash reserves by simply refraining from discounting further bills from time to time, as his holdings fall due for payment. Finally, he can so arrange his investments in bills that they mature and increase his cash balance at those times when he most requires additional funds, as, for example, at the turn of the quarter or when he has heavy dividends to pay on behalf of his customers.

The foregoing items of the balance-sheet comprise the banker's *liquid assets*. Those which remain represent the more permanent means of employing the funds at his disposal, and accordingly include those items upon which it would be dangerous to rely in times of emergency for money wherewith to meet the urgent demands of his customers for repayment of their deposits.

Investments.

These include the bank's investments in British and Colonial Government securities, in British municipal and railway stocks and loans, and in affiliated banks, *i.e.*, smaller banks intimately associated with the larger concern which holds a large part of their capital.

In some balance-sheets part of the total under the heading "Investments" is described as "lodged for public accounts" This means that, in accordance with law, investments to the amount indicated are registered in the names of joint trustees (including representatives of the bank), and are specially held (or "ear-marked") as security for the due repayment of public money lodged with the bank on account of government departments or local authorities

While Investments are correctly regarded as a bank's fourth line of defence, they are characterised by the fact that they are difficult to realise in emergency, for it is just at those periods when cash is most urgently needed that securities are unsaleable or saleable only at considerable loss. If, during a period of emergency, all the big banks endeavoured to realise their investments, there would be a heavy fall in security prices which would be accentuated by sales of investments by stock exchange operators who were unable to renew their loans Furthermore, the selling of large amounts of securities by a large bank would not only be dangerous as giving rise to suspicions of weakness, but would also serve to intensify any lack of confidence which might exist On the other hand, there is little doubt that our large joint-stock banks show the totals of such investments at considerably below their real worth, and by so doing create what is in effect a secret reserve.

Advances to Customers.

Under this heading are included the loans made by the bank to its customers as fluctuating overdrafts on current account, and as fixed loans on loan account The majority of such loans are repayable on demand or at short notice, but only a small proportion of the large total under this heading can be turned into cash at a moment's notice or even within a reasonable period. The trader who has borrowed from the bank in order to purchase additional stocks, or a private individual who has obtained an advance in order to buy a house, cannot be expected to repay the debt upon demand. Indeed, it is difficult enough for such customers to wipe off their indebtedness even within the period of notice which is usually allowed in such cases. At all events, it is certain that no bank of repute

can rely for funds in an emergency on a wholesale demand to its customers to repay their loans.

Bank Premises.

The premises of a bank are among its least realisable assets, for, apart from the fact that the large bank offices could only with difficulty be converted to other uses, it is obvious that assets of this character can at best be realised very slowly. Nevertheless, it is a well recognised fact that the value of the item Bank Premises as stated in the balance-sheets of our banks is far below its true worth, in substantiation of which we cannot do better than refer to the oft-quoted fact that the value of the premises of the Bank of England does not appear in its balance-sheet at all, although the asset must be worth several millions sterling.

Liabilities of Customers for Acceptances, etc.

This item is in the nature of a contra entry to the similar item which appears on the other side of the balance-sheet, and indicates that, although the Bank has assumed liability in respect of its signature on bills to the amount stated, it is secured to an equivalent extent by the signatures of its customers on the same bills.

Other Items which Appear in Bank Balance-Sheets.

Bank balance-sheets sometimes include other items in addition to those discussed in the foregoing paragraphs

Notes Issued or Notes in Circulation.—When one of these items appears, as in the case of the Bank of England, it represents the amount of notes issued by the bank which are in the hands of the public or held by other banks.

Rebate on Bills not Due.—Such large sums are invested by modern banks in the discounting of bills that a considerable proportion of the discount is unearned by the bank at the time its half-yearly balance-sheets are made up. Accordingly a banker adjusts his profits by opening an account in his books headed "Rebate on Bills not Due", to which he *credits* the total amount of discount which he calculates to be unearned at the date of the balance-sheet, and he includes that total in the balance-sheet under the heading "Rebate on Bills not Due" on the liabilities side. Where this item does not appear in the balance-sheet the total of the item "Bills Discounted" is adjusted to allow for unearned discount.

Balance of Profit and Loss Account.—The balance of a bank's Profit and Loss Account is frequently *not* included in

the general total of its current and deposit accounts, but is shown in the balance-sheet as a separate item on the liabilities side. The balance, of course, belongs to the shareholders of the bank and usually represents the undistributed profit after payment of the dividend and after providing for depreciation and allocations to reserves and other funds.

THE TEST OF A BANK'S STRENGTH.

The balance-sheet of a great joint-stock bank is of great importance not only to its numerous shareholders and officials, but also to the multitude of depositors who have entrusted their savings to its keeping, and further, to the body of potential customers of the bank represented by the public in any places wherein its business is conducted The published balance-sheet is necessarily the best means by which an outsider can judge the soundness and stability of the bank's organisation, but it is clear that the figures in themselves can convey little information which is useful, unless those perusing the items are able to form some estimation of their significance and true relation to one another.

What is an Adequate Cash Reserve ?

Every banker is influenced by two distinct forces pulling in opposite directions On the one hand, the necessity of maintaining an adequate reserve of legal tender constantly dictates caution ; on the other hand, the desire to make profits for the bank shareholders is a strong inducement to lend freely. What, then, is an adequate reserve ?

Clearly, much depends upon the class of business conducted. Banks which have considerable sums left with them on deposit at notice can safely carry smaller reserves than those which have a greater proportion of money on current account, or on deposit subject to withdrawal on demand. Again, banks which are essentially deposit or savings banks must maintain a higher percentage of cash than banks such as the agricultural and credit banks of the Continent, which are formed and capitalised specially for the purpose of granting loans against land and providing capital for industrial undertakings.

A bank operating chiefly in a rich residential suburb, where payments are made largely by cheque and frequently to recipients in other areas, requires proportionately less cash in its tills than a bank in a busy seaside resort where money is being spent freely and cash is being continually demanded by incoming visitors for pleasurable disbursements. Similarly, a joint-stock bank whose business lies largely in agricultural districts does not

require as a rule so high a proportion of cash as a bank which operates principally in busy industrial areas, for money is turned over much more quickly in the centres of great industrial activity.

There are other important factors which influence the proportion of cash held by a banker The amount of a banker's reserve varies considerably with the state of public confidence and with the general conditions of trade. In times of depression and business uncertainty, when confidence is at a low ebb and people lack faith in the future, greater cash reserves are maintained by the banks than in prosperous times when faith runs high, when trade shows promise and when many customers, intent upon " making hay while the sun shines ", apply to the banker for accommodation to finance new business ventures or to extend their existing operations. But whatever the conditions of trade or the circumstances of the banker's business, a sufficient reserve of legal tender must be maintained to meet all current and probable demands, normal and abnormal, for the bank's reputation for solvency might be injured and its stability impaired by even momentary hesitation in meeting its obligations

The Proportion of Cash Held.

There are a number of different ways of calculating what is known as a bank's *proportion*, or percentage, of cash held One method is to take the total of the balance-sheet as 100, and to work out the amount of cash as a percentage of that total This is, of course, tantamount to determining what proportion of a bank's total assets is represented by cash, and it is in fact frequently employed in comparative statements drawn up to indicate the distribution of the assets and liabilities of banks in this country

Another method, which has much to recommend it, is to take the proportion of the bank's cash to the amount of its liabilities on Current, Deposit, and Other Accounts , in other words, to compare the banker's cash (his first line of defence) directly with the source from which spring his most frequent and urgent demands for payment This is the method adopted by the large joint-stock banks in this country, the proportion of cash to deposits maintained during recent years averaging about 10–12 per cent., and " anything from 10 per cent. upwards may be regarded as sufficient for practical purposes ".[1]

The Proportion of Advances to Liabilities.

The second factor of importance in estimating the strength of a bank is the relation between the total of its loans and

[1] F E. Steele, *The Banker as a Lender.*

advances and its liabilities on current and deposit account, or alternatively the proportion of the amount of its loans and advances, excluding discounts, to the total of the bank's assets. The object of such an estimate is to determine whether the bank is maintaining a sufficiently liquid position, or whether it must be regarded as "overlending", *i.e.*, locking up too great a proportion of its funds in loans of a more or less fixed character.

It is difficult to lay down any hard and fast rules, but it is said to be an established principle among British banks that advances, *excluding* bills discounted, should not be greatly in excess of 50 per cent. of the total liabilities on deposit and current accounts, although in recent years the proportion has shown a tendency to rise. In 1929 the average was about 55 per cent.

The Quality of a Bank's Loans and Investments.

Apart altogether from the relative proportion of the various items in a bank's balance-sheet, the question of the *quality of a bank's loans and investments* is clearly one of vital importance, although it cannot, of course, be answered by any consideration of the figures disclosed by the average balance-sheet.

The strength of any institution as indicated by its balance-sheet is obviously merely ephemeral if its investments are largely of a speculative character, or if its loans are made without adequate security. Moreover, it is clearly more advantageous if a bank's loans are well distributed both in amount and in area, than if they are made in large amounts to a comparatively small number of customers or are confined mainly to a particular area or industry, either of which may be subject to a general disaster or acute depression.

Partly as a result of the great development of the branch banking system in this country, but mainly as a result of deliberate policy, our large banks do not lock up their resources to any great extent in any one industry Their risks are well spread over a wide field, while the capital which they supply is lent for relatively *short periods*, *i.e.*, English banks supply *commercial* rather than *investment* capital. If a manufacturer applied to a bank for a loan of £30,000 for the purpose of erecting a factory and installing machinery and plant, the request would probably be refused. But if the same manufacturer applied to the bank for a temporary overdraft to pay for raw materials, *i.e.*, to finance production during the stages between production and final consumption, accommodation would probably be granted if satisfactory security were forthcoming.

The Sources of a Bank's Profits.

Banks exist first and foremost to earn dividends for their shareholders and to make those dividends as large and as regular as is compatible with the maintenance of a sound and prosperous institution

The sources of a banker's income are numerous. First in order of importance is the amount received as interest on loans, overdrafts, and money lent out at call or short notice, together with the current account charges for "commission on turnover," "ledger fees" and "postages". In a similar category is the profit derived by the banker from discount charges and commission on bills of exchange

Another important source of income comprises interest on the banker's investments in stocks and shares, a fairly stable item which can be calculated in advance within reasonable limits Lastly, there are commissions earned by the banker for the variety of services which he renders, including acceptance commissions, commissions on stock exchange transactions, on operations in connection with the flotation of new joint-stock companies, and on foreign exchange business transacted for his customers. To this last item must, of course, be added the profits made by the exchange dealers in their daily operations.

But the banker's business is not all profit. As in any other business, there are heavy charges and expenses to be met and inevitable losses of various kinds to be provided for The chief item of expenditure is necessarily the sum paid to customers in respect of interest on deposits, and to this major expense must be added items such as salaries, pensions and directors' fees, rent, rates, taxes and insurance of premises, postages and stationery, travelling expenses and repairs to premises Apart from these necessary outgoings, the bank must make adequate provision to meet such ordinary trading expenses as depreciation of premises, leases and securities, while the nature of a banker's business renders him liable to severe loss from bad debts, theft, mistakes of his staff involving monetary liability, and from adverse legal decisions which may give rise to heavy costs.

Happily, the business of banking in this country is conducted on such efficient and sound lines that the shares in our joint-stock banks are regarded as being among the safest, steadiest and most profitable of stock exchange investments.

PART II

BANKER AND CUSTOMER

CHAPTER 4

THE CUSTOMER'S ACCOUNT

In spite of the importance to bankers of an understanding of the exact meaning of the term " customer ", there exists no legal definition No definition is given by the Bills of Exchange Act, 1882, while the legal decisions on the point are so conflicting as to afford little clear guidance. Probably the nearest approach to a definition was the statement of Lord Davey in *The Great Western Railway Company* v *London and County Bank*, 1901, to the effect that a customer " is a person who has some sort of an account with a banker ", from which it follows that any one may become a customer of a bank by opening a deposit or current account. (See also Chapter 16)

The Relation between Banker and Customer.

The relation of banker and customer is primarily that of *debtor and creditor*, with a superadded obligation on the part of the banker to honour the customer's cheques up to the amount of his available credit balance, or up to the limit of any overdraft which the banker has agreed to allow.

A banker is not a *trustee* of the money left with him by the customer, nor is he an *agent* responsible for its disposal, although, as we shall see later, he often undertakes duties which make him both agent and trustee for his customers Money left with a banker on deposit or current account is *at his absolute disposal*, to do with as he pleases. It is really *lent* to him by the customer, subject to the banker's undertaking to repay the amount on demand, or, in the case of a deposit account, after stipulated notice has been given

Furthermore, the debt which is created by the deposit of funds with a bank resembles any other debt in the fact that,

if the bank becomes insolvent, the customer has no rights other than those of an ordinary creditor. He must prove in the winding-up or bankruptcy proceedings for the amount due to him.

Necessity for Demand for Repayment.

But the debt due by a banker to his customer differs from ordinary commercial debts in one important respect which was not clearly recognised until the case of *Joachimson* v. *Swiss Bank Corporation*, 1921 In that case it was decided that whereas, in the case of ordinary debts, *a request for payment* is *not* necessary before a creditor can take steps to enforce payment, unless the parties have stipulated that such a request shall be made, a *demand* on the bank for repayment *is* necessary before the debt owing to a customer, on current or deposit account, becomes what is known as " actually and accruing due ".

In the absence of this distinction, a banker owing money to a customer would have the right to tender the full amount of the customer's credit balance in repayment of the debt *at any time* or *at any place*, thus summarily closing the account without reasonable notice and possibly injuring the customer's credit through the subsequent dishonour of his cheques On the other hand, the customer could demand repayment of his balance *at any branch* of the bank, and *at any time*, conditions that would be contrary to the established principles of banking, which require a customer to draw cheques only upon the branch where he keeps his account, and to demand payment only during recognised business hours.

And in regard to *deposit* accounts, the giving of notice, where notice is stipulated for, and the production of the deposit receipt, where such is issued, are, of course, *conditions precedent* to the right of the customer to demand repayment of the balance due to him.

Current Accounts and the Statute of Limitations.

The decision in the *Joachimson* case is of technical importance in its bearing upon the effect of the *Statute of Limitations* on the debt owing by a banker to his customer.

This statute (properly designated the Limitation Act, 1623) provides that an action to enforce a simple contract debt must be commenced before the expiration of *six years* from the time when right of action first arose ; otherwise, the debt becomes " statute-barred ". The prescribed period begins to run from the date when the debt is first payable, or from the date of the last written acknowledgment of the existence of the debt, importing a promise to pay, made by the debtor or his duly authorised

agent, or of the last payment on account of the principal amount owing, or of payment of interest thereon.

The *Joachimson* case clearly demonstrated that since a debt owing by a banker does not become *due and payable* until the customer has made a specific demand for repayment, the six years required by the statute will not commence to run until such a demand has been made. Actually, of course, no reputable bank would refuse payment of a balance once a demand therefor was made by the person entitled to the money.

But in the reverse circumstances where the customer is indebted to the bank, the relationship is *essentially* that of debtor and creditor and the principle laid down in the *Joachimson* case does not apply. So, in the absence of any express agreement as to demand for repayment, or as to the date thereof, the debt is one which is immediately accruing due and liable to be called for by the bank at any time after the date of the advance. Accordingly, the Statute of Limitations begins to run *from the date of each advance* (*Parr's Bank* v. *Yates*, 1898), and the customer cannot be sued for repayment of the debt if, for six years after the date of any advance, he has *not* made any acknowledgment of the obligation or repaid any part of what is due, or *paid* any interest thereon (not merely been *charged* with interest), and the banker has failed to commence proceedings for recovery.

But although the Statute may thus prevent a banker from suing for the recovery of a debt which has been unacknowledged for more than six years, it does not prevent him from obtaining payment by retaining and realising any securities of the debtor which have come into his hands in the ordinary course of business. Nor does it prevent a banker from suing a person who has given a continuing guarantee for the due payment of the debt, if the guarantee contains an undertaking by the surety to repay the advance "on demand", or "three days after demand", for in such cases the Statute does not begin to run until an *express demand* for repayment has been made by the banker and has been refused by the surety.

The Appropriation of a Customer's Payments-in.

If a customer has several accounts with the same bank he can stipulate that funds paid in to his credit are to be placed in whichever account or accounts he may select, or he may insist that some or all of the money is to be applied specifically to meet certain cheques, or to pay certain bills. If the banker does not agree to such an appropriation, he must refuse the amount tendered to him at the time of the tender.

In the absence of any such appropriation by the customer, the banker has the right to apply funds paid in to lessen or wipe off any debt owing to him by the customer, including even a debt which is statute-barred. But once such an appropriation is made and communicated to the customer, it is binding upon both parties, and cannot be varied or revoked by either.

The Rule in Clayton's Case.

In practice, specific appropriations of the kind here referred to are rarely made as between banker and customer, unless the customer has more than one account Hence it sometimes becomes necessary to determine how money paid into a current account shall be deemed to have been applied. The general rule of law in this respect is determined by what is known as the *Rule in Clayton's Case*, 1816, which provides that, where there is a *current* account between two parties and no evidence of any appropriation by either party of the items therein, *the money first paid in shall be deemed to have been first drawn out, i e* , the credits in order of entry in the account shall be deemed to have discharged the debits in the order in which they appear.

In the absence of agreement to the contrary, therefore, the Rule will operate against a banker who allows a customer to overdraw against security, since any payment into the account will be deemed to reduce the original loan, and any fresh advances will be unsecured

This principle is of particular importance in its bearing upon the rights of a banker under a guarantee, or against a deceased's estate, or against a partnership the constitution of which has been changed, for, unless in such circumstances the banker takes steps to prevent the operation of the Rule, he may be unable to recover the whole amount advanced. If, therefore, a banker wishes to protect himself against the operation of the Rule—which applies only in the case of a *current* or *running* account—he must *break* the account, *i e* , discontinue all entries thereon, and open a new account, at the same time informing the customer or his legal representative of the new arrangement.

The Obligation to pay a Customer's Cheques.

The feature which most distinguishes the relationship of banker and customer from that existing between other borrowers and lenders is the recognised obligation of the banker to honour his customer's cheques to the extent of the customer's balance, or up to the amount of an agreed limit if an overdraft has been granted, provided that such cheques are in proper form, and that no legal bar exists to prevent the banker from paying them.

This obligation or duty of the banker arises out of two implied agreements between the parties. The first is that the banker will repay what he borrows from his customer provided the latter makes a properly written demand for repayment at the correct branch The other is that the banker will not injure his customer's credit by refusing to pay cheques except upon reasonable and proper grounds ; if he does so, the customer is entitled to substantial but temperate damages as compensation for the injury he has suffered through the dishonour.

The banker's duty to pay cheques drawn by his customer does not apply to bills of exchange other than cheques, or to cheques issued by the customer against a *deposit* account, although bankers frequently do pay cheques drawn against deposit balances for the convenience of their customers.

The Duty of Secrecy concerning a Customer's Affairs.

It is part of the *contract* between a banker and his customer that the former will not disclose information concerning his customer's credit or the state of his account " except upon reasonable and proper occasion " In the case of *Tournier* v. *National Provincial Bank*, 1924, Lord Justice Bankes suggested that there are four of such reasonable and proper occasions upon which disclosure by a banker is permissible .—

(1) Where there is compulsion of law, as, for example, where under the *Bankers' Books Evidence Act*, 1879, a banker is ordered by the Court to produce his books in Court, or to produce a certified and duly sworn copy of an entry or entries therein

(2) Where there is a duty to the public to disclose, as, for example, where disclosure is necessary in order to avert a danger to the State.

(3) Where the interests of the bank require disclosure, as in the case where a banker issues a writ claiming payment of an overdraft and the amount thereof must be stated on the writ.

(4) Where there is an express or implied consent of the customer, as where a customer gives his banker as a reference as to his financial standing

The practice among banks of giving " *confidential opinions* " to one another concerning the credit and standing of customers is so well established that probably no customer could successfully object to it, unless he had expressly instructed his banker not to give such opinions. Provided the information is given in the usual manner and in the ordinary course of business. it

seems likely that a banker would be able to claim that, when a customer opens an account, he gives his *implied* consent to this practice.

When a confidential opinion is given, the information should be of an essentially general nature, embodying the banker's considered and truthful opinion as to the general reputation and financial position of his customer, but omitting any details which might infringe the customer's right to secrecy concerning his account. It is not the duty of a banker to give information other than what appears from the books of account before him, or what he is acquainted with from his personal knowledge.

Misrepresentation of a Customer's Position.

The question whether a bank is liable for damages for misrepresentation of its customer's position has long been a subject of contention, but the position now appears to be as follows .—

If a bank is accused of *fraudulent misrepresentation*, it is protected by Lord Tenterden's Act, 1828, and cannot be held liable *unless the representation is given under its seal.* But a bank manager or other agent of a bank who signs a document embodying a fraudulent misrepresentation will be *personally* liable

In regard to *innocent misrepresentation*, the position appears to be that an action against a bank cannot succeed unless (*a*) there was a duty on the part of the bank to give the opinion, *and* (*b*) the opinion was given by the bank under seal *or* on its behalf by a duly authorised official ; *and* (*c*) in giving the opinion, the bank or its official was guilty of negligence amounting to a breach of duty.

The Right to Set-Off a Customer's Balances.

Where the customer of a bank has two accounts in the same right, one in credit and the other in debit, and *there is no agreement, ear-marking, or course of business indicating an obligation to keep the accounts separate*, the banker is entitled, on giving reasonable notice to the customer, to set-off any credit balance against any debit balance and to combine the accounts in order to determine the net liability of the customer to the bank.

The opinion used to be held that two such accounts could be combined *at any time*, without giving notice to the customer. Now, however, a banker who combines a credit balance with an overdraft and without reasonable notice dishonours cheques drawn on the credit balance would probably render himself liable to an action for damaging the customer's credit. Indeed, one judge has gone so far as to suggest that the customer's

consent must be obtained before two separate accounts can be combined. (*Giving notice* does not necessarily mean that the customer's *consent* is obtained.)

The necessity for giving notice does not arise if the customer's account is *stopped* by his death, bankruptcy, or insanity, or by the service of a garnishee order (see below), for then the banker may at once combine the accounts in order to determine the net liability of the customer's estate to the bank. Furthermore, a banker is entitled *at any time* to combine different accounts if he holds securities of his customer under an agreement which provides that the securities shall cover the *ultimate* balance which may be due by that customer, or if the customer does anything to depreciate the value of the bank's security.

The right to combine can be exercised only if the accounts are *in the same right.* A current account and a deposit account in the same name or names may be combined, as also may two accounts of the same customer headed respectively "No 1 Account" and "No. 2 Account", provided that the banker has no actual or constructive notice that one of the accounts is connected with a trust or agency exercised by the customer. But an account, the heading of which indicates that it is a trust or agency account (*e g.*, "Golf Club Account", "Y M C.A Account", etc.), cannot in any circumstances be the subject of set-off against any other account of the same customer (unless there should be two of such accounts in the same right).

Again, a banker cannot claim to set off a partner's credit balance against a debt due by his firm, or *vice versa.* Nor can he combine the private account of a customer with a joint account upon which the customer is one of the parties, nor a debit or credit balance on the account of a deceased customer against a credit or debit balance standing in the names of his executors or administrators. Finally, a banker cannot in any circumstances combine the balances on different accounts of a public authority.

Following "The Usual Course of Business."

In all his dealings with a customer, the banker must take care to act in accordance with what is described as "the usual course of business", for, if he fails to do so, he may render himself liable to his customer for any loss or damage which may have arisen through his negligence. What is the usual course of business will depend generally on the custom of bankers in this country; "it must be the recognised or customary course of business of the banking community at large, not of any particular bank or group of banks, and a Court might well

reject anything which savoured of rashness or indifference to the interests of the customer or true owner. . . . The course of business must be not only usual but reasonable." [1]

Garnishee Orders and the Customer's Account.

A Garnishee Order is an order of the High Court in favour of a creditor who has obtained judgment against his debtor, attaching funds of the debtor which are in the hands of a third party, *the garnishee.*

Garnishee proceedings actually comprise two distinct steps. The first is the issue by the Court of a *Garnishee Order nisi*, which attaches the funds in the hands of the garnishee but gives him an opportunity of appearing before the Court to show cause why the funds in his hands should not be handed over to the judgment creditor The second step is taken when the order is made *absolute* by the Court, and the garnishee is compelled to transfer to the judgment creditor either the whole of the funds in his hands or such portion thereof as is necessary to satisfy the judgment debt

Several very important points arise in connection with these orders The order attaches *all* debts "*owing or . . . due*", so that the whole of a customer's balance on current account is attached, although the amount of the debt may be considerably less than the balance standing to the customer's credit. Consequently, a banker who receives a garnishee order must not interfere in any way with the balance on the relative account, and any cheques subsequently presented must be returned unpaid, even if they were issued before the date of the order, and even if the balance in excess of the amount garnisheed is ample to cover the payments.

If the balance to the customer's credit is *less* than the amount for which judgment has been obtained, the banker should dispose of the matter at once by paying the balance into Court as soon as the order *nisi* is served on him, if necessary exercising his right to deduct therefrom any debt which is properly due to him.

On the other hand, if the balance to the customer's credit is in *excess* of the amount of the judgment debt, the usual course (particularly if the banker is anxious to safeguard his customer's interest) is at once to inform the customer that the order has been served and to open a new account through which all future transactions are passed, the old account being allowed to remain dormant until the judgment debt is satisfied. If, in these circumstances, the order is made absolute, the banker should pay

[1] Paget, *Law of Banking*, 4th edition, page 206.

the required amount to the judgment creditor, and such payment then operates as a valid discharge as between the bank and the customer.

Since a garnishee order can attach only debts which are "*owing or* *due*", it is clear that such an order cannot touch any amounts which may *in the future become due* by the banker to the customer (*e.g.*, the proceeds of bills or coupons in process of collection, or of securities in process of realisation), nor can it touch any moneys which are not at the time of receipt of the order actually *due and payable*, or accruing due for payment, by the banker.

In this connection, difficulty arises because of the judgment in the *Joachimson* case, already mentioned. There it was held that money left with a banker is not a debt due and payable until a demand for repayment has been made by or on behalf of the customer, and at first sight it would appear that, unless this demand has been made, any balance in a banker's hands cannot be attached by a garnishee order. In the *Joachimson* case, however, the Court of Appeal held that the garnishee order *nisi* itself operates as a demand for repayment sufficient to render money on current account immediately repayable.

A garnishee order does not attach deposit accounts subject to notice, unless the notice has been given by the customer when the order is received, in which case the debt will be *due* if the notice has expired, and *accruing due* if the notice is still running. And it does not affect money on deposit receipts repayable upon fulfilment of certain conditions—such as the giving of notice, or the return of the receipt—unless those conditions have been fulfilled. But it does attach moneys on deposit account repayable on demand, or at call, or on a fixed date, for, in such cases, the funds are properly regarded as "due or accruing due".

The Customer's Pass Book.

It is of the utmost importance that a banker should ensure that all entries in his customer's pass book are absolutely correct, for if a customer, in reliance upon entries in his pass book which are actually incorrect, has been induced to draw out more money than he otherwise would have drawn, or has otherwise altered his position to his detriment, then the banker must bear the loss. And it is no defence for the banker to prove that the customer has had an opportunity of examining the pass book, for apparently there is no *obligation* upon the customer to see that the entries are correct.

Moreover, if a banker discovers that he has wrongly credited an amount to the account of the customer, he will run considerable

risk of being held responsible for injury to his customer's credit if, after discovering the mistake and before the error is communicated to the customer, he dishonours cheques drawn by the customer in reliance upon the position disclosed by the pass book.

Again, if cheques are wrongly debited to a customer's account, the customer can demand that his balance be restored, even if he has received his pass book from the bank and has had an opportunity of verifying the correctness of the debits. And the banker cannot contend that his customer, by his silence or by refraining from criticising the entries, has virtually adopted them as being correct.

Hence, where a bank over a long period had paid various cheques bearing the forged signature of its customer, and from time to time the customer had obtained his pass book but had raised no objection to the debits relating to such cheques, the banker was unable to succeed in his claim that, by so doing, the customer had acted negligently, and could be regarded as having induced the bank to pay subsequent forged cheques

Clearly, this position is most unsatisfactory from the banker's point of view, for the proper function of the pass book should be to constitute a conclusive, unquestionable, record of the transactions between banker and customer Provided the customer has had a reasonable opportunity of examining the entries, they should be regarded as final and incapable of being subsequently reopened to the bank's detriment If this view were adopted by the Courts, bankers would no doubt be able to regard the return of a pass book by a customer, without comment, as *prima facie* evidence that the customer had agreed the items and found the entries correct.

At the same time, the law will certainly protect a banker against a customer who is endeavouring to take fraudulent advantage of a mistake in his pass book. Before a customer can succeed he must act innocently and without negligence, but the principal difficulty appears to be in determining what acts of a customer amount to negligence.

The true test would seem to be that the customer must act as a " reasonable man " would in the circumstances Though there is no obligation to examine the pass book, the Courts would probably hold that, *in cases where the pass book had been examined*, a greater degree of care would be required from a business man than from a private customer.

Closing a Customer's Account.

A customer may at any time close his *current* account with a bank by withdrawing the balance if the account is in credit,

or by paying the banker what is due, plus any accrued interest and other charges, if the account is overdrawn. But it is clearly in the customer's own interest to make sufficient provision to enable the bank to meet any outstanding cheques, and, if this is not done, the bank is within its rights in returning any such cheques marked " Account closed ".

A *deposit* account cannot be closed by a customer and the funds thereon withdrawn, unless the requisite period of notice is given, or unless the deposit receipt (if any) is duly discharged and handed to the bank.

Without risking an action for damages, a banker cannot at any time summarily close an account which is in credit, pay back the balance to the customer, and dishonour any cheques subsequently presented. The customer is entitled to have reasonable notice that the banker wishes the account to be closed, and the correct procedure is to advise the customer in writing that no further credits to his account will be accepted, and that he should withdraw any balance standing to his credit, subject to his leaving with the banker sufficient funds to pay any outstanding cheques As to what is reasonable notice is a question of fact, but in *Prosperity, Ltd.* v *Lloyds Bank, Ltd.*, 1923, as much as one month was considered insufficient notice in the circumstances.

Similarly, a banker who wishes an *overdrawn* account to be closed should give his customer reasonable notice, and he should not dishonour cheques drawn by the customer unless the limit which he has agreed to advance has been exceeded or would be exceeded by the payment of the cheques. If a fixed loan has been granted and the proceeds thereof credited to a current account, the customer is entitled to draw out the *whole* of the credit balance unless the banker has given him reasonable notice calling in the loan.

An account, whether in debit or credit, is legally closed by the death, insanity or bankruptcy of an individual customer, by the dissolution of a partnership customer, and by the liquidation or winding-up of a company customer.

Assignment of the Balance on an Account.

If the debt owing by a bank to its customer is assigned by the customer to a third party, and due notice of the assignment is given to the banker, he must pay the balance to the assignee and to him *only*, *unless* (*a*) the banker has any right of lien or set-off in respect of the balance, or (*b*) the assignor gives him notice not to pay. In the former case, the banker can at once exercise his rights over the balance, paying the surplus (if any)

to the assignee, but in the latter case, his best course is to pay the money into Court or *interplead, i.e.*, apply to the Court to determine the ownership of the balance on the account.

The assignment of a balance on current account means that the contract between the banker and his customer is at an end, and that the assignee can give the banker an effective discharge which frees him from all future liability.

Savings Bank and Home Safe Accounts.

Many banks have in recent years offered facilities to encourage the saving of small sums by the opening of "*savings bank*" and "*home safe*" accounts, which may be opened for sums as low as one or five shillings.

Savings Bank Accounts are conducted in much the same manner as ordinary deposit accounts, but a fixed rate of interest of $2\frac{1}{2}$ per cent is payable, while small sums up to about £5 are repayable without notice at any branch of the bank A record of sums deposited is kept in a pass-book, which is handed to the depositor, and which must be produced by him on the occasion of each deposit or withdrawal.

Home Safe Accounts may be opened with a small initial deposit, usually of five shillings, which is placed to the credit of the depositor. A small safe is then handed to the depositor, in which small savings may be accumulated. The safe is taken at intervals to the bank to be emptied, when the contents are credited to the account of the depositor A pass-book is given to the depositor, and, as in the case of savings bank accounts, small amounts may be withdrawn without notice at any branch on production of the pass-book.

The general rules governing the conduct of a customer's account and the legal relationship of bankers and current account customers cannot, of course, be assumed to apply to savings accounts of the types described above.

CHAPTER 5

PERSONAL CUSTOMERS AND PARTNERSHIPS

The opening of an account involves the making of a clearly defined contract between the bank and the new customer, in which the parties assume certain obligations and become entitled to certain legally enforceable rights In view of this, it is usual for the bank to safeguard itself in the first instance by requiring some form of introduction from all persons who are not already known personally or by repute to the manager or any members of the staff Such introduction may consist of a reference to some other person or body known to the bank, or to some other bank, in which case a confidential inquiry is made regarding the standing of the person concerned It is of particular importance that a cheque-book should not be issued until satisfactory information has been received, otherwise innocent third parties may suffer through accepting cheques against which no funds are held at the bank Moreover, failure to obtain and follow up a reference may render the bank liable for negligence in respect of cheques collected for the customer (see Chapter 16)

It is always best for new customers to attend personally at the branch, wherever possible, so that they may be interviewed by the manager or a senior official, who should explain to them the methods and terms of the bank's business, and, in particular, the charges to be made by the banker for the conduct of the account, and the rate of interest which is to be charged or allowed, as the case may be

Obtaining Specimen Signatures.

The next step is to obtain the signature or signatures of the person or persons who are to operate the account in a special *Signature Book* which is kept for the purpose, or upon a specially ruled card, if a card-index system is maintained As a rule, separate books or separate card indexes are kept for current and deposit account signatures, but in all cases particulars of the customer's full name, occupation, and address are appended. For convenience of reference all signatures in the Signature Book

are indexed alphabetically at the beginning of the book, but if cards are used, they are, of course, filed away in alphabetical order.

Sometimes the person opening the account is merely an agent acting for the purpose on behalf of the actual customer, or he may be acting on behalf of himself and another person or persons. Thus a husband may open an account on behalf of himself and his wife, or a partner on behalf of himself and the other members of his firm, or the secretary of a limited company on behalf of the company. In all such cases the signatures of all those who will sign cheques must be obtained, and it is best that the persons concerned attend at the bank for the purpose If the customer wishes to have his cheques cashed at any other branch or bank, a second specimen of his signature will be taken for dispatch with the necessary authority to the bank or branch concerned

Authorities to sign for Customers.

Occasionally, a customer wishes to give authority to a certain person or persons to draw cheques on his account and/or to indorse cheques or bills in his name In such a case, the necessary mandate will be taken on the bank's prescribed form, and arrangements will be made for the bank to be supplied with a specimen signature of each person so authorised, who should be required to call personally at the bank so that he may thereafter be identified without difficulty by the bank officials

It is very desirable, in the absence of a special request from the customer to the contrary, that a mandate giving authority to sign should be worded so that it may apply whether the account is in credit or is overdrawn, otherwise difficulties may be experienced in holding the customer liable for any overdraft created by cheques drawn by the agent Furthermore, it must be remembered that an authority to *indorse* does not sanction the *drawing* of negotiable instruments ; that an authority to draw and indorse *cheques* does not extend to the drawing, accepting, or indorsing of *bills of exchange* other than cheques, and, finally, that an ordinary mandate authorising the indorsement and/or signing of cheques does not imply a power to pledge securities in respect of any advance created on the account.

The signatures of all persons entitled to sign cheques on a joint account (*i.e.*, the account of two or more parties), or upon the account of a partnership, company, or corporation, will also be obtained by the bank in a mandate, embodying definite instructions as to how and by whom cheques on the accounts are to be signed, and, in the case of joint accounts, as to how the balance of

the account is to be dealt with in the case of the death of one or some of the parties. Thus the mandate of a joint account may provide that cheques shall be drawn by any one of the parties; that of a partnership may decree that the signature on cheques of one or some of the partners will be sufficient; while that of a joint-stock company may instruct the bank to pay cheques signed by any two of its directors and countersigned by the secretary for the time being.

It is of course imperative that all responsible officers of the branch should be acquainted with the instructions relative to the accounts which are subject to their control, and for the guidance of the ledger keepers the essential particulars are inserted in red ink on each page of the account in the ledger.

Other special formalities applicable to certain classes of customer are discussed hereafter under the appropriate headings.

The Cheque Book Register.

When all formalities are completed and references have been taken up, the bank will issue a *cheque book* in favour of the customer, containing a number of the special printed forms used by customers to draw upon their current accounts.

All cheque forms kept on hand by the branch bear twopenny stamps and distinctive consecutive numbers for purposes of identification, a careful record thereof being maintained in a book kept by the cashier and described as the *Cheque Book Register*. In this all cheque books are listed in groups according to their size and kind, columns being provided for the consecutive numbers of the cheques, for the name of the customer, and the date of issue By this means it is possible to determine without difficulty the value of stamped cheques on hand at the branch at any particular time, and also in the event of a query arising concerning a particular cheque, to trace the customer to whom that cheque was issued. As an additional safeguard, banks make a rule never to issue cheque-books to unauthorised persons, and, unless the customer attends in person at the bank, they require his signature to a special requisition form, which is included near the end of each cheque-book, so that it may be completed and forwarded to the bank before the customer's supply of cheques is exhausted.

Infants as Customers.

Since the contractual capacity of an infant, *i.e* , a person under twenty-one years of age, is strictly delimited by law, it is clearly most inadvisable for such a customer to be granted an overdraft or loan, and though no serious difficulty should arise if the relative

account is kept in credit, it must not be forgotten that an infant is never liable on a bill of exchange as drawer, acceptor or indorser.

Although banks now open so-called " Home-safe " accounts even for the very young (see page 43), they do not as a rule open ordinary current and deposit accounts in the names of any persons under sixteen years of age. The usual course in such cases is to open the account in the name of a parent, or guardian, clearly marking it to indicate that it concerns the infant, as, for example, " Thomas Robinson, account of John Henry Robinson ".

If an advance is granted to an infant, the transaction is entirely void and the banker granting the loan will be unable to succeed in an action for repayment of the money, or to retain or realise any securities deposited by the infant in respect of the advance The bank can, however, enforce its rights against any third party who has given a guarantee or deposited security in respect of an overdraft granted to an infant

There is nothing to prevent an infant from acting as an agent to bind a principal, so that a banker is safe in accepting a written authority empowering an infant to draw or indorse cheques and bills, or to accept bills, or to overdraw his principal's account Furthermore, an infant may act as partner in a firm with power to bind his co-partners, but it is not desirable to allow an infant to operate a partnership account unless specific authority in that regard is obtained from the remaining partners

Married Women.

Here, again, no special procedure is necessary and no difficulty should be experienced if the account is kept in credit, for, in the absence of notice to the contrary, a banker is justified in treating an account in the name of a married woman and any moneys therein as belonging to her, and this is so even if it is afterwards shown that the funds really belonged to the woman's insolvent husband. Unless the banker receives express or constructive notice that funds on the account of a married woman do not belong to her, his duty is to pay cheques drawn by her, and, if he does so in good faith, he obtains a good discharge

As a rule, bankers will not grant an advance to a married woman unless they are specially safeguarded. If an advance is granted on the strength of the husband's position, his personal guarantee should be obtained, and if deeds or securities are deposited by a married woman in respect of an overdraft, they should be taken only after consultation with a solicitor and the execution of a formal document of charge, for, if the property concerned is subject to what is known as a " restraint against anticipation ", the married woman has no right either to deposit

the deeds as security or to encumber the future income therefrom.

There is nothing to prevent a married woman from acting in all matters as an agent on behalf of another or others, as, for example, in drawing cheques on an account. Moreover, she may be appointed to the office of executrix, administratrix or trustee, but, if she undertakes such duties, her husband cannot be held liable for any of her acts or obligations in the performance of the executorship, administration or trust, so long as he does not interfere therewith.

Lunatics and Drunken Persons.

The mandate contained in a cheque is terminated by the insanity of the drawer, so that a banker who pays cheques drawn by a customer who is or has become insane may be held to have paid away money of his customer without proper authority. The banker cannot, however, be held liable if the cheques were paid before he had received notice of the insanity.

Although drunkenness does not affect a person's power to contract, a contract entered into by a person when drunk can be avoided as against anyone who has taken fraudulent advantage of the drunken person's state. The point is not of great practical importance to bankers, but, to save disputes, it is advisable to have a witness when cheques are cashed for a customer who is obviously intoxicated. And, if a drunken person proposes to sign a guarantee or to enter into any other contract with a banker, the latter's best plan is to postpone the completion of the contract to another occasion.

Joint Accounts other than Partnership and Trust Accounts.

A banker who opens a current account in the joint names of two or more persons who are not partners should take a mandate, signed by all the persons concerned, embodying instructions as to how the account is to be operated, how cheques and bills are to be signed and indorsed, and how the balance is to be disposed of in the event of the death of any of the parties.

Unless the parties specifically indicate that they wish to delegate their authority to sign cheques to one or some of their number, or to an outside person, all cheques and other instructions to the banker must be signed by *all the parties*, and, in the absence of such authority, a banker should in no circumstances pay cheques which purport to be signed by one or some persons on behalf of all.

The general rule of law is that, on the death of any party to a joint account, the balance vests in the survivor or survivors, but such survivor or survivors are in the position of trustees in regard

to any part of the funds which properly belongs to the deceased's estate, and it will therefore save trouble from the banker's point of view to have the matter clearly provided for in the mandate.

On the death of any of the parties to a joint account on which *all* parties have to sign, the account should be stopped until satisfactory evidence of the death is produced to the banker. When this is done, the survivor or survivors should be permitted to deal with the balance, subject to any arrangements to the contrary as to the participation of the deceased's personal representatives. If, however, the mandate relating to such an account specifically provides that cheques may be drawn by one or some of the parties, then on the death of one the balance may, of course, be withdrawn by the survivor or survivors and proof of the death is not necessary

The mandate relative to a joint account will usually include an undertaking by the parties to be *jointly and severally* responsible for any overdraft Such an undertaking is essential if an advance is contemplated, for, in its absence, the parties will be liable only *jointly*, which means that, on the death of one of the parties, his estate is freed from liability, and only the survivor or survivors will be responsible for repayment of the advance.

On receipt of notice of the insanity of a party to a joint account, the account should be stopped pending receipt of instructions from the Court, unless the other or others are given authority, in the mandate, to draw cheques and deal with the balance.

If one or more of the parties to a joint account becomes bankrupt, the banker should stop all operations on the account, and should return all cheques drawn by any of the parties which are thereafter presented Operations on the account should be resumed and future cheques paid only after the receipt of joint instructions from the solvent party or parties and the trustee in bankruptcy of the insolvent party.

Accounts in the Names of Husband and Wife.

In the case of a joint account in the names of husband and wife, care should be taken to see that the mandate specifically provides for the disposal of the balance in the event of the death of either party. If this is not done, it might be claimed by the husband's personal representatives that the balance (if any) forms part of his estate, in which event it could not be claimed by the wife for her own immediate use although it may have been the intention of the parties that the balance should revert to the wife in the event of the husband's death.

Undischarged Bankrupts.

A person who has been adjudicated bankrupt suffers from a number of civil and contractual disabilities until he obtains an order of discharge from the Court. From a banker's point of view, the most important disabilities are: (*a*) that an undischarged bankrupt must not obtain credit in excess of £10 from any one person without disclosing the fact that he is an undischarged bankrupt; (*b*) that a banker must not conduct an account for a person whom he knows to be an undischarged bankrupt unless, having notified the trustee or the Board of Trade of the existence of the account, either (i) he receives the sanction of the Court or the trustee or the Board of Trade to the making of payments, *or* (ii) no action is taken by the trustee or the Board of Trade within *one month* of the notice

On the other hand, Section 47 of the Bankruptcy Act, 1914, protects certain transactions by undischarged bankrupts provided the property concerned has been acquired by the bankrupt *after his adjudication*, and brings within the sphere of this protection receipts, payments and transfers by a banker of money, securities or negotiable instruments

If, therefore, a banker delivers securities to a bankrupt customer, or pays out to such a customer—or on his instructions to a third party—money standing to his credit, the transactions will be protected as against the trustee in bankruptcy, *provided the property has been acquired by the bankrupt after his adjudication* and provided the transactions are completed before the trustee intervenes But if the property or money delivered has been acquired by the bankrupt *before his adjudication*, no protection is afforded, and the banker is accountable to the trustee for the value or amount of such property or funds

This protection does not, however, release the banker from the duty of giving notice of the existence to the trustee in bankruptcy or to the Board of Trade *in every case* where he discovers that one of his customers is an undischarged bankrupt

Accounts of Trustees.

In the conduct of a trust account the banker must not only recognise his duty to honour his customer's cheques; he must also consider the interests of the persons entitled to the benefits of the trust. But the banker is not liable in respect of a breach of trust so long as he cannot be regarded as being a party thereto or as having received notice thereof, and what constitutes such notice is a question of fact to be determined by the special circumstances of each case.

The banker will undoubtedly be affected with notice of the

breach if he derives some personal benefit therefrom, as, for example, where a customer has an overdrawn private account, and, being pressed to effect a reduction of the debt, transfers thereto funds from an account in his name known to be a trust account.

The banker would also probably be guilty of negligence within the meaning of Section 82 of the Bills of Exchange Act (see Chapter 16), if he were to credit a customer's private account with cheques payable to him in a fiduciary capacity, or payable to a trust with which the customer is connected.

On the opening of a trust account in joint names a banker should take a mandate providing that cheques are to be signed by *all* the parties to the account, and, unless the trust deed expressly provides that one or some of the trustees may sign on behalf of all, the banker should refuse to accept a mandate purporting to delegate authority to sign to one or some of the trustees.

Effect of the Death of a Trustee

On the death of a trustee who is a party to an account, a banker should satisfy himself that no special provisions on the matter are contained in the Trust Deed before permitting the survivor or survivors to operate the account or deal with any trust property in the bank's custody If the deed provides for the appointment of a new trustee, the account should be stopped until the banker is notified in writing of the appointment and is supplied with the signature and description of the person appointed

Upon the death of a sole trustee or the last survivor of a number of trustees, new trustees may be appointed in accordance with the Trustee Act, 1925, but pending such an appointment, the personal representatives of the deceased sole trustee may exercise any power or trust which could have been exercised by the deceased trustee.

Effect of a Trustee's Bankruptcy.

The bankruptcy of a trustee does not affect any trust property in his hands, for such property belongs to the beneficiaries and cannot be claimed by the private creditors of the trustee. Moreover, the bankruptcy of a trustee does not necessarily affect his rights to deal with trust property for the purpose of the trusteeship, although in such circumstances it may be desirable to apply to the Court for the appointment of a new trustee in accordance with the powers in this regard given in the Trustee Act, 1925. In the case of a trustee in bankruptcy, however, a new

appointment *must* be made if the trustee himself becomes bankrupt.

Accounts of Executors and Administrators.

The accounts of executors (which for present purposes may be regarded as including the accounts of administrators) are, of course, merely trust accounts of a special kind, subject to the important difference that, as executors may delegate their authority *to one of their number*, the signature of one executor is ordinarily sufficient to bind all parties to the account, whereas such a delegation of authority can be made by trustees only in exceptional circumstances.

But although executors may delegate their authority to one of their own number, they cannot empower any other person to act on their behalf, except for special business such as is transacted by solicitors, stockbrokers or auctioneers. A banker should not, therefore, accept a mandate authorising any *outside* person to operate on an executorship account

Occasionally, before probate or letters of administration are granted, the personal representatives of a deceased person require an advance for the purpose of the trust, as, for example, to settle outstanding debts or to pay funeral expenses. In such circumstances, a banker should satisfy himself as far as possible that the persons concerned have a right to deal with the affairs of the deceased, and he should then make all the parties jointly *and severally* responsible for the overdraft by taking their signatures to a joint and several guarantee. If necessary, he should also require the deposit of collateral security.

Even when probate or letters of administration have been issued, considerable care is required in granting accommodation to personal representatives Such representatives have no power to borrow money so as to bind the *general* estate of the testator, but, unless they are expressly forbidden to do so by the will, they can give the lender a charge over *specific* assets belonging to the estate. Wherever possible, therefore, such a charge should be taken, for, in its absence a banker cannot retain any securities belonging to the deceased's estate in respect of advances granted to the personal representatives, nor can he levy execution against the general assets of the estate in respect of a loan granted to the representatives.

If, on the other hand, the account of a deceased person is overdrawn at the time of death, the banker is entitled to retain in respect of the advance any securities which are in his hands (other than securities or valuables deposited for safe custody), until the advance is paid off by the personal representatives.

If such representatives do not repay the advance, the banker can take steps to realise his security, transferring the balance, if any, to the representatives. If the amount of security held is inadequate to repay the loan, the banker is entitled to call upon the representatives to pay the balance out of the general estate, and if this is not done, he can enforce payment of the amount due to him against the estate

Unless he is authorised to do so, a banker is not entitled to transfer from an executorship account an amount sufficient to discharge any outstanding liability of the deceased. For any such transfer he should get specific authority in the form of a cheque signed by all the representatives

The Accounts of Trading Partnerships.

In the case of a *trading* partnership, every partner has implied power to bind the firm by opening an account in its name and by drawing, indorsing or accepting bills of exchange, but this implied power may not be relied upon by any person who has notice that a partner has been restricted from so acting In spite of this general rule, no banker should open an account in the name of a firm consisting of several persons, or pay cheques or honour other instruments bearing the signature of one partner, without first taking a mandate, signed by all the partners, authorising the opening of the account and specifying the manner of operating thereon.

All partners should join in an authority to enable an *outside* person to operate the firm's account, and the mandate should distinctly provide whether or not the authority is to apply if the firm's account is overdrawn.

As a rule, the partnership mandate will embody an undertaking on behalf of the partners to hold themselves jointly *and severally* liable in respect of any overdraft or loan granted to the firm, but it is usual and desirable to take the signatures of all the partners to a joint and several guarantee as well. *All* the partners should also sign any document charging property of the partnership as cover for a loan or overdraft granted to the firm Such a safeguard is advisable in spite of the fact that any partner in a *trading* firm has implied power to pledge its credit, to borrow money, and to sell or pledge its property for the purposes of the partnership business

In the case of guarantees and legal mortgages *under seal*, all the partners must sign, for one partner has no implied power to bind his co-partners by giving a guarantee or by executing a deed in the name of the firm, unless in the former case it is the firm's practice or business to give guarantees.

Accounts of Non-trading Firms.

A partner in a *non-trading* firm, such as a firm of doctors or solicitors, has no implied authority to bind the firm by bills of exchange or promissory notes, or to borrow money on behalf of the firm, or to pledge its property as security for an advance If, therefore, a partner in such a firm seeks to bind it in any of these ways without having express authority to do so, that partner will be personally liable, but the other partners will not be bound. This general rule is subject to the exception that a person may be able to hold the firm liable if he can prove that the act of the partner was usual or necessary in the particular business, as, for example, the drawing of *cheques* for payments arising out of the business of the firm

In dealing with a non-trading partnership, a banker's best course is to require the signature and authority of *all* the partners in respect of all operations connected with the account, but there is, of course, no objection to his taking a mandate signed by all the partners giving one of their number or an outside person authority to operate on behalf of the firm.

Dissolution of Partnership.

A partnership may be dissolved by mutual agreement or by a change in its constitution caused by the death, retirement, or bankruptcy of a partner, and, in the last three cases, the banker should stop the firm's account if he wishes to preserve his rights against the estate of the partner who is dead, retired, or bankrupt If the partnership is continued by the surviving partners, they should be required to furnish the bank with a fresh mandate, and to open a new account for all subsequent transactions.

When a partnership is dissolved, the credit balance on the firm's account vests in the remaining partners, who can give the banker a valid discharge for the balance outstanding, but they are liable to the personal representatives of the deceased in the case of death, or to the trustee in the case of bankruptcy, or to the partner himself in the case of retirement, for that portion of the assets of the firm which belongs to the outgoing partner by reason of his interest in the partnership.

Retired partners, or the legal representatives of a deceased or bankrupt partner, have no power to bind the firm in any way whatsoever. But any cheques drawn on the firm's account by a deceased partner may be paid by the banker unless there are special circumstances which warrant their return marked " Partner deceased ", as, for example, the fact that the account has been stopped by the banker in order to safeguard his rights against the deceased partner's estate. Cheques drawn by a

bankrupt or retired partner may also be paid if they are dated before the bankruptcy or retirement, although it may be advisable in such cases to obtain confirmation from the other partners.

On the dissolution of a firm, the partners (or the remaining partners, if one is dead, bankrupt or has retired) have authority to bind the firm and continue its business so far as may be necessary for the winding up of the partnership affairs. For this purpose they may sell or pledge the partnership property, draw and indorse cheques, draw, indorse and accept bills, and perform any other acts which are necessary for the proper winding up of the firm's business

If a partnership account is not stopped on the happening of one of the events mentioned, any payments to the credit of an overdrawn account after the happening of the event will have the effect of reducing *pro tanto* the liability of the members of the old firm, or the liability of a guarantor for the old firm, by reason of the operation of the Rule in Clayton's case

Furthermore, a banker cannot hold liable the estate of a deceased or bankrupt partner in respect of debts or obligations created by the partnership after the date of death or bankruptcy, but a retiring partner may be held liable for obligations incurred after his retirement, unless notice of the retirement has previously been received.

The insanity of a partner does not necessarily involve the dissolution of the firm, but, on application by another partner, the Court may decree a dissolution if the insane person is found lunatic by inquisition or shown to the satisfaction of the Court to be permanently of unsound mind. From a banker's point of view, it is desirable that such a dissolution should be effected, otherwise he may be involved in difficulties by reason of the issue of cheques or by other activities of the partner suffering from the mental derangement.

CHAPTER 6

IMPERSONAL CUSTOMERS

The powers of such customers as joint-stock companies, friendly societies, and local corporations to contract and to transact business are strictly controlled by the law under which they are constituted Hence, before entering into business relations with any of these bodies, a banker should make himself thoroughly acquainted with any statutes governing their constitution and with any rules which may affect the conduct of their affairs

Joint-Stock Companies.

As a rule, the first step in connection with the opening of the banking account of a limited company is taken by the Board of Directors, which passes a resolution to the effect that the account of the company shall be opened at a certain bank, and authorises the secretary to supply the bank with the necessary particulars regarding the company's constitution and powers

This resolution is embodied in a mandate addressed to the banker and is forwarded to him with (*a*) the company's Certificate of Incorporation, for inspection and return; (*b*) copies of the company's Memorandum and Articles of Association for the banker's information and retention; (*c*) the company's Trading Certificate for inspection and return; (*d*) a certified copy of the resolution of the Board of Directors authorising the opening of the account, together with specimen signatures of the persons authorised to sign on the company's behalf; (*e*) a copy of the company's last balance sheet, certified by its auditor.

The *Trading Certificate* is not needed in the case of a *private* company, but is essential in the case of a *public* company registered after 31st December, 1900. Before the issue of this certificate a public company cannot commence business or borrow money, while any contract made by such a company before the issue of the certificate is provisional only, and is not binding on the company until the certificate is issued.

A Company's Memorandum and Articles.

The copies of the Memorandum and Articles are retained by the banker, who should carefully peruse them to ascertain the

nature of the business and the extent of the powers of the company.

The Articles are subsidiary to the Memorandum, but from them the banker must ascertain the rights vested in the directors to exercise the powers of the company as defined in the Memorandum. He should notice especially whether they contain any regulations governing the execution and indorsement of contracts, deeds, bills of exchange, promissory notes, and cheques, or concerning the conduct of the banking account; whether or not they prescribe that all acts of the directors must be done at board meetings, and whether power is given to the directors to delegate their authority, and if so, to what extent. He should also assure himself that the mandate signed on the company's behalf by its officials does not exceed any provisions contained in the Memorandum or Articles, for, if any acts of the officials go outside the powers conferred on the company by its Memorandum, they will be *ultra vires* the company, *i e*, beyond its powers and not binding upon it. On the other hand, if the acts are within the provisions of the Memorandum but outside the powers of the officers as laid down in the Articles, the acts will be *ultra vires* (*i.e.*, beyond the powers of) the officers, and the company *may* or *may not* be bound according to the circumstances. (See the *Rule in Turquand's case*, below.) If the banker is doubtful upon any material point, he should take the advice of a solicitor thereon.

Borrowing Powers of Joint-Stock Companies.

In the case of a *non-trading* company, express powers to borrow and pledge its property (*e g*, by debentures) must be included in the Memorandum, otherwise the company cannot exercise any such powers, even to the extent of discounting bills of exchange. On the other hand, a *trading* company has *implied* powers to borrow, to invest or lend its funds, and to pledge its property to such an extent as is reasonably necessary for the carrying out of its legal objects, even if such powers are not explicitly mentioned in its Memorandum.

A banker should not, however, grant a company an advance without first requiring the deposit with him of a copy of the resolution of the directors authorising the overdraft and sanctioning the deposit and signing of the proposed security. In addition, he should determine whether such a resolution is permissible under the terms of the Memorandum and Articles, for these documents may contain restrictions or conditions respecting the borrowing powers of the company or its officers. They may empower the directors to borrow money but debar them from

pledging as security any property of the company; or they may provide that the company can borrow and give security only by the resolution of its shareholders in general meeting. The documents should be searched also to ascertain whether they limit the company's borrowing powers to a certain fixed amount, for if any limit so specified is exceeded by the directors, or, if the directors borrow although the company itself has no such powers to borrow, then the borrowing will be *ultra vires* the company and void, and any security given will be inoperative against the company.

The remedy left to the lender in such circumstances is that of "subrogation" to the rights of the creditors or other persons who have been paid with the funds borrowed, *i.e.*, he may "stand in the shoes" of those who have benefited in money by reason of his having granted the advance. But this right does not entitle him to any securities or priorities of any creditors so discharged.

Moreover, unless the lender knew the directors were exceeding their powers, he may sue them personally for breach of warranty of authority, or he may obtain an injunction restraining the company from parting with the money, if it can be identified and has not been so used in the company's business that it cannot be followed.

If, on the other hand, the borrowing is not in excess of the powers *of the company* as contained in its Memorandum, but exceeds the powers *of the directors* as given by the Articles, the company may ratify the act of borrowing, and so make itself liable to repay the advance. If it does not do so, the banker *may* or *may not* be able to hold the company liable (see below), but the directors will be liable for breach of warranty of authority, provided the fact that they were exceeding their powers was unknown to the banker.

The Rule in Royal British Bank v. Turquand.

In certain cases, where from a perusal of the Articles it would not be possible for the banker to discover that the directors had exceeded their powers, the company will be bound even in the absence of ratification. Thus, in *Royal British Bank* v. *Turquand*, 1856, the directors of the bank—a company—were given power by the Articles to borrow and pledge property of the company *provided* a resolution of the shareholders in general meeting was first passed. The directors borrowed money from Turquand, but no resolution was passed. It was held that the company was bound, for although the lender, Turquand, was deemed to have notice of the restriction in the Articles, he

was not bound *to inquire* into the *internal affairs* of the company, and, in the absence of notice to the contrary, was entitled to assume that the necessary resolution had been passed.

In more recent cases, the Courts have interpreted very stringently this rule of *ostensible authority* as applied to limited companies, and a banker will not be able to rely upon it unless: (*a*) he proves that he knew of the ostensible powers of delegation at the time of the transaction, and gave value in reliance on those powers ; (*b*) there was nothing in the nature of the transaction to put him upon enquiry ; and (*c*) the transaction was one that could reasonably have been assumed to have been within the powers of the official or officials concerned.

Borrowing by the Issue of Debentures.

Companies frequently borrow money for the purpose of their business by the issue of *debentures*, which usually take the form of a deed under the company's seal, stamped with *ad valorem* duty, and containing a promise by the company to repay the money lent with interest thereon, subject to certain specified conditions. Debentures may be payable to *bearer*, in which case they are regarded as negotiable instruments transferable by delivery, or they may be *registered* debentures, *i e.*, payable to a registered holder, in which case they are usually transferable by deed. As a rule, interest on the former is paid against the submission to the company or its bankers of " *coupons* " detached from the debenture, while, in the case of registered debentures, interest is usually paid by warrant to the registered holder.

Usually, a debenture gives the lender as security for the loan a charge or mortgage over some specific part or all of the property of the company, in which case it is described as a " *mortgage* debenture ", and must be registered with the Registrar of Joint-Stock Companies. Sometimes, however, a debenture is merely a promise to repay money borrowed and does not give any charge over the company's property, in which case it is referred to as a " *naked* debenture ".

Where debentures are secured by a charge over the company's property, it is a common thing for the charge to be created by a separate *trust deed*, which embodies the terms upon which the issue of debentures is made, and is referred to in the body of each debenture. The charge created may be either *specific* or *floating*, or a combination of both. A *specific* charge is usually given over the fixed assets of the company, *e g.*, its land, buildings and machinery, and its effect is to debar the company from selling or disposing of such property during the existence of the charge.

MORTGAGE DEBENTURE TO BEARER

The Eastern Trading Company,

LIMITED

Incorporated under the Companies Act, 1929

No. 203 £500

Registered Office : 205 FENCHURCH STREET, LONDON, E.C.

Issue of £500,000 First Mortgage Debentures to Bearer

In 1000 Debentures of £500 each

CARRYING INTEREST AT THE RATE OF SIX PER CENT PER ANNUM

DEBENTURE

1 THE EASTERN TRADING COMPANY LIMITED (hereinafter called "the Company") will, on the 1st day of December, 19 , or on such earlier day as the principal monies hereby secured become payable in accordance with the conditions endorsed hereon, pay to the Bearer on presentation of this Debenture the sum of Five Hundred Pounds

2 The Company will, in the meantime, pay interest thereon at the rate of 6 per cent. per annum, by equal half-yearly payments on every 1st day of June and 1st day of December, in accordance with Coupons annexed hereto

3 The Company doth hereby, as beneficial owner, charge with such payment all its present and future capital stock, including uncalled capital, goods, chattels and effects, and all its real and leasehold property and interest in lands, and also all its book and other debts, goodwill, rights and assets, and generally all the present and future property, real and personal, and undertakings of the Company, including its uncalled capital for the time being, all of which premises of every kind above specified are intended to be included in the term "property", wherever used herein

4 This Debenture is issued subject to and with the benefit of the Conditions endorsed hereon, which are to be deemed part of it.

Given under the Common Seal of the Company,
the 10*th* day of *May*, 19

SEAL OF THE COMPANY

John Smith,
P R. Brown, } DIRECTORS.
James Thomson, SECRETARY

[The Conditions relating to the Security appear on the back]

COUPON ATTACHED TO FOREGOING DEBENTURE

THE EASTERN TRADING CO., LTD.

Debenture No. 203 **Interest Coupon No. 12**

For FIFTEEN POUNDS (less income tax), Half-year's interest due the 1st day of December, 19. , and payable at the SOUTHERN BANK, LIMITED, Fenchurch Street, London, E C , or at the Registered Office of the Company

For THE EASTERN TRADING CO , LTD ,
James Thomson,
Secretary.

£15 : 0 : 0

Floating Charges on a Company's Property.

A "*Floating Charge*" is one given over a company's property, present and future, including assets of a constantly changing nature, such as stock-in-trade, book debts, etc. Such a charge permits the company to deal with the assets charged in the ordinary course of its business so long as it is a going concern, and so long as the charge does not become "*fixed*" or "*crystallised*" The charge is said to become fixed when the money secured by the debenture becomes immediately repayable in accordance with the terms of the instrument, as, for example, when the company makes default in the payment of interest or when an order is made or a resolution passed for the winding up of the company.

All charges—fixed or floating—over a company's property are void unless they are registered within twenty-one days of creation with the Registrar of Joint-Stock Companies

The Winding-up of a Registered Company.

The existence of a company is terminated by its winding up or liquidation, during which its assets are realised and the proceeds applied in payment of its debts, the surplus, if any, being distributed amongst the shareholders

As soon as a banker receives notice of the commencement of the voluntary or compulsory liquidation of a company-customer, he should at once stop the relative account, and hold any credit balance thereon at the disposal of the liquidator, who has power to operate the account. If the account is overdrawn he must take the necessary steps to obtain repayment

In regard to the payment of a company's cheques after the commencement of a *compulsory* winding up, the banker's position is similar to that in the case of the bankruptcy of a private individual A compulsory liquidation is deemed to commence at the date of the presentation of the petition. From that date the power of the directors to draw cheques on the company's account is determined, and, unless the Court otherwise orders, the banker cannot debit to the account cheques paid by him after the date of the petition, even though he has no notice of its presentation. Accordingly, a banker's only safeguard is to maintain a regular search of the *Gazette*, especially if he has any suspicion that the affairs of the company are not as financially sound as they might be, and at once to stop the account of a company customer against whom a petition is presented—this despite the fact that many petitions are dismissed by the Court.

A *voluntary* liquidation is commenced by resolution of the company in general meeting, followed by a statutory advertise-

ment in the *Gazette*, and a banker, therefore, is rarely without due notice of the commencement of such a winding up. Here also, the account should be stopped until authority is received to permit the liquidator to deal with the balance.

Non-trading Corporations.

Non-trading corporations, such as railway companies, electric lighting companies, and water companies have no power to borrow money or to pledge their property as security unless such powers are conferred (*a*) in the case of *statutory* companies, by the statute under which they are formed, or (*b*), in the case of *registered* companies, by their Memorandum of Association. Nor, in the absence of express powers, can non-trading companies draw or accept bills of exchange or make promissory notes, although presumably they can draw and indorse cheques on a banking account properly conducted for the purpose of making and receiving payments.

Accordingly, on opening an account for any such corporation, the banker should safeguard himself by a careful investigation of its powers in relation to banking operations generally, and in no circumstances should he grant an overdraft unless the company is entitled to borrow If, in the absence of such powers, the banker grants an overdraft, or grants an overdraft in excess of any limit which is imposed by the corporation's constitution, the loan will be *ultra vires*, and the banker can rely only on his right of *subrogation*.

Building and Friendly Societies.

Before opening an account for a building society or friendly society, a banker should take a mandate embodying a resolution of the governing body of the society appointing the bank as its bankers, and containing precise instructions as to the manner of signing and indorsing all negotiable instruments on its behalf, with specimen signatures of the officials authorised to sign and indorse Before acting on the mandate, the banker should satisfy himself that the instructions given are in accordance with the registered Rules of the society, a copy of which should be obtained and filed for future reference.

The account should be opened in the full name of the society, the address of its registered office being given in the ledger heading. A note should be added specifying the names of the principal officials, and arrangements should be made for the immediate notification of any change in these particulars.

Before making an advance to such a society the banker should ascertain from the Rules and from the governing statute whether the society has any powers to borrow, whether there

is any limit to such powers, precisely how the powers are to be exercised and how the loans are to be secured.

If such precautions are not taken, the banker will run the risk of being unable to recover from the society any money lent to it in excess of the limit imposed either by its rules or by the Act under which it is constituted.

Cheques issued by a society registered under the Friendly Societies Acts, 1896 and 1908, are exempt from stamp duty, but before permitting a society to use unstamped cheques, the banker should satisfy himself that it is in fact entitled to the exemption.

Trade Unions.

Here, again, the general principles governing the conduct of the accounts of a friendly society will apply. The Rules of the Union must be investigated in order to ascertain the powers of its officials and the authority, if any, given to its officers to borrow money for purposes of the Union

The account of a trade union must be opened in the name of its properly appointed officers, all of whom should be required to sign cheques and other instruments. If an advance is granted, the personal security of the officers should be obtained in the form of a joint and several guarantee, although the officers have a limited power to borrow against a mortgage of property of the Union.

The cheques of a registered trade union are *not* exempt from stamp duty.

The Accounts of Clubs, Committees, and Associations.

Included under this heading are accounts opened for associations of various kinds formed for charitable, literary, religious, political, or sports purposes Such accounts are to be distinguished from those opened in the names of private customers with an indication in the heading that the account relates to some club, association, or society, as, for example, an account headed "Thomas Robinson, re Northtown Charity Club". Accounts of the latter kind may be treated as ordinary personal accounts, subject to the fact that the bank must be deemed to have notice of the fiduciary character of the funds.

If an account is to be opened in the name of an association, society, etc., the banker should require a mandate embodying a resolution of the association, or of its committee or council, appointing the bank as bankers of the association, and including instructions as to how cheques are to be signed, with specimen signatures of the persons authorised to operate. The mandate

should be duly authenticated by the signature of the chairman of the meeting at which the resolution is passed, and by the signatures of the officials of the association.

Associations of this kind have no legal entity and cannot be sued in respect of any liabilities incurred by their officials, while the officials or other persons who are deputed to sign cheques on the association's account cannot be held *individually* liable for any advance which may be created, if in signing they clearly indicate that they are acting on behalf of the association. Consequently, an overdraft on an account of this nature should be granted only against a guarantee from an individual of sound financial standing, or a joint and several guarantee from two or more reliable parties

Upon the death or retirement of any person signing cheques on the account of a society or association, the account should be stopped, subject to the banker's right to pay cheques drawn before the receipt of notice of the event in question The account need not, however, be stopped in such circumstances if the mandate authorises signature on behalf of the society by any one of two or several persons, provided that any cheques paid by the banker subsequent to receipt of notice of the retirement or withdrawal do not bear the signature of the person who has so retired or withdrawn.

Local Authorities.

Local authorities are really trustees for the public, whose interests they are required to protect. The funds which they control are trust funds, and the banker is presumed to know this. He must therefore exercise in connection with local authority accounts as great a degree of care as he would exercise in the case of any other form of trust account, and, if he permits a transfer from such an account in reduction of the private overdraft of a signing official, he may render himself liable for negligence.

In the majority of cases, the account of a local authority is opened in the name of a treasurer, who is usually the manager of the branch at which the account of the authority is kept, but in larger towns there may be a specially appointed official. An account thus opened in the name of a treasurer is regarded as existing between the treasurer and the local authority, and not between the local authority and the bank, for apparently a joint-stock bank is not permitted, except in special cases, to act as treasurer for such an authority. Accordingly, the heading on the ledger account and in the pass book should be worded somewhat as follows . " Thomas Robinson, Esq., Treasurer to the Northtown Urban District Council ", or " Thomas Robinson,

Esq , Treasurer to the Mayor, Aldermen and Burgesses of the Borough of Southtown ", and so on.

Separate accounts must be opened in respect of each separate undertaking of a local authority, and the respective balances and operations thereon must be regarded as entirely distinct for all purposes. Thus, if an authority has a number of accounts headed " General Account ", " Water Account ", " Tramways Account ", etc , the accounts must be kept quite distinct both by the authority and the bank, all cheques and credits being properly marked to indicate the account to which they refer In no circumstances can a banker exercise any right of set-off in connection with separate accounts of this nature.

Upon opening an account for a local authority the banker should obtain a properly authenticated resolution of the authority appointing the treasurer, embodying precise instructions as to how cheques and other negotiable instruments are to be signed, and accompanied by specimen signatures of those deputed to act on its behalf. As a rule, the mandate will be given under the common seal of the authority, and will provide that all cheques must be signed by three members of the council and countersigned by the clerk or other authorised person.

If a mandate is not thus given for certain persons to sign on behalf of the authority, it is usually arranged for the treasurer to be periodically furnished with a schedule of payments to be made by him to specified persons, the schedule being authenticated by the signatures of three members of the Council or Finance Committee, and countersigned by the clerk

Advances to Local Authorities.

Before granting an overdraft to a local authority, a banker must for his own protection determine whether the authority has statutory power to obtain the proposed advance, in what way and against what security the loans may be obtained, whether any limits are imposed, and whether the sanction of the controlling government department is necessary Having ascertained that the advance may be safely granted, the banker should ensure that the loan is duly charged, by a properly executed security which the authority has power to give, *e.g* , a mortgage on the local rates As far as possible, he should also safeguard himself by seeing that the money borrowed is applied for the purpose for which it was ostensibly obtained

If an illegal advance is granted to a local authority, apparently the banker's only remedy is that he may in certain circumstances be subrogated to the rights of creditors whose claims have been satisfied with the money borrowed from him.

CHAPTER 7

SECURITIES FOR ADVANCES

Possibly the most common form of security offered to a banker as cover for an overdraft consists of stock exchange securities, such as share certificates, bearer bonds and share warrants Securities of this kind usually preponderate in rich residential neighbourhoods, in wealthy financial centres and in high-class seaside resorts In agricultural districts, bank securities usually take the form of documents of title to land and buildings, while in manufacturing and trading centres the type of security will consist chiefly of documents of title to goods

The Quality of a Bank's Advances.

As was explained in Chapter 3, bankers in making advances to customers, always keep well before them the important question of the *quality* of their loans and overdrafts.

Accordingly, in considering any application for an advance, a banker makes careful enquiries in order to ascertain whether the customer proposes to use the money as floating or liquid capital in his business, or whether he proposes to apply it in the purchase of fixed assets, such as land, buildings, plant or machinery If the required loan is clearly of the nature of a long period investment, the banker will usually advise the customer, if he is an individual, that the money would be more advantageously raised on mortgage, or in the case of a limited company or corporation, that it would be best obtained by the issue of additional capital or debentures.

Wherever possible, a balance-sheet or a statement of affairs is obtained from the applicant, and the banker gives the various items careful consideration so as to ascertain whether the proposed advance is likely to be of any benefit to the borrower. He also makes careful enquiries of the customer as to the manner and time in which repayment is to be made. Clearly, a banker is likely to derive little advantage by granting accommodation to a person whose liabilities are already in excess of his available

assets. In such circumstances, a loan will merely have the effect of postponing the time when the customer will have to sell his possessions in order to meet his debts

Yet, the successful lender is more frequently he who is optimistic rather than he who is pessimistic. Bankers stand to gain both in reputation and worth by assuming that reasonable degree of risk which may be necessary in order to accommodate customers who, although temporarily embarrassed, are known to have a sound business, to be of undoubted integrity and to bear an established reputation in the district

At the same time, a banker must never overlook the fact that borrowers as a class tend to take a too hopeful view of things, and that it is not his place to accept unreasonable and hazardous risks Such propositions belong to the sphere of the moneylender rather than the banker, for the former is in a position to charge a rate of interest which is commensurate with the risk involved, whereas a joint-stock banker is prevented by custom and tradition from charging interest much in excess of the prevailing bank rate

The types of security taken by a banker may be divided into two broad classes (*a*) *personal* security and (*b*) *collateral* security.

PERSONAL SECURITY

A banker who grants an advance to a customer has always a personal right of action against that customer in respect of the debt, but as an action against a debtor is a long and tedious process frequently attended by unsatisfactory results, it is usual for the banker to safeguard his position by requiring the deposit of independent security

Technically, the term "personal security" is applied to an undertaking given by the customer, or by some third person on his behalf, as a security for the due repayment of an overdraft, and may take the form of a guarantee under hand or under seal, or a bond under seal, or a promissory note In all such cases the remedy of the banker is a personal one, *i e*, if the undertaking is not fulfilled and the money advanced is not paid in due course, the banker must take action in the Courts to enforce his rights against the person or persons who have signed the undertaking. Personal security is thus clearly distinguished from a security which can be realised by sale or transfer, or which involves a right of action against a person who is entirely strange to the transaction between the banker and his customer, *e.g.*, shares in a limited liability company.

GUARANTEES

A guarantee is a contract whereby one person, called the *guarantor*, undertakes to be answerable for the payment of a debt or the performance of some act by another person (called the *principal debtor*), who must be legally bound to pay the debt or to perform the act concerned There can be no contract of guarantee unless there is a prior contract in existence, upon which the principal debtor is liable to the party in whose favour the guarantee is given, *i e* , the creditor, who is thus the beneficiary under both contracts. The rule is that the guarantor is liable only if the principal debtor makes default The contract of guarantee is therefore a *secondary* one, and, even if the guarantor fulfils his obligation and repays the creditor, the debtor is not discharged from his liability, but may be sued for repayment by the guarantor.

A guarantee is invalid unless it evidenced by some note or memorandum *in writing*, which must contain at least the names of the parties, the signature of the surety, and the essential terms of the contract The consideration need not be specified, but in a banker's guarantee it is usually stated to be an agreement by the banker at the guarantor's request not to require immediate payment of the money due from the debtor.

A banker's guarantee must be comprehensive in form since it aims at safeguarding the banker against all possible contingencies, and is designed to cover any kind of transaction with the customer The guarantee usually provides that the contract shall not be prejudiced if any other securities are taken from the debtor, nor if any arrangements are made with the debtor regarding the exchange or release of securities, or for the giving of time in which to pay It provides also that, in the event of the bankruptcy of the customer, the banker shall be at liberty to recover from the guarantor the *full* amount for which he has agreed to be liable less any dividends received Finally, the guarantor promises repayment of the amount due to the bank a specified period (usually three days) after demand.

The Value of a Guarantee.

As a guarantee involves a personal right of action by the creditor against the guarantor, the value of such security depends essentially on the standing and worth of the guarantor, and on his ability to pay the amount of the advance, conveniently and without difficulty, *at any time.* It follows, therefore, that in accepting a guarantee as security, the banker's first duty is to ascertain whether the proposed guarantor can be relied upon for the amount which he undertakes to pay. And subsequently

at regular intervals he should take steps to satisfy himself that the guarantor is still to be relied upon

As a rule, a banker should not place too much reliance on guarantees by persons with limited incomes terminable at death, or by persons whose incomes are ordinarily terminable on their ceasing to be employed

Necessary Precautions in taking Guarantees.

It is very important that a banker should explain to a prospective guarantor the exact nature of the contract into which he is entering, define precisely the liabilities which he assumes, and ensure that the guarantee is signed by the surety of his own free will

Any enquiries addressed to the banker by a proposed surety should be answered fairly and openly But as long as there is no concealment amounting to fraud, the banker need not disclose the actual state of the debtor's account, or volunteer information concerning the debtor's affairs or business habits, unconnected with the contract of guarantee, which might have the effect of impelling the surety to revoke his offer to accept liability.

Continuing Guarantees.

Bankers' guarantees are almost invariably *continuing* guarantees, that is to say, they are so drafted that the guarantor is held liable for the *fluctuating* balance *at any time owing* on the debtor's account during the continuance of the guarantee, subject to any limit which may be specified The object of this is to ensure that the guarantor shall be liable for the *ultimate* balance due by the debtor when repayment is demanded by the banker, or when it becomes necessary to determine the balance due by the surety under the terms of the guarantee

As a rule, continuing guarantees provide that the surety's liability shall continue until *the expiration* of one calendar month (or other period) from the time when notice to terminate the guarantee is given by the surety *or his personal representatives.* The effect of this is that the guarantor, or his estate in the event of his death or bankruptcy, can be held liable for the payment of any *outstanding* cheques or for any liabilities of the principal debtor entered into before notice was given but which accrue *during the period of notice,* thus enabling the banker to complete or fulfil any obligations incurred by him on the debtor's behalf in reliance on the guarantee

Specific Guarantees.

A *specific* or *non-continuing* guarantee is one in which the surety undertakes to be answerable only in respect of a specific

transaction or in respect of a fixed amount, as, for example, a definite advance granted to a debtor on a separate loan account. Such a guarantee cannot be revoked by the surety until the loan is repaid and the debtor's liability extinguished, but, when this is done, the agreement becomes void and cannot be enforced by the banker in respect of any future advances.

PROMISSORY NOTES AND BILLS AS SECURITY

Bankers frequently make advances by the discount of promissory notes or bills of exchange which are signed by one or more persons in order to accommodate the party to whom the advance is made, the proceeds after discount being paid over to the accommodated customer In such circumstances, the banker should treat the persons signing as sureties in exactly the same way as he would treat them if they had signed a formal contract of guarantee

A banker who accepts a bill of exchange or promissory note as security, should take a memorandum of charge and ensure that the signature of each surety is witnessed and initialled by a responsible official of the bank The instrument itself should be either indorsed in blank or made payable to the banker's order If the customer obtaining the advance does not sign as an original party, he should be required to indorse the instrument as evidence of his liability thereon

COLLATERAL SECURITY

The term " collateral security " has, unfortunately, no strictly defined application. In general, it applies to all types of security which run *side by side* with the personal right of action which the banker has against a debtor customer in respect of an advance. In this sense the term " collateral security " applies to share certificates, bearer bonds, title deeds, life policies, etc., which are deposited *by the customer* as cover for an advance, and also to a guarantee or other security signed or deposited *by a third party* as security for the customer's overdraft

In its second sense, the term " collateral security " is applied to any of two or more instruments which *secure the same debt*, as where the account of one customer is secured by two guarantees, or by a guarantee and also by the deposit of documents of title.

If a banker holds collateral security deposited by a third party to secure a customer's overdraft, then, in all his dealings with the customer, he must exercise the greatest care to respect the relationship of principal and surety existing between the customer and the third party. In the absence of an agreement to the contrary, the surety will be discharged if the banker

without the surety's knowledge or consent makes a new arrangement with the principal debtor in regard to giving time for the repayment of the advance, or in regard to the amount of the advance, or the period for which it is granted.

Collateral security may become available to a banker as cover for an advance in one of four main ways · (*a*) Mortgage , (*b*) Pledge , (*c*) Hypothecation , and (*d*) Lien.

Mortgage.

A Mortgage is a conveyance of an interest in property for the purpose of securing the repayment of money lent, but the term is usually reserved for a conveyance of an interest in *land* or *immovable* property. A mortgage may be either *legal* or *equitable*

A *Legal* Mortgage, usually entered into when the transaction is not of short duration, transfers the ownership (though not necessarily the possession) of the property charged to the mortgagee, and gives the latter a right to sell the property upon default by the mortgagor in paying the principal or interest On the other hand, the mortgagor is left with his *equity of redemption*, *i e* , his power to reclaim full ownership of the property on properly discharging the mortgage.

An *Equitable* Mortgage, which may be created by deposit of title deeds with or without a memorandum, or even by a memorandum of charge without deposit of the deeds, gives the mortgagee only an equitable interest in the property, which can be realised only if the mortgagee has or obtains a power of sale, or obtains an order for foreclosure from the Court.

Pledge.

Pledge means the actual or constructive delivery of goods or securities by a debtor into the possession of his creditor to hold as a security for the debt. To constitute a pledge, there must be an *express* or *implied* contract between borrower and lender, by virtue of which the ownership of the security remains vested in the pledgor (he who deposits them). The rights of the pledgee (who is *in possession* of the security) permit him to retain the security until payment of the debt, and, in case of default, to realise it.

As a rule, a pledge is evidenced by a Memorandum of Deposit or a Memorandum of Charge, which gives particulars of the security, of the purpose of the deposit and of the amount and limit of the advance (*i e* , the consideration to be given). It also provides that the security shall be a *continuing one*

In the case of *fully negotiable* securities, a memorandum is not absolutely necessary, since a lender who acts in good faith and without notice of a defect of title on the part of the depositor is established as a pledgee by mere deposit of the securities (so long as there is no agreement inconsistent with their being held against an advance), and has an absolute title against all the world to hold them until his debt is discharged, and to realise them if he does not obtain repayment This is so even if the instruments have been lost by or stolen from the true owner, as mere delivery is sufficient to effect a transfer of the property in fully negotiable securities

The pledge of documents of title to goods is in effect a pledge of the goods themselves, for delivery of the documents is legally recognised as a constructive delivery of the goods represented

Hypothecation.

Hypothecation resembles pledge in many ways, but goods hypothecated do not pass into the possession of the creditor, *e g*, a debt due by a third party may be hypothecated The term is also used to describe the arrangement usually evidenced by a letter of trust or a trust receipt, under which a customer is allowed to have possession of goods already pledged to the bank, and agrees to hold them in trust for sale for the bank and to pay the proceeds into his account.

The Right of Lien.

Apart from the formal or specific deposit of securities, a banker who has granted an advance to a customer may obtain a legal claim to securities of that customer which pass through his hands in the ordinary course of business, by virtue of his right of "*lien*"

"Lien" is defined as the right of one person to *retain* property in his hands belonging to another until certain legal demands against the owner of the property by the person in possession are satisfied.

The right of lien does not, *as a general rule*, give the person exercising the right any power to *sell* or otherwise to realise the relative goods or securities

Lien differs from other forms of charge in that it is never the subject of a *formal* or *express* contract It is essentially an *implied* charge which arises by operation of law out of the course of dealings between the parties, and to create which no special arrangement or agreement is necessary. The right of lien, however, may be, and frequently is, expressly excluded by mutual agreement between the parties, or by the existence of

circumstances which are inconsistent with the exercise of the right.

The right of lien may be either *particular* or *general*. A particular lien confers a right to retain goods in connection with which the *particular* debt arose, whereas a general lien confers a right to retain goods, not only in respect of the debt incurred in connection with them, but also in respect of the *general* balance due by the owner of the goods to the person holding them

By legally recognised custom, a right of general lien accrues to certain persons who act as agents on behalf of others, as, for example, solicitors, bankers, stock-brokers, produce-brokers, factors, and wharfingers

Banker's Lien.

In the well-known and oft-quoted case of *Brandao* v. *Barnett*, 1846, it was stated : " Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract inconsistent with lien ".

From this statement it is clear that a banker has a right to *retain*, in respect of a debt due to him, *any* securities of his customer which come into his hands in the ordinary course of his business as a banker, provided there are no circumstances inconsistent with lien And it has always been understood that a banker's lien is an *implied pledge*, giving him a right, in case of default, not only *to retain* but also, after due notice to the customer, *to realise* securities of the customer and to apply the proceeds in satisfaction of his debt

Banker's lien is mainly important in connection with negotiable securities which come into the banker's hands (usually for collection) in the ordinary course of his business as his customer's banker , as, for example, cheques, bills, notes, bearer bonds and share warrants to bearer.

Circumstances Inconsistent with Lien.

In order that the lien may arise the banker must act simply and solely as a banker, and the securities must be deposited by or on behalf of a customer who is in debt The right of lien will be definitely excluded if the securities come into the banker's hands in any capacity *other than that of banker*, and also if there is an implied or express contract negativing the lien

Hence, although lien would apply to bills of exchange placed in a banker's hands for collection, it would not arise if the bills were handed to a banker, as an agent, for the express purpose

of being presented for acceptance to the drawee. In like manner, a banker cannot exercise a general lien on a scrip certificate deposited by a customer with express instructions that it is to be exchanged for a bond, for in such circumstances the banker acts merely in the capacity of agent and not strictly as a banker.

Again, no lien will arise in respect of securities expressly deposited *for safe custody* for in such a case the articles are received by the banker *as a bailee* and not in the capacity of banker But as is explained in Chapter 9, it is not always easy, in connection with coupons and bonds left for safe custody, to determine the precise line of demarcation between the banker's capacity as a bailee and his essential functions as a banker.

A *general* lien cannot be exercised in respect of property of a customer which is pledged as security for a *particular* debt Thus if A has two overdrafts at a bank, and specifically pledges securities in connection with one of these overdrafts, the banker's lien is excluded by the existence of the express charge, and he has no right to retain the securities against the overdraft on the second account But if the banker were to exercise his power of sale over the securities in order to wipe off the overdraft on the first account, he could, by virtue of his right either of lien or of set-off, retain any remaining proceeds of the sale against the second overdraft

Moreover, no lien can arise in respect of property which comes into the banker's hands by mistake, or which is placed in his hands with the object of covering an advance which is not granted

Banker's lien over negotiable securities is so well-established that it applies even to instruments which are not actually the property of the customer, but are held by him in fraud of the true owner But this will not be so if it is shown that the banker did not act in good faith, or if the instruments suffer from some absolute defect of title, as for example, where a bill or cheque bears a forged indorsement, or where a cheque bears a not negotiable crossing and has been stolen from or lost by the true owner.

CHAPTER 8

PRINCIPAL TYPES OF COLLATERAL SECURITY

In estimating the worth of collateral security, the banker should consider at least the following seven important points: (*a*) *Simplicity of title* The security should be such that the banker's title thereto can be perfected without difficulty (*b*) *Ease of Transfer* The banker should, if necessary, be able to obtain a complete transfer of the title to him or to his nominees without any great trouble or expense (*c*) *Reasonable steadiness of value* A security which is subject to wide variations in price does not form a desirable cover for an advance (*d*) *Readiness of sale* This point is of importance if the banker is to avoid being left with property on his hands which he cannot convert into cash except after considerable loss of time, trouble and expense (*e*) *Sufficient margin for loss or depreciation* Unless the security is one whose value is fairly stable, the banker should require ample security to ensure a sufficient margin in the event of a forced realisation (*f*) *Absence of* [illegible]. As far as possible the banker will avoid taking as security property which might involve him in liability to third parties, as, for example, shares whereon calls may be made (*g*) *Safety as to title* A final requirement is that the title (if any) obtained by the banker, or the title which the customer purports to possess, shall be secure against loss by theft or fraud

STOCK EXCHANGE SECURITIES

The most common and probably the most desirable form of security which is taken by a banker consists of what are collectively described as *stock exchange securities*, including stock and share certificates, debentures, bearer bonds and scrip certificates, issued by joint-stock companies and other corporations, by local authorities and by home, foreign and colonial governments.

As a rule, stock exchange securities have the advantages that they can be realised quickly and without difficulty, that the title, while being clear and unmistakable, is readily and inexpensively transferable, and that the actual market worth can easily be determined.

In estimating the worth of stock or shares as a security, the banker should ensure that the market value is properly ascertained, and, in the case of shares, determine whether or not they are fully paid up otherwise he may render himself liable for the payment of instalments or calls due, or to become due, to the company

Unless the circumstances are exceptional or a very wide margin is available, a banker should not accept as security (*a*) shares and stock in the less important foreign governments and undertakings—these are usually subject to wide fluctuations; (*b*) mining, oil and rubber shares—which are essentially speculative; and (*c*) local shares—which are not as a rule easily realisable

Stock exchange securities are divisible into two broad classes: (*a*) fully negotiable or convertible securities, and (*b*) non-negotiable or inconvertible securities.

Fully Negotiable Securities (Transferable by Delivery).

Fully negotiable securities (e.g., Bearer Bonds) probably form the ideal type of cover for an advance. As a rule, they are reasonably stable in value and are readily saleable Moreover, upon the default of the customer, the banker may obtain the full legal title to the securities by virtue of his general lien, whether they are or are not deposited with a memorandum, and whether they actually belong to the customer or not, provided the banker has no notice of any defect in the title of the depositor In practice, a Memorandum of Deposit is invariably taken with such securities, so that the banker may be safeguarded by having the customer's express acknowledgment of the purpose for which the deposit is made, and so that the cover shall be expressly agreed to be a *continuing* security. Possibly the only objections to negotiable securities are that they may be lost or stolen during the time when they are in the banker's hands, and that the banker's title may be defeated if it can be shown that he took the articles without good faith or with express or implied notice that they were not the property of the customer.

Non-Negotiable Securities.

Non-negotiable stock exchange securities may belong to one of two broad classes. (*a*) *Inscribed* stocks, and (*b*) *Registered* stocks and shares

Inscribed Stocks are so called because the title of the owner is evidenced by an entry in the books of the bank or other agent by whom the stock is issued, and transfer thereof can be effected only if the owner either attends in person, or appoints an agent

under power of attorney to attend on his behalf Certain British Government stocks are so inscribed in the books of the Bank of England, and attendance at the Bank is essential before the title can be transferred.

The *Stock Receipt* or acknowledgment issued to the owner of stock of this kind is valueless as security, since delivery thereof is not a pre-requisite to transfer of the stock With this type of security, therefore, the only method by which the banker can perfect his title is by having the stock transferred into his own name or into the names of his nominees by inscription in the books of the issuing bank In certain cases, however, stock certificates to bearer, with interest coupons attached, or registered stock certificates, may be obtained at the holder's option in respect of his holding of inscribed stock, and, wherever this option can be exercised, it affords a less cumbrous and more advantageous method of perfecting the security without the formality of inscription.

Registered Stocks or Shares, on the other hand, are evidenced by certificates given under the seal of the issuing body.

The banker's security over registered stocks and shares takes the form of either (*a*) a *legal* transfer, or (*b*) an *equitable* charge.

Legal Transfer of Registered Stocks and Shares.

The legal title to registered stock or shares in a company is obtained by the execution of a *transfer* of the security to the bank or to its nominees The transfer is effected (in accordance with the regulations of the issuing company) either in writing or under seal, and, when it is forwarded to the company with the certificate, the banker (or his nominee) is registered as the holder of the shares, and a new certificate is issued in his favour.

The same procedure applies in connection with registered stock or shares in a local corporation or other body.

Risks run by a Banker on Registration.

In registering himself as the holder of shares taken as security, a banker may run two important risks First, he renders himself liable as transferee for an indefinite period to indemnify the company against any loss which it may incur if it should transpire that the transferor's signature to the instrument of transfer has been forged (*Corporation of Sheffield* v *Barclay*, 1905) Secondly, in the case of partly paid shares, the banker renders himself liable for the payment of any calls which may thereafter be made, up to the extent of the balance still unpaid on the shares, and this liability exists, in the event of the liquidation of the company, for one year after the bank has ceased to hold the shares,

if the person to whom they are transferred is unable to meet the liability for the uncalled capital. It is for this reason that bankers prefer not to accept partly paid shares as security, unless the possibility that the unpaid capital may be called up is very remote, as in the case of first-class bank shares.

Equitable Charges over Stocks and Shares.

If the banker does not wish to take the full legal title to stocks and shares deposited as security, he may obtain an equitable title by (*a*) mere deposit of the certificates—a method now rarely adopted; (*b*) deposit of the certificates with a Memorandum of Deposit, or (*c*) deposit of the certificates with a Memorandum of Transfer and duly executed *blank* transfers.

The mere deposit of registered stocks and shares with or without a memorandum does not give the banker the right to realise the security on the default of his customer, but he has the right to call upon the customer to execute a legal transfer, and, if that is refused, he can apply to the Court for an order to transfer and for power to sell the securities

The Effect of a Blank Transfer.

A blank transfer is one which is incomplete in certain essential particulars, *e g*, the name of the transferee, the idea being that the banker may, on default of his customer, complete the transfer and have the shares registered in the name of himself or of his nominees. If, however, the regulations of the company concerned prescribe that transfer of its stocks and shares shall be by *deed*, a blank transfer is almost useless, for a deed cannot validly be completed in any material particular after its original execution, while it cannot in any event be completed by the banker unless he holds a power of attorney under seal from the depositing customer If, however, transfer can be *under hand* merely, the delivery of a blank transfer constitutes an authority to the transferee to fill up the blanks when he deems it necessary in which case the banker taking the transfer may insert the name of himself or of his nominees, or the name of any other party.

LIFE POLICIES AS SECURITY

Life policies are frequently accepted in practice as cover for temporary loans, and especially as collateral security in cases where advances are granted against guarantees or other forms of personal security.

Despite some opinions to the contrary, the assignment of a life policy is a good banking security provided the life office is

a well-established and successful concern, and provided the amount of the advance does not exceed the surrender value of the policy, which may be ascertained from the office. A good policy is, of course, a security which increases in value as time goes on, with the added advantage that the full sum assured, with bonuses added (if any), is payable on the happening of the event specified in the policy, *i e*, death or attainment of a certain age. Cases sometimes arise where the payment received in respect of a life policy on a borrower's death is sufficient to wipe off an overdraft and thereby obviates the necessity of realising other securities As collateral security in such circumstances a life policy is of the greatest value, and is unquestionably necessary where the success and pecuniary value of a customer's business or profession depend essentially on his own personal skill, knowledge and experience

There are, however, a number of important precautions which must be taken before reliance can be placed on a security of this kind First, the banker must ensure that the premiums are properly paid up and that future premiums will be paid as they fall due Secondly, it is necessary to have the age of the assured admitted by the company by separate letter or by indorsement on the policy Thirdly, the banker should ascertain at the outset how the surrender value of the policy will grow, or, if this is not possible, he should from time to time ascertain the surrender value from the company Usually, the value increases after the first two or three years, with the payment of each additional premium

Care should be taken to distinguish between a *whole life* and an *endowment* assurance policy, for whereas the former is payable only on the death of the assured, the latter is payable at the expiration of a certain term of years or on the previous death of the assured, and is therefore the more valuable Finally, any life policy taken as security should be perused to ascertain whether it contains any special conditions or restrictions which may reduce its value as a security, *e g*, restrictions on foreign travel by the person assured

Disadvantages of Life Policies as Security.

The disadvantages of a life policy as security are, first, that the company may avoid liability if it can show that the assured did not disclose all material facts which might have affected acceptance of the risk by the company. Secondly, the policy may in some cases be avoided if the assured commits suicide or dies by the hand of justice The third drawback is that, if a life policy is intended by the assured to provide for his family,

it may damage the bank's local reputation to claim the proceeds of the policy and so leave the family in need.

Then there is the fact that the value of the policy depends primarily on the continued payment of the premiums, so that if the assured allows these to lapse, the banker may be deprived of his cover unless he himself pays the premiums as they fall due, in which case he will, of course, merely be adding to the amount already advanced To safeguard himself, a banker keeps a careful record of all premiums due on policies held as security, and reminds his customer if the receipts are not duly received.

How a Life Policy is Charged as Security.

A life policy may be taken as a security in two ways (*a*) by mere deposit with a memorandum, in which case the bank obtains an *equitable* mortgage , or (*b*) by *Deed of Assignment* to the bank, in which case the latter obtains a *legal* mortgage

The first method has the advantages of cheapness and simplicity The policy is handed to the bank together with a memorandum of deposit (under hand or under seal), containing an undertaking by the assured to assign the policy if required to do so, while no formality is necessary when the advance is repaid other than the cancellation of the memorandum and the return of the policy to the assured This method does not convey a *full legal title* to the bank, and realisation may be difficult if the assured refuses to assist by giving the promised assignment.

It is more usual for banks to take from the customer a full legal assignment, which conveys the policy to the bank by way of mortgage, subject to the assured's *equity of redemption*, *i e* , it gives the banker power to surrender or otherwise dispose of the policy without the assignor's consent in satisfaction of any claims against him, but the assignor has a right to a re-assignment of the policy on payment of the money due The assignment embodies an undertaking by the assignor to keep the policy alive by punctual payment of the premiums, and to lodge the receipts with the bank, in default of which the bank is given power to pay the premiums and to add their amount to the debt.

LAND AS SECURITY

Title-deeds to land and buildings are frequently taken by banks as security, especially in country towns and agricultural districts.

The bank's security consists of the actual land or buildings to which the documents relate, and not of the deeds themselves. The latter are merely a " symbol " of the property to which they relate, so that, apart from the necessity of ensuring the

validity, completeness and correctness of the deeds, special precautions are necessary to ensure the proper valuation and protection of the property concerned.

Although land may form a valuable and useful form of cover, it is not an ideal type of banking security As a rule, such cover is offered as security rather for long period loans than for the short period advances which afford the banker the greatest degree of security and liquidity of his funds, and return him the greatest margin of profit The successful banker is essentially a short-term lender, and if it is obvious that a customer requires a " dead " loan against his title-deeds, the banker will prefer, and usually advise, him to raise a mortgage either through a solicitor or a building society

In spite of these disadvantages, advances against the security of land and houses or shop property are extremely common. In country districts, particularly, title-deeds are frequently deposited as security for temporary accommodation by farmers pending the harvesting and sale of their crops, and by landowners pending the receipt of their rents The deeds often comprise the only available security in such cases, and country banks have no hesitation in accepting them

Mortgages as Cover for Advances.

Several important matters have to be considered by a banker in accepting land as cover for advances, with a view to protecting himself against various contingencies which may have the effect of jeopardising the value and validity of his security. First, he must ensure that the value placed on the property is reasonable and that an adequate margin is allowed for all contingencies. Secondly, the deeds must be valid, complete and in order, and the document evidencing the bank's charge so drafted as to cover all contingencies likely to arise. Thirdly, if advances have been made against the security of the same property by other incumbrancers, care must be taken to ascertain and to safeguard the priority of the bank's charge. Fourthly, the bank must consider the effect on its security of the possible exercise by the mortgagor of his right to remove, or permit the removal of, fixtures from the property concerned.

Finally, there is the important point that a bank's security over land may be jeopardised if deeds are deposited by a person who, in so doing, acts in fraud of the true owner, as, for example, a solicitor who deposits with a bank deeds to which he has no right. In such circumstances the deeds can be reclaimed by the true owner without repayment of the amount advanced, even

though the bank has acted throughout in complete good faith, and without actual or constructive notice of the fraud

Despite the simplification of the law relating to real property which was brought about by the Land Registration Act, 1925, the matter is still one of great legal intricacy, and no banker who intends to make advances against the security of land should do so without first taking the advice of his solicitor in the matter

PRODUCE AND GOODS AS SECURITY

There is considerable difference of opinion as to the desirability of taking produce and goods as security against advances by the deposit or pledge of such documents of title as bills of lading, delivery orders, warehouse-keepers' warrants, and dock warrants

Some writers emphatically condemn documents of title to goods as undesirable banking securities, but the more modern view—borne out by the frequency with which such security is accepted in practice—is that such cover is reasonably sound if adequate precautions are taken to safeguard the position of the lender Moreover, it is not to be forgotten that loans of this type are among those which afford the greatest assistance to the trading community, at the same time providing bankers with a highly remunerative and in other ways attractive type of business

Nevertheless, successful loaning against the security of goods undoubtedly calls for a fair degree of specialised knowledge, for apart altogether from the necessity of ensuring the validity and completeness of the documents themselves, and of dealing so far as is possible only with customers of known integrity, there is the further need of taking into consideration the quality, value and freedom from deterioration of the goods in respect of which the documents are issued

The question of the *quality* of the goods is clearly of importance in case the banker should be called upon to realise the commodities which he has accepted as security, while the *risk of deterioration* must be carefully considered where the goods have to be sent great distances, or where they have to be stored for a period before realisation Perishable goods or goods which are subject to vagaries of demand or of fashion are certainly not suitable as banking securities, while greater protection can be obtained by accepting as security goods in everyday use, having a ready sale, than by accepting luxury articles subject to an uncertain or widely fluctuating demand

In addition, the considerable risk of fraud in connection with the taking of goods as security must not be overlooked, and it is clearly not always easy for a banker to satisfy himself regarding the real value and absolute quality of the great variety of

articles which enter into the trade of the country, and which may be offered to him as security. The banker's position in these respects can, however, be reasonably safeguarded, if produce and goods are accepted as security only from customers of known repute, and if a competent independent valuation of the goods is insisted upon Revaluation at intervals should, of course, be arranged wherever it appears to be desirable in the banker's interests

Finally, the banker must ensure that the property in the goods is clearly and properly conveyed to him by the documents deposited by the customer

DOCUMENTS OF TITLE TO GOODS

Goods are taken by a banker as security in one of two chief ways either (*a*) *directly* as security for an advance on current account , or (*b*) as security for the due payment of bills of exchange discounted or accepted by the banker on behalf of his customer. In the first case, the goods will constitute a *direct* security for due re-payment of the advance, whereas in the second case they are merely *collateral* security for due payment of the bills.

A banker accepting such security will have regard to three important points . (*a*) the validity and completeness of the documents ; (*b*) the nature, quality and value of the goods, and (*c*) the rights of any persons who may have claims against the goods, including the seller, the buyer, and the person having possession of the goods for the time being

In examining the documents the banker will ascertain that they purport to be complete and in order, and that they are properly stamped, where stamping is necessary Care will be taken to distinguish between documents which in themselves *give a title* to the goods specified (*e g* , bills of lading and dock warrants), and documents such as warehouse-keepers' receipts and certificates, which are merely *acknowledgments of the deposit* of goods.

Bills of Lading.

A bill of lading is a document signed by the master of a ship, acknowledging the receipt of certain specified goods on board the ship, and embodying an undertaking on behalf of the shipowners to deliver the goods to " order ", or to a named person, " or his assigns ", upon payment of the freight stipulated for.

A bill of lading is not a negotiable instrument, and, if it is drawn in favour of a named person without the addition of words such as " *or his assigns* ", it is not even transferable. Such a document is known as a *Straight Bill of Lading*, and the goods

concerned must be delivered to the person named and to him only. Delivery to any other person will be made at the shipowner's own risk. If, however, a bill of lading is drawn " to order ", the full property in the goods concerned may be transferred simply by delivery of the bill after indorsement by the shipper. But such a transfer is " subject to equities " ; *i e* , the transferee, even if he takes the instrument for value and in good faith, cannot acquire, or pass, a better title to it than his immediate transferor had

Bills of lading, like documentary bills, are usually drawn in *sets* of three or four parts, excluding any unsigned copies The object is to enable the different parts to be sent to the consignee or his agent (frequently a banker) by different mails, and so reduce to a minimum the risk of loss or delay in transit.

As a general rule, an unsigned copy of a bill of lading is retained by the consignor as evidence of shipment, for use in the event of his having to claim on the insurers under the marine insurance policy covering the goods A second copy will be kept by the master of the ship, to assist him in the identification of the goods.

" Received for Shipment " Bills of Lading.

The ordinary form of bill of lading states that the goods in question have been " *Shipped* on board the ", and such bills are known as " shipped " or " on board " bills of lading. Some shipping companies, however, state in their bills of lading that the goods have been " *Received for Shipment* on board the ", and such bills are distinguished as " received for shipment " bills of lading

Bills of this class are issued because, at certain busy periods, or in the case of *through transit*, a shipping company cannot undertake definitely to carry goods *on a particular ship* Hence, a " received for shipment " bill does not afford evidence that the goods concerned have been received on board a particular, or, indeed, on any ship, and there is no guarantee that actual shipment will not be delayed indefinitely It is, therefore, doubtful whether, where delivery of a bill of lading is demanded, a " received for shipment " bill is a good tender.

" Through " Bills of Lading.

Bills of lading occasionally purport to cover the goods concerned throughout their journey from the place of origin to the place of shipment and thence to the port of destination. Such documents, known as " Through Bills of Lading ", are commonly issued by American railway companies in respect of produce

moved from the interior to the seaboard for shipment abroad, and they then combine a railway receipt and a bill of lading. They are, however, unacceptable as security unless they clearly cover the goods throughout *the whole* of their journey.

Bills of Lading as Security.

Wherever possible, bills of lading accepted as security should be drawn " to order or assigns ", so that they may be transferred by indorsement to the banker They should be closely examined to ascertain whether they contain clauses which may necessitate the payment of heavy charges to the shipowner, or which may otherwise operate to the detriment of the lender Since a bill of lading affords no evidence of the quality or value of the goods, the lender should protect himself by insisting on the deposit of an invoice showing the value and description of the goods Further, it should be ensured that the bill of lading is accompanied by the relative marine insurance policy or certificate of insurance, whereon the description of the goods should agree with that given in the bill of lading It should also be ascertained whether the bill of lading is *clean*, *i e* , whether it acknowledges that the goods have been shipped " in good order and condition ", or whether the shippers qualify their acknowledgment of the shipment by stating that the goods or the packages were in some way defective at the time of their receipt on board, in which event the bill of lading is said to be *claused*, or *foul* or *dirty*

Wherever possible, a banker advancing against the security of bills of lading issued in sets should arrange for the deposit with him of all parts of the set, so as to ensure that the goods cannot be claimed by any person to whom one of the parts has been fraudulently transferred Finally, the banker should make certain that the goods are adequately insured (*in his name* but at the customer's expense) against fire and theft at any place where they are stored

Dock and Warehouse Warrants.

Dock and Warehouse Warrants are documents issued by dock companies, warehouse-keepers, or wharfingers, in favour of persons depositing goods, and state that the goods described therein are deliverable to the person named in the warrant, or to his assigns by indorsement

Although these warrants are transferable by indorsement and delivery, or by mere delivery if indorsed in blank, they are not negotiable instruments, so that any transferee thereof will be affected by any defects in the title of his transferor.

As a dock company or warehouse-keeper cannot be compelled

to hold goods on behalf of any person other than the original depositor with whom the contract was first made, it is essential that a banker who takes such a document as security should at once give notice of his claim to the holders of the goods, so that a new warrant may be issued in his name. The banker should also make arrangements to have the goods insured against fire and theft at the borrowing customer's expense.

Warehouse-keepers' Receipts and Certificates.

These are documents issued by warehouse-keepers, stating that the goods specified therein were deposited on a particular date by a person named, and that they are held at his disposal Such documents, which are usually stated to be " not transferable ", are merely receipts or acknowledgments for the relative goods They are not documents of title, for the owner may obtain possession of the goods without surrender of the certificate or receipt, by signing and forwarding to the warehouse-keeper what is known as a DELIVERY ORDER This is a document addressed by the owner of the goods to the warehouse-keeper instructing him to deliver either all or some of the goods to a specified person or to his assigns Although such a document is not strictly a document of title, it is nevertheless necessary to enable a third party to obtain goods in respect of which a warehouse-keeper's receipt has been issued

A *warehouse-keeper's receipt* or *certificate* taken as security should be accompanied by a delivery order made out in favour of the banker, so that he can obtain possession of the goods and have them stored in his own name. If the banker does not wish to register himself as owner of the goods, he should lodge a " *stop order* " with the warehouse-keeper holding the goods, in order to prevent unauthorised dealing with the articles by the customer or third parties

Letters of Hypothecation.

Customers depositing documents of title to goods with a banker as security are ordinarily required to sign a document of charge known as a *Letter of Hypothecation.*

The Letter of Hypothecation pledges the documents with the banker as security, authorises him to deal with the goods in any way which may be necessary, to insure and store them in his own name at the customer's expense, to pay freight thereon to the customer's debit, to sell them if he deems fit, and to apply the proceeds in repayment of any advance or payment made by him on behalf of the pledgor Should the amount so realised be insufficient to satisfy his claims, the banker still has recourse

to the signatory to the Letter of Hypothecation for the balance due.

Thus the object and general effect of such an authority is to ensure that the banker may be adequately covered in the event of the dishonour of the bills drawn against the goods, or in the event of the failure of the customer to repay the sum advanced.

Such a memorandum of charge is essential in circumstances where the documents are not made out " to order " or " to assigns", and the banker cannot obtain a good title by mere delivery. Moreover, a memorandum of this kind is essential to support the banker's claim to the relative goods or the documents of title thereto, in cases where he does not deem it desirable to append his own signature to the actual documents, in view of the risk that he may incur liability to parties of whose interests he is unaware

Trust Receipts.

Customers who have obtained advances from a banker on the security of goods are frequently unable to repay the amount borrowed until they have realised the goods and received the proceeds As the documents of title must be produced before goods can be obtained from a shipping company, dock company or warehouse-keeper, bankers sometimes arrange to release the documents to the customer against his signature to an instrument known as a " *Trust Receipt* ".

This embodies an agreement by the customer hypothecating the goods to the banker as security for the advance, and undertaking to hold them and any proceeds received in respect thereof as a trustee for the banker, in whose name the goods are insured and, if necessary, warehoused.

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CHAPTER 9

THE BANKER AS BAILEE AND AS AGENT OF HIS CUSTOMERS

Property which is left by customers with a bank for safe custody is usually deposited in a locked box, the key of which is kept by the customer, or, if it consists of deeds or securities, it may be enclosed in an envelope, which should be sealed with the customer's recognisable seal The name of the customer usually appears on the outside of the box or envelope, but in the majority of such cases, the banker is given no precise information regarding the contents Negotiable securities, such as bearer bonds, are usually left with the banker uncovered, particularly where he is required from time to time to detach the coupons and to present them for payment

Receipts for Articles Left for Safe Custody.

The majority of banks in this country issue to customers a special form of receipt in respect of all articles lodged for safe custody, and require that the receipt shall be returned to the banker duly discharged by the customer before the articles deposited can be withdrawn Moreover, it is usually provided that the depositor shall attend *in person* at the bank in order to withdraw the articles, and, if he is unable to do so, he is required to sign an order on the back of the receipt instructing the banker to deliver the articles to the bearer of the document.

As a rule, the receipt is taken from a *Safe Custody Receipt Book*, and is detached from a counterfoil which the customer is required to sign on depositing the valuables By so doing he not only acknowledges that the articles deposited by him are as stated on the counterfoil, but also provides the receiving banker with a specimen of his signature, which can, of course, be compared with that signed on the receipt when the articles are withdrawn

In the event of the receipt being lost by the customer, he is requested on withdrawing the articles either to give another receipt, or to sign his name opposite the relative entry in the

bank's Register of Articles for Safe Custody. If a third party is permitted to withdraw articles belonging to a customer under a letter of authority or by virtue of the customer's instruction on the back of the receipt, he should be required to sign the Register, and the customer's letter of authority or instruction should be filed away with the other receipts for articles withdrawn.

If articles are deposited in the names of two or more persons, all of them should be required to sign the counterfoil and the Receipt should be made out in the names of all the parties. Upon proper proof of the death of one of two or more parties in whose joint names valuables are deposited, delivery may be made to the survivor or survivors, provided the bank has no notice that the valuables are held by the parties as trustees

Articles lodged for safe custody on behalf of a partnership, limited company, local authority, or other body should be accepted only if the counterfoil is signed by duly authorised officials, while the return of valuables in such cases should be made only against the signature of persons who are properly authorised to act on behalf of the body concerned, although such persons need not necessarily be those by whom the valuables were originally deposited

In the case of trustees, the banker should take particular care to see that the valuables are deposited in the names of *all* the trustees, and that the signatures of all are obtained to the counterfoil In no circumstances should one or some of several trustees be permitted to withdraw or to handle valuables deposited in the names of all, unless the signed authority of all the trustees is first obtained. Moreover, if one of several trustees is given authority by his co-trustees to deal with valuables for safe custody in a certain way (*e g* , to cut off coupons for collection), the banker acting on such authority should see that its terms are rigidly complied with and not exceeded

Death or Bankruptcy of the Depositor.

On the death of the person in whose name articles are left with a banker for safe custody, the banker should not permit dealings with the property except by the personal representatives *after* production of the probate or letters of administration, although the banker should not object to the examination of the articles in his presence by persons properly interested, as, for example, near relatives of the deceased If a will is contained in a box which is so examined, it may be handed over against the signature of all the executors mentioned therein, but no other documents should be transferred until probate is

produced, and the authority of all the personal representatives obtained. If several executors are named in a will, the signature of all should be required in acknowledgment of articles lodged for safe custody in the name of the deceased.

On the bankruptcy of a person who has deposited articles with a banker for safe custody, the banker should obtain the permission of the Official Receiver or of the trustee in bankruptcy before releasing the articles, and will be safe in accepting the signature of either as an authority for the withdrawal.

The Banker in the Capacity of Bailee.

In taking charge of a customer's valuables for safe custody, the banker undertakes the obligations of a *bailee*, *i e*, a person to whom goods are delivered in trust, to be held until reclaimed by the depositor, who is described as the *bailor* No property in the goods thus deposited passes to the bailee, his capacity is merely that of a warehouseman or custodian of the goods for the person depositing them, and his liability for loss or theft of the articles depends upon whether he renders the service gratuitously, or whether he is recompensed for his trouble, *i e*, whether he is a *gratuitous bailee*, or a *bailee for reward* or *for hire*

The distinction is important from a banker's point of view because the liabilities and obligations of a bailee for reward are more onerous than those of a gratuitous bailee Whereas a gratuitous bailee is bound to use only the best means and facilities at his disposal, a paid bailee is in the position of an expert. He is bound to provide himself with the best safeguards known to practical science, and his failure to display the requisite degree of care will constitute negligence for the consequence of which he will be responsible to the depositor

It is difficult to define the banker's position because, in the ordinary state of affairs, he receives no special payment for his services, and no definite arrangements are made with the customer when the account is opened. Unfortunately, there is no agreement among the authorities as to whether the banker in such circumstances is a gratuitous bailee or a bailee for reward. Sir John Paget maintains that the banker is properly regarded as a *gratuitous* bailee; but other eminent authorities contend that a banker is a bailee *for reward* because he makes a profit by keeping a customer's account, and because one of the considerations by virtue of which customers open or continue their accounts at a bank is that the banker will at any time accept their valuables for safe custody in accordance with long established practice. In support of this view it is argued that, before opening

an account, a prospective customer knows from the advertisements and literature of the bank that he will have a right to leave his valuables in the hands of the bank for safe keeping, and that he will be able to obtain the benefit of the modern protective devices at the disposal of the bank for the safeguard of his property from fire or theft. On his part, the banker knows that customers will expect this service, and he lays himself open to act as a bailee of the customer's property because he expects to derive some benefit from the existence of the account.

Whichever view is accepted, it cannot be denied that the service rendered must be regarded as being more than mere courtesy, for there is little doubt that the refusal of a banker to accept a customer's valuables for safe custody would be followed in the majority of cases by the removal of the account to another bank Moreover, this service is one which bankers do not usually place at the disposal of persons who are not customers, and presumably a charge would be made by a banker who was asked to undertake the safe custody of articles belonging to outside parties. Nevertheless, it must be remembered that a customer cannot *compel* a banker to take charge of his valuables

Is a Banker liable for Ordinary or Gross Negligence?

It is generally stated that the difference in respect of a banker acting as a gratuitous or a paid bailee is that in the former case he is liable only for *gross* negligence, whereas in the latter case he is liable for *ordinary* negligence. This distinction, however, is hardly correct. Even if the view is accepted that a banker is a gratuitous bailee, "he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description" (*Giblin* v. *M'Mullan*, 1868). "The banker publicly professes the art of taking care . . and negligence which, in the case of another person might be unrecognisable, would be appalling in the case of a guardian of credit and capital" [1] It follows, therefore, that even if a banker is to be regarded as a gratuitous bailee, he would be liable if he had failed to take all precautions which his experience had shown were usual and necessary. In other words, a banker who acts as gratuitous bailee is expected to exercise as much care as would be expected of a highly expert bailee for reward.

The banker does not *insure* the safety of goods thus entrusted to him, so that if the goods are lost in spite of the fact that he has exercised every reasonable care, he will incur no liability

[1] Hart, *Law of Banking*, page 608.

to the party depositing This is so even if the goods are lost or fraudulently dealt with by one of the bank's employees, provided that the bank itself can show that it has acted without negligence.

A banker will be held liable for the loss, destruction or damage of articles entrusted to him for safe keeping which he deposits elsewhere than on his own premises, quite apart from any question of negligence. In such circumstances, his liability arises from breach of one of the conditions of the contract of deposit.

Finally, it should be noted that a bailee of goods has no better title thereto than the bailor, so that if the latter has obtained goods or securities from another person by fraud, the true owner will be able to sue the bailee for their return even though the bailor's authority for withdrawal is not obtained

Return of Articles Left for Safe Custody.

Whether the banker is regarded as a gratuitous bailee or a bailee for reward, he must return the articles upon demand to the depositing customer *but to no other*, and if through his negligence the articles are stolen or otherwise lost, or if he delivers them to a third person without being authorised to do so by his customer, he will be liable to make good their value

For these reasons a banker should take every care to satisfy himself concerning the genuineness of the signature to an instruction for delivery of articles left for safe custody, for he will be unable to escape liability to his customer for conversion if, in returning such property, he acts upon a signature which is forged or unauthorised. If there is any doubt as to the authority of a person who presents an order for delivery of articles left for safe custody, the banker is justified in obtaining the customer's confirmation of the request for withdrawal Danger of mis-delivery in such a case may be avoided if the banker insists upon sending the articles by a member of his own staff to the customer's own house or place of business.

The articles returned must accord in description with the articles deposited. Thus, if uncovered bearer bonds are left with the banker, the instruments returned must be identical in description, serial number and value with those which were deposited But a banker is in no degree liable for the contents of a locked box or a sealed envelope, unless in the case of a box the contents are specifically divulged to him at the time of the deposit and the key is left in his hands

Valuables for Safe Custody and Third Parties.

If a customer gives an authority to a third party to obtain access to a box or parcel deposited at a bank for safe custody,

the banker should see that the terms of the authority are strictly complied with. Thus, if the customer merely authorises the third party to *inspect* the documents or contents, the banker should ensure that the contents are examined only in his presence and should see that nothing is removed and that nothing is altered or damaged. Moreover, if the authority permits the third party to remove a particular article from a box or parcel, the banker should see that only the specified article is taken away

Accordingly, a solicitor who has the customer's authority to inspect the contents of a box should not be permitted to remove any of the contents, or to alter any documents without the customer's express consent, or to remove the box from the bank, even if, in the latter case, the solicitor offers to give an undertaking not to interfere with, damage or remove the contents

Lien Over Articles for Safe Custody.

Since articles deposited for safe custody are left with the banker for a specific purpose only, they cannot be subject to the banker's general lien In other words, a banker cannot retain jewellery or negotiable securities deposited with him merely as a warehouseman for his customer in respect of any loan or overdraft due by that customer to the bank In such circumstances the banker acts in two distinct capacities, and his legal rights and liabilities arising from the two capacities are in no wise related If, however, a customer's securities deposited for safe custody have to be dealt with by the banker in the ordinary course of his business *as a banker*, then the lien will arise

The foregoing is the guiding principle, but the decisions based thereon are not consistent, and each case is a question of fact to be determined according to the custom of bankers in the circumstances and the general course of dealings between the banker and the customer concerned Thus, if bearer bonds with coupons attached are left in the care of a banker and the *customer* periodically cuts off the coupons and hands them to the banker for collection, no lien will arise in respect of the *bonds*, although the banker can exercise a lien over the *coupons* and their proceeds by virtue of the fact that they come into his hands *as a collecting banker*. Moreover, it has been suggested, though on somewhat doubtful grounds, that the lien will extend to the bonds as well as to the coupons if the securities are lodged with the banker and he is instructed to cut off and present the coupons as they fall due. But the banker will have no lien either on the bonds or on the coupons if the latter are cut off

and presented for payment *by the customer* himself. Again, no lien will arise over the bonds in any of the foregoing circumstances, if there is evidence from the terms of a receipt given by the banker that the securities are received by him expressly for safe custody, as, for example, if the receipt specifically acknowledges that the bonds are to be held by the banker "*for safe custody*".

Drawn Bonds and Coupons in Safe Custody.

In the absence of an express or implied agreement with the customer, there is no obligation on the banker's part to present for payment coupons on bonds left with him for safe custody, although in practice bankers almost invariably undertake this service in respect of all bonds of their customers to which they have access Of course, if the banker has once accepted the responsibility to make collections, he will be liable to the customer if any loss ensues by reason of his failure to present coupons for payment at the correct time If the coupons are payable by advertisement, it devolves upon the banker to ascertain the dates upon which payment will be made (*e g.*, by searching the *Bondholder's Register*), and to present the coupons for payment at the place specified

The banker's liability to present for collection applies also to bonds, held by him for safe custody and accessible, which are periodically drawn for payment, and he must take any necessary steps to ascertain whether any bonds so held are among those which are from time to time advertised as drawn In actually collecting the proceeds of coupons and bonds the banker must exercise every possible care as the customer's agent for the purpose, and will be liable for any loss that may arise from his negligence in the discharge of this duty.

Clearly, a banker can incur no liability in respect of the collection of coupons and bonds if he has no access to the bonds, as, for example, where they are deposited in a locked box of which the customer keeps the key, or in a sealed envelope.

Stock Exchange Business.

A banker must exercise due care and follow the usual course of business in connection with the purchase and sale of stock exchange securities on behalf of his customers. In rendering this service the banker becomes the *special* agent of his customer for the matter in hand, and it is imperative that he should act strictly in accordance with the customer's instructions and follow the exact course of business which is usual in connection with these operations. This implies that he must exercise every care in buying or selling as the case may be, see that the

bank's brokers do not exceed the limits (if any) given by the customer, use due diligence in obtaining the transfer and having it properly completed, ensure that the securities bought or sold (and no others) are actually received by him or sent to the brokers, and, finally, see that the correct amount is paid or received by his customer in respect of the transaction. If the banker omits in any way to comply strictly with the instructions given to him by the customer, or if he is negligent in effecting a sale or securing a purchase at the given limit, he may be held liable for any loss which ensues.

Advising Customers on their Investments.

In spite of the fact that advising customers concerning their investments is not an *essential* characteristic of the business of bankers, it is nevertheless a common practice for them to give such advice, and it is possible that, if the Courts were called upon to decide the question, they would find that advising upon investments is a part of ordinary banking business, particularly if it were shown that banks participate in the broking commission

It is unlikely that a joint-stock bank or its managers would act otherwise than in good faith and honesty in giving such advice, and, since the bank is adequately protected against a charge of fraudulent misrepresentation by Lord Tenterden's Act, 1828, the only ground on which a customer could bring an action against a bank for wrong advice is that of negligence on the part of its agent, the manager or other person giving the advice. (See page 37)

Nevertheless, the practice of giving customers advice of this kind is fraught with considerable danger, for the average bank manager cannot possibly be in a position to advise on any one of the vast number of securities which are quoted on the Stock Exchange At the same time, the manager always has at his disposal the assistance of the experienced brokers who act on behalf of his bank, so that the safest course is merely to forward to the customer an opinion obtained from the bank's brokers This procedure safeguards both the manager and the bank.

PART III

BANKING INSTRUMENTS

CHAPTER 10

BILLS OF EXCHANGE

Note.—Section references in this and subsequent chapters are to the Bills of Exchange Act, 1882

The Bill of Exchange is the most important type of negotiable instrument known to the modern trading community, and its great utility springs from the fact that it may pass through several hands for value before it is finally discharged, and therefore forms a convenient and safe means of making commercial payments and of transmitting funds from place to place. Apart from being a widely-used medium of payment, the bill of exchange is a most important instrument of credit whose functions are recognised in all places where men trade. It enables credit to be given and taken, it permits payment to be deferred and capital to be rapidly turned over in business operations. Moreover, as a bill is easily convertible into cash by sale or discount, and automatically turns into cash at maturity, it is an admirable form of short-term investment of special utility to bankers.

As an instrument of credit the bill of exchange payable after date or sight shows to great advantage, particularly in comparison with the cheque, for while the latter is usually presented for payment soon after its issue, the essential attribute of a long bill is that it shall not be presented and paid until the expiration of an agreed period, during which time, known as the *term* or *currency* of the bill,[1] the drawee has the use in his business of the sum for which it is drawn and is enabled to put himself in funds

[1] In other words, the "term" or "currency" of a bill payable other than at sight or on demand is the period of time which has to run before it reaches maturity, *i.e.*, the term during which the instrument is current. Such a bill is sometimes described as a *tenor* bill, and, after the due date has arrived, it is no longer regarded as being current, but is described as being *overdue*.

to pay the bill on the due date On the other hand, the fact that a bill is not immediately payable does not prevent the payee or holder from at once converting it into cash if he so wishes, since most bills of exchange can be discounted with no loss other than that of interest for the unexpired period of the instrument

These facts explain why the bill of exchange is so widely used in international transactions Jones, of London, may send goods to Brown in Australia and may obtain payment by drawing a bill on Brown for the value of the goods, payable in three months Jones can at once obtain cash for the bill if he so desires by discounting it, or by negotiating it for value to a third party, while the period of three months which has to run before the bill matures gives Brown time to sell the goods at a profit and collect sufficient funds to meet the bill when it is presented for payment

Transactions involving bills of exchange and cheques are of such frequent occurrence in everyday banking practice that every banker must be thoroughly acquainted with the legal principles and provisions applicable to bills of exchange as they have been laid down by decisions in the Courts and the Bills of Exchange Act, 1882.

Terms used in the Act.

The provisions of the Bills of Exchange Act cannot be clearly grasped without an understanding of the significance of certain important " terms " which are frequently used in the sections A number of these are explained in Section 2 of the Act, and although their meaning may not be clear to the reader on a first perusal, they have to be referred to so frequently that the provisions of the Section are given in full below —

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

" Acceptance " means an acceptance completed by delivery or notification

" Action " includes counter-claim and set-off.

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

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

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

(*Technically, the possessor of a bill or note payable to order is not the bearer of it*)

" 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

The Important Characteristic of "Negotiability."

The bill of exchange owes its great mercantile importance to its characteristic of *negotiability* and to its statutory recognition as a *negotiable instrument*

A NEGOTIABLE INSTRUMENT is one which is, by a legally recognised custom of trade or by law, transferable by delivery or by indorsement and delivery in such circumstances that (*a*) the holder of it for the time being may sue on it in his own name, and (*b*) the property in it passes free from equities to a *bonâ fide* transferee for value notwithstanding any defect in the title of the transferor

The general rule of law is that no person can derive a good title to any property if he takes it from a person who is not the true owner. In the case of a negotiable instrument, however, a person taking it in good faith and for value is not affected by any defects in the title of the person from whom he took it, and he can thus obtain a good title even through a thief.

A *bonâ fide* transferee for value of a bill of exchange is known as a "holder in due course" (see Chapter 11). Such a transferee has an absolute title to the instrument and its proceeds, and the only case in which his claims may be defeated is when there is a prior forgery on the instrument, for no person can acquire a full title through a forgery Hence, if there is any doubt as to whether or not an instrument is negotiable, a rough and ready test to apply is—*Can a perfect title be obtained through a thief?* If so, the instrument is negotiable , if not, the instrument is not negotiable

Many instruments now recognised as negotiable have become so recognised *by virtue of the long-established custom* of merchants, whose practice in this regard has been confirmed by the Courts. Among such instruments are Exchequer Bills, Treasury Bills, Bank notes, dividend warrants, share warrants, East India bonds, bankers' circular notes, debentures payable to bearer. Other instruments are recognised as negotiable *by Act of Parliament*, notably bills of exchange (including cheques) and promissory notes.

The tendency is for the list of negotiable instruments to be increased whenever it is shown that, by the custom of merchants, an instrument is transferable by delivery and that a good title to it passes to a *bonâ fide* holder for value in spite of any defects in the title to the transferor Foreign instruments are negotiable here only in so far as they are recognised as such by English mercantile usage. Share certificates and share transfers are not negotiable. Bills of lading, and other documents by the transfer of which a title to goods can be given, are passed by delivery with or without indorsement, and persons taking them may sue in their own name without previous notice of the transfer to the party chargeable ; but they are not by reason of this negotiable, as a holder in good faith and for value of any one of these documents has no better title than that of the person from whom he received it

Assignability.

The characteristic of *assignability* must be clearly distinguished from that of [illegible] Assignability is the characteristic which permits a *chose in action*, *i.e.*, a legal right which can be enforced by action in a court of law, such as a debt or a share in a joint-stock company, to be assigned by one person to any other, orally or in writing, provided the debtor or the person holding the funds is given to understand that the right has been transferred Such an assignment is described as an *equitable assignment* Moreover, a debt or other chose in action may be *legally assigned* so as to enable the assignee to sue in his own name, provided that the assignment is made in writing, that it is absolute and not by way of charge, and that written notice thereof is given to the debtor or to the person holding the funds

It will be observed that, in the case of an assignment, notice thereof must always be given to the debtor, whereas, in the case of negotiation, no such notice is required Furthermore, an assignment, whether legal or equitable, is always *subject to equities*, *i e* , the assignee takes subject to any rights which the party liable or third parties may have against the assignor, and he can acquire only the same title as was possessed by the assignor But a person who takes a negotiable instrument for value in good faith takes it "*free from equities*", *i e* , he takes the instrument free from the rights of third parties and *free from any defect* in the title of a prior holder

Suppose A owes B £50 B can transfer this right against A to C by assignment in writing, but C's right to the £50 is subject to any set-off or counter-claim which A may have against B. If, however, A gives B a promissory note for £50, B may transfer

the note to C, by mere delivery if it is payable to bearer, or by indorsement and delivery if it is payable to order; and provided C takes the instrument *in good faith* (whether for value or not), he can claim payment of the £50 from A, and is not affected by any claim A may have against B.

Transferability.

There are, however, many instruments, which, while not being negotiable may be passed from hand to hand for value without the formalities of assignment in such a way that the property in them is transferred from one person to another without notice to the party liable. Such instruments are *transferable* if everything is in order the transferee obtains a good title, but the absence of negotiability means that the transfer is made "subject to equities", and the rights of the transferee are liable to be defeated by any prior defects of title or by any defences which can be set up against any prior holder.

British Postal Orders, though they are clearly marked "Not Negotiable", are frequently passed from hand to hand for value Such transfers are perfectly valid so long as all parties act honestly and in good faith, but the intervention of theft, fraud, or illegality is sufficient to defeat the rights of any subsequent holder

Who is the "True Owner"?

The *true owner* of a negotiable instrument is the person who is entitled to the property therein There is a presumption that the bearer of an instrument payable to bearer is the true owner, and therefore any negotiation by him is valid and effectual as far as third parties acting in good faith are concerned There can be only one true owner of a negotiable instrument, and where, for example, a bearer cheque has been stolen and has come into the hands of a *bona fide* transferee for value, he, and not the person from whom it was stolen, is the true owner

Specimen Bills of Exchange.

1. Bill Payable After Date

£200 London, 1st *April*, 19

IMPRESSED STAMP 2/-

Three months after date pay to James Brown or Order the sum of two hundred pounds for value received

To William Arnold, 62 St James' Street, Liverpool

Fred Davies.

In this bill, Fred Davies, as the *drawer*, orders the *drawee*, William Arnold (usually a *debtor* of the drawer), to pay a sum certain in money (£200) to or to the order of the *payee*, James Brown (usually a *creditor* of the drawer), at a determinable future time, *i e*, three months after the date of the bill.

After he has signed the instrument, the drawer, Fred Davies, will issue it to the payee, James Brown, by whom it will in due course be presented to the drawee, Arnold, who will express his willingness to comply with the order by writing his signature across the face of the instrument, adding, if he wishes, the word "*Accepted*" and the date By so doing Arnold is said to have "accepted the bill", and thereafter is liable in respect of his signature as *acceptor* to any persons who may take the bill as holders

If Arnold does not wish to carry out the instructions of the drawer, he will refuse to accept the instrument, and he is then said to "dishonour the bill by non-acceptance", in which case he does not become liable *on the instrument* to any party, though he may be liable *to the drawer* in respect of the consideration for which the bill was drawn Again, even after accepting the bill and thereby undertaking to pay it on its due date, the acceptor may refuse to pay it when it is presented for payment, in which case he is said to "dishonour the bill by non-payment", but in this instance there will be an immediate right of action against him by the holder, since the acceptor is liable on his signature for due payment of the bill when it matures

When he has obtained the drawee's acceptance to the bill, the payee, James Brown, may either hold the bill until it falls due for payment, or discount it, or hand it to another person in payment of a debt If he decides to transfer the bill and the rights therein to another, he will sign his name on the back (*i e*, he will "*indorse*" the instrument), and pass it to the "*indorsee*" By thus transferring the instrument, Brown is said to "negotiate" it, and, by affixing his signature to the bill and delivering it, he

2 Bill Payable to Bearer on Demand

£200 London, 1*st April*, 19...

ADHESIVE OR IMPRESSED STAMP 2d

On demand pay bearer the sum of two hundred pounds for value received

To William Arnold, 62 St James' Street, Liverpool. Fred Davies.

thereby incurs the liabilities of an *indorser*. This means that he guarantees that, if the instrument is not duly paid at maturity, he himself will pay the amount to anyone who holds the bill with a good title

In Example No. 2, the amount of the bill must be paid on demand to the bearer of the instrument, *i e.*, the person in possession thereof

3. Bill Payable to Order after Sight



£200 London, 1*st April*, 19 .

Ten days after sight pay to James Brown or Order the sum of two hundred pounds for value received

To William Arnold, 62 St James' Street, Liverpool

Fred Davies

Example No. 3 is a form of bill payable " ten days after sight ', *i e* , ten days after the bill has been exhibited to the drawee (William Arnold). The question of due dates is discussed on page 112, *et seq.*

4. Bill Payable after Date with Interest



£125 London, 1*st April*, 19. .

Three months after date pay James Brown, or Order, the sum of one hundred and twenty-five pounds with interest at 3½ per cent per annum, from date hereof to date of payment

To William Arnold, 62 St James' Street, Liverpool

Fred Davies

Example No 4 is a form of bill payable " three months after date ", *i e* , three months after the date appearing on the bill It also stipulates that the drawee is to pay, in addition to the amount of the bill, interest on that amount at a fixed rate for a fixed period.

Requisites as to Form of a Bill.

Section 3 (1) of the Bills of Exchange Act, 1882, defines a bill of exchange in the following terms :—

3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

From this definition it will be seen that there are *eight* essential requirements of an instrument which is to constitute a valid bill within the meaning of the section : (*a*) the bill must be an *order to pay* ; (*b*) the order must be *unconditional* ; (*c*) the instrument must be *in writing* ; (*d*) it must be *addressed by one person to another* ; (*e*) it must be *signed by the person giving it, i e* , the drawer ; (*f*) it must be made payable *on demand or at a fixed or determinable future time* ; (*g*) it must be drawn for *a sum certain in money* ; (*h*) it must be made payable to *a named payee or his order or to bearer*

Every one of these requisites must be complied with if the instrument is to constitute a valid bill of exchange An instrument that does not comply with any one of them, although it may otherwise be perfectly valid, is not a bill of exchange,

A Bill must be an Order.

The Act does not prescribe any form of wording as essential to the validity of a bill. So long as the words employed in ordering the payment are *not a mere request* but have an *imperative* character, any form of wording will satisfy the definition. " A bill must in its terms be imperative and not precative " [1] The addition of mere words of courtesy will not, however, invalidate the bill Thus a bill drawn " Please pay X £100 " is perfectly valid

The Order must be Unconditional.

The order to the drawee must be free from any conditions subject to which payment is to be made There may be a conditional acceptance [Section 19 (2*a*)] or a conditional indorsement (Section 33) of a bill, but the use of any words implying a conditional *order* by the drawer will invalidate the instrument *as a bill*

On the other hand, the employment of words which give *a direction to the drawee coupled with the order* do not necessarily affect the unconditional character of the order, provided that such a direction falls within the exceptions specified in Section 3 (3), which provides as follows :—

3. (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

[1] Chalmers, *Bills of Exchange*, 8th edn , page 12.

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.

Hence, instruments running, " Pay AB or order £100 out of the money in your possession belonging to the A. Company ", or " Pay to Thomas Brown £700 out of the proceeds of the sale of cargo shipped per ss *Majestic* ", are invalid, as each is a conditional order to pay out of a particular fund. But an order to pay a sum of money followed by the statement, " Which you will please charge to my account and credit according to a registered letter I have addressed to you ", has been held to be an unconditional order, since it consists merely of an unqualified order to pay coupled with an indication of a particular account to be debited with the amount.

For similar reasons, orders running, " Please pay to Messrs. X & Co or Order £600 on account of moneys advanced by me for the A B Company ", or " Please pay X Y , or Order £120 against 20 chests of tea shipped by ss *Majestic* ", would be quite valid

The test of the conditional character of the order is *whether payment to the holder depends upon the fulfilment of any condition* other than the mere pecuniary capacity of the drawee to pay the bill when presented , if so, then the order is conditional Although an instrument with a conditional form of order is void as a bill of exchange, it may nevertheless be used as evidence of a contract between the drawer and drawee, provided that it is properly stamped

Writing is Essential.

Section 2 provides that " writing " includes " print " A typewritten bill or one in pencil would also be valid, but the risks of alteration, obliteration or defacement make such instruments undesirable in commercial usage

A Bill must be " Addressed by one Person to another ".

The term " person " is defined by Section 2 as including " a body of persons whether incorporated or not ", so that the drawer or drawee may be one or more individuals, or an incorporated body or a partnership

Section 6 provides that *there may be more than one drawee* to a bill, but if there are, they must be addressed *jointly* and not alternatively or in succession.

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.

Hence, a document addressed to "Thomas Robinson *or* James Brown", or to "Thomas Robinson, and thereafter to James Brown", is not a bill, although it would be quite in order if the drawees were addressed jointly, as, for example, "To Thomas Robinson *and* James Brown".

Section 6 also provides that the drawee must be named or otherwise indicated with reasonable certainty. Accordingly, if a person purports to accept an instrument in the form of a bill with no drawee mentioned, then that person cannot be made liable as acceptor of the bill since such an instrument is not a valid bill of exchange. But the person purporting to accept may be held liable on his signature as the maker of a promissory note.

Section 5 (2) further provides —

5. (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.

An instrument in which drawer and drawee are the same person does not come within the definition in Section 3 (1), which requires a bill to be addressed *by one person to another*. The effect of Section 5 (2), however, is that, while it does not make such an instrument a valid bill, it nevertheless permits the instrument to be *treated* as a valid bill *by the holder*, and ensures that the rights of the *holder* are not prejudiced by the irregularity in the form of the instrument. So, in the case of bankers' drafts drawn by one branch on another branch, or on Head Office, the *holder* has all the *rights* of the holder of a cheque

"Signed by the Person Giving it".

Although the signature of the drawer is essential to the validity of the bill, it need not be affixed when the bill is drawn. It may be affixed *at any time*, but until it is so affixed, the instrument is incomplete or inchoate It is not valid as a bill or note and no action thereon can be taken by the possessor.

Section 18 (1) expressly provides that acceptance may take place before the drawer signs the bill or while it is otherwise incomplete.

In accordance with the provisions of this section, a debtor will sometimes effect payment of his debt by sending to his creditor a form of bill which he has drawn up and accepted, the creditor being left to sign his name as drawer and obtain payment of the bill.

Payment must be of "A Sum Certain in Money".

All bills must order the payment of money and money only, for by Section 3 (2) of the Act, an instrument which by its terms requires some other act to be done in addition to the payment of money is not a bill of exchange.

So, where a bill was drawn ordering "the payment of money and the delivery of a wharf and horses", it was held that such an instrument was not a valid bill. But a statement on the face of a bill that documents are to be given up either on acceptance or on payment does not effect the validity of the bill, since the statement is addressed to the holder, and not to the drawee.

For the purposes of the Act, the term "money" means the legal currency of any country, so that an order to pay in "East India Bonds" does not comply with the provisions of the Act

A bill is invalidated also by the addition of any words to the amount of the bill which would cause the sum payable to be *other than a sum certain, i e*, such as would make the amount payable an indefinite or contingent sum Hence, a bill ordering payment of "£100 and all fines according to rule" has been held to be invalid. But by Section 9 ·—

> **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.
>
> (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.

If a bill orders payment by instalments, the section requires the *instalments to be stated.* But it will be sufficient if the amount of each instalment is either specifically stated, or is *clearly ascertainable from the wording of the bill*, as, for example, where the bill gives the number of instalments payable and the date of payment of each instalment. Accordingly, a bill for "£200 payable by two equal instalments due 1st March and 1st September" is valid, but a bill for "£200 payable by instalments" is not valid, for in the latter case no indication is given as to the amount of the instalments.

A bill drawn in foreign currency is perfectly valid, even though no rate of exchange is indicated—*Cohn* v. *Boulken*, 1920. Such a bill is payable at the rate of exchange ruling at its maturity,

and, if action is brought thereon in our Courts, judgment will be given at that rate.—*Uliendahl* v. *Pankhurst*, 1923.

A discrepancy between the amounts expressed in words and figures will not invalidate a bill, for by Section 9 (2) —

> **9.** (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.

Bankers usually refuse to pay cheques or bills in which the amounts expressed in words and figures differ, and return such documents with an answer such as " Words and Figures Differ ". Occasionally, however, the smaller of the two amounts is paid, and there is little to be said against this practice.

" On Demand or at a Fixed or Determinable Future Time ".

Section 10 thus defines payment " 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.

A cheque is a bill on demand in which no time for payment is usually expressed, for the order usually runs " Pay James Brown or order, ten pounds ".

When a bill is payable at a *determinable future time* is thus explained by Section 11 —

> **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.

The period of time which a bill has to run before maturity does not affect the validity of the bill, *so long as the day upon which payment is to be made is definite or determinable and certain to occur.* Thus if payment is dependent on the occurrence of an event which is *certain* to happen, even though the actual date of its happening is unknown, then the bill is valid. Accordingly, an order to pay " Seven days after the death of A ", is a good bill, but orders to pay " On the marriage of A " or " On the birth of a son to X " or " On the arrival of H M.S. ' Connaught ' at Calcutta " are not valid, for there is no certainty that any of these events will occur.

To whom Payment is to be Made.

According to the definition, a bill must require payment to be made to a specified person or " to order " or " to bearer ". Section 8 (2) further provides that " a *negotiable* bill may be payable either *to order* or *to bearer* ".

The term " bearer " is defined by Section 2 as " the person in possession of a bill or note which is payable to bearer ". Section 8 (3) defines " a bill payable to bearer " in the following terms :—

> **8.** (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.

An indorsement in blank is one which specifies no indorsee, *i e* , where the payee or indorsee merely signs his own name and does not make the bill payable to another person. The payee or indorsee of a bill payable to order does not become the bearer of it *until he indorses it*, and no person can become the bearer of a bill to which the indorsement of the payee or indorsee has been forged, since a forged signature is " wholly inoperative ", and does not make the bill payable to bearer. (Section 24)

Section 8 (4) and (5) thus defines " a bill payable to order " .—

> **8.** (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.

Thus an order bill may be drawn payable (1) " To A or Order ", or (2) " To the Order of A " , or (3) " To A ".

In each of these cases the effect is the same The bill is a negotiable instrument in the hands of A, who has power to transfer or negotiate it by indorsement followed by delivery.

As a general rule, a bill is a fully negotiable instrument, but by its terms transfer may be definitely prohibited, for Section 8 (1) of the Act provides that :—

> **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.

The prohibitive words must in themselves clearly indicate an intention to restrict the transferability of the instrument, for the law will not imply such an intention if any ambiguous words are used. The most usual method of prohibiting transfer is to draw the bill in the form " Pay A *only* " without the words

" or order " or " or bearer ", or with such words clearly crossed out and initialled by the drawer. The word " only " is regarded as clearly indicating the drawer's intention to restrict transfer and to order payment to be made to the named payee and to no one else. In the case of a cheque, the words " Not transferable " are usually added across the face of the instrument. (See page 170.)

Certainty as to the Payee.

Section 7 (1) provides that —

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

This certainty as to the payee must be obvious from the face of the bill itself, but in cases of " latent ambiguity "—as, for instance, when the payee is misnamed or designated merely by description—oral or written evidence will be allowed to identify the payee Thus if a bill is made payable " to the order of Jim Broune " evidence will be admissible to prove that " James Brown " is the person intended to receive the money The certainty as to the payee is not affected by the fact that there may be one or more payees, for by Section 7 (2) —

> **7.** (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.

Examples of bills payable to the holder of an office for the time being are instruments running " Pay to the Order of the Chancellor of the Exchequer ", or " Pay the Town Clerk, Bedford, or Order ".

By Section 5 (1) of the Act —

> **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.

A bill in which the drawer and payee are the same person would run " Pay Self or Order ", " Pay Ourselves or Order " or " Pay Order ". The case is not so easily understood where the drawee and payee are the same person, as when the drawee acts in two distinct capacities , for example, where he is trading on his own account and where he is also agent for another party interested in the bill. This might arise for instance where the drawee is the agent of a party to whom the drawer is indebted, while the agent himself is indebted to the drawer. Thus, the A. Co., Ltd., owes £100 for rent to a landlord C ; B (the property agent of C) has bought articles to the value of £100 from the

Company. The Company therefore draws a bill on B "Pay to your own order £100", and B indorses the bill to C after acceptance by himself. The negotiation of such an instrument is essential to the establishment of any rights under it, as "The instrument is not a bill *which can be enforced* until the drawee has indorsed it away" [1] Another common example is where a customer draws a cheque payable to his banker in settlement of some debt due to the latter.

Inland and Foreign Bills.

Inland and foreign bills are thus distinguished by Section 4 of the Act —

> **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.

The definition of "British Islands", as given in this Section, is more comprehensive than the term "United Kingdom" used by the Stamp Act, 1891, in reference to the determination of stamp duties (see Chapter 23) Following the legislation of 1922, the term "British Islands" here given does not now include the Irish Free State

From a consideration of the foregoing definition of an inland bill, it follows that a bill is a *foreign bill* if·

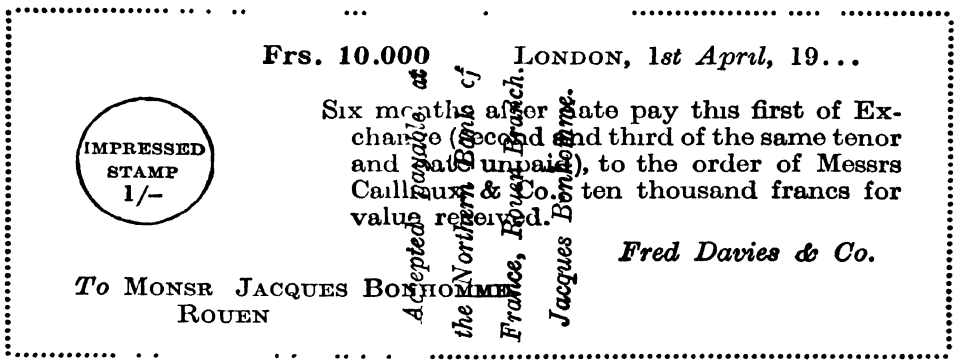
> (*a*) It is not drawn within the British Islands, *or*
>
> (*b*) Being drawn within the British Islands, it is neither payable therein nor drawn upon someone resident therein

Considerable variation exists in the form of foreign bills Apart from the fact that such bills are frequently drawn in foreign currencies, they usually also contain an indication of the particular transaction in respect of which they are drawn, or specify how a rate of exchange is to be determined, or provide that documents attached, representing the goods against which the bill is drawn, are to be surrendered on acceptance or on payment. The following specimens [2] will illustrate these points.

[1] Chalmers, *op. cit.*, page 18.

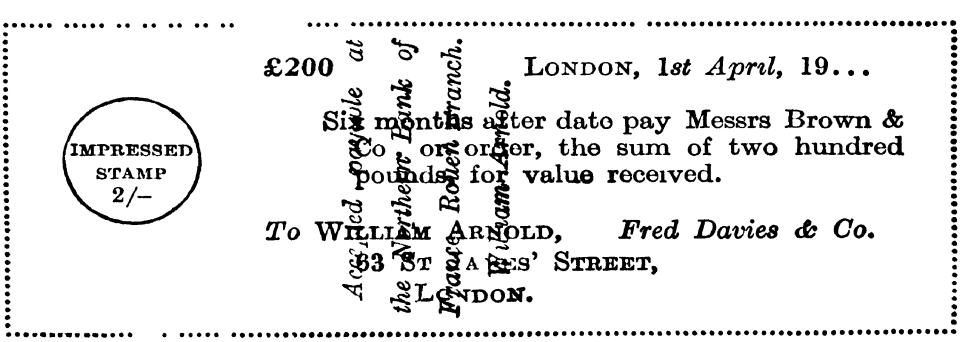
[2] See also *The Principles and Arithmetic of Foreign Exchange*, by the same author (MacDonald & Evans, London).

5. SPECIMEN OF FOREIGN BILL



For the purposes of the Bills of Exchange Act this is an example of a foreign bill, for although it is *drawn* in the British Islands, it is *not payable therein nor is the drawee resident therein* If the drawee had accepted this bill payable at a bank in London or at an address or office of his own in this country, the bill would be an inland bill, as it would be both drawn *and* payable in the British Islands

6. INLAND BILL PAYABLE ABROAD



This is an example of an *inland* bill, for although it is payable abroad, it is drawn in the British Islands *on a person resident therein*. Moreover, the bill would be none the less an inland bill even if the payees, Brown & Co , resided abroad and indorsed or negotiated the instrument outside the British Islands, for the place of indorsement or negotiation does not affect the character of a bill as inland or foreign

Where on the face of the bill it is uncertain or it cannot be definitely ascertained whether it is an inland or foreign bill, Section 4 (2) of the Act will apply, enabling the holder to treat the instrument as an inland bill. Apart from the question of stamp duty (see Chapter 23), one of the chief practical differ-

ences between inland and foreign bills is that, upon dishonour by non-acceptance or non-payment, a foreign bill *must* be noted and protested, whereas, in the case of an inland bill, noting and protesting are *optional*, except in certain special circumstances (see *post*, Chapter 19). Moreover, inland bills are generally *sola* bills, *i.e.*, drawn in one part only, whereas foreign bills are usually drawn in "sets" of two or three parts.

Importance and Effect of the Date of a Bill.

The date of the bill is generally inserted by the drawer, but it is provided by Section 3 (4) of the Act that the omission of the date shall not invalidate the bill. Moreover, Section 13 (2) provides that a bill shall not be invalid merely because it is antedated or postdated, or because it is dated on a Sunday.

If a bill is undated, it will be considered to be dated as at the time it was issued The date appearing on a bill is *primâ facie* the true date of the instrument, for by Section 13 (1) —

> **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

Section 9 (3) provides for the case in which a bill expressed to be payable with interest is issued undated —

> **9.** (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.

Provision is made by Section 12 for the holder of certain bills to insert the date if the instruments are incomplete in this respect —

> **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.

Days of Grace and the Due Date.

The date on the face of a bill is important as enabling the holder or bearer to determine at a glance when the instrument was drawn. But, in the case of bills payable at a fixed period *after date*, its chief function is to fix the date of maturity or pay-

ment of the instrument, so that presentment for payment on the due date may be made to the drawee.

A bill payable *on demand* or *at sight* is, of course, payable by the drawee at any time on or after the date of the instrument. A bill payable *after sight* is payable at the expiration of a stated period from the time when the bill is first sighted by the drawee, while a bill *after date* falls due at the expiration of a stated period calculated from the date given on the instrument But in the last two cases, Section 14 provides for the allowance of three extra days, known as "Days of grace", before the bill need be paid by the acceptor —

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

(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.

Days of grace do not apply to bills payable on demand, such as cheques, which are payable on presentation to the drawee banker, nor to bills drawn payable on a certain date "fixed" or on a certain date "without grace". By custom also Bank Post bills issued by the Bank of England are paid without grace.

Where a bill is made payable by instalments, days of grace are added to the date of each instalment; so if a bill for £100 is made payable by two equal instalments on May 1st and June

1st, the instalments fall due to be paid by the drawee on May 4th and June 4th respectively.

Days of grace are also allowed in the case of bills which are drawn payable only one, two or three days after date or after sight, in spite of the fact that such bills are treated for the purpose of stamp duty in the same manner as bills payable on demand. (See Chapter 23)

Sub-Sections 14 (1*a*) and 14 (1*b*) aim at providing for cases in which bills fall due on *non-business* days, *i e* , bank holidays, common law holidays and holidays appointed as such by Royal proclamation.

Bills falling due on Non-Business Days.

Common law holidays are those which have resulted from very ancient custom, and which are now legally recognised They include Sunday throughout the British Isles, and Christmas Day and Good Friday in England, Wales and Ireland

Bank holidays are those appointed by the Bank Holidays Acts, 1871 and 1903 In England and Wales, the bank holidays are Easter Monday, Whit Monday, the first Monday in August and Boxing Day, *i e* , the 26th December if that date is a week-day, otherwise the 27th December if the 26th December falls on a Sunday The bank holidays *in Ireland* are similar, with the addition of St. Patrick's Day, the 17th March, if this day is a week-day, or the 18th March if the 17th falls on a Sunday *In Scotland*, the bank holidays are New Year's Day (or if this day falls on a Sunday, the following day), the first Monday in May, the first Monday in August, Christmas Day and Good Friday

Though Christmas Day and Good Friday are bank holidays in Scotland they are only common law holidays in England, Wales and Ireland Some books are in error in stating that these two days are now common law holidays in Scotland, for the law governing bank holidays has not been altered since the original Act of 1871 The fact is that Section 14 of the Bills of Exchange Act was drafted with the object of making uniform the laws of England and Scotland relative to holidays so that the effect on the due date of bills would be the same in both countries, *i e.*, it aimed at making Christmas Day and Good Friday have the effect of common law holidays in Scotland as well as in England, Wales and Ireland.

But those responsible for the Act overlooked the case where Christmas Day is a Saturday and the last day of grace of a bill falls on the following day, Sunday, 26th December Since Christmas Day is a bank holiday in Scotland such a bill in Scot-

land is payable on the *succeeding business day, i.e.*, Monday, 27th December, for by virtue of Section 14 (1*b*) " 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 [illegible] business day ". But as Christmas Day is merely a common law holiday in England, Wales and Ireland, such a bill in those countries is payable on the *preceding business day, i.e.*, Friday, 24th December.

The section clearly provides that the term " month " frequently used in bills means a *calendar* month and not a *lunar* month of four weeks Accordingly, a bill dated 30th June and payable one month after date falls due on 2nd August. (30th July is one month from 30th June, to this three days of grace are added, making 2nd August)

Where a bill is payable so many *months* after date or sight, no account is taken of " *lacking* " days in any month Hence, a bill dated 31st December, and payable two months after date, falls due on 3rd March of the following year, and this due date will be unaffected whether or not the year is a leap year. But a bill dated 1st February at 30 *days* after date is payable on the 6th March in an ordinary year and 5th March in a leap year, for in such a case *days* and not months must be reckoned

A bill cannot be dishonoured by non-payment before the last day of grace, and presentment for payment before that date is premature

Where, in the case of bills payable *after sight*, the date of acceptance does not coincide with the sighting date, the due date is calculated from the sighting date. So, if a bill payable one month after sight is accepted " Sighted 1st May, accepted 2nd May ", the period begins to run from 1st May, not from 2nd May, and the bill falls due on the 4th June Again, Section 65 of the Act provides that, where a bill payable after sight is accepted for honour, the due date is calculated from the date of noting for non-acceptance, and not from the date of acceptance for honour The object of the law in all these cases is to put the holder in exactly the same position as if the bills had been duly accepted on presentation.

In most foreign countries days of grace are not allowed, but where bills are drawn in such foreign countries and made payable in this country, the usual three days of grace are allowed before payment is due. For, " 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 " (Section 72).

Thus a bill payable after date drawn in Paris payable in London takes three days of grace, whereas a bill drawn in London payable in Paris is payable without grace.

Examples Involving Days of Grace

Date of Bill	Currency or Term	Date Due
31st January.	One month after date	3rd March in any year.
1st February	One month after date	4th March in any year.
1st February.	Thirty days after date	6th March in an ordinary year 5th March in leap year
26th November	Three months after date	1st March in an ordinary year 29th February in leap year
1st May.	Three months after sight, sighted and accepted 12th June	15th September
1st May	Three months after sight, sighted 12th June, accepted 13th June	15th September.
22nd November.	One month.	24th December, unless that day is a Sunday, when it is payable on the 23rd
23rd November	One month.	In the event of the 26th December being a week-day, the due date is 27th in England, Wales and Ireland, but 26th in Scotland If 26th is a Sunday, due date is 24th December in England, Wales and Ireland, but 27th December in Scotland
24th November.	One month.	27th December, but if the 26th is a Sunday, the 27th becomes a bank holiday in England, Wales and Ireland, and the bill is payable on the 28th.

Bills in a Set.

Foreign bills are often drawn in sets of three parts, identical in all respects, except that each part refers to the other two, and only one is stamped. Loss is prevented by sending two parts for acceptance by different mails, whilst the other is negotiated at home. One part only should be accepted, or indorsed, otherwise the signer may be liable on two signatures. All parts form one bill, and should be fastened together when they reach their destination. Discharge of one is a discharge of the set, but the acceptor remains liable if he pays a part other than the one which bears his acceptance. If two or more parts are negotiated to different holders in due course, the one whose title first accrues is deemed the true owner as between such holders.

CHAPTER 11

THE PARTIES TO A BILL

The Act of 1882 lays down two requirements which must be fulfilled by a person before he can become a party to a bill, *viz*, (1) Signature, and (2) Delivery

In regard to *Signature*, Section 23 of the Act provides :—

> **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.

The signature may be the usual signature of the party, or it may be his mark (see Chapter 14), or it may be an impression made by the use of any instrument which is used for the purpose of attesting documents, *e g.*, it may be made by rubber stamp, or by seal, as in the case of a corporation. An example of a "trade or assumed name" arises where a person named, say, John Brown is in business trading alone as "The Acme Cycle Co", or under some similar description, and signs bills in that trade name

The Act does not insist that the signature shall be affixed by the person to be made liable as a party to the bill, for, by Section 91, the signature may be affixed by some other person acting with the authority of the person purporting to sign. (*See below* under "Signature by Procuration".)

It is clear from Section 23 that the mere fact that a person's name is mentioned on the face of the bill as a "referee in case of need" or as a "case of need" (see Chapter 19), does not render that person liable as a party to the instrument, though such a person will become so liable if he signs his name to the instrument as an acceptor for honour.

Delivery is defined by Section 2 as "transfer of possession, actual or constructive, from one person to another", and no person can be liable as a party to a bill unless his signing of the

nature of that person as an indorser is essential for the purpose of putting the bill into a proper state for negotiation.

Section 2 of the Act defines "indorsement" as "an indorsement *completed by delivery*". In Example 1 on page 100, James Brown will become an indorser when he affixes his signature on the back of the bill and then delivers it to another party, known as the "*indorsee*", who will in turn become an indorser when he signs his name and delivers the instrument.

By Section 56 of the Act :—

> **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

In such cases it is usual to say that the person "backs" the bill, and he is sometimes known as a *quasi indorser*. "An indorsement, properly so called, must be made *by the holder*, but when a person who is not the holder of a bill or note backs it with his signature he is not an indorser, but a *quasi* indorser".[1]

Capacity of Parties.

The capacity and authority of parties to a bill are thus defined in Section 22 of the Act —

> **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 indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto

Since capacity to contract is in general enjoyed by all persons, it follows from the above Section that, subject to the limitations mentioned below, the power to draw, accept or indorse bills of exchange is possessed by all persons The word *persons* here includes all *legal persons*, who, although not persons in actual fact, are nevertheless persons in the eye of the law

INFANTS At law, a person under the age of 21 is an infant, and, as such, is incapable of incurring personal liability on bills, even to make payments for necessaries. An infant may, however, act as agent and bind others, while his signature as an indorser to a bill would serve to pass rights and liabilities in the chain of indorsements, but no remedies on the bill are available against him personally.

[1] Chalmers, *Bills of Exchange*, 8th Edn., page 215.

REGISTERED TRADING COMPANIES have *implied* powers to incur liability on bills in the transaction of their business, but, in the absence of *express* authority in a Memorandum of Association or governing statute, as the case may be, neither a non-trading registered company nor a statutory company has any such powers, although such a company may have implied powers to issue cheques for the purposes of its business.

CORPORATIONS such as local authorities and municipal bodies have no *implied* power to contract by bill, though, here again, they may issue cheques for making payments necessarily arising out of their functions.

Cheques or bills issued by a registered company or corporation can be under the seal of the corporation or company, or under its signature as written by its duly-appointed agent or agents (Section 91)

PARTNERSHIPS. In the case of a *trading* firm, a partner has full implied power to bind the firm by acts done in the ordinary course of business, including the drawing and accepting of bills. But though there is nothing to prevent a partner in a *non trading* firm from drawing and indorsing cheques for the purpose of the firm's business, a partner in such a firm has no *implied* power to bind it by a bill of exchange, and cannot safely do so unless he is *expressly* empowered either by the Articles of Partnership or by special authority from all the other partners Nevertheless, if *all* the partners in a non-trading firm join in a bill, it will bind the firm, whether or not the use of the bills is expressly authorised.

Signature by an Agent.

To render a person liable as a party to a bill, it is not essential that he should *himself* sign the instrument. His signature may be written thereon by an agent, expressly or impliedly authorised to do so , and, in like manner, the signature of a firm, corporation, society, institution or registered company may be written on a bill by a duly *authorised* agent. In all such cases, the principal will be completely bound by the signature and liable on the instrument.

Signature by Procuration.

When an agent is authorised to signs bills on behalf of his principal, it is usual for him to do so by a "*per procuration*" signature. Thus where a person named William Brown gives his agent, Thomas Robinson, authority to sign bills on his behalf, the usual form will be—

per pro. (or *p p.*) *William Brown.*
Thomas Robinson.

It is most important when dealing with bills signed in this way that the existence and extent of the authority of the agent should be verified, for Section 25 of the Act provides that —

> **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.

In the case of *Stewart* v *Westminster Bank, Ltd* , 1926, Lord Justice Atkin expressed the view that " a signature by procuration " within the meaning of this section means a signature by proxy as indicated by any of the forms " for and on behalf of ", " per procuration " or " per pro " But, in the same case, the Court of Appeal apparently took the view that a signature *on behalf of a limited company* in any of the forms mentioned is not a procuration signature within the meaning of Section 25, and, if there are no circumstances of suspicion, such a signature does not of itself put on inquiry any person who accepts it. The Court maintained that, since a company cannot sign except by the hand of a human agent, then, when it does so sign, the signature is, in fact, the company's own signature Other important legal decisions regarding the implied powers of company officials are discusssed on page 58

The section is thus of chief importance in the case of bills signed " per pro." on behalf of private individuals and partnerships. It is essential in such cases that the authority to sign per pro and its limits be known to any party relying upon an instrument bearing such a signature, for the principal is not bound if the agent has no authority to sign on his behalf. The form of such a signature is in itself a warning to any person taking the instrument that he may or may not get the money

Even where authority actually exists, the agent can bind the principal only to the actual extent of the authority. Suppose a clerk who has authority to draw cheques " per pro " for purposes of his principal's business, draws a cheque " per pro " his employer and makes it payable to a bookmaker in payment of his own betting losses If the bookmaker accepts the cheque, he cannot enforce payment against the principal, for he should know that it is most unusual for a clerk to be in a position to give his principal's cheques for such purposes.

But, when once a bill so signed in excess of authority has been honoured, Section 25 confers no right to recover the money *The section applies only during the negotiation or currency of a bill.* Nevertheless, a right of recovery may, in some cases, arise on other grounds. The general rule appears to be that, where an agent has drawn cheques in excess of his authority and the

heques have been paid on presentation, the principal can recover heir amount from the payees if the latter had notice that the heques were being used for the agent's own purposes or that the gent's authority was limited (*Reckitt* v. *Nunburnholme*, 1928).

Agent's Personal Liability.

An agent who complies with the requirements of the Act will not be personally liable on a bill of exchange or a promissory note even though his own signature appears on the instrument, or Section 26 provides that —

> **26.**—(1) Where a person signs a bill as a 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.

From these provisions it will be observed that it is not sufficient for the agent merely to sign *his own name* and to add he capacity in which he signs, *e g* ," L Jones, Agent for Thomas Robinson ". If the agent is to avoid personal liability, the ignature employed must be of such a character as to indicate easonably that the agent not only *is* an agent, but is *acting* s an agent for a *named* principal.

Particular care should be exercised in regard to signatures by fficials on behalf of limited companies Thus in the case of *Candes* v. *Marcus*, 1909, a cheque had stamped across the top he words " B Marcus and Co , Ltd " and was signed at the oot " B Marcus, Director , S H. Davids, Director." It was eld that the two directors were personally liable on the cheque. On the other hand, in the case of *Chapman* v. *Smethurst*, 1909, promissory note bore the signature " J H Smethurst's Laundry Dye Works, Ltd , J H Smethurst, Managing Director ". It as held that the director was not personally liable despite the bsence of any words such as " per pro." or " for and on behalf f " since the form of the signature made it reasonably clear hat the director was signing as agent and not as principal.

Finally, by Section 31 (5):—

> **31.** (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.

Suppose D, the holder of a bill payable to his order, dies and

ment signed "J X., executor of D". X in such a case will be *personally* liable on the indorsement, unless he adds to his signature such words as "*sans recours*" or "without recourse to me personally".

Forged and Unauthorised Signatures.

If a person who purports to sign as agent on behalf of another has, in fact, no authority to do so, the signature will not bind the supposed principal, for by Section 24 of the Act it is provided that —

> **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.

When is a Signature Unauthorised?

The question as to when a signature is *unauthorised* within the meaning of this section has given rise to considerable controversy The position is, of course, quite clear in any case where one person, without a vestige of authority, signs as agent on behalf of another person In such circumstances no title passes, even to a person who gives value for the instrument in good faith.

But the position is different when an agent, having actual or implied authority to sign on behalf of another, draws or indorses cheques or bills in accordance with the authority, but misappropriates the proceeds.

Suppose, for example, that Jones, as Brown's agent, is empowered both to draw and indorse cheques on behalf of Brown, and that Jones (*a*) fraudulently draws cheques in his own favour on Brown's account, and (*b*) fraudulently misappropriates the proceeds of other cheques payable to Brown but which he indorses by virtue of his authority

In the first case, the paying banker can without question debit the cheques to Brown's account, provided he has no express or constructive notice that the agent is misapplying his principal's funds, for the cheques are properly drawn in accordance with the authority given to Jones: the signatures are authorised as regards the paying banker though not as regards third parties. In regard to (*b*), it was considered until recently that such

ıdorsements as those of Jones on behalf of Brown would be ɔerfectly valid so far as third parties were concerned, even though he proceeds of the instruments were misappropriated by an gent acting in abuse of his authority. The view taken was hat the signature by the agent was, in fact, authorised, although he misappropriation of the proceeds of the instruments was ıot.

Now, however, it has been clearly laid down by the Court of ıppeal in *Stewart* v. *Westmınster Bank*, 1926, that a signature by ın agent who has authority to sign is nevertheless entirely in- ɔperative within the meaning of Section 24 unless both the actual ıgnıng *and the applıcatıon of the ınstruments and their proceeds* ɔre made in accordance wıth the express or ımplıed authorıty f the prıncıpal,—always provıdıng, of course, that the prıncıpal ɜ not precluded by any actıon or cırcumstance from denying he sıgnature of the agent

In this case, a director, with full authority to sign on behalf f his company, fraudulently passed ınto his private account heques of his company whıch he had indorsed on its behalf t was held that the dırector had no authorıty to sıgn *for such a ɔurpose*, and that, as the company had done nothing to preclude t from denying the sıgnatures, such sıgnatures were quıte ın- ɔperative and conferrred no tıtle even on a person who, ın good aıth, had gıven value for the cheques,—ın thıs case the bank, vhıch had to refund the total amount of the cheques to the ıquıdator of the company.

The Effect of Forgery.

The effect of the forgery of a person's sıgnature as a party o a bıll ıs really just as ıf the signature had never been wrıtten · he supposed sıgnature ıs quıte ınoperatıve, *ı.e* , it ıs useless as a neans of passıng the property in the instrument.

But, in certaın circumstances, a person whose signature has ɔeen forged may be *estopped* from pleadıng the forgery, and from lenying that the signature is his This may happen, for example, vhere a person, upon hearing that his sıgnature has been forged, loes not immediately disclaim it, or if by his conduct he induces he party who is seekıng to hold him hable to act upon the signa- ure as if ıt was a genuine one. Thus, in *Brook* v. *Hook*, 1871, B's ɔcceptance to a bıll was forged. A holder who took the bill in ɔood faıth subsequently heard of the forgery, and wrote to B to nquire B replied that the signature was his, and was accord- ngly held liable on the acceptance even though it was forged. See also Chapter 13 ın relatıon to forged sıgnatures on cheques)

he claims through a forgery does not mean that such a person never has any *recourse* in respect of the bill. On the contrary, he will have a right of action against (*a*) all parties to the bill who incurred liability thereon *subsequent to the forgery* (Sections 54 and 55), (*b*) his immediate transferor for value, if the latter has not indorsed (Section 58); (*c*) the forger; also in some circumstances, against (*d*) the person whose signature has been forged, if the latter is estopped from denying the validity of that signature. Moreover, if the holder can show that the payee is a *fictitious* or *non-existing person*, his title to the bill is not affected by the forgery, since the instrument may then be regarded as payable to bearer (Section 7—see page 134)

It must be observed, too, that where a signature is [illegible] *to the passing of a title* to the bill (*i e*, where it is not the signature of the payee or of an indorsee), the fact that it is forged will not affect the title of a subsequent transferee, though the latter will, of course, be unable to sue the person whose signature has been forged For example, a transferee's title to a bill originally made *payable to bearer* is not prejudiced by a forgery of the *payee's* indorsement, since the person in possession of such a bill is the bearer and therefore the holder of it, nor will a forged indorsement placed on a bill merely by way of security prevent the passing of a good title

For similar reasons, forgery of the *acceptor's* signature does not prevent the passing of a good title, since this signature is not essential to the negotiation of the bill Forgery of the *drawer's* signature, on the other hand, has the effect of rendering the bill invalid, since the instrument cannot then be regarded as "drawn by one person on another", nevertheless Sections 54 and 55 of the Act enable the transferee, in such a case, to enforce payment against all parties other than the drawer

Not only does a person taking a cheque under a forgery derive no title to the instrument, but he is also liable to the true owner for conversion (see Chapter 16) The only exception to this rule is where a bill or cheque is negotiated abroad in a country under whose laws forgery does not prevent the passing of a good title, in which case subsequent holders of the instrument in good faith are not liable Indeed, it would appear from the decision in *Embiricos* v. *Anglo-Austrian Bank*, 1905, that such persons acquire a good title to the instrument and its proceeds.

The Holder of a Bill.

Section 2 defines the term "holder" as "the payee or indorsee of a bill or note who is in possession of it or the bearer

thereof." Thus the bearer is always a holder, but the converse is not necessarily true.

By virtue of this definition, the holder of a bill may or may not be the person who is legally entitled to the instrument, while the person in possession of a bill may or may not be the holder If A, the payee of a bill, indorses the instrument in blank and gives it to a banker X for collection, then X and not A is the holder of the bill, for he is the bearer thereof, *i e.*, the " person in possession of a bill which by its terms is payable to bearer ". But if a person other than the payee of an unindorsed bill payable to order is in possession of it, he is not the holder of the instrument. Thus the drawee of a bill payable to the order of a third party which has been sent to him for acceptance is not a holder, for he is neither the payee nor the indorsee of the instrument

Again, a person who finds a bill payable or indorsed to someone else's *order* is not the holder, for he is not the payee, indorsee or bearer thereof. On the other hand, the finder of a bill *payable to bearer* or *indorsed in blank* who keeps the bill, or a person who steals such a bill, is a holder of the instrument, although he is an unlawful holder ; that is, his possession of the instrument is unlawful, but by reason of the fact that the bill is payable to bearer he can nevertheless give a valid discharge to anyone who pays it in good faith, and he can also transfer a good title to anyone who takes the bill before maturity in good faith and for value

A person who takes a bill under a forgery is not the " holder " of the bill, since he is neither the payee, the indorsee nor the bearer. Thus, if a bill is payable to A *or order*, and A's indorsement as payee is forged by B, who transfers the bill for value to C, C is not the holder of the bill, but is merely the person in possession of an unindorsed " order " bill.

The holder of a bill may sue upon it in his own name, and although his own title be defective, he can give to one who innocently takes the bill for value without notice of such defect a better title than he himself possesses.

Consideration for a Bill.

The word " value ", which has been used without definition hitherto, means " valuable consideration ". Every contract on a bill, *i e* , every liability incurred on it, depends for its validity not only on compliance with the legal requisites as to form laid down in the Act, but also on the passing of valuable consideration in accordance with the rules of law prescribed by that Act. *Valuable consideration* has been defined 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 " (*Currie* v *Misa*, 1875) It is a return or *quid pro quo* given by one person in respect of a promise made by another, with the result that the promise is not made *gratuitously*. As a rule, consideration takes the form of a transfer of goods or the performance of some service in return for payment, which may, of course, be made in legal tender or by cheque or bill of exchange, or in some other way.

Like any other simple contract, a contract on a bill requires the existence of consideration in order that it may be legally enforceable against all parties, for proof of the absence of consideration as between a transferor and transferee is a good defence by the transferor against action on the bill by the transferee

It is a well-recognised principle of Common Law that valuable consideration must not be *past*. This means that, as a general rule, the consideration must pass between the parties *at the time when* the contract is made, so that an *antecedent* debt or liability will not be valuable consideration for a subsequent agreement. In respect of bills of exchange and promissory notes, however, the Bills of Exchange Act overrides this principle of the Common Law, for by Section 27 of the Act it is provided .—

> **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.

The Presumption of Consideration.

In any action on a bill there is a legal presumption, which may be rebutted (see " Accommodation Bills ", page 132), that the defendant has received consideration. This is provided for as follows by Section 30 (1) :—

> **30.** (1) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

Although consideration is always *presumed* to exist in the case of a bill or cheque, there is no need to include a statement thereof in the bill itself, for by virtue of Section 3 (4) .—

> **3.** (4) A bill is not invalid by reason—
>
> (*b*) That it does not specify the value given, or that any value has been given therefor.

The use of the words " for value received ", which are usually inserted in a bill, are however *primâ facie* but not conclusive

evidence that consideration has been given in respect of the instrument.

Moreover, any party to a bill, even if he became a party thereto for no consideration, is liable, as soon as value has been given by any *subsequent* party, to any holder who takes the bill after value has once been given therefor; and this is so whether that holder himself gave value or received the bill . . . In such actions it is not necessary for the plaintiff to prove that consideration passed from him or to the defendant, provided that consideration has been given *since* the defendant became a party to the bill. For example, B draws a bill on A, who accepts for no consideration. B indorses the bill to C for value, who indorses it to D for no consideration. D, the holder, although a gratuitous holder, can sue A or B, even if he knows that A is a gratuitous party D cannot, however, sue C, since *no* consideration has passed *since* C became a party to the bill

Holder in Due Course.

In contradistinction to a mere holder, whose title may possibly be proved defective, and who may be unable to sue on a bill in his own name, there is the person described by the Act as a *holder in due course*, who has an unassailable title to the instrument in all circumstances A holder in due course is one who has taken the bill under the conditions laid down in Section 29 (1) of the Act .—

> **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.
>
> ("Force and fear" is the Scottish term for "duress")

From these provisions, the first requisite of the title of a holder in due course is that he must be the *holder* of the bill; and a person cannot be a holder if there is a prior forgery, since a forged signature is "wholly inoperative". The title of a holder in due course is, however, not affected by any *defects* in the title (*i e*, as distinct from *complete absence* of title) of the person who nego-

tiated the bill to him. He holds the bill free from any such defects in title, as well as from mere personal defences (such as set-off or counterclaim) available by prior parties amongst themselves, and he can enforce payment against all parties liable on the bill Thus, in the example given on page 127, C, owing to the forgery of A's indorsement, cannot be a holder in due course because he is not even a holder. If, however, the bill had been payable to A *or bearer*, and had been stolen by B before he transferred it to C, the latter, provided that he took the bill before it was overdue and satisfied the other requirements of Section 29, would be a holder in due course, with every right to enforce payment of the bill against all prior parties.

There are four other essentials necessary to complete the title of a holder in due course . (*a*) the bill must be complete and regular on the face of it , (*b*) it must have been taken before it was overdue, without notice that it had previously been dishonoured , (*c*) it must have been taken in good faith and for value, and (*d*) it must have been taken without notice of any defect in the title of the person who *negotiated* it

A person cannot be a holder in due course unless the instrument has been *negotiated* to him. Negotiation in the case of a bill payable to order is required by Section 31 (3) to consist of *indorsement* by the holder completed by delivery Hence the payee of a bill to order cannot be a holder in due course, since the bill, although delivered to him, is not indorsed to him by the drawer (*R E Jones, Ltd* v *Waring & Gillow, Ltd* , 1926)

From Section 29 (1*b*), a person cannot be a holder in due course if he has notice of any fraud or illegality in connection with the bill on the part of the person from whom he received it Notice of defect of title for this purpose means actual or constructive notice, that is, either a knowledge of the facts, or a suspicion that something is wrong combined with a wilful disregard of the means of confirming such suspicion Moreover, a person cannot be a holder in due course of a bill which is *absolutely void* for any reason, as, for example, a bill which is absolutely void under Section 5 of the Betting and Loans (Infants) Act, 1892

With these exceptions, a holder in due course has an absolute title to the bill against all the world He can take action on the bill in his own name against any or all of the prior parties thereto, and he can do so free of all defences which are based upon defective title, and free of any mere personal defences available to prior parties among themselves Thus it is no defence to his claims that a bill was stolen or lost so long as it cannot be proved that he claims through a forgery. Moreover, a holder in due course can transfer an equally good title to any person to whom

he chooses to pass the instrument, whether he transfers it for value or not, for by Section 29 (3) :—

> **29.** (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.

It may be noted in connection with this sub-section that, even if a person taking from a holder in due course has *knowledge* of a fraud or illegality affecting the bill, he still takes all the *rights* of that holder provided that he is not a *party* to the fraud or illegality ; but he does not *himself* become a holder in due course

Holder for Value.

The Act gives no definition of the term " holder for value " Such a definition is, of course, unnecessary, for the phrase means simply what it says, *i e* , the holder of a bill who has given value for it We find, however, that a person who has not *himself* given value for a bill which he holds may be in substantially the same position as if he had in fact given value for it, for Section 27 (2) lays down the principle that —

> **27.** (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.

Thus, if a holder for value indorses a bill to an agent for collection, the agent can sue the acceptor but he cannot sue his own principal. Chalmers [1] has expressed the principle as follows . " The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it ".

The term " holder for value " is therefore used to designate both those persons who have actually themselves given value and those who are *deemed* under Section 27 (2) to be holders for value.

It must, however, be pointed out that the actual giving of value is sometimes essential For example, the terms " holder for value " and " holder in due course " are frequently confused, whereas they should be clearly distinguished. If a person holds a bill for which value has at any time been given he is a holder for value by presumption of law, and it does not matter who gave the value, But a person cannot be a holder in due course unless he has *himself given value* for the bill, though he may have the rights of such a holder—see Section 29 (3) above.

[1] *Bills of Exchange*, 8th Edn., page 99.

"A holder in due course is always a holder for value, and something else in addition" But a holder for value is not necessarily a holder in due course, he is only a holder in due course if he has satisfied all the conditions. A holder for value may or may not have himself given value for the bill, or he may have received it from a person who has or has not himself given value; but he has all the rights of the person from whom he received it against all *prior* parties to the bill, and no more than those rights If he has not himself given value, he has *no* rights against the person from whom he received the bill On the other hand, he can indorse the instrument to a holder in due course and so give the latter a perfect title with full rights against *all* prior parties But although a holder for value is unprotected as regards defects which arose *subsequent* to the giving of value, his position is much stronger as regards defects which arose *before* the giving of value, for, by Section 30 (2), 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 illegality, the title of the holder will be presumed to be good if he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill As a matter of fact, if the holder could prove that full value had been given, there would be an almost conclusive presumption that it had been given in good faith

Lien on a Bill.

Bills of exchange, like other negotiable instruments, are frequently the subject of *lien*, a term which has been explained in Chapter 7 In this connection, Section 27 (3) provides that —

> **27.** (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

In the absence of special agreement to the contrary, a banker has a lien in respect of his advances on all negotiable instruments of his customers, including bills and promissory notes, which come into his hands in the ordinary course of business as a banker So, if A hands to Bank B a bill for £200 for collection at maturity at a time when he is indebted to the bank for an advance of £100, Bank B can sue the parties to the bill for £100 only, for it is a holder for value only to the extent of its lien

Accommodation Parties and Accommodation Bills.

An accommodation party to a bill of exchange is a person who has signed the instrument without having received any consideration for assuming the liability evidenced by his signa-

ture on the instrument The definition and liability of such a party is thus given by Section 28 of the Act —

> **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.

If there are two or more *consecutive* accommodation parties to the bill, none of them can sue the other or others on the bill But any accommodation party who is called upon to pay a holder for value may sue the party accommodated, since the latter party is regarded as having agreed either (*a*) himself to take up the bill, or (*b*) within a reasonable time before maturity to provide the accommodating party with funds to meet the liability, or (*c*) to indemnify the accommodating party against the consequences of non-payment

The fact that one (or more) of the parties to a bill is an accommodation party does not necessarily make the bill an *accommodation bill* This point is expressed in the following terms by Sir Mackenzie Chalmers "A bill which is signed by one or more accommodation parties is frequently spoken of as 'an accommodation bill', but this is incorrect, an accommodation bill is a bill whereof the *acceptor* (*i e*, the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party thereto This distinction is material when questions arise as to what is a discharge of the bill An accommodation bill is discharged by the person who is in substance, though not in form, the principal debtor [see Section 59 (3)], or if time be given to such person" [1]

Legally, therefore, an accommodation bill is one *accepted* for the accommodation of another person, *i e*, one whereon the acceptor is a mere surety and not the principal debtor The person accommodated may be the drawer, or an indorser, or a person whose name does not appear on the bill, but who uses the instrument in order to obtain credit by its sale, discount or negotiation

Hence, a bill which has been signed by the drawer in order to accommodate an indorser, or which has been "backed" by a person who signs it as an indorser, is not an accommodation bill in the strict sense of the term, for in such a case the acceptor is

[1] Chalmers, *Bills of Exchange*, 8th Edn., page 102.

the principal debtor and not a surety. Payment of a bill of this kind by the person accommodated does not discharge the instrument, for the acceptor remains liable until *he* pays. On the other hand, payment of a *pure* accommodation bill by the party who has been accommodated by the acceptor will operate as a total discharge of the instrument by virtue of Section 59 (3) of the Act.

Suppose X accepts a bill drawn by A for the latter's accommodation, and the instrument is indorsed for value to B and C C sues the acceptor X, but it is no defence on X's part to show that the bill was accepted merely for the drawer's accommodation ; and C need not prove that he himself gave value, for he is not concerned with the absence of value as between the drawer, A, and the acceptor, X Even if C had given *no* value for the bill, he is entitled to recover against X if B gave value , but if in such circumstances C sued B, B could prove the absence of consideration as between himself and C, and C would be unable to recover from B Moreover, if the drawer A paid C, and then sued the acceptor X on the bill, X could prove that he accepted the bill merely for the drawer's accommodation, and would not therefore have to pay A.

It may, however, be added that bills of the second class above mentioned are frequently described as, or considered to be, accommodation bills from a *commercial* as distinct from a legal standpoint

Fictitious and Non-existing Payees.

Section 7 (3) provides that —

> **7.** (3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer

Considerable litigation has arisen over the interpretation of the phrase "*fictitious or non-existing person*", and important consequences have resulted from the decisions of the Courts.

The practical importance of this section is revealed in cases where the payee's indorsement has been forged If the payee is fictitious or non-existing within the meaning of the section, the bill is payable to bearer, and a person who has given value for it in good faith can enforce payment as a holder in due course ; otherwise, he is not even *a holder* since he has no title whatever to the bill.

Prima facie, the term *non-existing* payee refers to some purely imaginary individual such as " The Man in the Moon ", " Old King Cole ", etc., but it is possible for the payee to be a non-existing person in spite of the fact that a living person bears the

name inserted, if the drawer of the bill had no knowledge of the existence of such a person when ordering the payment.

In the case of *Clutton* v *Attenborough*, 1896, a clerk induced his employer to sign cheques payable to a person named Brett, indorsed the cheques in this name, and appropriated the proceeds It was held that, as "*Brett*" was a *non-existing* person, the cheques were payable to bearer, and accordingly that Attenborough & Sons, who had given value for the cheques in good faith, could hold the drawers liable.

The term *fictitious* payee is not quite so easily explained in the light of the legal decisions on the point, but the main factor to be considered is *the intention or state of mind of the drawer when signing the instrument.* If the drawer in signing did not intend the named payee to receive the payment, then the payee is fictitious whether he exists or not, and whether or not the drawer knew he existed

Thus in *Vagliano Bros* v *Bank of England* 1891, the plaintiffs had accepted bills of exchange payable at the Bank purporting to be drawn by A payable to the order of B & Co , both A and B & Co being customers of the plaintiffs Subsequently it was discovered that the plaintiffs' clerk had forged the signatures of both A and B & Co to the bills, and, by indorsing the bills in the name of B & Co , had obtained cash for the bills from the Bank The plaintiffs claimed that the Bank had made payment upon a forged indorsement, and were therefore not entitled to debit the plaintiffs' account with the amount of the bills. The bankers, however, pleaded that the bills were bearer bills within the meaning of Section 7 (3) of the Act, and that they were accordingly protected against the forged indorsement.

It was held by the Court that the payees, although in fact actual persons, were nevertheless "fictitious" within the meaning of the Act, as *the drawer, i e. the clerk, did not intend payment to be made to the person named*, and that the bills, being properly regarded as payable to bearer, could be debited to the account of the plaintiffs.

The same test was applied in the case of *Vinden and Rogers* v. *Hughes*, 1905, where a clerk persuaded his employer to draw cheques payable to actual creditors of the firm but for fictitious amounts, which he appropriated by forging the indorsements and fraudulently cashing the cheques with the defendant The defendant maintained that the payees were fictitious and that the bills were therefore payable to bearer, but this defence failed, as it was held that the payees were not fictitious persons, since *the drawer* (*i e* , the employer) signed the cheques *in the intention* that the payees should receive payment.

It follows that it cannot be claimed that a cheque is payable to bearer merely because the drawer has been grossly deceived as to the payee, for " it matters not how much the drawer of a cheque may have been deceived if he honestly *intends* that the cheque shall be paid to the person designated by him ". (Mr Justice Bray in *Macbeth* v. *North and South Wales Bank*, 1908)

THE LIABILITIES OF PARTIES TO A BILL

The relationship of the various parties to a bill having been indicated, it is now necessary to consider the precise nature of their liability to the holder and to one another.

Since a person is not a party to a bill unless his signature appears thereon, the drawee is not liable until he accepts and the payee is not liable until he indorses. The first person to undertake liability on a bill is usually the drawer, although a bill may be accepted before the signature of the drawer is affixed If the bill is presented for acceptance and is accepted before issue to the payee, the acceptor will be the second party to become liable, although by signing he becomes the party *primarily* responsible to all subsequent holders Following him, the payee when he indorses will assume liability and subsequent holders will become liable in order as they respectively indorse.

Presumption as to Value and Good Faith.

There is a presumption of law that every party to a bill has become a party thereto for valuable consideration, and that *prima facie* every holder is a holder in due course. This, as we have already seen, is provided for by Section 30 of the Act —

> **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, 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.

The Contractual Aspect of a Bill—Void and Voidable Contracts.

Since a bill of exchange is a document embodying a contract, every party to a bill is a party to a contract If the transaction in respect of which any person signs a bill is lacking in any of the essential features of a valid contract, the contract will be either *void*, *voidable* or *unenforceable*, and the liability of the party concerned will be restricted accordingly

A contract is *unenforceable* when, although in every way a valid contract, it is incapable of being enforced by legal action owing to non-compliance with some statutory requirement. An example of this would occur where rights of action on a bill had become statute-barred Although such a bill might be in every way a valid contract, no action could be brought upon it in the absence of a written acknowledgment of liability More difficult questions arise where the contract evidenced by the signature of a party to a bill is *void* or *voidable*

A contract may be rendered *void* by any one of several causes ; but the most important point in connection with bills of exchange is that a contract depends for its validity upon the existence of a power to contract and an intention to contract The question of the contractual capacity of various persons and bodies was referred to in Chapters 5 and 6 The general rule is that if the contractual capacity of a party to a bill is so restricted (as in the case of an infant or a non-trading corporation) that he has no power to incur liability on a bill, the contract of which his signature is evidence is void, and there can be no action against him on the bill, though an action will lie against the other parties to the bill Such an *absolute* defect in the contractual capacity of a party is to be distinguished from a mere *temporary* defect, which has only the effect of rendering the bill *voidable* Thus if a person signs a bill of exchange whilst incapacitated by lunacy or drunkenness, and the incapacity is known to the other party to the contract, the former party may repudiate or affirm his liability when the incapacity has ceased, but he is in any case liable to a holder in due course (*see* below).

If a person signs a bill not of his own volition, but by reason of some fraud, duress or misrepresentation, the contract will be either void or voidable If the fraud is such that the person signing intended to put his name to a totally different document, the contract is totally void, and the person signing can escape all liability on the instrument. Thus in the case of *Foster* v *Mackinnon*, 1869, an old man of feeble eyesight was, without any negligence on his part, induced to indorse a bill under the belief that he was signing a railway guarantee It was held that he was not liable to a holder in due course Similarly, in the case of *Lewis* v. *Clay*, 1897, the defendant, who had signed a promissory note under the belief that he was witnessing a legal document, was held not liable on the instrument.

It will be observed from these decisions that, where the contract evidenced by a signature to a bill is *void*, the person signing can escape liability even to a holder in due course. On the other hand, the fact that a contract is merely *voidable* affects only the

persons making the contract, and the rights of a holder in due course remain intact

The fact that a signature to a bill is obtained by fraud or misrepresentation is not sufficient to render the contract void if the person signing is aware of the true character of the instrument. In such a case the contract is merely voidable and the person signing, although not liable to the other party to the contract, is nevertheless liable to a holder who has taken the bill after value has in good faith been given for it subsequent to the fraud or misrepresentation

The Liability and Warranties of the Drawer.

The statutory warranties undertaken by a person who signs a bill as drawer are laid down in Section 55 of the Act —

> **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.

" Due presentment " means presentment for acceptance and payment in accordance with the rules laid down in the Act A bill is accepted " according to its tenor " when it is accepted generally (*i e* , as drawn) If it is not so accepted (*i e* , if a qualified acceptance is given) the holder is entitled to treat the bill as if acceptance had been refused. As the drawer only undertakes that the bill shall be accepted and paid according to its tenor, it is only reasonable that he should be discharged if a qualified acceptance is taken without his consent, and this is provided for by Section 44 (Chapter 18) Nevertheless, the drawer is responsible for due payment of the bill according to its tenor *as qualified by the acceptance* if a qualified acceptance is taken by the holder *with his* (*the drawer's*) *consent*

It is to be noted that this general undertaking of the drawer may be limited in accordance with the provisions of Section 16 (1) of the Act, which provides that the drawer of a bill, and any indorser, may insert therein an express stipulation negativing or limiting his own liability to the holder Thus the drawer may qualify his signature by adding the words " Sans recours " or " Without recourse to me ", in which case he does not undertake to pay the holder in the event of dishonour.

Section 55 (1 *b*) operates to prevent the drawer from denying to a *holder in due course* the payee's *existence and his capacity*

to indorse at the time the bill is drawn, but does not impose upon him any responsibility for the genuineness of the signature of the payee, so that he is in no way responsible to a transferee of the instrument if the signature which purports to be that of the payee is forged or unauthorised.

The Liability and Warranties of the Acceptor.

Unless and until he signs the bill as acceptor, the drawee is not liable on the bill Consequently neither at common law nor under the Bills of Exchange Act, 1882, does the drawee as such give any warranties to the existing parties The drawee remains liable to the drawer solely in respect of the consideration for which the bill was drawn, but the action which may be taken in this connection is in no sense an action on the bill itself It must be remembered also that, although a bill is a written instrument signed by certain parties, it does not (except in Scotland) operate as an assignment of funds in the hands of the drawee, so that the drawee cannot be sued by a holder as the assignee of funds due by him (the drawee) to the drawer. This is provided for in Section 53 of the Act —

> **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.

Suppose X owes B £100 and B draws a bill on X for the amount, transferring the instrument to C in payment of a debt The fact that X refuses to accept the bill does not enable C to sue him on the bill, nor to sue him in the capacity of assignee of the debt owed to B by X The operation of the Section so far as it refers to cheques drawn by customers on bankers is explained in Chapter 13

When the drawee of a bill accepts the instrument he becomes a party thereto, and is thereafter primarily liable on the instrument to all subsequent holders for value The statutory warranties and liabilities of the acceptor are thus set forth in Section 54 of the Act ·—

> **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.

By virtue of Section 54 (1), the acceptor is liable only to the extent of the *tenor of his acceptance* He is under no obligation to see that the bill is such that it cannot be subsequently altered fraudulently, so that an acceptor is not liable on a bill which has been altered in amount after his acceptance, except to a holder in due course in respect of the original amount of the instrument as it was accepted by him The operation of this sub-section is illustrated in the case of *Scholfield* v *Earl of Londesborough*, 1896, explained on page 151 It should be observed that the liability of the acceptor of a bill of which the amount has been altered, differs from the liability of the drawer of a cheque, for the latter may be held liable by the paying banker for the fraudulently increased amount of a cheque if by his negligence he facilitates the alteration See *London Joint-Stock Bank* v. *Macmillan* (Chapter 15)

Sub-section (2) operates by way of estoppel against the acceptor, and its effect may be illustrated by considering the case where a bill is drawn by Brown on a drawee Robinson, payable to Jones The bill is passed to the payee Jones before acceptance and he indorses the instrument to Andrews, who takes it as a holder in due course and obtains Robinson's acceptance thereon. After acceptance, Robinson cannot thereafter question the existence of the drawer Brown, or his capacity or right to draw the bill, or the genuineness of his signature; nor can he question the existence of the payee Jones, nor his capacity to indorse the bill to Andrews, the holder in due course On the other hand, the acceptor Robinson does not take any responsibility for the genuineness or validity of the indorsements of either Jones or Andrews, in spite of the fact that Jones' indorsement was on the instrument at the time of Robinson's acceptance.

The Liability and Warranties of an Indorser.

The warranties given by an indorser and the liabilities assumed by him are given in Section 55 (2) of the Act.—

55. (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.

It should be observed that the provisions of Section 55 (2) (*a*) are similar to the corresponding provisions applicable to the drawer under Section 55 (1) (*a*), *ante*, but, whereas the drawer undertakes to indemnify any indorser whatsoever, the indorser undertakes only to indemnify any indorser *subsequent to himself* who may have been called upon to pay the bill.

The words "according to its tenor" in Section 55 (2) (*a*) must apparently be taken to mean the tenor of the bill *at the time the bill was indorsed*, and cannot be assumed to relate back to the time of acceptance or drawing of the bill Thus, an indorser would be liable to a subsequent indorser for the increased amount of a bill if the amount had been altered after drawing or acceptance but *before the time of his indorsement* Moreover, if a person indorses a bill which bears a prior forgery, he will be unable to bring forward the forgery as a defence to an action by a transferee subsequent to himself

Reference must be made here to those indorsers who are termed *quasi-indorsers*, by virtue of the operation of Section 56, the terms of which have already been noted on page 120, *ante*. From that Section it is to be noticed that, so far as liability is concerned, the law draws no distinction between a *quasi-indorser* and an indorser in the strict use of the term, and the warranties of the former are such as are defined in Section 55 (2) above.

Order and Ratio of Liability of Parties.

In considering the parties on the bill collectively and not individually, it becomes necessary to determine the order, if any, of their liability on the instrument, and also the ratio of liability as between themselves and so far as outside parties are concerned. Byles thus describes the position "The legal effect of drawing a bill payable to a third person, is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not The effect of accepting a bill or making a note is an absolute contract on the part of the acceptor of the one or maker of the other, to pay the payee, his order or the bearer, as the instrument may require. The effect of indorsing is a conditional contract on the part of the indorser, to pay the

immediate or any succeeding indorser, or bearer, in case of the acceptor's or maker's default ".

There are two periods of time to be considered when ascertaining the order of liability on a bill, *viz* : (*a*) before acceptance, and (*b*) after acceptance.

Order of Liability of Parties before Acceptance —Before acceptance of a bill the *drawer* is ultimately liable, *i e* , he is the principal debtor, and the indorsers, if any, are sureties for due payment by him to any holder Suppose A draws a bill on B and delivers it to C who indorses it to D, who indorses it for value to E. If B has *not* accepted, A (the drawer) is the party who is ultimately liable, *i e* , he is the principal debtor and E, the holder, can sue A immediately on dishonour without suing C or D, who are merely in the position of sureties for A. Or E can sue D only, or he can sue A, C and D together, but whichever party is sued has a right of action against a previous party until the liability eventually rests on A, who has no action on the bill against B, but can sue B for the consideration in respect of which the bill was drawn

Order of Liability of Parties after Acceptance —In this case the *acceptor* is the party ultimately liable, *i e* , he is the principal debtor, and the drawer and indorsers are sureties severally liable if he fails to pay Thus, if B in the above example accepts the bill, then he (B) is the person who is ultimately liable, *i e* , liability will ultimately fall on him after passing through perhaps D, C and A respectively if B dishonours ; or he may be sued directly by E In the event of dishonour, E can sue any prior party on the bill for the whole of the amount, or he may sue A, B, C and D together

It must be noted, however, that the sureties on a bill are not in the position of ordinary sureties who can claim division of the liability , *each* party is *individually* liable for and may be sued for the whole amount of the instrument, and he cannot claim that he is liable only for a proportionate amount according to the number of parties to the bill. Moreover, the right of any party (other than the acceptor) who is compelled to pay is to sue any prior party for the full amount of the bill, and the party so sued must in turn proceed against any parties prior to him.

The order of liability amongst the indorsers is that in which the indorsements are affixed to the instrument, *i e* , the order of liability is from a subsequent party to a prior party. Thus, in the example given, the holder E can sue any or all of the *prior* parties A, B, C or D, but if C had to pay the bill, then he could not sue either D or E as these are parties subsequent to him, although he could sue either A or B. Difficulty sometimes arises,

however, because the indorsements do not appear in the order in which the bill was actually negotiated, and in such circumstances oral evidence has to be admitted to prove the order in which the indorsers are properly liable

The right of any party to avail himself of any previous right of action depends upon whether proper notice of dishonour, as required by the Act (see Chapter 19), has been given to the party or parties whom it is sought to hold liable.

The amount of damages which a person (*i e*, the holder or any indorser who has been compelled to pay the bill) may recover from a prior party or the drawer or acceptor, as the case may be, is provided for in Section 57 of the Act, as is also explained in Chapter 19

The Liability of a Transferor by Delivery.

Although only those persons who have signified their consent to incur liability on a bill by affixing their signature to the instrument are properly described as *parties* thereto, certain obligations are assumed by a person who, being in possession of a bearer bill (*i e*, one which originally or by indorsement is payable to bearer), negotiates it without indorsing it In such cases Section 58 of the Act provides that —

> **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

Although not liable on the instrument, as are the acceptor, drawer and indorser under Sections 54 and 55, a transferor by delivery may be liable on the three distinct grounds of (*a*) lack of genuineness in the instrument transferred by him, (*b*) absence of right to transfer the instrument, and (*c*) knowledge that the bill was valueless at the time of transfer.

If the bill is *sold* or discounted, *i e*, exchanged for some present consideration such as goods or money, the transferee takes it at his own risk, subject to the warranties laid down in Section 58. Hence, if the bill actually turns out to be valueless, owing to the insolvency of one or more of the parties to it, the transferee has no recourse against the transferor unless he can show that the transferor *knew* that the bill would not be paid If, however, the bill is valueless owing to the forgery of an essential

signature or of essential signatures, then the transferee can sue the transferor on the warranty of genuineness, for such direct damage as he has suffered.

These remarks apply to a banker who discounts a bill for a holder who does not indorse the instrument. If the bill is dishonoured, the banker cannot sue the transferor unless the transferor had no right to discount it, or knew the bill was valueless at the time he offered it for discount, or the bill was not genuine.

If the bill is *not sold*, but is given in settlement of a pre-existing debt, the position is different, because, in this case, the creditor *could* have demanded cash; and it is assumed that, when he obliges his debtor by taking the bearer bill, he takes it as a substitute for, and a means of ultimately obtaining the cash which he might properly have insisted upon So, in these circumstances, there is presumed to be an implied contract by the transferor to pay the amount of the bill if it is dishonoured Again, however, this presumption can be negatived by any definite agreement between the transferor and the transferee to look upon the bill as a *final* and unconditional composition of the debt

Where the transferee wishes to hold the transferor liable, he must act with due diligence in presenting the bill and in giving notice of dishonour to prior parties, for he must avoid any suggestion that he has brought his loss on himself.

CHAPTER 12

NEGOTIATION, ITS MEANING AND EFFECT

It has been explained that the important characteristic of a negotiable instrument is that the property therein may be transferred by simple delivery of the instrument itself, or by indorsement followed by delivery, so that the transferee, under proper conditions, obtains a title free from all equities and may sue on the instrument in his own name The transfer of the majority of negotiable instruments is not governed by statute law, but as the bill of exchange is the most important and widely used of such instruments, the conditions governing its transfer are clearly defined in the Bills of Exchange Act, 1882. They are best considered under the three headings. (1) Issue, (2) Delivery; and (3) Transfer

Issue of a Bill.

The mere fact that the drawer of a bill completes the instrument and appends his signature does not at once render the bill operative as a negotiable instrument, for the career of a document as a bill does not commence until it is properly *issued*.

Section 2 of the Act defines *issue* as "The first delivery of a bill or note, complete in form, to a person who takes it as a holder" As the Section requires the delivery of a "bill complete in form", there can be no legal issue of an *incomplete* instrument which is handed by the drawer to another person solely for the purpose of completion or for some other special purpose

Again, the deposit of a completed bill by the drawer in the hands of an agent, or in the custody of another person to await the instructions of the depositor, is not a valid issue of the bill, since delivery in such cases is *for a special purpose only* —See below.

The Meaning of "Delivery".

We have seen that no person becomes liable on a bill until his signature thereon is coupled with *delivery* of the instrument,

i e, actual or constructive transfer of possession thereof from the person signing to the transferee.

Actual delivery takes place, of course, when the instrument is handed by the transferor to the transferee or his agent, but it is not always so easy to show that a *constructive* delivery has taken place Constructive delivery is some act which involves a change of possession without physical transfer, *e g*, where an indorser notifies the indorsee that he holds the bill at the latter's disposal, or where a bearer bill in the hands of an agent of the owner becomes that agent's property in pursuance of some contract

In determining whether constructive delivery has taken place, it is the *intention* that is of importance, so that if a person who has signed can satisfy the Court that he had no intention of becoming liable, and is not responsible for delivery of the instrument, the Court will exonerate him from liability thereon On the other hand, if by his conduct—or by communication—he induces another person to infer that the bill *will be delivered*, and such person acts on that presumption to his detriment, the former would be barred by "estoppel" from denying delivery, and would have to abide by the consequences of his action

It follows that no property in a bill or cheque will pass if the transferor (*a*) does not actually hand it to the transferee or inform him that the bill or cheque is at his disposal, *or* (*b*) hands it to another person *for a special purpose only*, as, for example, to be held in safe keeping, or for any other specific purpose, such as to meet another bill.

Elements of Valid Delivery.

The elements of a valid delivery are thus defined in Section 21 —

> **21.**—(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 a drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed *until the contrary is proved.*

"Immediate parties" to a bill are those who are in direct or immediate relation with each other, as, for example, the drawer

and acceptor, or the drawer and first indorser, or the first and second indorsers. Other parties are *remote*, as, for example, the acceptor and payee, or the drawer and the second or third indorser.

The general rule of law is that oral evidence is inadmissible to vary the effect of a written contract, but Section 21 (2*b*) provides that evidence may be admitted as between immediate parties, and as regards a remote party *other than* a holder in due course, to show that delivery of the bill was conditional only and was not intended to be effectual as a transfer of the property in the bill In other words, the *drawer* may bring such evidence as a defence to a claim on the bill by the payee or first indorser, or the acceptor as against the drawer, or the second indorser against the third indorser, for in such cases the parties are " immediate ", and it does not matter when the parties are immediate whether or not the plaintiff claims to be a holder in due course, for, if the defendant's contention that there has been no delivery is correct, the plaintiff obviously *cannot* be a holder in due course

But the acceptor cannot bring evidence to dispute the payee's claim, or to dispute an indorser's claim, unless such remote parties (*i e*, as regards the acceptor) are not holders in due course In *Ingham* v *Primrose*, 1859, A drew a bearer cheque intending to deliver it to B, but before A issued the cheque to B it was stolen from his possession, and was subsequently negotiated to C, who took it as a holder in due course C was able to sue A, since as against a holder in due course a valid delivery from A to B and between all parties prior to C was conclusively presumed

But suppose a promissory note is made by B payable to a banker C and is handed by B to C as collateral security for an overdraft on current account Then the banker C cannot sue B on the note if the account is in credit, for in such a case B and C are immediate parties and the delivery was conditional. In like manner, the transfer of a bill to another party for discounting on behalf of the transferor will be ineffective as a delivery of the bill except as against a holder in due course.

It should be observed that the burden of proving that there has not been a valid and unconditional delivery within the meaning of this Section rests on the person who seeks to evade liability on that ground.

Delivery by Post is Sufficient.

Delivery of a bill, to be valid, need not be made in person; it may be made by post or by any other agency So, if a bill is indorsed by Robinson and sent by post to an indorsee Brown at the latter's request, the delivery will be valid and effectual. The post in such circumstances becomes Brown's agent, so that

Robinson cannot recover the instrument once it is posted, and Brown must bear any loss which may arise if the bill is stolen during transit. On the other hand, if there is no express or implied request on the part of the receiver that the post shall be used for delivering, the Post Office is the agent of the *sender*, and there is no delivery until the letter containing the bill has been handed by the Post Office to the addressee. Moreover, any loss in the post must be borne by the sender

Inchoate Instruments.

The presumption in favour of a holder in due course that there has been a valid delivery of a bill by all prior parties does not apply if the instrument in question left the possession of one of those prior parties while it was still "*inchoate*", *i e.*, unfinished or incomplete in some particular In connection with the completion of such instruments, Section 20 provides that :—

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

Reference should be made to Section 12 as to the omission of the date.

The following points require to be noticed in connection with Section 20 :—

First, the section provides that the instrument must not only be signed, but that it must also be *delivered*, such delivery being made *for the purpose of converting the instrument into a bill* So long as delivery of an incomplete stamped document for completion can be proved, then no person who has signed it can avoid liability thereon to a holder in due course But, if an inchoate instrument is stolen or misappropriated while it is still incomplete, and it is thereafter fraudulently completed and subsequently negotiated, the fact that there has been no delivery

will defeat any action taken on the bill even by a holder in due course The proof by the party whom it is sought to hold liable that there was no delivery by him will suffice to render the plaintiff's claim void

The law on this point is certainly difficult, but the Courts have made it quite clear that a person cannot be held liable on his signature on an inchoate bill, even by a holder in due course, if that person can prove that there has been no delivery of the inchoate instrument by him Thus, in *Baxendale* v. *Bennett*, 1878, a blank acceptance was stolen from the possession of the acceptor, A, and, having been filled up as a bill, was negotiated to a holder in due course The latter was, however, unable to recover from A, since the bill was incomplete or inchoate when it left A's possession, and A was able to prove that there had been no delivery of the instrument by him. In like manner, a person can avoid liability on a bill if he can prove that he handed the instrument in an incomplete form to another *for safe custody only*, or if he can prove that it was delivered for some purpose other than for conversion into a bill

Another case in point was that of *Smith* v *Prosser*, 1907, where the defendant handed two blank forms of promissory notes bearing his signature to his agent, who was ordered to keep the notes until he was authorised by the signer to fill them up as promissory notes and to raise money on them in order to make certain payments on the signer's behalf The agent, without receiving such instructions, filled up the notes, and, having discounted them with the plaintiff, who *bonâ fide* gave value for them, misappropriated the funds It was held that the defendant was not liable on the notes since there had been no delivery of the instruments by him for purposes of conversion into promissory notes and negotiation He had entrusted the blank signed forms of promissory notes to his agent *as a custodian only* and not with the intention that he should fill them up and raise money upon them without further instructions The signer was therefore not estopped from denying liability on the instruments.

On the other hand, in *Carter* v. *White*, 1883, A, in payment of a debt, gave B a blank acceptance of a bill for the amount of the debt. A died, and B completed the bill by inserting his name as drawer and payee It was held that B *could prove* against the estate of A for the amount of the bill, as it was signed *and* delivered to him with the *express object that it should be duly completed.*

The second point is that, unless there is a limitation on the holder's authority, he can complete the bill to the extent which the stamp will cover ; but if the amount exceeds that which is

covered by the stamp, then no action can be taken on the instrument, since an insufficiently-stamped bill is invalid and unenforceable (Stamp Act, 1891—see Chapter 23.)

Furthermore, where the delivery for completion is subject to any limitation as to the authority of the holder to complete the instrument, then, in order to make liable any party who became a party prior to completion, it is necessary to show that the limitations have been satisfied and that the bill was completed in accordance with the authority given But, in any such case where an instrument has been *delivered for purposes of completion* and negotiation and, after being completed, gets into the hands of a holder in due course, then such a holder obtains an *absolute* title and can sue on the bill even though the authority for completion has been fraudulently exceeded, or even though the bill was not completed within a reasonable time

The Effect of Material Alteration.

Any material alteration in the terms of a bill without the consent of all the parties will invalidate the bill as against any party who has not consented to the alteration The Act itself does not give a general definition of "material alteration", but Sir Mackenzie Chalmers defines such an alteration as one "which in any way alters the operation of the bill and the liabilities of the parties whether the change be prejudicial or beneficial" [1]

Section 64 of the Act provides that —

> **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

Among other alterations which have been held to be material are: (*a*) the alteration of the rate of interest specified in a bill, as from 3 per cent to 2½ per cent ; (*b*) the alteration of the words "with lawful interest" to "with interest at 6 per cent", (*c*) the conversion of a bill payable three months after date to

[1] Chalmers, *Bills of Exchange*, 8th Edn., page 249.

a bill payable three months after sight, (*d*) the indorsement of a particular rate of exchange on a bill which does not provide on the face of it that this shall be done (*e*) the addition of a place of payment without the acceptor's consent, or (*f*) the alteration of the place of payment without the consent of a prior party

Since the bill is in itself a contract, it is only just that a person who in good faith and for value takes an instrument which on the face of it appears to be in order should be enabled to enforce payment thereof, *according to its original tenor*, against any party thereto This right is afforded to a *holder in due course* by the proviso to Section 64 (1) above, which means in other words, that the parties liable on a bill which has been materially altered are 'estopped' as against a holder in due course from denying liability for payment of the bill according to its original tenor

Thus in the case of *Scholfield* v *Earl of Londesborough*, 1896, a bill was drawn for £500 with a stamp sufficient to cover £4000 and with vacant spaces before the amount in both the words and figures After the acceptor had signed his acceptance he handed the bill to the drawer who fraudulently altered the amounts in words and figures to £3500 It was held that a holder in due course could recover from the acceptor only the £500 the amount for which the bill was originally drawn, *viz*, the bill was not avoided by the alteration but was payable according to its original tenor

Thus suppose X the holder of a bill alters the amount payable and indorses it to Y who indorses it to Z Y and Z are aware of the alteration Z can claim against X and Y for the amount of the bill *as altered*, but he has no right of action against any party on the bill prior to X But if Z was a *holder in due course*, *viz* if he had given value in good faith for the bill, and was unaware of the alteration then he could not only sue X and Y for the full amount of the bill as altered, but he would also have a right of action against any party prior to the indorsement of X, according to the 'original tenor' of the bill, *viz*, for the amount of the bill before it was altered

Fraudulent Completion distinguished from Material Alteration

Material *alteration* of a bill which was already completed, as dealt with by Section 64, must be carefully distinguished from fraudulent *completion* of an inchoate instrument, as dealt with by Section 20

In the case of fraudulent completion, a holder in due course

has a right to enforce the instrument *as completed* against an party who took it subsequent to the completion and also agains the original signer unless the latter can prove no delivery for th purpose of completion (Section 20)

But, in the case of fraudulent alteration, the holder in du course can enforce payment of the bill against prior parties onl *according to its original tenor*, *i e* , according to its tenor befor it was fraudulently altered (Section 64), though he can recove the full amount (as altered) from persons who became partie subsequent to the alteration This distinction is brought out i the following case, which should be compared with *Scholfield* v *Earl of Londesborough* quoted above

In *Garrard* v *Lewis*, 1882 A signed an acceptance, the amoun of which was left in blank, but whereon the figures £14 0s 6d were given in the margin The drawer fraudulently filled up th bill for £164 0s 6d , and altered the figures to make them corre spond It was held that the alteration of the figures in th margin did *not* constitute a material alteration of the bill bu that the circumstances involved fraudulent *completion* so holder in due course was entitled under Section 20 to recove from A the full amount of the instrument as completed, and could not plead material alteration of the instrument unde Section 64

Transfer or Negotiation of a Bill

The manner in which a bill of exchange may be transferre or negotiated is defined by Section 31 of the Act as follows

> **31** (1) A bill is negotiated when it is transferred from on person to another in such a manner as to constitute the transfe 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 o the holder completed by delivery

It follows that a bill is not properly negotiated if the *manne* of transfer clearly shows that the transferee is not to be con stituted the holder, as where a bill is merely transferred to a agent for safe custody Sub section (2) indicates that a bi which either originally or by indorsement is payable *to bearer* in a deliverable state as it stands, whereas indorsement of a bi payable *to order* is essential to put it in a deliverable condition

Transfer without Indorsement.

Although a bill payable to the transferor's *order* cannot b negotiated unless it is indorsed *before delivery*, such a bill is some times transferred by the holder without being signed by him The effect of such a transfer is thus defined by Section 31 (4)

31 (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

Suppose a bill payable to Robinson or order is delivered by Robinson to Brown without indorsement Brown is not a *holder* within the meaning of the Act, he is merely an *equitable assignee* of a chose in action He cannot sue in his own name or negotiate the instrument to any person but must join Robinson with him as a party to the proceedings in any action on the bill against any parties prior to Robinson Brown may, however bring an action against Robinson to *compel* him to give his indorsement to the bill, and when this is obtained Brown then becomes a holder and can sue in his own name against any party

Again if X the holder of a bill payable to his order transfers it to Y without indorsement and thereafter dies the Court may compel X's executors or administrators to indorse the instrument in favour of Y Similarly if X becomes bankrupt his trustee can be compelled to indorse the instrument in favour of the transferee Y But negotiation of a bill in such circumstances will only date back to the time when the transferor or his representative actually indorsed the bill so that if in the first example, Brown had received notice of a defect in Robinson's title before Robinson had indorsed the instrument then he (Brown) would be bound by such notice and could not sue as a holder in due course

It should be clearly understood that the provisions of this section are confined to the transfer of bills payable *to the order* of the transferor Where a bill is, either originally or by indorsement payable *to bearer* the transferee has no right to demand the indorsement of the transferor and the latter incurs no liability on the bill (see page 143)

Legal Transmission of a Bill.

The Bills of Exchange Act deals only with the transfer of a bill by negotiation and does not touch the principles of general law by virtue of which the title to a bill may be *transmitted* from one person to another as a chose in action or chattel

On the death or bankruptcy of the holder of a bill, however, the title thereto passes to his personal representatives in the former case and to the trustee in bankruptcy in the latter event, and such representatives may have to indorse the bill personally in order to obtain the funds for the estate The indorser in such a case would be personally liable on the bill unless his indorse-

ment in its terms restricted his personal liability, by intimating to all other parties that it was the signer's intention to limit liability to the estate for which he acts. To meet cases of this kind, Section 31 (5) of the Act provides that .—

> **31.** (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.

Examples of indorsements conforming with these provisions are given in Chapter 14

Assignment of the Property in a Bill.

Since a bill of exchange is a chose in action, it may form the subject of a valid equitable or legal assignment by one person to another. So, if the holder of a bill payable to his order transfers the instrument without indorsement to another person for value, the transfer will operate as an *equitable assignment* and the transferee will obtain such a title to the bill as was possessed by the transferor Again, the holder may execute a *legal* assignment of the bill, in which event, as has been explained, the assignee will be able to sue in his own name, but his rights will be subject to any prior equities attaching to the instrument, *i e*, to any defence or set-off which prior parties may have against the assignor Moreover, if the assignor does not give up the bill, and subsequent to the assignment transfers it to a holder in due course, the latter's rights will prevail as against the assignee

In one case, X assigned to A certain property including a bill payable to bearer, but subsequently transferred the bill for value to B, who had no notice of the prior assignment. B, as a holder in due course, obtained the legal title to the bill, and his right thereto was unaffected by the claim of the assignee, A, under the assignment.

A bill or promissory note may also be the subject of a *donatio mortis causâ*, *i e*, a gift made by a person in contemplation of and subject to his death Thus, if Brown in contemplation of death hands a bill payable to bearer to Jones, the property in the bill passes to Jones on the death of Brown, *but not before.* Jones would have a valid title to the bill even if it had been payable to Brown's order, but had not been indorsed by him before death, though it would, of course, rest with Jones to prove his title to the instrument

When a Bill may be Re-issued.

By Section 37 of the Act .—

> **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.

Thus, if a bill payable at a future date is indorsed by the holder to the drawer or acceptor, or to a prior indorser, such drawer, acceptor or prior indorser may at any time before maturity re-issue the bill and indorse it away. For example, if A draws on B in favour of a payee C a bill which is negotiated to D, E, and F in turn, and F negotiates the bill by indorsement back to indorser C, C will retain his rights against A and B, but will have no right of action against D, E and F This principle is known as the *rule against circuity of action*

Negotiation of Overdue Bills.

In general, a bill of exchange continues to be negotiable until it is paid at maturity by the principal debtor or party primarily liable, but Section 36 (1) specifies two conditions under which the negotiability of a bill is destroyed —

> **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.

Reference should be made to Sections 59–64 and 68 as to discharge, and to Section 35 as to restrictive indorsements An example of a restrictive indorsement is one in the form " Pay F *only* "

In regard to the negotiation of an overdue bill, Section 36 (2) of the Act provides —

> **36.**—(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

By virtue of this Sub-section, as also by Section 29 (1*a*), a person who takes a bill when it is overdue cannot be a holder in due course, and the title of such a person is affected by any defect in the title of previous holders existing at the due date of the bill

The reason for this is that the fact that the bill is overdue should in itself arouse suspicion in the mind of a transferee. He takes a bill which on the face of it ought already to have been paid, and he cannot ignore the fact that there must be some explanation why the bill has not been discharged, as, for example, the fact that the title of the person who held it at maturity was defective.

But the mere fact that a bill is overdue does not of itself

cause a defect in the title to the instrument, if it is otherwise perfectly valid The sub-section merely provides that, if a defect *already exists* in the bill at maturity, then persons taking *after* that date are subject to any such defect So, if a bill is drawn payable to A's order in respect of an illegal consideration, and B takes it by indorsement from A *when overdue*, B cannot recover from the drawer. But where the drawer of a bill, which has been accepted for an illegal consideration, indorses it before the due date to A, who takes it *bonâ fide* for value without notice and indorses it when overdue to B, B can sue all the parties, since his transferor, A, had a good title

The term " defect of title ", used in the Sub-section, is explained in Section 29 (2), page 129, and it does not include set-off or counterclaim Hence, a person who takes an overdue bill for value is not affected by the fact that a prior party whom he seeks to hold liable has a right of set-off or other similar defence against the party from whom he received the bill, as the existence of a set-off or the fact that consideration was not given in respect of a prior transfer of the bill does not constitute defect of title For example, if a holder X takes an overdue bill from a drawer Y for value, the fact that the acceptor A has a right of set-off against the drawer, or that the bill was accepted by A for the drawer's accommodation, does not prevent the holder X from succeeding in his action against A In such circumstances, there is no question of *defect of title* ; in the first case, it is a matter of a right of set-off, and, in the second, a defence based on the absence of consideration.

The meaning of " overdue " as applied to a bill payable otherwise than on demand is defined in Section 14, which provides that such a bill is not overdue until after the expiration of the last day of grace As to bills payable *on demand* (including cheques), Section 36 (3) provides that —

> **36.**—(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.

This provision is considered in reference to cheques in Chapter 13

Since the date upon which a bill is indorsed does not as a rule appear on the instrument, it has usually to be determined from the circumstances in each case But by Section 36 (4) of the Act it is provided that .

> **36.**—(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue.

It is a matter for the Court to determine whether or not a bill was in fact negotiated before or after it was overdue.

Negotiation of Bills after Dishonour.

Section 36 (5) of the Act enacts that —

> **36.**—(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.

The transferee of a dishonoured bill who has notice of the dishonour is therefore in much the same position as the transferee of an overdue bill There is, however, one important difference If the transferee of a dishonoured bill has no means of knowing that the bill has been dishonoured, he *may* be a holder in due course and so be unaffected by any defects But a person who takes an overdue bill cannot in any circumstances be a holder in due course.

Rights and Powers of the Holder.

Section 38 of the Act prescribes the principal rights and powers of a holder thus —

> **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

This section expressly or impliedly gives the holder a right (*a*) to sue on the bill in his own name , (*b*) to hold or retain the bill, if he is a holder in due course, as against any prior parties ; (*c*) to negotiate the bill , (*d*) to afford the person paying the bill in due course a valid discharge. In addition, a holder has a right, in certain circumstances, which are explained elsewhere, (*e*) if he so desires, to present a bill for acceptance and payment, where such presentment is excused , (*f*) to note or protest a bill on dishonour by non-acceptance or non-payment and to recover from prior parties the expenses incurred ; (*g*) to insert additional matter on a bill, as, for example, the true date of issue if the bill is undated, or the true date of acceptance if the acceptance of a bill payable after *sight* is undated, or to convert an indorsement in blank into a special indorsement.

The Holder's Right to Sue.

In regard to Section 38 (1), if a bill is payable to a person or persons, or to his or their order, any action on the instrument must be brought in the name or names of such persons. Consequently, if a bill is payable to Brown & Co., it is not sufficient that an action be brought in the name of one of the partners or of the principal or managing partner On the other hand, if the bill is payable to bearer, action may be brought in the name of any person who is in actual or constructive possession of the instrument, either alone or jointly with another or others. Thus, if Brown is the holder of a bill and indorses it in blank to a banker for collection, either Brown or the banker may take proceedings against the acceptor for the amount of the bill

In regard to Section 38 (2), if the acceptor of a bill has a valid set-off or counter claim as against the payee, the latter cannot demand payment of the bill, but this fact would not prevent a subsequent holder in due course from enforcing full payment of the instrument as against the acceptor In other words, a holder in due course as compared with a mere holder has the additional benefit that his title is not subject to equities and is entirely free from personal defences of prior parties The expression *personal defences* refers to such defences as set-off and counter claim, and probably also covers all such defences as omission of the duties of presentation, notice of dishonour, and protest or noting

The right *to sue* on a bill must be distinguished from the right to *recover* thereon Although any valid holder has a right to sue, *i e*, take action at law, on the instrument, his right to recover or to succeed in his action will depend upon his title.

Remedy in Respect of Lost Bills.

A holder who has lost a bill is afforded two remedies by the Act The first, by Section 69, applies only before a bill is overdue, and the second, by Section 70, applies to any action on the bill

Holder's remedy before bill is overdue By virtue of Section 69.—

> **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.

The Act does not indicate the nature of the security to be given to the drawer, so that it is presumed to be a matter of mutual agreement, but where application is made to the Court to obtain a duplicate from the drawer, then the security provided must be satisfactory to the Court It is to be noted that it is only the *drawer* who is thus compelled to issue a duplicate, and the holder cannot compel the acceptor or any indorsers to sign the duplicate

Action on a Lost Bill Nevertheless, Section 70 provides that the remedies of the holder against the acceptor, drawer or indorsers shall not be prejudiced by reason of the loss of the instrument

> **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.

As a rule, the plaintiff deposits the indemnity with the Court before the action is brought, since failure to do so might debar the plaintiff's right to claim costs

The loss of a bill does not excuse presentment for payment or the giving of notice of dishonour, and Section 51 (8) of the Act requires protest to be made on a copy of the bill if the original is lost or mislaid (See Chapter 19.)

CHAPTER 13

CHEQUES

A cheque is defined by Section 73 of the Bills of Exchange Act as "a bill of exchange drawn on a banker, payable on demand", and the same section decrees that, except as otherwise provided, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque

In view of these provisions, a complete legal definition of a cheque can be obtained by combining the definition given in the foregoing paragraph with the definition of a bill, given in the Act, and, on doing this, we obtain the following —

1 A cheque is an unconditional order in writing addressed by one person to another, who must be a banker, signed by the person giving it, requiring the banker 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

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 cheque

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 banker is to reimburse himself, or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the cheque, is unconditional

4. A cheque 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

Every word in the foregoing adapted definition of a cheque is of importance, and on analysing it, we see that there are seven essential requisites to be fulfilled. The order to pay must (*a*) be *unconditional*, (*b*) be *in writing*, (*c*) be addressed *by one person* to another, who must be a banker, (*d*) be *signed* by the person giving it, (*e*) require payment to be made *on demand*, (*f*) order payment of a *sum certain* in money, (*g*) order payment *to order or to bearer.*

The Parties to a Cheque

The issue of a cheque concerns three persons (*a*) *the drawer*, *i e*, the person who addresses the order to the banker, and by whom or in whose name the instrument is signed, (*b*) *the drawee*, *i e*, the banker to whom the order is addressed and who is authorised to pay the money, (*c*) *the payee*, *i e*, the person to whom or to whose order the drawer wishes the money to be paid

In the specimen here given, *Thomas Robinson* is the drawer, *The Northern Bank* is the drawee, and *James Brown* is the payee The liabilities of each of these persons are discussed in subsequent pages, but here it may be stated that, as the provisions of

No 792630 NORTHTOWN, *1st September*, 19.

THE NORTHERN BANK, LIMITED,
Northtown

Pay *Mr James Brown* or Order
One hundred pounds

STAMP 2d

£100 0 0d THOMAS ROBINSON

the Act relative to bills apply generally to cheques, the rights and liabilities of the drawer, payee, and indorser of a cheque are technically comparable with those of the drawer, payee, and indorser of a bill payable upon demand There are, however, certain important differences, which arise from the fact that a cheque is never accepted The drawer of a cheque is the party who is always ultimately liable thereon, whereas, in the case of an ordinary demand bill which has been accepted and dishonoured, the drawer would be able to proceed against the acceptor The drawee, whether of a cheque or an ordinary bill, is, of course, never liable as such to any party other than the drawer, and then only on the consideration he has received

The Order to the Bank must be Unconditional.

The cheque must be an *unconditional* order to pay, *i e*, the drawer cannot impose any conditions upon the drawee banker, as, for example, by stating on the face of the instrument that it is to be paid only on condition that a receipt either on the front or on the back is duly completed by the payee But the drawer may if he so desires impose a condition on the payee, as for example, by insisting on the face of the cheque that an attached

receipt is to be duly signed and stamped before *presentment* for payment. It is only the *order* to pay which must be unconditional within the meaning of the definition

This requirement is of special importance because customers sometimes issue documents requiring their bankers to pay money only on condition that an attached receipt is signed, but it is clear from the definition that such instruments are not cheques

A cheque is not invalid merely because it bears on its face an indication of the account to be debited, *e g* , " No 1 Account ", or " White Lion Account ", or because it bears some indication of the transaction it is intended to settle, *e g* , " Pay John Brown (Rent of 17 Northend Road) or order ".

" Writing " is Essential.

The second essential is that the order must be *in writing* From a practical point of view, it is unfortunate that the Act only partially explains what is meant by " writing " Section 2 states that " writing " includes " print ", but it would appear that the writing may be in ink, or lead-pencil, or that it may be printed, typewritten or made by any other mechanical process

Nevertheless, the use of an ordinary lead-pencil for completing cheques is generally discouraged by bankers, owing to the ease with which the writing may be altered or become indecipherable, and cheques so drawn are usually returned to the drawer for confirmation, though cheques completed with a *copying* or *indelible* pencil are paid without question Moreover, bankers will not, in the absence of a special agreement and indemnity, pay cheques on which the signature of the drawer has been impressed by a rubber or metal stamp, for in such cases it is impossible to ensure that the signature has been placed on the cheque by the drawer himself or by his authority

" Addressed by One Person to Another (a Banker) ".

The order to pay embodied in a cheque must be addressed by one person to another, who must be a *banker* *Person*, as provided by Section 2 of the Act, " includes a body of persons whether incorporated or not ", *i e* , it includes one or more individuals or a corporation sole or aggregate But in all cases the drawer and the drawee must be *distinct* legal persons, and it is for this reason that a draft drawn by a branch on head office, or *vice versa*, is not strictly a cheque, for in the eyes of the law the head office and branch are regarded as one entity

A Cheque must be Signed by the Drawer.

The fourth requirement is that the cheque must be signed by the person giving it, *i.e.*, by the drawer. But the signature may,

of course, be written by the drawer himself or by any person acting under his authority, so long as an agent so signing clearly indicates that he signs for the named drawer in a representative capacity, and so excludes his *personal* liability. Moreover, the signature on a cheque need not be the actual name of the drawer, but may be a trade or assumed name or the name of a partnership (Section 23). On the other hand, a person cannot, as a rule, be held liable in respect of his signature on a cheque if the signature has been forged or has been written thereon without his authority (see page 124)

The Meaning of "Payment on Demand".

In connection with the essential that the order must require payment to be made *on demand*, Section 10 (1) of the Act provides that

> **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

In general, cheques are drawn, "Pay Thomas Brown or order", no time for payment being expressed. It is doubtful whether an instrument which provides that presentment shall be made within a prescribed period or before a specified date, or which makes payment conditional upon the signing, etc, of a receipt, is payable on demand within the meaning of this section

The Order must be for "A Sum Certain in Money".

As we have seen in regard to bills, the sum payable is a *sum certain in money* within the meaning of the Act, although it is required to be paid: (*a*) with interest, (*b*) according to an indicated rate of exchange, or (*c*) according to a rate of exchange to be ascertained as directed by the cheque

As a rule, the amount of a cheque is stated both in words and in figures, but where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by *words* is the amount payable [Section 9 (2)]

In practice, cheques bearing the amount in words only are paid, but if the amount is given in figures only, it is usual to return the instrument marked, "Amount required in words". Such a cheque should not be paid on representment unless it appears to have been properly completed by the *drawer* or unless an indemnity is given by the collecting banker. If the amount given in words differs from that given in figures, the cheque should be returned marked, "Words and figures differ", though

some bankers will pay the amount in words if it is less than the amount given in figures

Mistakes in specifying the amount to be paid are frequently made by customers in drawing cheques, but as a general rule payment should not be refused on this account if the intention of the drawer is plain on the face of the instrument Thus the mere omission of some or all of the words " pounds ", " shillings " and " pence " is not sufficient to justify the return of a cheque if the amount can clearly be taken as agreeing with the amount in figures For example, a cheque reading " twenty-five 1/6d ", or " twenty-five one shilling and sixpence " may reasonably be paid if the amount in figures is given as " £25. 1s 6d "

Payment must be " to Order " or " to Bearer ".

In regard to the requirement that a cheque must order payment to be made to, or to the order of, a specified person or to bearer, reference should be made to Section 7, quoted on page 109

From this it will be seen that if the cheque is not payable to bearer and no payee is indicated, the banker is entitled to return the cheque marked " Payee's name required ", although it is usual in practice to regard a cheque drawn " Pay . . . . . or order " as being payable to the order of the drawer and to require his indorsement as a discharge

A cheque payable to bearer usually runs simply, " Pay . . . . . bearer ", or it may be drawn, " Pay Thomas Robinson or bearer " Open cheques so drawn may safely be paid to anyone presenting them for encashment and no indorsement is necessary Sometimes the words " or order " printed on the face of the cheque are deleted, and the words " or bearer " substituted , but, in such a case, the alteration should be confirmed by the signature or initials of the drawer, otherwise the cheque should be returned marked, " Alteration requires drawer's confirmation "

A cheque may be made payable to two or more payees *jointly*, *e g* , " Pay John Brown *and* Thomas Robinson " , or to alternative payees, *e g* , " Pay John Brown *or* Thomas Robinson ", or to the holder of an office for the time being, *e g* , " Pay the Town Clerk, Bedford, or order ", in which case the cheque requires indorsement by the holder of that office for the time being.

The Date of a Cheque.

The date on a cheque is not essential to its validity as a legally enforceable instrument, for by Section 3 (4*a*) a bill (including a cheque) is not invalid merely because the date is omitted.

In practice, bankers are accustomed to return for completion cheques which do not bear a date, in spite of the fact that, by virtue of Section 20, any person in lawful possession of a cheque which is wanting in any material particular, including presumably the banker to whom the cheque is presented for payment, has a *primâ facie* authority to fill up the omission in any way he thinks fit, subject to any limitations of authority which he may have been given

"Stale" Cheques.

Although a date is not essential to the validity of a cheque, it is nevertheless of considerable importance to a holder in certain circumstances, for, by virtue of Section 36 (3), a cheque becomes overdue for purposes of negotiation when it appears on the face of it to have been in circulation *an unreasonable length of time*,—a question of fact to be determined by the circumstances of each case If a cheque is negotiated after the lapse of a reasonable length of time, the holder takes it *subject to any equities*, *i e*, subject to any defects in the title of the person from whom he received it Moreover, an indorser of a cheque which is thus allowed to become "stale" before being presented for payment is freed from liability on his signature to the holder

In the absence of special circumstances, a cheque would probably be regarded as having been in circulation an unreasonable length of time from the point of view of its *negotiability* after the lapse of about ten days or so from its date of issue This view was confirmed in a case decided at the Cardiff County Court, in which the plaintiff, a licensed victualler, gave £15 on account to a man named Brown for a cheque for £50 payable to Brown's order and dated *twelve* days previously On presentation the cheque was dishonoured, and Brown, who had obtained it under false pretences, disappeared The Judge held that the cheque was overdue when the plaintiff cashed it, and that it should have excited suspicion, as it had been in Brown's possession for thirteen days, although he told the plaintiff that he wanted money The plaintiff could not, therefore, recover from the drawer

Liability of Parties on Stale Cheques.

Though a cheque may be stale for purposes of *negotiation*, it is not necessarily stale from the point of view of *payment* by the banker Moreover, the fact that a cheque is stale for either of these purposes does not necessarily imply that the *drawer* is freed from his liability to make the payment, or that an *indorser* of the cheque is discharged from liability in respect of his signature.

The law in this regard is thus stated by Section 45 (2) —

> **45.**—(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.

Presumably an indorser would be discharged under this section if the cheque was stale for purposes of negotiation But the liability of the drawer in this connection is determined by Section 74, which provides —

> **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

In conjunction with this section it must be observed that the right of action on a simple contract debt, including a cheque or bill, is not barred for six years, which period begins to run in the case of a cheque from its date, or if no date is specified, from its date of issue, if that can be proved It follows, therefore, that though a banker will not pay a cheque which is over six or twelve months old, the holder may enforce payment thereof against the drawer at any time within six years of the date of the instrument, and will succeed, except to the extent to which the *drawer has suffered damage by the delay* in demanding payment

The drawer would be prejudiced, and the holder could not succeed against him, if the drawer had sufficient funds at the bank to meet the cheque, but before the presentment and after the expiration of a reasonable time, the bank had failed In such a case the holder would have to fall back on his right to prove in the winding-up proceedings of the bank, for if he were allowed to succeed against the drawer for the full amount, the latter would lose more by the delay in presenting

the cheque than he would have done if it had been properly presented and paid within a reasonable time of its issue "Moreover, if the drawer had *no funds* to his credit, but was authorised to overdraw, the drawer would still be discharged ; but the holder could not prove against the banker's estate " [1]

But unless there is satisfactory *proof of damage*, the drawer of a cheque is *not* discharged merely because presentment was not made within a reasonable time, for Section 74 clearly states that *he must suffer actual damage* through the delay It is in this respect that the position of a drawer differs essentially from that of an indorser, for, by virtue of Section 45 (2), the latter is discharged by mere delay in presentment

In the case of *King & Boyd* v *Porter*, 1925, a cheque for £150, dated 3rd May, 1921, was mislaid for a period of three years In February 1924, it was discovered, and on being presented for payment by the plaintiffs (*who were indorsees*) on 11th March, 1924, it was dishonoured The Court of Appeal for Northern Ireland held that, so far as the drawer's liability was concerned, the effect of Section 74 of the Bills of Exchange Act, 1882, was to take cheques out of the operation of Section 45, and that so long as the drawer had suffered no actual damage through the delay in presentment, he was not discharged by reason of the fact that the cheque had not been presented within a reasonable time

What is a Crossed Cheque ?

A crossed cheque is thus defined by Section 76 —

> **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.

From this definition it will be seen that there are two distinct types of crossing (*a*) *general*, and (*b*) *special.*

A GENERAL CROSSING must include two parallel transverse lines written, printed, or perforated across the face of the cheque and these may be accompanied by any such additions as the

[1] Chalmers, *Bills of Exchange*, 8th Edn , page 288.

words " & Co.", " and company ", " Not negotiable ", " Not negotiable...& Co.", " Account Payee ", " Account Thomas Robinson " or " Under ..pounds ". In all these cases, the *lines* alone constitute the crossing, and though the additional words may have a certain effect, they are not an essential part of the crossing, nor do they constitute a crossing if the transverse lines are absent.

SPECIAL CROSSING The name of a banker, written, stamped, or perforated across the face of a cheque, forms a *special* crossing, whether it appears alone or with transverse lines, or with any of the additional words which have been mentioned

The following page gives specimens of the most frequently used forms of general and special crossings

The Effect of the Words " Not Negotiable ".

Of the additional words which are frequently added to a crossing only the words " Not negotiable " are recognised by the Act as having any special effect, and in this regard Section 81 provides —

> **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

It is not always clearly understood that the operation of the words " not negotiable ", as explained in this section, is in no way to restrict the *transfer* of a cheque from one person to another They merely remove from a cheque that characteristic of negotiability to which reference has already been made (see *ante*, page 98) If, therefore, a person takes a cheque crossed " Not negotiable " which has been stolen or lost, he cannot enforce payment of the instrument nor can he retain any moneys paid to him in respect of the instrument as against the *true owner*, however honestly he may have acted, and even though he had no knowledge of the fact that the cheque had been stolen or lost.

But, if there is no question of defective title, the instrument is good for all purposes, and may circulate in exactly the same way as a cheque which does not bear the restrictive words

Although the words " not negotiable " have no legal significance unless they form part of a crossing, a banker who is called upon to pay an *uncrossed* cheque bearing these words would be well advised to safeguard the interests of himself and of his customer by returning the instrument as an embarrassing document requiring the drawer's confirmation.

SPECIMENS OF GENERAL CROSSINGS

A/c Payee Not Negotiable

Under Ten Pounds

Not Negotiable
Under Five Pounds

Not Negotiable
Payee's a/c only

Not Negotiable
& Co

Not Negotiable
& Co.

SPECIMENS OF SPECIAL CROSSINGS

Northern Bank, Ltd.
A/c Payee only.

Northern Bank, Ltd
Northtown

Northern Bank, Ltd
Northtown
Remitted for collection
to Lloyds Bank, Ltd

Northern Bank, Ltd
Not Negotiable

Northern Bank, Ltd
Northtown
A/c Northtown U D C

Northern Bank, Ltd,
Northtown

Cheques which are not Transferable.

A cheque which is crossed "Not negotiable" must be clearly distinguished from one which is not transferable in its origin or by indorsement because of the insertion of words prohibiting transfer or indicating an intention that it should not be transferable (Section 8 (1), see *ante*, page 108). An example of an instrument of the latter type is one drawn payable to "Thomas Robinson *only*", having the word "bearer" or "order" struck out, and with or without the words "Not transferable" written across the face of the instrument

A cheque which is "not transferable" differs essentially from a "not negotiable" cheque. As we have seen, the latter can be passed from hand to hand and paid even though it bears evidence of having been transferred, subject to the fact that if there is any defect in the title of one of the holders, then that holder and subsequent holders will be liable to recoup the true owner But a "not transferable" cheque must be paid to the payee specified and to him *only*. In no circumstances should such a cheque be collected or paid by a banker if it bears evidence of having been transferred, otherwise the collecting banker will render himself liable for negligence, and the paying banker for disobeying the mandate of his customer

The Effect of the Crossing on a Cheque.

Unless the words "not negotiable" are added, a general or special crossing has no effect whatsoever upon the full negotiability of a cheque as between different holders · it merely restricts the manner in which the cheque is to be collected and paid The general effect of a crossing so far as it concerns the banker on whom the cheque is drawn, is that he must not pay the instrument *except to another banker*, and if a banker is named in the crossing, then he must pay the instrument only to that banker In no circumstances should a crossed cheque be cashed over the counter, for if it is so cashed, then the banker paying the money will be liable to the true owner of the instrument if the funds are paid into wrong hands

Accordingly, anyone crossing a cheque is assured that, if it is lost or stolen, it cannot be paid by a banker otherwise than in accordance with the crossing without his running the risk of having to refund the money so paid to the true owner of the instrument. The addition of the words "Not negotiable" is an added safeguard, for anyone who takes a cheque so marked takes it at his own risk, and no title to the property in the instrument can be obtained by or through any holder who is not strictly entitled to it.

It is not always appreciated that the effect of a crossing applies equally to a *bearer* as to an order cheque. The fact that a crossed cheque is payable to bearer merely dispenses with the necessity for indorsement, and, if it is crossed " Not negotiable ", it loses the characteristics of full negotiability.

Power to Cross a Cheque.

Sections 77 and 78 of the Act provide that :—

> **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
>
> **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.

In accordance with the provisions of Section 77 (3 and 5), every banker in practice makes a point of crossing either to himself or to another banker for collection all cheques paid in for collection, with the object of ensuring that the proceeds of the cheques will be paid to the banker named in the crossing and to no other

Since a crossing is a material part of a cheque, it cannot be altered otherwise than is sanctioned by Section 77, and a banker should not therefore pay cheques presented to him which bear evidence that the crossing has been materially altered, obliterated, or erased, or that the name of a banker or the words " not negotiable " have been crossed out.

" Opening " a Crossing.

The crossing on a cheque is sometimes cancelled or neutralised, or, as it is technically termed, " opened ", by the drawer's writing the words " Pay cash " or " Please pay cash " either across the top of the cheque or alongside the crossing, the words being accompanied either by his signature or by his initials Cancellation is often necessary when a crossing is *printed* on cheques on their first issue by the bank, and its object is to make it possible for the payee (who possibly has no banking account) to obtain cash over the counter.

The practice is not sanctioned by the Bills of Exchange Act,

and, although it has received a certain degree of recognition in the Courts, it should be strongly discouraged because of the risk to the paying banker that the initials or the signature of the drawer may have been forged by someone who has found or stolen the instrument If a cheque of this description is presented for encashment by the drawer himself, or by a payee who is well known to the banker, the risk is slight, but a banker would undoubtedly be liable to the true owner of the instrument, and unable to debit its amount to his customer, if he paid out the money and it subsequently transpired that the signature or initials of the drawer had been forged

Once a crossed cheque has been issued the drawer himself has no right to alter or add to the original form of his mandate, if by so doing he is likely to prejudice a lawful holder, and he may render himself liable to the true owner if the cheque is paid, by reason of such an alteration, to a person who is not entitled to it

Fortunately, less difficulty should arise now that the London clearing bankers have let it be known that no opening of a crossing will be recognised by them unless the alteration is accompanied by the full signature of the drawer, and then only if the cheque is presented for encashment by the drawer himself or by his known agent

Inchoate or Incomplete Cheques.

Section 20, which deals with the completion of an inchoate or incomplete bill by the holder, applies equally to a cheque which, when issued by the drawer, is wanting in any material particular

From the section it is clear that the person to whom an inchoate cheque is handed by the drawer for completion has *primâ facie* authority to complete it in respect of the date, name of the payee and amount , and the drawer will not thereafter be in a position to object if the completion is effected in a reasonable time and strictly in accordance with the authority given at the time of issue Nevertheless, if a cheque wanting in some material particular is presented for payment by anyone other than the drawer, the paying banker should not in any circumstances permit the holder to insert the details which are missing, but, in the interests of himself and of the drawer, he should insist on marking the cheque with an answer indicating that certain essentials are absent

We have seen, too, that if an inchoate document, subsequently completed, is to be valid, it must be " delivered by the signer in order that it may be converted into a bill " (including a cheque), and it must also be " filled up within a reasonable time, and strictly in accordance with the authority given ".

Nevertheless, Section 20 further provides that, if an instrument *which has been delivered* for the purpose of completion comes after completion into the hands of a holder in due course, it will be valid and effectual in his hands even though it has not been completed in conformity with these provisions

The drawer of a cheque therefore runs considerable risk if he issues a signed cheque without filling in the particulars of its amount and the payee's name, for, if a wrong amount is filled in and the cheque is subsequently presented for payment by a *holder in due course*, the latter may be in a position to enforce payment even though the amount of the instrument is much in excess of the drawer's original instructions for its completion But payment cannot be enforced by anyone other than a holder in due course Thus in *Paine* v *Bevan & Bevan*, 1914, a person signed a blank cheque and handed it to a confidential clerk to fill in the name of the payee The clerk filled in a wrong name, and it was held that the drawer was *not estopped* as against a holder who had not given value from saying that it was wrongly filled up as regards the payee's name. The drawer was therefore entitled to recover the amount of the cheque from such a holder who had obtained payment from the bank

To avoid difficulties of this kind, and also in order to provide against material alterations of the amount such as are discussed below, it is usual for the drawer of cheques handed to an agent or employee for completion to stamp them across the face with some such words as " Under ten pounds ", or " Not over twenty pounds ", in which cases no more than the maximum amount specified will be paid upon presentment Although words such as those given have no statutory authority, a banker who paid more than the sum specified would undoubtedly be unable to debit his customer in respect of the excess payment

The Effect of Material Alteration.

By virtue of Sections 64 and 78, any alteration of the date, sum payable, place of payment or crossing on the face of a cheque is *material*, and, unless the alteration is made with the drawer's consent and is confirmed by his signature or initials, the cheque cannot be debited to his account, since the alteration renders the cheque void except as against the party who has himself made, authorised or assented to the alteration, and subsequent indorsers.

This general rule is, however, subject to the exceptions (*a*) that a holder in due course can enforce payment according to its original tenor of a cheque which bears a *non-apparent* alteration ; (*b*) that the crossing on a cheque can be altered by a holder

and by the collecting banker in accordance with the provisions of Section 77, already quoted, and (*c*), which is explained in Chapter 15, that the drawer of a cheque the amount of which has been fraudulently altered cannot refuse to be debited therewith if he has carelessly facilitated the alteration.

The effect of these provisions was well illustrated by an interesting case which arose some time ago. A certain person claimed to have a banking account in the country and when in London obtained the indorsement of a friend to a cheque for a small amount in order to facilitate his cashing it at the indorser's London bank After obtaining this indorsement, the drawer altered the amount of the cheque (which we will assume to be £15) to, say, £150, signed the alteration, and obtained cash for that amount from the London bank, which, of course, relied on its customer's indorsement. The cheque was subsequently returned with the answer "Account Closed", by which time the drawer had disappeared The cashing bank at once sought to recover the amount of the cheque from the indorser, but the latter naturally repudiated liability for any amount exceeding the original £15 Legally, of course, he was not liable even for this amount, as, by Section 64, the alteration was a material one which had the effect of discharging the indorser's liability, while, since the alteration was open and apparent, the bank could obtain no benefit from the proviso to Section 64 enabling a holder in due course to enforce payment according to the original tenor of the cheque

It is imperative that a banker paying cheques should see that any alterations thereon are duly confirmed by the initials or, preferably, by the signature of the drawer

In the case of cheques signed by more than one person, or signed on behalf of a limited company, partnership or other body, material alterations should be confirmed by the initials or signatures of *all* the persons signing the cheques Thus alterations on cheques signed by *two* parties to a joint account should be duly initialled or signed by *both* parties ; but if either party has authority to sign cheques alone, the initials or signature of one will suffice, and that one person need not necessarily be the one who originally signed the instrument Similarly, where any two or more directors have power to sign cheques on behalf of a company, any alteration should be confirmed by the initials or signatures of two directors—not necessarily those who originally signed the instrument. In no circumstances should a banker accept the initials or signature of a secretary alone in confirmation of alterations on a company's cheques, unless the secretary alone has power to issue and sign such instruments, which is unlikely.

An alteration frequently seen in practice is that of the words " or order " to " or bearer ", on the face of a cheque, in consequence of which the instrument becomes transferable by mere delivery without indorsement. An alteration of this kind may be made by the drawer and by him only, and should be clearly confirmed by his initials or signature, or by the initials and signatures of all the drawers, if there are more than one On the other hand, the payee or indorsee of a cheque may alter the words " or bearer " into " or order ", or cross out the words " or bearer " if they appear, thereby making the instrument payable to order This latter alteration, although not covered by the Act, is sanctioned by custom.

Examples of unusual material alterations sufficient to affect the validity of a cheque if made without the drawer's consent are the deletion of the words " Not negotiable " on the face of the instrument, and the alteration of the name of the branch at which the cheque is payable. The former is a material alteration, although it is not specially mentioned in the Act, while the latter is one of the particular cases of Section 64 (2), being an alteration of the place of payment of the cheque The alteration of the name of a branch might be made, for example, by the cashier at a branch at which the drawer originally had his account when that account has been transferred to another branch, but only the drawer of the cheque has a right to make such an alteration, and the correct procedure is to return the cheque marked " Drawer's account transferred to another branch ".

Cancellation of a Cheque

In accordance with Section 63 (see Chapter 20), a cheque is discharged when it is intentionally cancelled by the holder or his agent, and in such a case any party liable on the instrument is entirely freed from his liability Cancellation may be effected by cancelling the drawer's signature, by totally destroying the cheque, by tearing it up, or by marking it clearly in some way across the face with the obvious intention that it shall thereafter be regarded as cancelled In practice, banks carefully cancel all cheques which they have paid by crossing out the drawer's signature, and stamping the word " Paid " across the face of the instrument

If the cancellation is made intentionally by the holder, the drawer and any indorsers prior to the holder are discharged, but, by Section 63, a cancellation is inoperative if it is made unintentionally, or by mistake, or without the authority of the holder, as, for example, where a bank cashier by mistake cancels the signature of the drawer on a cheque which is not drawn on

his branch In such a case the cheque is not discharged, and the cancellation may be annulled by the cashier's writing across the top left-hand corner of the cheque some such words as "Cancelled in error at Northtown branch, J. R Thomson, Cashier".

Mutilation of a Cheque.

A cheque is mutilated when it bears evidence of having been torn or when some part of it is missing. As a rule, mutilation of this kind is accidental, but it may indicate that it was the intention of the drawer or of the holder of the cheque to cancel or annul it, and that the pieces had thereafter been fraudulently appropriated, and negotiated or presented for payment after having been pasted together A banker to whom a mutilated cheque is presented should, therefore, refuse payment unless the mutilation is confirmed by the signature or initials of the drawer, or by the signature of the collecting banker Mutilated cheques which are not so confirmed should be returned with the answer "Mutilation requires confirmation" or simply "Mutilated cheque", for if they are not so returned the banker may be unable to debit the drawer, since he may have paid a cheque which the drawer or a subsequent holder had intended to annul

Payment of Debts by Cheque.

Unless there is an arrangement between debtor and creditor that payment shall be made by cheque, there is no obligation on the part of the creditor to accept payment in this way, and he is free to refuse such an instrument and to demand payment of his debt in legal tender On the other hand, if a cheque is accepted by the creditor without demur, then he will be presumed to have accepted the instrument in payment of the debt due to him, *provided*, however, that the cheque is duly honoured when it is presented for payment in accordance with the provisions of the Bills of Exchange Act

Payment by cheque or bill of exchange is, in fact, generally regarded as a *conditional* payment, unless there are circumstances which indicate that the instrument was accepted in final discharge of the debt The condition is, of course, that the debt will be revived if the cheque is not duly honoured when it is presented to the drawee, but until such a presentment has been made and payment refused, the creditor has no right to sue the debtor in respect of his obligation

As we have already noticed, the holder of a cheque retains his right of action on the written instrument until six years from its original date, but neglect on his part to obtain payment within a reasonable time will discharge the drawer to the extent

of any damage suffered by him through the delay, in respect of his liability both on the instrument itself and on the debt for which it was given. Moreover, any indorsers of the cheque will be entirely discharged, by virtue of Section 45.

In some cases, the obligation of a debtor from whom a cheque has been taken in payment may be regarded as having been discharged even though the money has not been received by the creditor. This may occur if the cheque is lost or misappropriated after it has reached the creditor's hands, and is paid in due course by the drawee-banker. A banker is compelled to pay a bearer cheque if it is in order and he is satisfied regarding the *bonâ fides* of the presenter, while he may in good faith pay an order cheque on which the indorsement of the payee or indorsee has been forged, with the right, in both cases, to debit the amount to the drawer's account. Clearly, the drawer, having thus paid once, cannot be called upon by his creditor to pay a second time, and in such circumstances the remedy of the creditor is against the finder or thief who has wrongly obtained payment of the instrument.

Payment by Cheque Through the Post.

The general rule of law is that, as between the sender and the addressee, any loss which arises from the sending of a cheque by post will fall upon the person *who first makes the Post Office his agent*, for the purposes of the payment. In the majority of cases the Post Office is the agent of the *sender*, for it is he who usually decides to make the payment by this means, and, if such is the case, the sender must bear any loss which may ensue by reason that the cheque has been lost or stolen before it reached the addressee.

On the other hand, there may be circumstances which, in the opinion of the Court, make the Post Office the agent of the *creditor*, *i e*, the person receiving the money, as, for example, where he expressly or impliedly requests that payment shall be made by cheque forwarded to him by post. In such a case, delivery of the cheque to the Post Office is regarded as delivery to the agent of the creditor, and the latter must bear any loss which may arise during the time when the cheque is in the hands of that agent.

Nevertheless, the Courts tend to free the creditor from liability in this respect if it can be shown that the method of payment adopted by the sender differed in any material way from that which was prescribed by the creditor. If, for example, the creditor had asked for a crossed cheque to be sent by post to him in payment, but the debtor sent an *uncrossed* cheque, or

sent the cheque by hand instead of by post, and it was stolen, then he would be liable to stand the loss if the cheque were paid.

It must be remembered that, even when a cheque has reached the creditor, it is merely a *conditional* payment, whether the Post Office is the agent of the sender or of the creditor, for, as has been already pointed out, the debt against which the cheque is drawn is at once revived when the cheque is dishonoured, unless there is an agreement by the creditor that the cheque itself shall be regarded as a final and conclusive settlement, in which case there is a right of action on the cheque only

CHAPTER 14

INDORSEMENTS

In spite of the frequent use of the terms "indorser" and "indorsement" in banking law and practice, there is no statutory definition of either of them in the Bills of Exchange Act, or elsewhere Fortunately, however, it is not difficult to determine their exact significance, since this is clearly indicated by the provisions of the Act, and by pronouncements in a number of decisions given in the Courts

It may be usefully observed that the word indorsement is derived directly from the Latin words *in dorsum*, meaning "on the back", and accordingly the term "indorsement" is applied in a general sense to mean any writing (and not necessarily a signature) upon the back of a document, as, for example, a deed, insurance policy, or bill of lading

In reference to cheques and bills of exchange, however, the word may be defined as the writing on the back of the instrument by which the property in a cheque or bill payable to order is transferred from one person (called the *indorser*) to another (called the *indorsee*).

The Effect of an Indorsement.

The indorsement on the back of a cheque or bill is, in fact, evidence of its transfer or "negotiation" from one person to another, the *transferor* indicating by his signature his intention to pass the instrument and any rights connected with it to another person, who is known as the *transferee*. In order to be legally effective an indorsement must, of course, consist of the proper signature of the person who is entitled to indorse the instrument, or of his duly authorised agent, since a forged or unauthorised signature is wholly inoperative and confers no right on a subsequent holder to enforce payment of the cheque or bill so indorsed (Section 24).

Furthermore, it is of first importance that the authentic or authorised signature of the transferor should be obtained on all

cheques or bills negotiated by him so that he may be held liable to subsequent holders as an indorser of the instrument

Requisites of a Valid Indorsement.

Section 32 of the Act clearly defines the requisites of a valid indorsement in the following terms —

> 32 An indorsement in order to operate as a negotiation must comply with the following conditions, namely —
>
> (1) It must be written on the bill itself and be signed by the indorser The simple signature of the indorser on the bill, without additional words, is sufficient
>
> 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

As an indorsement must be written *on the bill itself*, a separate promise in writing to indorse, or an assignment of a bill or note by a separate instrument, is not an indorsement Moreover, by virtue of Section 2, an " indorsement " means an indorsement *completed by delivery*, so the mere fact that the signature of the payee or indorsee appears on the back of a bill or cheque does not make that signature an indorsement unless the signer has given effect thereto by delivering the instrument

Although it is usually advisable for indorsements to be made on the *back* of bills and cheques, it should be noted that Subsection 32 (1) merely provides that an indorsement shall be " written on the bill itself ", and it follows, therefore, that an indorsement written on the *face* of a bill of exchange or cheque is quite in order in spite of its inconvenience

An " *allonge* ", such as is referred to in Section 32 (1), is a

piece of paper which is gummed or pasted to one end of a bill or cheque with the object of providing additional space for further indorsements when the back of the cheque or bill is already covered It is, of course, not often that a bill or cheque is negotiated so many times that an allonge becomes necessary, but the device is sometimes met with in connection with foreign bills of exchange The first indorsement of an allonge should be partly on the bill and partly on the allonge

A copy is an exact reproduction of the bill at the time the copy is made, including the face of the instrument and any indorsements appearing on the back Under the last indorsement copied a line is drawn, and the words " So far copy " are added, any subsequent indorsements being written under the line *Copies* of a bill are not recognised in this country unless they form part of a bill in a set as provided by Section 71 (see Chapter 10), but in those countries where copies are recognised, room for additional indorsements is sometimes found on a copy or copies of the original bill

In connection with Section 32 (3), the custom whereby dividend warrants payable to two or more persons may be indorsed by any one of the parties is expressly saved by Section 97 (3) (See Chapter 22)

Classes of Indorsement.

The Bills of Exchange Act refers to seven classes of indorsement (*a*) *Partial* indorsements , (*b*) Indorsements *in blank* ; (*c*) *Special* indorsements , (*d*) *Conditional* indorsements , (*e*) *Restrictive* indorsements ; (*f*) Indorsements *negativing* or limiting the liability of the indorsers , (*g*) *Facultative* indorsements, *i e* , waiving some or all of the holder's duties

Each of these classes is governed by special sections or sub-sections of the Act, which are discussed in the following paragraphs

Partial Indorsements.

Partial indorsements, referred to in Section 32 (2), are rarely seen in practice, but typical examples would be special indorsements in the following terms on a cheque for £100 . " Pay Thomas Robinson or order sixty pounds ", or " Pay Thomas Robinson sixty pounds and James Brown forty pounds ". Both indorsements may operate as an authority to receive payment of the amount specified, but are invalid as a negotiation of the bill, so that the indorsees can neither sue on the instrument nor further indorse in order to transfer the property therein

Indorsements in Blank and Special Indorsements.

These are distinguished by Section 34 of the Act in the following terms :—

> **34.** (1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer
>
> (2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.
>
> (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.

An example of an indorsement *in blank* would be the signature " Thomas Robinson " on the back of a cheque or bill payable to " Mr. Thomas Robinson or order ", the signature indicating that Thomas Robinson discharges the instrument in return for payment, or that he transfers his rights therein to some person unnamed In accordance with Section 8 (3), a bill or cheque on which the *only* or *last* indorsement is an indorsement in blank, is payable to bearer, and thereafter no indorsement of the instrument is necessary to transfer the property therein.

An example of a *special* indorsement on a cheque payable to Thomas Robinson would be :

" Pay the Acme Cycle Company, Ltd ,
Thomas Robinson ",

or :

" Pay James Brown or Order,
Thomas Robinson "

The indorsement of the company in the one case and of James Brown in the other as indorsees are necessary before the instrument can be discharged or transferred to another holder

A special indorsement may be made by any indorser, and not necessarily by the payee, while in accordance with Section 34 (4) above, any holder of a bill or cheque originally payable *to order* may convert the last blank indorsement thereon into a special indorsement, and thereby make the instrument payable to order, although by reason of the blank indorsement it had become payable to bearer. For this reason a special indorsement is said to *control* or override a previous indorsement in blank, but it must be clearly understood that a special indorsement on a bill drawn payable to *bearer* has no effect and does not make the instrument payable to order.

Sometimes the holder of a bill or cheque which is not payable to himself takes advantage of the provisions of this sub-section

to make the instrument payable to an indorsee without himself signing it and so incurring the liabilities of an indorser Suppose Thomas Robinson comes into possession of an order cheque indorsed in blank which he wishes to transfer without his signature to James Brown, and the name of the last indorser is Henry Arnold. Robinson may write the words " Pay James Brown or order " above Henry Arnold's signature, and so ensure that, while the cheque cannot thereafter be paid unless it is indorsed by Brown, he himself cannot be liable as an *indorser* of the cheque since his signature does not appear thereon. Nevertheless, Robinson is liable as a transferor by delivery in accordance with Section 58 (3). (See Chapter 11.)

Conditional Indorsements.

A conditional indorsement is not defined in express terms by the Act, but may be stated to be an indorsement which makes the transfer of the property in a cheque or bill by the indorser to the indorsee dependent upon the fulfilment of a stated condition Examples of such an indorsement are —

" Pay Thomas Robinson or order on the arrival of s s. Majestic at Montreal,
James Brown "

" Pay Thomas Robinson if he marries Anne Taylor,
James Brown ".

As between the indorser and the indorsee the condition would presumably be operative, so that, if the indorsee receives payment of the instrument although the condition has not been fulfilled, he will be regarded merely as having received the money in trust for the indorser

Nevertheless, Section 33 protects the payer of a cheque or bill in such circumstances by providing that :—

> **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.

This provision is clearly of advantage to bankers, who will usually have no means of satisfying themselves whether a condition has been fulfilled or not Moreover, it would obviously be illogical to affect the payer of a bill or cheque with a condition in an indorsement when the order addressed to that payer by the drawer cannot be made conditional. On the other hand, the section provides that the power to disregard a condition in an indorsement is *optional*, so that the payer may *if he chooses* refuse payment until he has proof that the condition has been fulfilled.

Restrictive Indorsements.

A restrictive indorsement is thus defined by Section 35 of the Act —

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

A perusal of this Section and of the preceding paragraph will indicate that restrictive and conditional indorsements are both types of special indorsements

While Section 35 (1) gives all the rights of an ordinary holder to the indorsee under a restrictive indorsement, it limits his full capacity to deal with the instrument in the respect that he cannot transfer his rights unless, *from the words employed*, it can be assumed that he has power to do so

Thus, if a bill is indorsed " Pay D for the account of X ", or " Pay D for Collection ", D cannot indorse the bill to E so as to give E the right to receive payment on account of X , but if the bill is indorsed " Pay D *or order* for the account of X ", or " Pay D *or order* for Collection ", then D has a right to indorse to E, since the addition of the words " or order " imply that D has authority to indorse to another party

The rights of all subsequent indorsees where a restrictive indorsement authorises further transfer are defined in Section 35 (3), and may be illustrated as follows A draws a bill payable to B, who restrictively indorses it to C thus " Pay C or order for my use " C indorses the bill to D, and the bill is subsequently dishonoured by the drawer D can sue B on the bill, but only subject to any defence or set-off which B could have had against C He can also sue A, the drawer , but if A has any defence against B or C he may set up that defence against D

In neither of the foregoing cases is any duty imposed on the paying banker to see that the terms of the condition or restriction are observed, although he should not pay without inquiry a cheque or bill which is restrictively indorsed *to prohibit further transfer*, but which, nevertheless, bears evidence of subsequent

negotiation, in the form of one or more indorsements following the restrictive indorsement

A restrictive indorsement prohibiting transfer has exactly the same effect as words in the body of the instrument inserted for that purpose, *e g* , " Pay James Brown *only* "

Restrictive indorsements frequently met with in practice are those which specify that the proceeds of a cheque are to be paid only to a specified account, as in the following examples [1]—

" To be placed to the account of Jones Bros with the Blankshire Bank,
Jones Bros ".

" To the credit of Brown and Brown with the Alliance Bank, Manchester,
Brown and Brown "

" Pay to A L Turner's A/c,
B Backer "

" Please place to the credit of my account,
James Brown "

In none of these cases is a further indorsement contemplated by the indorser, and it would clearly be very difficult for a paying banker to justify his action in paying a cheque bearing one of these indorsements and a subsequent indorsement or subsequent indorsements At the same time it is not the business of the *paying* banker to see that the instructions given in such an indorsement are complied with, although a banker *collecting* the proceeds of such a cheque would no doubt be required to see that they are placed to the account specified

Sometimes additions to an indorsement which are intended to be restrictive may be regarded as invalidating the indorsement as a good discharge, and the cheques in such cases may be returned by the paying banker marked " Indorsement irregular " Examples are —

1. " Credit Thomas Robinson ".
2 " For Lodgment a/c,
Smith, Brown & Jones ".

On the other hand, additions to an indorsement such as " Paid in ", " Pay cash ", " Received without prejudice ", and " Received cash " are in order, but in the last two cases a receipt stamp is required if the amount of the cheque is for £2 or over.

[1] See *Questions on Banking Practice*, Nos. 742–744.

Negativing, Limiting, and Facultative Indorsements.

Section 16 of the Act provides for circumstances in which an indorser may desire to escape the usual liabilities and obligations attaching to the indorsement of a cheque or bill, or where he may wish to waive some or all of his rights.

> **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

Thus, if Thomas Robinson is the payee or indorsee of a cheque, and wishes to escape liability thereon in the event of dishonour, he may sign his name on the back of the instrument in the usual way and add the words "*sans recours*" or "without recourse to me" after his signature, in which case a subsequent holder would be unable to proceed against the said Thomas Robinson if the cheque was unpaid Or he may add the words "*sans frais*" or "without expense", indicating that although he is prepared to accept liability for the amount of the instrument if it is unpaid, he will not bear any expense which may be incurred by the holder in the event of dishonour, as, for example, expenses resulting from the protest of a bill or cheque (see Chapter 19) It must be understood, however, that words such as "*sans recours*" refer only to liabilities *on the bill* · they would not, for example, free a person from liability for conversion if he dealt with a bill on which a material prior indorsement had been forged

An indorsement in which the signer waives some or all of his rights (*i e* , of the duties of subsequent holders) is known as a "*facultative*" indorsement The following is an example .—

> "Pay James Brown or Order,
> William Robinson.
> (*Notice of Dishonour waived*)"

The meaning of this addition is that the indorser does not require the holder to give him notice of dishonour if the bill is refused acceptance or payment

Cancellation of an Indorsement.

An indorser (and all subsequent indorsers who have indorsed prior to the cancellation) may altogether avoid liability if his signature is intentionally cancelled by the holder or his agent, as is provided by Section 63 (2), discussed in Chapter 18 Bills and cheques are sometimes paid in by customers on which some of the indorsements are entirely obliterated by a black impressed stamp or some other means, and in such cases no action can be taken, in the event of dishonour, against the parties whose signa-

tures have been so obliterated, or against subsequent parties who would have had a right of recourse against the parties whose signatures have been cancelled.

Bankers and Indorsements.

So far as a paying banker is concerned, the indorsement of the payee or indorsee is required as evidence that a cheque or bill has been duly paid in accordance with the instructions given by the customer. If, however, an order cheque is actually presented for payment by the payee, and he refuses to sign the cheque in return for receiving the money, the banker should hand back the cheque with the answer "Payee's indorsement required" The banker could not thereafter be held liable by the customer for dishonouring the cheque, as it is in the customer's own interests that a proper discharge should be obtained Moreover, the banker himself is not bound to assume unusual risks, for, if he paid a cheque without indorsement, he might be held liable for not following the "ordinary course of business". Alternatively, the banker can demand a receipt for the payment, duly stamped 2d if the amount is £2 or over, and if the payee will not give such a receipt he renders himself liable to a penalty of £10

Although a banker must protect the interests of his customers by seeing that indorsements on all cheques and bills paid by him are to all appearances correct and in conformity with the requisites of a valid indorsement, it would not be reasonable to expect the paying banker to accept responsibility for the *authenticity* of all indorsements upon the many cheques passing through his hands. This is the general position taken by the law as embodied in the Bills of Exchange Act, 1882, which lays down in precise terms the protection afforded to bankers who exercise *reasonable* care in relation to indorsements on customers' cheques

Nevertheless, a banker should in no circumstances pay or collect a cheque or bill if he is not satisfied with the indorsement or indorsements thereon (even if they are in a foreign language), and it is for this reason that the examination of indorsements on cheques and bills paid or collected by a branch bank is entrusted to a responsible official with some knowledge of the technicalities appertaining to indorsements generally. The banker is not concerned with the correctness or otherwise of indorsements on cheques or bills originally made payable to bearer, but in the case of order cheques or bills, it should be seen that *all* indorsements (not merely that of the payee) are technically correct, and that any *special* indorsements are followed by the signatures of the indorsees specified.

If the paying banker is not satisfied as to the validity or correctness of an indorsement, he should either return the instrument unpaid and marked " Indorsement requires confirmation " or " Indorsement irregular ", or, if the instrument is presented for payment by the indorser in person, he should get the latter to correct any defect or verify the signature if it is doubtful. If the banker knows that an indorsement is not in the handwriting of the payee or indorsee, he should not pay the instrument without confirmation of the signature, but he cannot, of course, insist that the writing shall be that of the payee, for Section 91 (1) provides that a signature need not be made by a person's own hand but may be written by or under the authority of the person whose signature it purports to be

Though there is no legal rule as to the order in which indorsements should appear, it is clearly advisable that the payee's signature should appear first on the back of the bill, and that the signatures of special indorsees should immediately follow the relative special indorsements It may, however, happen that the payee's indorsement does not appear first, particularly when the back of the instrument is crowded with signatures, and in such cases particular care is required to trace the order of transfer and ensure that the payee's signature actually appears, and that all special indorsements are properly completed

Indorsements Generally.

It is desirable that all indorsements should be wholly or partly in ink, but an indorsement is legally valid if made in pencil, or if made entirely by means of an impressed stamp, provided that the impression is made by or under the authority of the payee or indorsee In practice, however, indorsements in pencil are generally discouraged owing to the liability to obliteration or alteration, but cheques bearing a pencilled indorsement forming one of a series of indorsements and followed by other indorsements in ink, are frequently paid without question (see *Questions on Banking Practice,* No 977)

Although there is no doubt that the Courts would regard as valid an indorsement made wholly by impressed stamp, if it could be shown that the impression was made by or under the authority of the payee, it is highly desirable, as is pointed out by the Council of the Institute in *Questions on Banking Practice,* No 978, that such indorsements 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 was impressed by authority. Similarly, an indorsement

entirely in printed characters would not usually be accepted, although there is no question as to its validity The collecting banker should, therefore, refuse to accept such indorsements on cheques paid in by his customers, since he will invariably be put to the trouble of confirming them to the paying banker

The foregoing remarks apply to indorsements which are made *wholly* by impressed stamp No objection can be raised to an indorsement in which the name of the payee is impressed, but wherein the signature of the agent or official appears in ink, as frequently happens in indorsements on behalf of a limited company or local authority

In the case of a first indorsement on a cheque or bill payable to order, the general rule is that the signature should correspond in its essentials with the description of the payee given on the face of the instrument, while an indorsement following a special indorsement must correspond with the name of the indorsee specified in the special indorsement. This means that the *surname* in the indorsement should be identical with the surname given as that of the payee or indorsee, whether it is given correctly, or not, for if the name is not correctly given, Section 32 (4) of the Act, already quoted, authorises the holder to sign his name incorrectly in accordance with the spelling as given, adding his proper signature if he thinks fit

On the other hand, it is not essential that *Christian* names be written in full, even if they are so given on the face of a cheque or in a special indorsement , but if the indorsee chooses to give his Christian name or names in full, then the spelling thereof must correspond exactly with that given on the instrument Moreover, there is no objection to the Christian name being given in full, although initials only are given on the face of the instrument or in the special indorsement But a surname only will not suffice for an indorsement, even where no Christian name or initial is given on the cheque or bill.

Courtesy Titles.

As the guiding principle is that an indorsement should be the ordinary form of signature of the payee or indorsee, it is usual in practice to return cheques bearing indorsements which include courtesy titles or forms of address, although the indorsement should be regarded as being in order if such expressions are added to a signature with the obvious intention that they should be merely descriptive. On the other hand, it is usual in certain foreign countries to include courtesy titles with indorsements, and no objection should be raised on this ground to indorsements by foreign payees or indorsees.

With the exception mentioned, a banker should not accept without confirmation indorsements in the form "*Mr.* Thomas Robinson", "Thomas Robinson, *Esq*", "*Major* Thomas Robinson", or *Dr.* Thomas Robinson", for the recognised forms of signature in such cases are "Thomas Robinson", with or without the descriptive expressions "Major" or "M D" in the last two cases. The abbreviation "Mrs" is regarded as both a courtesy title and a term of description (See "Indorsements of Married Women")

Examples of Correct Forms of Indorsement by Individuals.

PAYEE	FORM OF INDORSEMENT
Mr Thomas Robinson	Thomas Robinson or T Robinson
or	
Thomas Robinson	Thomas Robinson, Thomas Robertson (where payee's
or	name is correctly Robertson)
T Robinson	Thomas Robinson, Senior
Dr Thomas Robinson	Thomas Robinson, M D
,,	Thomas Robinson, F R C S, or simply Thomas Robinson
Capt Thomas Robinson	Thomas Robinson, or Thomas Robinson, Capt, R A M C
Thomas Robinson, Esq.	Thomas Robinson
Mr Thomas Robinson, Senior	Thomas Robinson or Thomas Robinson, Senior
— Robinson	Thomas Robinson
Sir Thomas Robinson	Thomas Robinson, or Thomas Robinson, Kt
Lord Robinson	Robinson
The Duke of Middlesex.	Middlesex

Examples of Incorrect Forms of Indorsement by Individuals.

PAYEE.	FORM OF INDORSEMENT	IRREGULARITY
Mr Thomas Robinson	*Mr* Thomas Robinson	Courtesy title should be omitted in a signature
,,	Thomas Robinson, *Junior*	Mr Thomas Robinson is *prima facie* Thomas Robinson, Senior (see above)
,,	Thomas *Robynson*	Spelling differs
,,	*Tomas* Robinson	,,
,,	*T P* Robinson	Initials differ
,,	Robinson	Full signature required, including christian name or initials.
Thomas Robinson, Esq	Thomas Robinson, *Esq*	Courtesy title should be omitted
Rev Thomas Robinson	*Rev* Thomas Robinson	,, ,,
Dr Thomas Robinson	*Dr* Thomas Robinson	,, ,,
Capt Thomas Robinson.	*Capt* Thomas Robinson	,, ,,
,,	Thomas Robinson, *Lieut*	Description incorrect
Mr Thomas Robinson, Junior	Thomas Robinson	See above, should be Thomas Robinson, Junior

Indorsements of Married Women and Widows.

The abbreviation "Mrs" before the name of a payee is regarded as a term of courtesy and also as a term of description, thus differing from the abbreviations "Mr" or "Esq.", which are regarded as terms of courtesy only. For this reason a cheque drawn payable to "Mrs Thomas Robinson" should be indorsed by the usual signature of the payee, followed by words indicating

that she is either the wife or widow of Mr Thomas Robinson, as, for example, " Jane Robinson, wife of Thomas Robinson ", or " Jane Robinson, widow of Thomas Robinson ".

If the payee's name is given merely as " Mrs Robinson ", she should indorse with her usual signature, " J Robinson ", or " Jane Robinson " A cheque drawn payable to a married woman or a widow in her maiden name should be indorsed with her usual signature, words being added to indicate that the name has been changed by marriage Thus, if Mrs Jane Robinson was originally Miss Jane Brown, she should indorse a cheque made out in the latter name as follows —

" Jane Robinson (née Brown) "

Examples of Correct Indorsements by Married Women

Payee	Form of Indorsement
Mrs Thomas Robinson	Jane Robinson, wife of Thomas Robinson Jane Robinson, widow of Thomas Robinson, deceased Jane Robinson (Mrs Thomas Robinson)
Mrs T Robinson	Jane Robinson, wife of T Robinson, or Jane Robinson (Mrs T Robinson), etc
Mrs Robinson	Jane Robinson, or (Mrs) Jane Robinson
Mrs Capt Robinson	Jane Robinson, wife of Capt Robinson
Miss Jane Taylor (now married)	Jane Robinson (née Taylor), or Jane Robinson, formerly Jane Taylor

Examples of Incorrect Indorsements by Married Women

Payee	Form of Indorsement	Irregularity
Mrs Thomas Robinson	Jane Robinson	Should indicate that she is the wife or widow of Thomas Robinson
,,	Mrs Jane Robinson	Courtesy title should be omitted
,,	Mrs Thomas Robinson	Not Mrs Robinson's signature
Mrs Robinson	Mrs J Robinson	Courtesy title should be omitted
Miss Jane Taylor (now married)	Jane Robinson, née Jane Taylor	Née is, for obvious reasons, correctly applied to the surname only

Indorsements of Joint Payees (other than Trustees and Executors).

Cheques payable to two or more distinct payees should be indorsed by each of the payees individually, unless one has authority to sign on behalf of all, or the payees are in partnership and the indorsement clearly indicates that it is the signature of a partner on behalf of the firm Thus a cheque payable to " Mr Thomas Robinson and Mr James Brown ", or " Messrs Thomas Robinson and James Brown ", or " Thomas Robinson, Esq and James Brown, Esq ", should be indorsed by both payees, and if the signatures have obviously been written by the same hand, confirmation of the indorsement should be required, unless the banker has knowledge that one payee can sign for both, or unless

one payee has died, and satisfactory evidence of the death is produced, in which case the proceeds of the cheque belong to the survivor

If a cheque is payable to "Thomas Robinson and another", it should be indorsed "For self and James Brown, Thomas Robinson", or "For self and another, Thomas Robinson", but any other variants should not be accepted without confirmation, as, for example, the signature "Thomas Robinson" alone, or the signature "Thomas Robinson" with another signature in a different handwriting

Examples of Correct Indorsements by Joint Payees.

PAYEES	FORM OF INDORSEMENT
Messrs Thomas Robinson and James Brown	Thomas Robinson, James Brown (in different handwritings)
Messrs Robinson and Brown	For self and Thomas Robinson, James Brown (if duly authorised to sign) Robinson & Brown (if a firm, and name signed by one of the partners—see below)
Mr Thomas Robinson and Mrs Jane Robinson	Thomas Robinson Jane Robinson For self and Mrs Robinson, Thomas Robinson (authority may be presumed in this case)

Examples of Incorrect Indorsements by Joint Payees.

PAYEES	FORM OF INDORSEMENT	IRREGULARITY
Messrs Thomas Robinson & James Brown	Thomas Robinson (in same handwriting) James Brown (in same handwriting)	Both should sign independently, unless one can sign with authority (see above)
	Robinson & Brown	Two distinct signatures required, or an authorised signature on behalf of both
Mr Thomas Robinson and Mrs Jane Robinson	T & J Robinson	do do

Indorsements of Agents.

In accordance with the provisions of Section 91 of the Act, it is sufficient if the signature requisite for an indorsement is written by some person acting by or under the authority of the payee or indorsee But, in order that the principal and not the agent shall be liable, the signature must unmistakably indicate that the agent is signing on behalf of a named principal

In accordance with the general rules of law relative to agents, any person with or without power to contract may serve as an agent to sign on behalf of another, and a "person" for this purpose includes such bodies as a registered company and a partnership

As a rule, agents in this country sign on behalf of their principals by means of a *per procuration* signature in the form shown on page 121. Per procuration signatures in which the abbreviation " per pro.", or " p p ", does not *precede* the name of the principal are not accepted without confirmation, but the form " James Brown, *per pro.* Thomas Robinson ", would appear to be legally valid, although by no means customary.

In the case of a per procuration signature, the inclusion of the abbreviation " per pro." or " p p." is in itself a sufficient indication of the authority of the agent, but the words " for ", " per ", or " pro " are not in themselves so indicative, and should not be accepted unless the signature of the agent is accompanied by a word or words specifying his capacity

Per procuration indorsements are very frequently signed by persons who have no actual or implied authority, and, though such indorsements are accepted by bankers, there is a considerable risk in the practice. As a general rule, no liability is incurred if a cashier asks a wife to discharge a cheque payable to her husband, or a son paying in cheques to his father's account to discharge the articles on behalf of the father

But a paying banker should always demand confirmation of the authority to sign in the case where a per procuration signature is written on behalf of a company or local authority, and the status of the person signing is not such as would warrant the banker in assuming that he has in fact authority to sign (See Indorsements of Companies, below)

Unless the surrounding circumstances are suspicious, however, bankers do not usually dishonour cheques indorsed by agents on behalf of individuals, even if such cheques are presented for encashment over the counter

In the absence of a per procuration signature, agents usually sign in one of the following forms .—

For Thomas Robinson,
James Brown,
Agent (or Secretary or Manager).

Thomas Robinson,
by his Attorney, James Brown.

Thomas Robinson,
per James Brown,
Agent

Thomas Robinson,
by James Brown, Attorney

Indorsements in any of these forms are satisfactory as explicitly indicating the authority of the signers, but confirmation should be required if the status of the signer is not given, as, for example, in such forms as " Thomas Robinson, by (or per) James Brown ", or " For Thomas Robinson, James Brown ". In such cases there is nothing to indicate the authority of the person signing, and a paying banker is quite justified in demanding a

confirmation of the indorsement or an addition of words specifying the capacity of the signer

As has been previously explained, the mere addition to the agent's signature of words describing him as an agent will not make the indorsement that of the principal and exclude the agent's personal liability. The principal must be *named*, and the signature must clearly indicate that it is on his behalf Thus, in the case of a cheque payable to " Thomas Robinson ", an indorsement in the form " James Brown, agent to Thomas Robinson ", would not be accepted because the signature is strictly that of James Brown, with the mere addition of descriptive words, and cannot therefore be regarded as binding on the principal.

The signature of the agent himself must be his full signature in its usual form His surname and christian name or initials must appear, but words of title or courtesy must be omitted unless they are merely descriptive. The initials of the agent with the principal's name are not sufficient Titles or words of courtesy may, however, appear in such cases in connection with the name of the principal, because he is not regarded as signing his usual form of signature

In accordance with the general rule regarding the powers of agents, an agent has no implied power to delegate his authority to sign on behalf of another, so that any indorsements which indicate such a delegation should be returned for confirmation or for the signature of the agent himself This is made clear in the following examples —

Examples of Correct Indorsements by Agents

(Signed on behalf of Thomas Robinson)

per pro Thomas Robinson,
James Brown

James Brown,
per pro Thomas Robinson

For (or per) Thomas Robinson,
James Brown, Agent

Thomas Robinson,
by (or per) his Attorney, James Brown

per pro Mr Thomas Robinson,
James Brown

per pro Capt Thomas Robinson,
James Brown

Thomas Robinson,
per (or by) James Brown, Attorney.

per pro Thomas Robinson,
James Brown & Co

per pro Thomas Robinson, Esq ,
James Brown

Examples of Incorrect Indorsements by Agents.

(Signed on behalf of Thomas Robinson)

Form of Indorsement	Irregularity
For (or pro) Thomas Robinson, James Brown.	" For " or " pro " is not a sufficient indication of authority " Agent " or some such word should be added
James Brown, For (or pro) Thomas Robinson.	" " " "

Form of Indorsement	Irregularity.
Thomas Robinson, per (or by) James Brown	"Per" or "by" is no indication of authority Word or words indicating capacity required.
Thomas Robinson, per pro James Brown.	"Per pro" must precede the principal's name.
James Brown, Agent (or Attorney) for Thomas Robinson	Agent's signature only, as the additional words are merely descriptive
Per pro (or for) Thomas Robinson, James Brown, per (or by) William Brown	Delegation of authority not permissible.
Per pro Thomas Robinson, J B	Signature of agent required, and not merely initials
Per pro Thomas Robinson, Brown	Agent's full signature required
Per pro Thomas Robinson, Capt James Brown.	Agent's signature must appear without "Capt" or with "Capt" *after* it

Indorsements of Executors and Administrators.

As executors have implied power to delegate their authority to one (or some) of their number (see Chapter 5), no objection can be raised to the indorsement of cheques by one executor, provided he clearly indicates *that he is an executor*, and that he signs on behalf of himself and his co-executors. The fact that a person signs for himself and his *co-executors* is, of course, clearly indicative that he *is* an executor, even though his signature is not followed by the designation "Executor". Although authority to sign may be delegated by several executors to one of their number, they have no power to place such authority in the hands of any *outside* person, and accordingly indorsements which are otherwise in order should be refused if the person signing does not indicate that he is an executor

If a will exists, the executors are the only persons entitled to deal with cheques or other property of the deceased, but in the absence of a will, power to deal with the property of the deceased is vested in an administrator or administrators appointed by the Court, whose powers of signing and indorsing are similar to those of executors as here defined

Cheques payable to a deceased person should be indorsed by his executors or administrators in the recognised way, and, if so discharged, should be paid by a banker without question unless he has reason to doubt the authority of the persons signing in which case he should ask for production of the probate or letters of administration or for confirmation by the presenting banker.

Signatures in discharge of cheques payable to a deceased by any person or persons other than the legal representatives should not be accepted by a banker, otherwise he may render himself liable to refund any moneys wrongly dealt with to the persons empowered to deal with the estate. For this reason the

signature of a widow or son should not be accepted in indorsement of a cheque payable to a deceased, unless such individual is the personal representative of the deceased

Examples of Correct Indorsements by Executors and Administrators.
(Signed on behalf of Thomas Robinson, deceased.)

For self and { Co-executor(s) / or / Co-administrator(s) } of Thomas Robinson, deceased,
James Brown

For self and { Co-executor(s) / or / Co-administrator(s) } of the late Thomas Robinson,
James Brown

For the Executors of the late Thomas Robinson,
James Brown,
Executor

Per pro the { Executors / or / Administrators } of Thomas Robinson deceased,
James Brown, Executor

James Brown, { Joint Executors / or / Administrators }
William Brown, } of Thomas Robinson, deceased

James Brown, sole { Executor / or / Administrator } of Thomas Robinson, deceased

Jane Robinson, sole { Administratrix / or / Executrix } of Thomas Robinson, deceased

Examples of Incorrect Indorsements by Executors.

Form of Indorsement.	Irregularity.
For executors of Thomas Robinson, deceased, James Brown	Signature does not indicate that *Brown is an executor* signing for *all* the executors
For self and Co-executors, James Brown	Indorsement must specify name of deceased
Per pro Executors of Thomas Robinson, James Brown.	Capacity of the signer as executor must be indicated
Per pro Thomas Robinson, deceased, James Brown, Executor	Signer cannot sign as agent of a deceased person

Cheques made payable to the executors or administrators of a deceased person require signing in accordance with the foregoing general rules, and if one person signs for all the representatives he should clearly indicate his capacity to discharge the instrument. Thus a cheque payable to the " Personal Representatives of Thomas Robinson, deceased ", may be indorsed in any of the correct forms given above.

Indorsements by Trustees.

Trustees differ from executors in the important respect that, if there are more than one, they cannot ordinarily delegate their authority to one or some of their number. As a rule, trustees must act *personally* and *jointly* in regard to all matters connected with the trust.

Accordingly, if there is anything on the face of a cheque to indicate that it is payable to trustees, it must be indorsed in such a way as clearly to show that all the trustees have joined in the discharge, otherwise confirmation of the indorsement should be required. If the cheque is payable to a person whose estate is vested in the hands of trustees, the latter should indorse the instrument and indicate clearly that they sign as trustees of the payee concerned.

Examples of Correct Indorsements by Trustees (*e g*, of Thomas Robinson, deceased).

PAYEE.	FORM OF INDORSEMENT
Trustees of the late Thomas Robinson.	James Brown | Trustees of Thomas William Brown | Robinson, deceased
Trustees of Thomas Robinson, deceased	
James Brown and William Brown, Trustees of the late Thomas Robinson	James Brown | Trustees of the late William Brown | Thomas Robinson.
Trustees of Thomas Robinson, deceased	James Brown, Sole Trustee of Thomas Robinson, deceased

Examples of Incorrect Indorsements by Trustees.

FORM OF INDORSEMENT	IRREGULARITY
For self and Co-trustees of Thomas Robinson, deceased, James Brown	One trustee cannot, as a rule, sign on behalf of all
Per pro Trustees of Thomas Robinson, deceased, James Brown	,, ,, ,, ,,
James Brown | (On cheque payable to Trustees William Brown | of the late Thomas Robinson)	Signers must indicate that they are the trustees of Thomas Robinson
James Brown, Trustee of Thomas Robinson, deceased	Designation should be "sole trustee", or the signature or signatures of remaining trustee or trustees should be added
Per pro (or for) Thomas Robinson, James Brown, Trustee (on cheque payable to Thomas Robinson, deceased).	Trustee cannot sign as agent of a deceased person.

Indorsements on behalf of Partnerships.

Any partner in a *trading* firm has implied power to bind the firm by signing its name on negotiable instruments, with or without the addition of his own name or of words indicating his authority It follows, therefore, that, when in such cases the partner's name is omitted, there is, as a rule, nothing to guide the banker as to whether the signature was or was not written by a partner, and his only safeguard is to ensure that the indorsement strictly conforms to the name of the payee on the face of the instrument, or, where there is a recognised practice in regard to any special form of indorsement, that that practice is rigidly followed. This is specially important because the names of firms are often so much alike as to cause confusion or to give rise to fraud. On the other hand, if a firm's name is wrongly

given, a partner of the firm is entitled, like any other indorser, to sign the wrong name, adding the correct name if he thinks fit.

As any partner has implied power to sign on behalf of the firm, a banker would not normally return a cheque or bill drawn by a firm payable to "selves" and signed in a different handwriting from that of the indorsement.

These points are made clear by the following examples —

Examples of Correct Indorsements on behalf of Partnerships.

PAYEE.	FORM OF INDORSEMENT.	
Messrs Robinson & Co.	Robinson & Co *or* Per pro Robinson & Co, Thomas Robinson	
Messrs Thomas Robinson & Co.	Thomas Robinson & Company. Thomas Robinson & Co For Thomas Robinson & Company, Thomas Robinson, Partner	
Messrs Robinson, or Messrs Robinsons.	Robinson and Robinson Robinson & Son. Thomas Robinson & Son Robinsons	Thomas & Jane Robinson Thomas & William Robinson Robinson Bros T Robinson, Jane Robinson
Messrs Robinson Bros	Robinson Bros	Per pro Robinson Bros, Thomas Robinson
Messrs Robinson & Brown	Robinson & Brown	Per pro Robinson & Brown, Thomas Robinson
	Thomas Robinson James Brown	For Robinson & Brown, Thomas Robinson, Principal

Examples of Incorrect Indorsements on behalf of Partnerships.

PAYEE	FORM OF INDORSEMENT	IRREGULARITY
Messrs Robinson & Co	T Robinson & Co Robinson & Brown	Name differs, and may be that of another firm
Messrs Thomas Robinson & Co	Robinson & Co T Robinson & Co, James Brown	,, ,, The signature should indicate the authority of the signer, as, for example, by the addition of the word "partner"
Messrs Robinson	Robinson & Co T Robinson & Co	Payee's name suggests two or more persons of the name Robinson, whereas the indorsements are of firms which may include persons not so named
Messrs Robinson Bros	T & J Robinson T Robinson J Robinson Per pro. T & J Robinson, T. Robinson T Robinson & Bros	Signatures do not indicate that the persons included in the names are brothers ,, ,, Firm name differs.

Indorsements on behalf of Registered Companies.

By virtue of Section 30 of the Companies Act, 1929, an indorsement is deemed to have been made on behalf of a joint-stock company when it is made in the name of the company, or by or on

behalf of or on account of the company by a person acting under its authority

It follows that the mere writing or impressing of the name of a company by some one acting under its authority constitutes a valid indorsement, but, though bankers will accept the mere signing of the name of a partnership as a good discharge, they often refuse to accept without confirmation an indorsement or signature on behalf of a joint-stock company which does not clearly indicate the capacity of the signer. Moreover, bankers will not, as a rule, accept such indorsements unless they are made by persons who are usually in a position to bind the company, as, *e g*, directors, general managers, secretaries, or, in the case of a company which is being wound up, the liquidator Indorsements by subordinate officials, such as cashiers, foremen, ledger clerks, or private secretaries should not be accepted without confirmation It is to be remembered, also, that officials who have express authority to sign on behalf of a company, have usually no right to delegate that power to others, accordingly indorsements which bear evidence of such a delegation should be returned for confirmation or authorised signature

Important legal decisions concerning signatures on behalf of limited companies are discussed at pages 58 and 122, to both of which reference should be made at this point

As in the case of all other discharges, an indorsement on behalf of a company should correspond exactly with the name of the company as given on the face of the instrument or in the special indorsement, but if the name so given is inaccurate or incomplete, the indorser should sign in the incorrect form, adding the company's correct description underneath The term "limited" should, of course, appear in the final indorsement, whether or not it is given on the face of the cheque, for this word must not be omitted in any signature on behalf of a limited company

Examples of Correct Indorsements on behalf of a Limited Company.

Payee	Form of Indorsement
The Acme Cycle Co, Ltd	Per pro The Acme Cycle Co, Ltd, or For the Acme Cycle Co, Ltd, or For and on behalf of the Acme Cycle Co, Ltd, or The Acme Cycle Co, Ltd, John Brown, Director or Secretary. or Manager.
Do	The Acme Cycle Co, Ltd, per John Brown, Director. or Secretary. or Manager

Examples of Correct Indorsements on behalf of a Limited Company— *(continued)*

PAYEE	FORM OF INDORSEMENT.
The Acme Cycle Co , Ltd	Per pro The Acme Cycle Co , Ltd , John Brown (Though this form is legally in order, some banks will not accept it without confirmation)
Do	The Acme Cycle Co , Ltd (in Liquidation) John Brown, Sole Liquidator
Do	The Acme Cycle Co , Ltd , John Brown & Co , London Agents
Thomas Robinson & Co , Ltd (Company's name T Robinson & Co , Ltd)	For and on behalf of Thomas Robinson & Co , Ltd , T Robinson & Co , Ltd , James Brown, or { Director / Secretary / Manager }

Examples of Unacceptable Indorsements on behalf of a Limited Company.

PAYEE.	FORM OF INDORSEMENT.	IRREGULARITY
The Acme Cycle Co , Ltd	Per pro. The Acme Cycle Co , Ltd James Brown, or { Cashier / Foreman / Clerk }	Authority of signer not usually regarded as sufficient without confirmation
Do	For Acme Cycle Co , Ltd , per pro John Brown, Director H Smith, Private Secretary	Delegation of authority to sign is not accepted without confirmation
Do	For Acme Cycle Co , Ltd H Smith, pro { Secretary / or Director }	,, ,,
Do	The Acme Cycle Co , Ltd	Quite legal, but usually returned for confirmation
Do	Per pro Acme Cycle Co , John Brown, { Director / or Secretary. }	The word "limited" is essential and must appear.
Do	John Brown, Director, The Acme Cycle Co , Ltd	Merely the signature of the director, with a description of himself added
Thomas Robinson & Co , Ltd.	For T Robinson & Co , Ltd , John Brown, Director	Name of Company does not agree

Indorsements of Official and Fiduciary Payees.

The name of the payee on the face of a cheque is sometimes followed by a word or words describing an official or fiduciary position, thus indicating that the money is being paid to the person named in his official or fiduciary capacity. In such cases the indorsement of the payee must be followed by a description corresponding to that on the face of the cheque.

Thus, cheques payable to " William Brown, Treasurer of Northtown U.D.C.", or to " James Brown, Collector of Taxes ", should consist of the signatures of the persons named followed by descriptions corresponding to those given.

Again, if a cheque is made payable to the holder or holders of an office for the time being, without actually specifying the name or names of the individuals, as, for example, to " The Treasurer, Northtown U D C." or to " The Collector of Taxes ", the indorsement must include, not only the signature of the person holding the position, but also the description as given

But the fact that the payee of a cheque *happens* to hold an official or fiduciary position does not make it necessary for him to sign in that capacity if the cheque is made payable to him personally, even though the money is intended by the drawer to be paid for official or fiduciary purposes The indorser may, if he wishes, add a description of his capacity, but the addition of such words should not be such as to make it necessary for the banker to demand confirmation of the signature So, where a cheque payable to " A M Chambers, Esq " is indorsed " A M. Chambers, for self and Co-trustees of the late Arthur Chambers ", the paying banker must not ignore the fact that one trustee cannot, as a rule, sign on behalf of all, and he should, therefore, demand confirmation of the indorsement

Examples of Correct Indorsements of Official or Fiduciary Payees.

PAYEE	FORM OF INDORSEMENT
Thomas Robinson, Treasurer, Northtown U D C	Thomas Robinson, Treasurer, Northtown U D C
The Treasurer, Northtown U D C.	,, ,, ,, ,,
Northtown U D C	For Northtown U D C , Thomas Robinson, Treasurer
The Mayor of Northtown	Thomas Robinson, Mayor of Northtown.
The Collector of Taxes	Thomas Robinson, Collector of Taxes.
The Liquidator, James Brown & Co , Ltd	Thomas Robinson, Liquidator of James Brown & Co , Ltd

Examples of Incorrect Indorsements of Official or Fiduciary Payees.

PAYEE	FORM OF INDORSEMENT	IRREGULARITY.
Thomas Robinson, Treasurer, Northtown U D C	Thomas Robinson.	Requires official description
Treasurer, Northtown U D.C.	Thomas Robinson	,, ,,
Do do do	Treasurer, Northtown U.D C	Requires signature of the official.
Northtown U D C.	For Northtown U D C , James Martin, Collector.	Requires confirmation or signature by an authorised official A rate collector is not regarded as being so authorised.

Examples of Incorrect Indorsements of Official or Fiduciary Payees— *(continued)*

Payee	Form of Indorsement	Irregularity.
Collector of Taxes	Per pro Thomas Robinson, Collector of Taxes, James Brown	Should be confirmed, as authority to discharge cannot be delegated
Thomas Robinson, A/c A B	Thomas Robinson	"A/c A B" should be added as an indication that the funds are correctly dealt with.

Indorsements by Mark.

Cheques or bills made payable to persons unable to write should be indorsed by the "mark" of the payee, properly authenticated in the recognised form as indicated below, and the witness, who should be an independent party known to the illiterate payee and to the banker collecting or paying the instrument, should clearly state his name, occupation, and address under or alongside the word "witness". This precise formality, and the full particulars of the witness are necessary in case difficulty should arise, and the collecting or paying banker has to call upon the witness to prove the identity of the signer

His John **X** Smith mark	*Witness* James Brown, Grocer, 17, High Street, Northtown

The paying banker should demand confirmation of the discharge in the case of any material departure or omission from this recognised form, and a similar procedure should be adopted in cases where a reasonable doubt exists as to the validity of the discharge For instance, the form "× Jane Smith, her mark, in the presence of J Jones, High Street, Northtown" should not be accepted, as it does not clearly indicate that "J Jones" *signs* as a witness

Indorsements of Impersonal Payees.

It has been pointed out that bankers sometimes rely on the provisions of Section 7 (3) of the Bills of Exchange Act, 1882, to treat as payable to bearer cheques which are clearly intended to be exchanged into cash, as, for example, cheques drawn payable to "Housekeeping or order", "Wages or order", "National Health Insurance Stamps or order", "Cash or order", etc

It is doubtful, however, whether the Section refers to cases of this kind, and, though it seems reasonable to treat such cheques as payable to bearer on the ground that they are not capable of indorsement, since no person is indicated who can give a discharge for the payment, bankers are justified in refusing

to pay cheques so drawn unless they are indorsed by the drawer or cashed by him or his known agent If payment of any such cheque is refused, the answer " Irregularly drawn " should be clearly written on the face, but a banker who has been accustomed to treat such cheques as payable to bearer would run considerable risk of liability to his customer if he refused to cash them without giving reasonable notice of his intention

The practice of regarding such cheques as payable to bearer should in no circumstances be applied to cheques drawn with the obvious intention that the money shall pass into public or local taxation accounts In all such cases the discharge of a recognised official should be obtained Thus, a cheque payable to " Income Tax or order " should be discharged by the Collector of Inland Revenue, a cheque to " Borough Rates or order " discharged by the Borough Treasurer, and so on

Similarly, the drawer's indorsement should be required on cheques payable to a specified account, presumably in his own name, as for example on cheques to " Farm Account or order ", or to " Deposit Account No 2 or order " (See *Q B P*, No 717)

Indorsements of Anomalous Payees and of Cheques Irregularly Drawn.

Customers are often so careless in completing the particulars on the face of cheques that it is difficult for the banker to determine precisely what is intended by the drawer, but the collecting banker must nevertheless see that indorsements on cheques collected by him are in order, and the paying banker must obtain a complete and regular discharge in the interests of both himself and the drawer Innumerable examples could be given in illustration of these points, but the following list should serve to indicate the procedure in certain cases frequently met with in practice :—

How Drawn	Comments.
Bearer or order.	No indorsement necessary, as instrument is payable to bearer
Bearer (Mrs Robinson) or order, T E Robinson	Mrs Robinson's discharge should be obtained.
Bearer (my wife) or order, T E Robinson.	" " " "
——— or order.	Cheque should be returned as irregularly drawn, since a payee should be specified.
Thomas Robinson ~~or Bearer.~~	Requires the indorsement of Thomas Robinson
Thomas Robinson ~~or Order~~ (followed by drawer's initials).	Sometimes paid without indorsement as a bearer cheque, although most bankers would return cheque marked " Requires payee's indorsement or completion of alteration "

How Drawn.	Comments.
Thomas Robinson only . . .	Should be indorsed by Thomas Robinson *only*, and the signature confirmed by the collecting banker, unless the cheque is presented in person, when identification of the payee should be insisted upon If the cheque bears evidence of transfer in the form of more than one indorsement, it should be returned with the answer "Cannot pay without confirmation, cheque bears evidence of transfer"
Thomas Robinson .	Such a cheque is regarded as payable to order, and should be indorsed by the payee
Thomas Robinson, or order of James Brown	Either person named may give an effective discharge
Self or Order, Thomas Robinson	Requires indorsement of the drawer In such a case indorsement by an agent should not be accepted
A/c Thomas Robinson or order	Requires the indorsement of Thomas Robinson, or "Placed to the credit of payee's account with us", followed by the signature of the collecting banker
Thomas Robinson in full settlement	Should be indorsed in the same terms An indorsement, "Thomas Robinson in part payment", should be returned as irregular
Pay to the order of the R S I Insurance Company or Bearer	The company's indorsement should be required
Pay bill attached or Bearer	Cheque payable to bearer, but should not be paid unless the bill referred to is handed over in return for the payment
Thomas Robinson or Bearer, indorsed Pay to the order of James Brown, Thomas Robinson	No indorsement required, as cheque is originally payable to bearer, and special indorsement does not make it payable to order.

Answers on Cheques returned on Technical Grounds.

Technical reasons for the return of cheques by the paying banker should be given clearly and unmistakably, so that the collecting banker or person to whom the cheque is returned may have no difficulty in putting matters right, and so that the credit of the drawer may not be affected by the non-payment of the instrument. Answers on returned cheques are usually written in the left-hand top corner and abbreviations (such as "E/I"; "R/D", etc) must not be used, as the Clearing Bankers will not now accept them

If objection is raised to the manner in which the cheque is drawn, the answer should be "Cheque Irregularly Drawn", "Requires Payee's name", etc., the words "Will pay on completion" or "Will pay on drawer's confirmation" being sometimes added to protect the drawer's interests

If the indorsement of the payee is missing, the usual answer is "Requires Indorsement" or "Payee's indorsement required", but if the missing indorsement is one which should follow a

special indorsement, then the omission should be clearly indicated in the answer by some such words as " Requires third indorsement ", or " Indorsement of Thomas Robinson required "

Particular care is necessary to ensure that special indorsements are properly completed, for a variety of forms are used by indorsers in making cheques payable to special indorsees The usual form is " Pay to James Brown or order, Thomas Robinson ", but the same intention is evidenced, and the indorsee's signature should be obtained, in respect of such forms as " Transfer to James Brown, Thomas Robinson ", " Thomas Robinson in favour of James Brown ", or " Thomas Robinson to the order of James Brown "

Sometimes when a cheque is not indorsed by the payee, a collecting banker will obviate the need for obtaining the payee's discharge by indorsing the cheque in the following terms —

" Placed to the credit of payee's account with us,
per pro The Northern Bank, Ltd ,
James Brown, Manager "

As a rule, such a discharge is accepted by bankers in this country, rather in order to save trouble than for any other reason Nevertheless, the method is open to some danger, for the paying banker may be held liable by his customer for having paid out funds without the signature of the payee, although he would no doubt be indemnified by the collecting banker in respect of any loss which might arise On the other hand, the collecting banker may in fact be authorised to indorse cheques in this way on behalf of a customer, as, for example, when the latter is travelling abroad, but in such a case the best form of discharge is —

" Indorsed on behalf of and under the authority of Thomas Robinson,
per pro the Northern Bank, Ltd ,
James Brown, Manager "

If an indorsement is irregular or for any reason unacceptable, the usual answers in practice are " Indorsement irregular ", or " Indorsement requires Banker's Confirmation "

The majority of indorsements which are refused on account of irregularity or unacceptability are confirmed by the collecting banker, who writes on the back of the instrument the words " Indorsement confirmed ", and adds his signature as an indication that he vouches for the authenticity of the discharge to which exception is taken The banker so signing will thereafter be liable to indemnify the paying banker if the indorsement turns out to be other than what it purports to be

The phrase "Indorsement confirmed", followed by the banker's signature, is to be preferred to "Indorsement guaranteed", for in the second case the signature may be regarded as a guarantee requiring a 6d stamp

Indorsements in Foreign Languages.

An indorsement in a foreign language should not be accepted unless the banker is satisfied as to its correctness and completeness. As a rule, no difficulty is experienced in dealing with indorsements in a European language, but care is needed in connection with indorsements *in oriental characters* These should not be accepted without confirmation unless the banker has reason to be satisfied as to their correctness Such indorsements are sometimes accompanied by a translation, but the translation should not be regarded as correct unless it is certified by a notary or confirmed by a banker The Council of the Institute of Bankers suggest that if such indorsements are not accepted, the answer given by the paying banker should be—

> "*Fourth* (etc) indorsement requires notarially certified translation, or will pay on banker's confirmation".

CHAPTER 15

THE PAYING BANKER

In this country, the principal feature of the relationship between a banker and his customer is the obligation of the banker to honour his customer's cheques This legal obligation implies that a banker who refuses or neglects to act upon the mandate of his customer, properly given, may render himself liable to the former for breach of contract Moreover, the banker may have to pay substantial damages for injury to the customer's credit and reputation if either is injured by reason of the dishonour of his cheques without reasonable justification

The duty of a banker to honour his customer's cheques is, however, subject to a number of important provisos First, the customer must have an account upon which the banker usually allows cheques to be drawn, *i e* , a current or drawing account, and the state of that account must warrant the payment, *i e* , there must be either sufficient funds to the customer's credit, or an arrangement for an overdraft to an agreed limit Secondly, the cheque must be signed by the customer and be drawn in legal form, and must purport to be properly indorsed, if indorsement is necessary. Thirdly, there must be no legal reason or excuse justifying a refusal to pay , and, finally, the cheque must be presented by the holder or his authorised agent during recognised business hours at the branch where the customer's account is kept

A banker's obligation to pay cheques does not extend to bills of exchange accepted by a customer payable at his bank, although a banker who had paid such bills without question for a long period might be liable for damages if, without first giving reasonable notice to the customer, he suddenly refused to do so.

The Customer's Right to Draw Cheques.

The mere fact that a person is a customer, with some sort of an account at a bank, does not give him the right to draw cheques on that bank. Cheques need not be paid by the banker unless the customer has at the bank an account of the type upon which cheques are usually issued and paid, and which contains funds withdrawable *upon demand* , *i.e* , a *current* or *drawing* account.

The existence of a credit balance on such an account always gives the customer a right to issue cheques although the matter may not have been mentioned when the account was opened. But, in the absence of specific agreement to the contrary, the customer's right to draw cheques on funds in his banker's hands does not apply to funds on *deposit* or *savings* account, whether repayable on demand or after notice, for apart from the question of notice, it is in such cases ordinarily stipulated that " Personal application must be made and the deposit account book produced at the bank when any money is withdrawn ". Withdrawals from accounts in respect of which Deposit Receipts have been issued can be made only if the receipt is produced and is signed by the owner, while the banker will not pay over the funds to a third party, unless that party is *known* to be receiving payment on behalf of the owner.

Nevertheless, a banker would rarely refuse payment of a cheque drawn by a customer against funds on deposit, for even if the amount were not debited to the deposit account, the banker would be reasonably safe in granting a temporary overdraft on current account—thereafter requesting the customer to make the necessary transfer from deposit to current account Moreover, many provincial banks (particularly in the north of England) allow customers to draw cheques against deposit accounts without any previous arrangement, although in London it is not usual to permit such withdrawals.

The Customer must have Funds at his Disposal.

Even where the customer has a *current* account, the banker is under no obligation to pay cheques if payment is not warranted by the state of the account But since a banker may so easily be held liable for damage to his customer's credit, he should ensure that the dishonour of a cheque is really justified before he returns it. First, he should make certain that all credits paid in by or for the customer have been duly entered in his account. Secondly, if the customer has more than one account in the same right, it is advisable although not essential to ascertain whether the combined balance on all the accounts will justify the payment. Although the banker has no right to combine accounts which it has been agreed shall be kept separate, it is possible that the customer may have reasonably expected that the cheque would be paid by reason of his having on balance sufficient funds to his credit. In such a case, a banker would usually pay the cheque in reliance upon the customer's making the necessary provision to cover it. The banker is not bound to inquire whether the customer has funds available at any other branch of the bank, nor need he have regard to the fact that credits, of

which he has not had advice, may have been paid in at another branch.

On the other hand, the banker is entitled to reserve sufficient funds to meet any outstanding cheques which he has marked at the customer's request, or for clearing purposes ; and if there is an express arrangement that a certain agreed balance shall be maintained by the customer as security for an advance, the banker is within his rights in reserving that balance before deciding whether or not the customer has sufficient funds on his account. Again, if the customer has instructed the banker to reserve certain credits or funds to meet specified cheques, the banker must not apply those funds in payment of any other cheques.

The judgments in the famous *Gordon Case,* 1903, left some doubt as to whether a banker who had credited as cash the amount of items paid in by a customer for collection was entitled to refuse payment of cheques drawn against such credits and presented before the proceeds of the credits were received. In the more recent case of *Underwood* v. *Barclays Bank,* 1924, however, the Court of Appeal made it clear that, in the absence of an express or implied agreement giving the customer a right to draw cheques against uncleared items, a banker is entitled to return such cheques with the answer " Effects not cleared ".

As a rule only customers known to be financially weak are in practice not allowed to draw against uncleared funds, cheques of good customers being usually paid without question.

A customer need not have a *credit* balance in order that his cheques should be paid. The issue of a cheque when no funds are available is tantamount to making an application for an overdraft, and, if the banker chooses to grant the accommodation, he can pay the cheque and rely on his customer to make the necessary arrangements to meet it. Furthermore, if there is a definite agreement that the customer may overdraw up to a certain limit, the banker must not dishonour cheques which the customer has issued in reliance upon such an arrangement without first of all giving reasonable notice that he wishes to terminate the agreement. But, subject to any agreement to the contrary, such notice may be given at any time, and, once it has been given, the banker's only duty is to pay cheques drawn by the customer prior to receipt of the notice.

Cheques returned on account of insufficiency of funds are usually marked " Refer to drawer ", and this answer should be used in preference to " Not sufficient funds ", since the latter may be regarded as unnecessarily divulging the state of the customer's account.

Particular care should be taken in returning cheques marked

" No Account ", for, if it subsequently transpires that a mistake has been made by the banker, the drawer may be awarded substantial damages since it is a criminal offence for a person fraudulently to issue cheques on a bank where he has no account.

In practice, answers are invariably given on cheques which are refused payment, and the rules of the London Clearing House require that such answers shall be given But the holder of the cheque has actually no *right* to be informed of the banker's reason for refusing payment, since there is no privity of contract between the holder of a cheque and the drawee banker

Cheques must be Signed by the Customer.

A banker must pay out his customer's money only against a mandate which the customer has himself issued or authorised Hence, every cheque paid by the banker must be signed by the drawer himself, or by his duly authorised agent

To protect himself, the banker should ensure that the signature on each cheque presented corresponds with that of the customer in the banker's Signature Index, and if there is any discrepancy, the cheque should be returned marked " Signature differs ". Cheques drawn on behalf of impersonal customers (including companies, local authorities, etc) must be signed in accordance with the instructions given to the banker in the relative mandate, otherwise they should be returned with some such answer as " Signature differs ", " Signature incomplete ", or " Secretary's signature required ".

If a banker pays a cheque bearing a signature which is not in accordance with his mandate, or if he pays a cheque on which the drawer's signature is forged, he will usually be unable to debit the amount to his customer.

Only in very exceptional cases can a customer be charged with a cheque bearing a forged or unauthorised signature, as, for example, where the banker can show that the customer, by his actions, has so misled the banker as to cause him to pay a cheque which would otherwise have been refused , or if the customer has in some way induced the banker to think that the signature was a genuine one, or if the customer, having received notice of the forgery of his signature to a cheque, did not at once take steps to warn the banker, whose position was consequently prejudiced by subsequent payment of the cheque.

The rule in such circumstances is that, if the banker suffers injury by reason of any action or inaction of his customer in regard to a forgery, then the customer is " *estopped* ", or precluded, from denying that the forged signature is his signature. But this principle will not apply if the position of the bank is not

directly prejudiced by the customer's action, or if the customer maintains silence at the request of the bank, as, for example, when it is desired to protect one of the bank's servants who was responsible for the forgery.

Moreover, a banker can debit his customer with cheques bearing *unauthorised* signatures if the customer has expressly ratified the actions of his agent in so signing, or if he is estopped from denying their validity, as, for example, when he has not objected to his account being debited over a period with cheques drawn by an agent who had no authority to sign on his behalf

If a banker is unable to debit his customer with a cheque bearing a forged or unauthorised *signature*, he is generally entitled to a refund of the money from the person to whom it was paid. This right is indisputable if the person who received the money held the cheque by virtue of a prior forgery or acted without good faith , but if there is no question of bad faith or absence of title the banker cannot recover from the person receiving the payment unless he demands repayment of the money within a reasonable time and before the position of that person might have altered to his detriment. This applies to the return of a cheque bearing a forged signature of the drawer to the collecting banker after the lapse of the recognised time allowed by bankers for the return of cheques presented through the clearings. If, in such a case, the customer's account cannot be debited, the loss must fall on the paying banker unless he can recover from the person who obtained the money.

Alteration of the Sum Payable.

The requisite that a cheque must be signed by the customer implies that any material alterations thereof must be duly authenticated by *his* signature or initials, so that a banker who pays a cheque bearing an *apparent* material alteration which is not so confirmed may be unable to debit the customer's account. The position is not, however, quite so clear in those cases where a cheque bears a *non-apparent* material alteration.

It was at one time considered that, so far as the drawer was concerned, a non-apparent material alteration of the amount on the face of a cheque had the effect of avoiding the instrument except as against a holder in due course, and, consequently, that the banker who paid the wrong amount was liable to stand the loss as having made a payment contrary to his customer's mandate, although the banker would be entitled to debit the customer with the original amount of the cheque.

In the famous case, *London Joint Stock Bank* v. *MacMillan and Arthur*, 1918, however, the House of Lords held that a banker

could not be held liable for having paid a cheque bearing a *non-apparent* alteration of the amount, *if the customer by his negligence in drawing the cheque had facilitated the alteration.* In this case, a clerk of the firm MacMillan and Arthur presented for signature to one of the partners a cheque which he had prepared ostensibly for £2, but with spaces left before and after the figure 2 and with no amount written in the body of the instrument. Having obtained the signature, he altered the cheque to £120 and, the alteration not being apparent, obtained payment from the bank and absconded.

The firm maintained that, since the cheque bore an unauthorised material alteration, it could not be debited to their account. But in giving judgment in favour of the bank, Lord Findlay said . " A cheque drawn by the 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 to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker *as a natural and direct consequence of this breach of duty . . . The customer is bound to take usual and proper precautions to prevent forgery.*"

Determination of a Banker's Obligation to Pay.

Section 75 of the Act provides that —

> **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.

In addition, the banker's obligation is terminated in any of the following cases —

> (3) Notice of the customer's insanity
>
> (4) Notice of the presentation of a bankruptcy petition against the customer , the banker may also refuse payment of cheques payable to third persons if he has received notice that the customer has committed an act of bankruptcy In the case of a registered company the obligation is terminated by the presentation of a petition for winding up or by the passing of a resolution to wind up
>
> (5) Notice that the customer is an undischarged bankrupt.
>
> (6) Service upon the banker of a garnishee order (see Chapter 4), or of any injunction or similar order from the Court prohibiting transactions upon the account.
>
> (7) Notice of an assignment by the customer of the credit balance upon his account
>
> (8) In the case of trust accounts, notice that the customer intends to apply the funds in breach of the trust, and
>
> (9) Notice of any defect in the title of the person presenting the cheque.

These points are dealt with at length in the following paragraphs.

Countermand of Payment by the Customer.

To justify a refusal to pay a cheque, a customer's countermand of payment thereof must be expressly communicated to the banker and be duly authenticated by the signature or signatures of the person or persons authorised to sign cheques drawn on the account.

A "stop" may be registered by one of several partners, trustees, or executors in respect of a cheque which has been given by one, some, or all of the persons so associated, *e.g*, one partner may countermand payment of a cheque drawn by any other or others Similarly, if cheques are to be signed by any two directors of a company, a countermand of payment is effective if signed by any director or directors.

Subject to such special cases, only the drawer of a cheque is entitled to stop payment, so, if a banker is advised by the true owner of a cheque that it has been lost or stolen, he should at once advise the drawer of the fact, or request the true owner to do so, in order that the drawer's instructions to stop payment may be obtained If in the meantime the cheque is presented, payment should if possible be postponed pending the receipt of such instructions.

The drawer's right to stop payment of a cheque exists up to the last moment when payment may be made or refused by the banker. In the case of cheques presented through the clearing, the banker has up to the close of business on the day of presentment to pay or to return the cheque, so the drawer's right to stop payment exists until the close of business at the branch on that day, and he may exercise this right even though the cheque has been cancelled and debited to his account.

A banker should not stop a cheque in reliance upon instructions communicated by telephone or by an unauthenticated telegram, unless he is certain that the instructions emanate from the drawer himself or from his known agent. It would, nevertheless, be inadvisable to ignore instructions which are not authenticated, and, if there is any doubt, the best course is to postpone payment pending written confirmation of the stop by the drawer, a suitable answer being, "Payment countermanded by telegram (*or* telephone), and postponed pending confirmation".

A customer who desires to stop payment of a cheque must provide sufficient details to enable the banker to identify the cheque beyond all reasonable doubt; and these details must be exact. In the case of *Hilton* v. *Westminster Bank, Ltd*, 1926, it was held by the House of Lords that the bank could not be held

responsible for having paid a cheque, which the drawer claimed to have stopped, but had in fact described by the wrong number.

If a cheque which has been effectively countermanded is paid, the banker cannot debit the amount to his customer, nor can he recover the payment from the person who received the money unless the recipient acted without good faith or had no title.

It is, therefore, important that a proper record of all stops should be in the hands of each paying cashier, and also that the details should be entered in red ink on the customer's ledger account, so that every stop is constantly before the notice of the clerk responsible for posting cheques. Notice of a stop should also be sent by the banker to any branches or other banks at which the customer's cheques are cashable

Notice of the Drawer's Death, Insanity, or Bankruptcy.

To justify a banker's refusal to pay cheques, notice of the customer's death, bankruptcy, or insanity may be either express or constructive What is considered constructive notice is usually a question of fact, and, although a banker cannot be expected to act upon unconfirmed rumours, he cannot safely disregard information which is reasonably to be regarded as reliable

In the case of death or insanity, difficulties rarely arise, and, although a banker should refuse payment of cheques presented after he has received reliable information, he is nevertheless entitled to debit the customer with cheques presented and paid before such information is received

On the other hand, considerable difficulty arises in connection with a customer's insolvency Although a banker can incur no special loss *unless the customer is ultimately adjudicated bankrupt*, he must in all cases, when he hears that his customer has committed an *act of bankruptcy* [1] act *as though bankruptcy will eventually ensue* When a customer is adjudicated bankrupt, a banker who has paid his cheques may, in certain cases, be liable to refund the amount of the cheques to the trustee in bankruptcy. As the banker is under no obligation to his customer to run risks of this nature, he is released from his duty to pay cheques drawn by a customer in all circumstances where payment is likely to involve him in any liability to the trustee in bankruptcy

[1] The Bankruptcy Act, 1914, specifies eight "acts of bankruptcy," the commission of one or more of which by a debtor is a necessary preliminary to the presentation of a bankruptcy petition against him The acts specified include a formal declaration on the part of the debtor to the effect that he is insolvent, the debtor's departure from the country to defeat his creditors, and other actions which are normally signals of a person's insolvency. An act of bankruptcy is "available" (*i e*, can form the basis of a bankruptcy petition) for a period of three months from its commission.

There are three stages preliminary to the adjudication of a person as a bankrupt. These are (*a*) the commission of an act of bankruptcy, (*b*) the presentation of a bankruptcy petition, and (*c*) the making of a receiving order The extent of the banker's liability, and consequently the extent of his power to refuse payment of cheques, may best be considered under these headings

Act of Bankruptcy.—The position of the banker between the commission of an act of bankruptcy and receipt of notice of the presentation of a petition is by no means clear, but the better opinion appears to be as follows Where the customer draws cheques *in his own favour*, the banker is protected if he pays such cheques even if he *has notice* of the act of bankruptcy But he has no such protection in the case of cheques payable to *third persons*, even if he is *without notice* of the act of bankruptcy

Upon receipt of notice that a customer has committed an available act of bankruptcy, a banker may therefore refuse payment of all cheques drawn *in favour of third persons*, but he has no grounds for refusing payment of cheques drawn *in favour of the customer himself*

Notice of Presentation of a Bankruptcy Petition —A banker who has received notice that a *bankruptcy petition* has been presented against his customer has no protection whatever, and should not pay *any* cheques drawn by the customer The presentation of a petition does not affect the banker unless and until he has notice thereof.

Receiving Order —The banker's duty to pay cheques is also determined by the making of a receiving order against his customer, and he is liable to the trustee for all moneys paid on account of his customer after such an order has been made, whether he had notice of the making of the order or not The only exception to this rule is that, where advertisement of the receiving order has for any reason been postponed, the trustee can recover from the banker only so far as it is not reasonably practicable for him (*i e*, the trustee) to recover from the persons to whom the money has been paid—*Bankruptcy Amendment Act*, 1926.

A banker who discovers that one of his customers is an *undischarged bankrupt* is required by the Bankruptcy Act, 1914, to give notice to the trustee or to the Board of Trade of the existence of the account, and he may not make any payments out of the account without instructions from the Court or the trustee, unless, at the end of one month from the time when he gave the notice, he has received no instructions from the Court or the trustee.

The position is similar in the case of the winding up of a limited company, and no cheques should be paid by a banker who has received express or implied notice of the commencement of the winding up.

Cheques refused payment by reason of the actual or impending bankruptcy of a customer or of the winding up of a company should be marked " Refer to Drawer ".

Assignment of a Credit Balance.

As the credit balance on a current account ceases to belong to the customer when he assigns it to a third party, and gives due notice thereof to the banker, cheques drawn by the customer against such a balance must be returned with a suitable answer, such as " Refer to Drawer "

But the fact that the balance belongs to the assignee gives the latter no right to draw cheques against the amount unless the banker agrees to accept him as a customer, in which case the correct procedure is to open a new account and to transfer thereto the balance assigned

Although a customer may assign his bank balance to a third party, Section 53 (1) of the Act specifically provides that a bill of exchange (which includes a cheque) does not, except in Scotland, operate as an assignment of funds in the hands of a drawee Hence, the holder of a cheque has no claim against the banker in respect of funds in his hands to the credit of the drawer, and, if a cheque is dishonoured because the balance on the drawer's account is insufficient to meet it, the holder has no claim to that balance as against either the banker or the drawer, for there is no privity of contract between the banker and the holder.

Furthermore, a banker must not so divulge the state of a customer's account as to allow the holder of a cheque to pay in funds to the drawer's credit in order to bring the available balance up to an amount sufficient to meet the cheque If he did this, the banker would run some risk of liability for damages for wrongfully disclosing the state of the customer's account On the other hand, if the banker makes no disclosure but the payee learns of the state of the account from other sources and tenders an amount sufficient to make up the balance, there is then no ground for refusing payment of the cheque.

The fact that one cheque is dishonoured because the amount available is insufficient to meet it does not justify the banker in refusing payment of a subsequent cheque or cheques which fall within the balance Difficulty sometimes arises, however, if several cheques are presented simultaneously and the available balance, while insufficient to pay them all, is sufficient to cover

one or some of the cheques. Apparently the banker incurs no liability if in such circumstances he refuses to pay all the cheques, but the best course where the amounts are not equal is to pay the larger cheque if the balance is adequate. Moreover, if the balance on an account is sufficient to pay only one of two cheques of equal amount which are presented simultaneously, the best course is to return both instruments, unless the banker can obtain the drawer's instructions If the dates differ, one way out of the difficulty is to pay the cheque bearing the earlier date, but, if the dates are identical, this cannot be done, although the banker would probably then be justified in paying the cheque bearing the earlier number.

Although there is not usually any privity of contract between a banker and third parties, it is possible for the banker to make some special arrangement with the payee or holder of a cheque whereby such privity is established between them, and whereby he becomes bound to pay the cheque , as, for example, where the banker expressly or impliedly leads the holder to believe that a cheque in his hands will be paid if it is presented. (See below, " Marking Cheques at the Request of the Holder ".)

Knowledge of an intended Breach of Trust.

A banker is no exception to the rule that persons transacting business with trustees may render themselves liable if they are privy to any transaction which is clearly in defiance of the usual conditions attaching to trusteeships. He must therefore refuse payment of cheques drawn upon a trust account if he has any reason to believe that the drawer is committing a breach of trust. If, for example, a banker can reasonably be presumed to know, either by the heading of the account or otherwise, that the money deposited therein is held by the drawer on trust, he would run some risk if he paid out money from the account for purposes which quite obviously were in breach of the trust. But this does not imply that the banker must query every cheque drawn , he is liable only if the circumstances are such that any reasonable man would be put on inquiry.

Again, if a customer has two accounts, one private and the other fiduciary, as may arise in the case of a treasurer to a local authority, the banker should not permit transfers to be made from the fiduciary account to the private account unless he has good reason to believe that such transfers are in order.

Defect in the Holder's Title.

A banker must not pay a cheque of his customer if he has reason to believe, or if he can reasonably be presumed to know, that the presenter has no right or title to the instrument, as, for

example, where the drawer or a holder of a cheque advises the banker of its loss or theft. In such a case, the banker incurs no liability, either to the holder or to the drawer, if he postpones payment pending inquiries or pending the drawer's confirmation.

So far as the holder is concerned, there is no privity of contract between him and the banker, so that he has no right to enforce payment against the banker even if he has an absolute title to the instrument, *e g*, if he is a *bonâ fide* holder for value of a bearer cheque. In regard to the drawer, he could not claim that his credit was damaged in the circumstances by the mere postponement of payment. But it must be remembered that the holder in due course of a bearer cheque which had been lost or stolen has a good title to the instrument against all the world, and is in fact the true owner, so that the amount would ultimately have to be paid to him by the drawer.

Cheques must be duly presented at the Proper Place.

The banker is under no obligation to pay his customer's cheques unless they are presented by the holder or his authorised agent at the branch at which the customer's account is kept, during recognised business hours This is in accordance with the rules in Section 45 of the Act governing the presentment for payment of bills of exchange generally By this section presentment must be made at "a reasonable hour on a business day"; in the case of a cheque this would be any time during recognised business hours "The proper place of payment", as defined by the section, is the address of the bank given on the cheque If such an address is not given, but the name of the bank is specified, presentment at the Head Office would presumably be recognised.

The provision in Section 45 (8) that presentment through the Post Office is sufficient, where authorised by agreement or usage, legalises the presentment of cheques through the post by bankers. But the presentment of a cheque through the post by the *holder* (other than a banker) with a request for cash in exchange would not be a presentment sanctioned by usage or custom, and payment in such circumstances should not be made unless the request is made by the *drawer* himself.

When the holder of a cheque presents it for payment, he must deliver it up to the party, *i e*, the banker, making the payment [Section 52 (4)]. Thereafter, the banker is entitled to retain the paid cheque as a voucher evidencing the payment made by him on behalf of his customer, the drawer, until such time as the account between him and the drawer is settled. After settlement of the account between them, the drawer is entitled

to any paid cheques as vouchers evidencing the relative payments as between himself and the payees, and these are usually handed to him with his pass-book.

Ante-dated Cheques.

Since Section 13 (2) of the Act provides that a bill (including a cheque) is not invalid by reason only that it is *ante-dated*, the fact that a drawer dates a cheque several days before its issue will not affect its validity. But if the cheque is negotiated, a holder will presumably be affected by prior defects of title, since the instrument would on the face of it appear to be overdue at the time of negotiation

From the banker's point of view, the ante-dating of a cheque is of importance only in connection with the banking practice of regarding as "stale" for purpose *of* [illegible] cheques which are not presented for some considerable time after their date. The custom of bankers in this respect varies considerably Some bankers will return cheques which have been outstanding for more than six months, while others will pay cheques bearing a date twelve months prior to the date of presentation for payment.

Post-dated Cheques.

Although the Act states that a cheque is not to be regarded as invalid merely by reason of its being post-dated, a banker must exercise care in regard to cheques which bear a date after that on which they are presented for payment. The position is in fact fraught with such danger that the only safe course is to return all cheques of this kind with the answer "Post-dated", with or without the addition of the words "requires drawer's confirmation".

The main reason for this is that a post-dated cheque must not be debited to the drawer's account until the date indicated thereon, for, unless the drawer has made an obvious mistake, it is to be presumed that his intention was that the cheque should not be paid until the arrival of the date indicated by him A customer may have various reasons for post-dating a cheque He may wish to have an opportunity of paying in sufficient funds to meet it, or, he may wish to have the benefit of the funds in his account until the last moment.

Clearly, therefore, a banker who pays a post-dated cheque before its date is disobeying his customer's mandate, and will therefore have to stand any loss which results from his action. Hence, if such a cheque had been lost and is cashed before its date by the finder or by a thief, or if before its date the customer countermands payment, the banker will be unable to debit his customer.

There is, in addition, the possibility that the banker may render himself liable to an action for injuring his customer's credit, if, having paid such a cheque, he is compelled, through lack of funds, to dishonour cheques subsequently presented. Moreover, if the banker seeks to protect his customer by paying the cheque but not debiting his account until the due date, the customer may fail in the meantime and the banker be left with the cheque on his hands.

A cheque dated on a *Sunday* must not be paid until the following Monday, and any such cheque presented on the Saturday should be returned marked "Post-dated", or it may be held over by the banker until the succeeding business day, provided that due advice of the fact is given to the presenter.

It is sometimes stated that, although a post-dated cheque is recognised by the Act as being valid, it is to all intents and purposes not payable *upon demand*, but is strictly a bill of exchange payable at a determinable future time, and, if dated more than three days after its issue, is really subject to *ad valorem* stamp duty. It has even been [illegible] that the absence of such a stamp renders the drawer liable to a penalty under the Stamp Act, but this is a point which has not yet been decided (see Chapter 23). On the other hand, the fact that a post-dated cheque is insufficiently stamped does not affect any right of action on the instrument, for such an action cannot be commenced until the arrival of the due date, when the cheque will be correctly stamped with the twopenny duty.

Finally, it may be noted that an authority or power to issue *cheques* (given, for instance, to a partner in a non-trading firm) does not extend to the issue of post-dated cheques, since such instruments are, in effect, bills of exchange payable at a future date.

Cheques must be in Legal Form.

A cheque should not be paid unless it conforms to the "requisites as to form" already discussed It must be clear and free from ambiguity, embodying in plain, unmistakable terms the unconditional order of the customer to the banker to pay on demand a sum certain in money, it must be due for payment, *i e.*, not post-dated or stale, at the time of payment, if it is payable to order, it must purport to be properly indorsed by the payee and all subsequent indorsers, and it must be properly stamped.

The banker has a right to insist that cheques shall be drawn in such a manner as to enable him to fulfil his obligations without any doubt as to what he is required by the customer to do.

He need not undertake risks or liabilities which, when the account was opened, were not contemplated as likely to arise in the ordinary course of business, and he is fully entitled to refuse payment of any document which is irregularly drawn, provided that he does so in such a manner as not to damage his customer's credit.

But if the banker has been accustomed to pay cheques drawn with a certain irregularity, he must not discontinue to do so without first giving reasonable notice of his intention to the customer. A banker who has been accustomed to pay on behalf of a customer orders with a form of receipt attached, cannot suddenly refuse to do so on the ground that such documents are not cheques, or that the mandate is not unconditional.

The Necessity for Proper Indorsement: Payment in due Course.

Whether or not a cheque is properly indorsed is a question of fact to be determined by the circumstance of each case in accordance with the recognised principles relating to indorsements considered in Chapter 14 As is there stated, a paying banker must obtain for his customer a reasonable and proper discharge for all cheques paid by him, and, in deciding in any particular case what is a reasonable and proper discharge, he must be guided by the recognised practice of bankers and by such principles concerning indorsements as have from time to time been laid down in the Courts.

While a paying banker is responsible for seeing that the indorsements on cheques are technically correct and apparently in order, he cannot reasonably be expected to accept responsibility for their *authenticity*, since he cannot possibly know the signature of every holder through whose hands a cheque may pass in the course of its career. Yet, a cheque is not discharged by payment in due course unless it is paid to *a holder*, for by Section 59 (1) of the Act .—

> **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.

As a person who holds a cheque or bill by or through a forged indorsement is not a "holder", the question naturally arises. What is the banker's position if he pays away his customer's money to a person who is not a holder of the cheque by reason of the fact that it bears a forged indorsement ?

The Protection of the Paying Banker.

Fortunately, the difficulties with which banks are faced by reason of forged or unauthorised indorsements have been recognised, and statutory protection in this regard, as well as in regard to unauthorised alterations of crossings, is afforded to them by three important clauses of the Act, *viz* , Sections 60, 79 and 80.

Section 60 protects the paying banker in the following terms against forgery on cheques paid by him on account of his customers —

> **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.

While this section applies generally to *all* cheques, whether *crossed* or *uncrossed*, the Act imposes on the paying banker certain additional duties in regard to the payment of *crossed* cheques, and provides that, if those duties are properly discharged, the banker will be afforded a certain degree of additional protection

Section 79 provides that a paying banker will be liable to the true owner of a crossed cheque for any loss sustained by the latter by reason that the banker (*a*) pays a crossed cheque otherwise than to another banker, or, if it is crossed specially, otherwise than to the banker named in the crossing, or his agent for collection being a banker , or (*b*) does not refuse payment of a cheque crossed to more than one banker On the other hand, the paying banker is protected by Section 79 against the claims of the true owner, if, in good faith and without negligence, he pays, either to someone other than a banker, or to someone other than the banker named, a cheque which bears a non-apparent or obliterated crossing, or a crossing which has been added to or altered otherwise than as authorised by the Act, provided, in the latter case, that the alteration or addition is not apparent. The Section further renders such a payment valid as against the drawer.

More general protection to the banker paying crossed cheques afforded by Section 80 in the following terms .—

> **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.

In brief, therefore, the paying banker is protected against forged indorsements (*a*) on *uncrossed order* cheques, by Section 60, provided he pays in good faith and in the ordinary course of business, (*b*) on *crossed* cheques, by Sections 60 and 80, provided he pays, in good faith and without negligence, in accordance with the crossing, and in the ordinary course of business

If the banker brings himself within the requirements of these Sections, the payment of the cheque is good for all purposes, so far as he is concerned, even though payment is made to or for a person who has no right to the instrument, or even though the cheque bears a forged indorsement. But to obtain the protection, the banker must strictly comply with all the provisions of the particular Section which applies in the circumstances.

The Meaning of "Good Faith".

Both Sections 60 and 80 require payment to be made in *good faith*, which is, of course, a matter that can be decided only from the facts of each case According to Section 90 of the Act, "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" And as Sir John Paget points out [1], "It is difficult to conceive, still more to formulate, conditions involving absence of good faith on the part of a corporation, such as a Joint Stock Bank, with relation to paying cheques." Nevertheless the bank will be responsible for lack of good faith on the part of any of its employees, so that it would be liable under this Section if a cheque was paid by a cashier who had good reason to doubt the genuineness of an indorsement Moreover, both Sections 79 and 80 require payment to be made "without negligence" as well as in good faith

"The Ordinary Course of Business".

The phrase "in the ordinary course of business" is more easily explained, for a banker would certainly lose the protection of Section 60 if he paid a cheque out of his usual business hours, and probably also if, without reasonable inquiry, he paid a cheque for a large amount to a person who was obviously unlikely to be entitled to such a document, *e g*, a tramp. Again, it would certainly not be in accordance with the ordinary course of business if a banker omitted to examine the indorsements on a cheque before paying it, or if he failed to examine them with reasonable care.

[1] *Law of Banking*, 4th edn, page 205.

Although cheques which are presented otherwise than through the clearing or by post must be paid during usual business hours, this does not mean that a bank will not be allowed a reasonable margin of time, after the advertised closing hour, in which to pay a cheque, as for example, where the presenter actually enters the premises before closing time. (*Baines* v. *National Provincial Bank*, 1927.)

Payment of a cheque in due course and in the ordinary course of business does not necessarily imply that *cash* must be handed across the counter. A cheque may be duly paid either by the transfer to the holder of the amount in legal tender currency or in the form of the banker's own draft or cheque in full discharge, or merely by entries in the banker's books (*i.e.*, as between one customer and another, or as between the paying banker and the collecting banker).

Payment of an *uncrossed* cheque, which either originally or by indorsement is payable *to bearer*, will be valid even though the person in possession of the cheque is not the true owner, either because he has found or stolen the instrument, or because he has knowingly taken it from a finder or thief.

When payment is made in legal tender over the counter and there is no question of a mistake of fact *as between the banker and* the *recipient*, and no question of any absence of good faith on the part of the recipient, the payment is complete and irrevocable as soon as the presenter of the cheque touches the money; this occurs, for instance, where the banker finds out before the presenter leaves the bank premises that the drawer's account does not justify the payment, or that he has overlooked a "stop" placed against the cheque.

Payment in due course is also made if the banker sends by post legal tender or a draft, in exchange for a cheque presented *by the drawer or another banker* through the post, for Section 45 of the Act provides that "where authorised by agreement or usage a presentment through the post office is sufficient". But this should not be taken to apply to the holder of a cheque as distinct from the drawer or another banker, and any cheques so presented for payment by a holder should be returned with the request that they should be presented by the holder in person or through a banker.

Cashing Crossed Cheques.

In addition to his statutory liability to the true owner under Section 79, it is clear that a banker who pays a crossed cheque to anyone other than a banker, or otherwise in contravention of the terms of the crossing is not acting without negligence within

the meaning of Section 80. Moreover, since he does not pay in the ordinary course of business, he also loses the protection of Section 60, and will be unable to debit his customer's account if the cheque bears a forged or unauthorised indorsement. The paying banker is never safe in cashing a crossed cheque over the counter unless he is paying it to another banker.

Cheques Crossed "Not Negotiable" and "A/c Payee Only".

The fact that a cheque is crossed "Not negotiable" and bears evidence, in the form of more than one indorsement, that it has been negotiated or transferred, does not deprive the banker who pays it of the protection of Section 80, on the ground of negligence As has been previously pointed out, a "not negotiable" crossing does not make the cheque *not transferable*, and no duty is imposed upon the paying banker to inquire whether a valid title was passed when the instrument was transferred.

The same position arises if the cheque bears an addition to a crossing such as "Account Payee" or "Account Payee only" or "Account A B.", with or without such words as "not transferable" or "not negotiable". There is nothing in such additions to prevent payment of a cheque even though it bears several indorsements, but the paying banker is justified in regarding such cheques as ambiguous or embarrassing documents and in returning them with some such answer as "Form of cheque irregular" or "Crossing irregular". In practice, most bankers now refuse to *collect* such cheques except for the account of the payee, so that paying bankers are unlikely to be troubled with these points except in the case of cheques presented to them over the counter. (See also page 240.)

"Not Transferable" Cheques.

The position is, however, quite different in the case of a cheque which is clearly and unmistakably intended to be "not transferable", as, for example, where it is drawn payable to "John Brown *only*", or "John Brown, *not transferable*", with the word "Order" or "Bearer" crossed out and initialled by the drawer, and with or without the words "not transferable" written on the face of the instrument.

Since a cheque so drawn cannot be regarded as payable "to order", the paying banker has no protection under Section 60. If such a cheque is crossed, the paying banker should take reasonable steps to ensure that the proceeds have actually reached the payee, otherwise he will lose the protection of Section 80 on the ground of negligence. Accordingly, a not transferable cheque, if presented by another bank, should be paid only if the

collecting banker confirms that the money has been placed to the credit of the payee. If the cheque is presented over the counter, it should be paid only on proof that the presenter is the payee, or someone authorised to receive payment on his behalf In no case should such a cheque be paid if it bears any evidence that it has been transferred, otherwise the paying banker will incur liability to the true owner, and be unable to debit his customer with the amount thereof.

The same considerations apply in the case of a cheque which has been restrictively indorsed.

Extent of the Paying Banker's Liability.

If the paying banker fails to bring himself within the protection of either Section 60 or Section 80 by reason of his having paid otherwise than in good faith, without negligence and in the ordinary course of business, he cannot debit the amount of a cheque bearing a forged indorsement to the account of his customer, and if the amount has been so debited it must be refunded. Moreover, he will also be liable to the true owner of the cheque, *i.e.*, the person who is legally entitled to the instrument and its proceeds, in an action for " conversion " of his property, and, if such an action succeeds, the banker will be compelled to pay the value of the document to the true owner, being left to recover if possible from the person to whom the cheque was paid It follows, therefore, that a banker may pay the amount of a cheque *twice*, once to or for the person presenting the cheque, and once to the true owner.

Marking Cheques as " Good " for Payment.

The " marking " of a cheque means the placing thereon of the signature or initials of a banker (accompanied, as a rule, by the word " Good "), in indication of the fact that at the time of the marking he has in his hands sufficient available funds of the drawer to justify his regarding the cheque as being " good " for payment The exact legal significance of such a marking depends upon whether it is done on the instructions of the drawer, or at the request of the payee or other holder, or of another banker, but its general effect is to facilitate negotiation of the cheque.

A customer sometimes requests his banker to mark a cheque as good for payment when he wishes to satisfy the payee that there is not the slightest doubt that the cheque will be met, as, for example, when the cheque is being taken by the payee in exchange for the deeds of a house, or in payment of a bill of exchange, or in payment for negotiable securities. If the banker complies with such a request, he is thereafter justified in regarding the cheque as having been constructively paid. He can retain

on the account sufficient funds to meet it when presented, and, if necessary, can dishonour any cheques subsequently presented which would deplete the amount so retained. And this is so even though in the meantime the drawer may have died, or become bankrupt or insane, and even though a garnishee order is served on the banker attaching the balance on the drawer's account, for funds to the amount of the cheque are regarded as having been definitely appropriated to meet it.

Furthermore, the drawer has no right to countermand payment of a cheque marked at his request if the cheque has once left his possession, for the banker, having " undertaken a moral and professional obligation, founded on recognised custom, towards any other banker who may present the cheque for payment "[1], cannot be expected to agree to a countermand which may operate to his detriment.

But although the marking of a cheque at the request of the drawer imposes a moral obligation on the banker, *legally* the marking is neither an admission of liability to pay the instrument nor an acceptance of the cheque within the meaning of the Bills of Exchange Act.

Marking Cheques for the Payee or Holder.

In this country the marking of cheques at the request of the payee or of a subsequent holder is almost unknown, but, if it is done, it would appear that the banker must stand by his implied guarantee of the validity and value of the cheque for any purpose to which it may thereafter be applied.

If however, the customer stops payment of the cheque after it has been marked but before it is presented for payment, as he is undoubtedly entitled to do if he so desires, the banker cannot pay the cheque to the debit of his customer's account, and if he does pay he will have to bear the loss himself.

When, therefore, a request is made by the holder that a cheque should be marked, bankers in this country safeguard themselves where possible by issuing their own drafts payable on demand, thus providing the holder with a fully negotiable instrument and enabling them to debit the amount at once to the account of the customer.

Marking Cheques for Another Banker.

As between banker and banker, there is a long established custom whereby cheques received too late in the day for presentment through the usual clearing channels are marked as " Good " for payment by the paying banker, at the request of the collecting banker.

[1] Paget, *Law of Banking*, 4th edn., page 167.

The marking of cheques in accordance with this custom undoubtedly constitutes a constructive payment of the cheque by the banker, entitling him specifically to appropriate the necessary funds of the drawer to meet the cheque when it is finally presented, and to return any cheques presented subsequent to the marking which would deplete the funds so appropriated. It cannot well be otherwise, for this marking of cheques for clearance purposes has been legally recognised as an implied undertaking or promise to pay on the part of the banker on whom the cheque is drawn.

It follows, therefore, that the appropriation by the paying banker of funds to meet a cheque marked for clearing purposes is on a par with such an appropriation made in respect of a cheque marked at the request of the drawer, and is not affected by the drawer's death, bankruptcy, or insanity, or by the service of a garnishee order attaching the balance of his account. The money is regarded as having been specifically applied for a particular purpose which the banker is bound to fulfil, and thereafter payment of the cheque cannot be countermanded by the customer.

Advising "Fate" by Telegram or Telephone.

A paying banker is sometimes requested by the collecting banker to advise, by telegram or telephone, the "*fate*" of a cheque drawn on him, *i e*, he is asked to send a message by telegram or telephone stating whether the cheque will be paid.

The paying banker should exercise considerable care in acceding to such requests, for he may himself become liable for the amount if he so far commits himself in replying as to be *bound* to honour the cheque on presentment. If, for example, he replies, "Yes, cheque will be paid", or "Yes, if in order", he will be unable to refuse payment when the instrument is presented (provided that it is in order), even though the drawer may in the meantime have stopped payment, or have died, or become bankrupt or insane.

A promise to pay made by telegram or telephone is not a payment in the ordinary course of the paying banker's business sufficient to justify his debiting the drawer's account *in any event*, and he has no power to retain or specifically to appropriate funds of the drawer to meet such a cheque. If the banker so appropriates funds and is consequently compelled to dishonour cheques which are subsequently presented, he may render himself liable to the drawer for damage to his credit. Moreover, as the drawer has the right to stop payment of a cheque at any time before the expiration of the period within which the bank may pay or return it, the *only* safe procedure is for the paying

banker to give a non-committal reply, such as " Cheque would be paid if in our hands and in order ". An answer of this kind leaves it open to the paying banker to dishonour the cheque if any circumstances make it necessary for him to do so.

A similar non-committal statement should be made when a cheque which has previously been dishonoured is recalled either at the drawer's request, or because the paying banker, having received sufficient funds, desires to protect his customer's credit by paying the cheque. In such circumstances a suitable answer is " Cheque *Reynolds* would be paid if re-presented now and in order ".

But these remarks do not apply when the paying banker *at the drawer's request* advises a banker or holder by telephone or telegram that a cheque will be paid, for in such a case the banker is entitled specifically to appropriate funds to meet the cheque and to pay it on presentment in any event.

Cheques are sometimes presented *direct* by the collecting banker by post and not through the usual clearing channels, with a request that the paying banker shall advise fate by telegram In such cases the paying banker should reply, " Cheque Reynolds paid " or " Cheque Reynolds unpaid ", as the case may be. When once advice of the payment has been sent the customer cannot thereafter stop the cheque or refuse to have it debited to his account. If such a cheque is unpaid, it should be returned direct by post to the collecting banker and a confirmation of the telegram enclosed.

Payment of Cheques under Advice.

Customers who reside at some distance from their bank, or who are spending a holiday in another town, frequently require arrangements to be made for them to cash cheques with a local branch or with another bank. Upon receipt of such a request and provided the customer's credit permits, the banker will instruct his branch or agent at the place concerned to cash his customer's cheques up to a stated amount for any one day, week or month Cheques so cashed are described as being " paid under advice ".

A bank which pays under advice a cheque drawn on another *branch of the same bank* is protected by Section 60, since such substituted payment is apparently to be regarded as payment by the *bank* on which the cheque is drawn. But if a cheque so paid under advice is drawn *on another bank*, the cashing bank obtains no statutory protection in the event of the indorsement being forged or unauthorised.

The Return of Unpaid Cheques.

The Act lays down no rules as to how long a drawee-banker may retain a cheque before returning it unpaid, and the time available to the banker must therefore depend upon the particular circumstances of each case.

As a general rule, it may be said that when a cheque is presented over the counter the holder is entitled to be paid or to have payment refused *immediately*. But where the cheque is presented over the counter by another bank and notice of its fate is not required at once, it is customary to allow the drawee bank *until the close of business hours* on the same day to decide whether he shall pay or return the cheque.

In regard to local clearings, it is usually provided by the rules that cheques must be paid or returned on the day of receipt, and the same rule operates between the City banks in regard to cheques presented through the Town Clearing By the Rules of the London Clearing House, unpaid Metropolitan and Country cheques must " be returned by post *on the day of presentation* direct to the Bank or Branch Bank whose name and address are on the crossing ".

When a cheque is presented *direct* through the post by another banker, it is considered that the paying banker becomes also a collecting agent and, as such, may exercise his legal right to return unpaids in time to reach the presenting bank on the day following receipt if the latter is in the same town, and not later than by the last post on the day following receipt if the presenting bank is in another town In practice, however, such cheques are always returned on the day of receipt, and a paying banker holding a cheque over until the next day would, as a matter of courtesy, advise the presenting banker of the fact.

Similar remarks apply in the case of cheques presented for payment by another customer of the same branch, for although the banker has, as collecting agent, until the close of the following business day in which to return the cheque, he would usually either return it on the day of presentation, or advise the presenting customer that it was being held over until the following day. But where a cheque is presented through the post by a stranger, the banker should return it at once with a request that presentment be made either in person or through another bank.

In connection with the reason for dishonouring a cheque, the Rules of the London Clearing House provide that " No Return can be received without an answer in writing on the Return why payment is refused ". Accordingly, the reason for the return of a cheque presented through the clearing must be clearly written thereon by the drawee banker, and this practice

is applied also to cheques presented through a local clearing. But the banker is not compelled to give an answer or reason for dishonour in respect of a cheque which is presented by the holder in person, though it is usual in practice for a reason to be given in just the same way as if the cheque had been presented through the clearing.

Payment of a Customer's Bills.

Failing an express or implied agreement to the contrary, a banker is under no obligation to pay bills of exchange, other than cheques, which are accepted payable at the bank by a customer, although such an acceptance is in itself a sufficient authority to the banker to pay the bill and to debit his customer with the amount If there is no credit balance available, the banker, if he so wishes, may regard the acceptance of a bill payable with him as a request for an overdraft, and may charge the customer with interest on any amount paid out in respect of such an acceptance.

In paying such a bill the banker is outside the protection afforded by the Bills of Exchange Act, and cannot debit his customer if he has paid out to a person claiming through a forged indorsement. In such an event, the bill is not discharged , the acceptor remains liable, and the banker has simply thrown his money away. To safeguard themselves, therefore, bankers sometimes take from their customers an authority on a special form to pay bills which are domiciled with them, the authority embodying an undertaking by the customer that he will indemnify the banker if it should turn out that the bill or bills bear a forged indorsement or forged indorsements

Although the banker is unprotected if he pays a bill bearing a forged indorsement, he is unaffected by the fact that the *drawer's* signature is forged " The drawee of a bill is bound to know the drawer's signature It is his fault if he writes his acceptance on a forged instrument and it is his act of acceptance which sends the bills forward for payment to the banker " (Lord Macnaghten in *Vagliano Bros.* v. *Bank of England*)

It is, of course, imperative that the banker should verify the signature of the acceptor, for if the signature turns out to be forged he cannot debit his customer and must bear the loss himself, subject to the proviso, already discussed in connection with forged signatures on cheques (see *ante*, page 124), that a customer will be estopped from denying the validity of his signature if he has induced the banker to rely upon a signature which is forged or unauthorised.

In general, a banker should not pay overdue bills without

a definite authority from his customer, although he would be quite justified in making such a payment if he has sufficient funds in his hands, for payment in due course is defined in Section 59 (1) as " payment made *at or after maturity of the bill* ".

Bills bearing material alterations should not be paid unless the alterations are confirmed by the drawer, and if, after acceptance, a bill is fraudulently altered in respect of its amount, the acceptor cannot be held liable, except for the original sum, and the banker paying a larger amount would be unable to debit the customer with the excess.

Subject to these conditions, and assuming there is no question of forgery, a banker is perfectly safe in paying a customer's acceptance even over the counter to a person who appears to be in *bonâ fide* possession thereof

Bills of Exchange " to be Retired ".

Frequently, bankers with whom bills are domiciled are requested by their customers to pay the instruments before they actually fall due, the instructions being given on a special " Bills to be Retired " form, which is signed by the customer and sets forth details of the bills concerned. A bill paid in such circumstances is said to be " retired " or withdrawn from circulation

As a rule, payment of a bill before its date is made *under rebate, i.e.*, the acceptor is allowed a deduction from the amount of the bill equal to the interest on that amount for the period which the bill has still to run before maturity, the interest being calculated at ½ per cent. per annum above the current rate allowed on short deposits by the London joint-stock banks

A receipt in the following form is indorsed on the back of the bill :—

> Received payment of the within bill from the acceptor, *James Brown*, this *17*th day of *September* 19 , under rebate at 3½ per cent per annum
>
> per pro The Northern Bank, Ltd ,
> *William Robinson,*
> Manager,
> Northtown Branch

As a bill of exchange is not paid in due course until it is past " at or after maturity " (Section 59), a retired bill is not discharged and must not be cancelled by the banker who pays it on behalf of the customer. The bill should be delivered to the acceptor or kept at the bank pending receipt of his instructions.

CHAPTER 16

THE COLLECTING BANKER

The term "Collecting Banker" is applied to a banker who collects the proceeds of cheques, bills, and other documents either on his own behalf, or as is more usual, on behalf of a customer or another banker. Unless he is collecting on his own behalf, the banker is in the position of an agent acting on behalf of a principal—and, as such, he incurs certain liabilities if he fails properly to discharge the duties entrusted to him. The extent of this duty will depend upon the facts of each particular case and upon the recognised practice in the circumstances, but a banker will in any case be liable to his customer for any loss or damage which may result from his omission to use reasonable care, skill, and diligence in the discharge of his duty as a collecting agent Thus he will be liable for delay in making presentment unless such delay is excused by the Act, or for omitting to present the bill at the proper place, as defined in the Act and explained in Chapter 18.

In the absence of an indemnity or other agreement to the contrary, the collecting banker is liable also for the negligence of any agent or correspondent employed by him to collect bills and cheques of his customer.

In carrying out his functions as a collecting agent, the banker has no duty towards the persons from whom the proceeds are collected, and so long as he acts in good faith and does not give any personal undertaking or make any misrepresentation concerning the documents, he incurs no responsibility in the event of any loss arising Thus, in presenting a documentary bill for payment, a banker incurs no liability if the documents are not in order, and is not responsible for their genuineness

Collection by a Banker on his Own Behalf.

Sometimes a banker is regarded as collecting cheques and bills *on his own behalf*; as, for example, where he collects cheques which he has cashed over the counter, or where he is collecting the proceeds of cheques specifically paid in to reduce a loan due to him, or cheques against which he has already given his cus-

tomer the right to draw, although the proceeds have not actually been received. In such circumstances (provided that he acts in good faith and fulfils the other requirements of Section 29) the banker becomes " a holder in due course ", and is legally regarded as collecting the proceeds for himself, although such proceeds ultimately rest in the customer's account.

When a banker collects merely as an agent, he is in the position of a " holder ", since he is technically the bearer of an instrument which either originally or by indorsement is payable to bearer. But in no case does he become liable *on the instrument* itself unless it is signed by him or on his behalf

The Meaning of " Conversion ".

A collecting banker runs a risk in one respect of incurring liability to persons other than the customer for whom he collects, and that is in connection with the common law obligation imposed upon all members of the community to refrain from " converting " property belonging to others *Conversion* implies wrongful interference with the goods of another in a manner inconsistent with the owner's right of possession, and occurs when " goods " are taken, used, or destroyed, or when some control is exercised over them which is inconsistent with the owner's right The term " goods " for this purpose includes bills of exchange, cheques and promissory notes.

From a banker's point of view, possibly the most important aspect of conversion is that the wrong may be committed *in perfect innocence*, so that immunity from liability cannot be secured even by the exercise of the utmost care and skill Moreover, the liability exists even in the case of a person who is acting merely as an agent for another, for conversion is a *tort* which renders the person committing it *personally* liable, besides rendering liable the principal on whose behalf the agent was acting when the wrong was committed Nevertheless, the person suing can recover damages from one party only

Thus, in spite of the fact that a banker may have acted quite innocently or solely as an agent, and may have derived no profit from the transaction, yet, if he can be shown to have converted the goods of another, he will be liable to make good their value to the *true owner*

The remedy of the true owner whose property has been converted is to sue the person converting in an action for conversion, trover, or detinue of the property , if he succeeds he will be entitled to the return of the goods or to damages, in addition to the costs of the action In the case of a negotiable instrument, such damages will be the face value of the instrument.

In an action for conversion of a negotiable instrument, it is usual for the true owner to join with his claim for conversion a claim for " money had and received " to his use, in which case he is free to recover on either ground The claim for " money had and received " against a person who had no knowledge of the rights of the true owner is based on an *implied* promise, which the law *imputes* to a person dealing with the money of another, to repay that money to the lawful owner when it is demanded.

The Banker's Liability for Conversion of Cheques and Bills.

The business of a banker involves such frequent handling of instruments belonging to others that he must, in the absence of statutory protection, run considerable risk of liability for conversion And though he runs the greatest risk of incurring this liability when he is acting as an agent for collection, he may, as we have seen in the preceding chapter, incur liability for conversion when he acts as a *paying* banker, by paying a cheque or bill to some one other than the true owner.

There are three cases in which a banker, in his dealings with cheques and bills, may render himself liable for conversion —

1. *Paying a cheque or bill bearing a forged indorsement.* Since payment of a cheque or bill to anyone who holds through a forgery is not a payment to the " holder ", it does not constitute a valid discharge of the instrument. But in respect of *cheques* the paying banker is safe if he can bring himself within the protection afforded by Sections 60 and 80 of the Bills of Exchange Act, 1882 (Chapter 15) He has, however, no such protection in the case of *bills of exchange* other than cheques, although he is protected by Section 19 of the Stamp Act, 1853, and by Section 17 of the Revenue Act, 1883, in respect of documents, other than cheques, which fall within the purview of these sections. (Chapter 22)

2. *Collecting a cheque, bill of exchange, or promissory note bearing a forged indorsement, or in respect of which the customer has no title or a defective title* So far as bills of exchange and promissory notes are concerned, the liability is absolute, but in connection with crossed cheques the banker is protected by Section 82 of the Bills of Exchange Act, 1882 (discussed below), and in regard to certain conditional orders by Section 17 of the Revenue Act, 1883 (Chapter 22.)

3 *Taking for value a bill of exchange, cheque, or promissory note bearing a forged indorsement, or a cheque crossed " not negotiable " to which the title is void or defective* Here again there is no statutory protection, for a banker who takes such an instrument for value is not protected either as a paying banker or as a collecting banker.

The banker's liability to the true owner in these respects exists quite independently of any right of recourse which he may have against his customer.

The Collection of Cheques for a Customer.

UNCROSSED OR OPEN CHEQUES —In collecting *uncrossed* bearer or order cheques *for a customer* a banker is afforded no protection, and, should such an instrument bear a forged indorsement, or should the customer's title thereto prove void or defective, the banker incurs the ordinary common law liability for converting the property of the true owner In such circumstances, he *may* be able to debit the amount of the cheque to the customer concerned, but this fact does not release him from his liability to the true owner.

A banker who collects an *uncrossed* order cheque *on his own behalf* is liable to the true owner only if the cheque bears a forged indorsement ; but, even then, he can enforce his rights against any indorsers of the cheque who indorsed *after* the forgery, and also against his immediate transferor if that person has omitted to indorse If however, the question is not one of forgery, but is merely one of defective title on the part of the person from whom the banker took the instrument, the banker in such a case (assuming that he acts in good faith and without notice of the defect) is a holder in due course with power to enforce payment against all prior parties to the instrument.

CROSSED CHEQUES —In regard to *crossed* cheques, whether payable to bearer or order, the banker obtains statutory immunity or protection from his common law liability for conversion by virtue of Section 82 of the Act, which provides as follows .—

> **82.** Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

The provisions of this section are further extended in the banker's favour by Section 1 of the Bills of Exchange (Crossed Cheques) Act, 1906, which reads :—

> **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.

This act was passed to negative the effect of the Court of Appeal decision in the famous Gordon Case (*Capital & Counties Bank* v. *Gordon*, 1903), in which it was decided that, by *crediting as cash* cheques paid in by a customer, a banker became a holder

for value and was to be regarded as collecting the proceeds *for himself* and not *for his customer*.

But it is to be noted that this amendment applies only to *crossed* cheques, and does not therefore affect the banker's position in relation to open or uncrossed instruments. Moreover, it is not entirely clear whether the protection afforded by the Crossed Cheques Act is confined to cases where the customer's account is merely credited with the amount of cheques paid in or whether it extends also to cases where the banker has given value for the cheques. In *Sutters* v. *Briggs*, 1922, Lord Birkenhead expressed the opinion that the latter was the more likely interpretation, but there is no definite ruling on the point If the banker is a holder in due course, he will not, of course, need any statutory protection ; but, in cases where he is unable to claim the rights of a holder in due course owing to a prior forgery, or where the cheque bears a " not negotiable " crossing, the question of statutory protection assumes great importance and is one which will ultimately have to be decided by the Courts.

Conditions which must be Fulfilled.

In order to claim the protection of Section 82, the banker must act strictly in accordance with its provisions, although, as Sir John Paget has pointed out, it is doubtful whether any section of any other Act has been so watered down by legal decisions, with the result that the banker's position is so hedged about with pitfalls and technicalities that the section really affords him but scant protection.

First, the banker must act " *in good faith and without negligence* ", and this applies to the *whole* transaction, from the receipt of the instrument from the customer to the receipt of the proceeds from the paying banker. Secondly, he must collect *for a customer*, and not for himself or for a person who cannot be regarded as a customer.

Since it is to be presumed that modern joint stock banks do not act otherwise than in good faith in all their dealings, the question of good faith in relation to the collection of cheques is not very important, although a bank will be liable if it is shown that there was an absence of good faith on the part of any of its employees

" Good faith " and " negligence " are not mutually exclusive terms, for Section 90 provides that a thing is deemed to be done in good faith within the meaning of the Act where it is in fact done honestly whether it is done negligently or not.

What Constitutes " Negligence " ?

The matter of negligence is, however, one of great importance, for although the question as to what constitutes negligence has

to be decided on the circumstances of each case, the term is capable of a very wide interpretation, frequently to the detriment of the banker. The matter is also of importance inasmuch as the Section imposes on the banker a statutory duty *to the true owner* to avoid negligence, in spite of the general principle that a banker's duty is *to his customer* and to no other, and the fact that, as a rule, there can be no negligence where there is no duty. Moreover, when a collecting banker relies upon the protection of Section 82, the burden of proving that he has acted " without negligence " is upon him, since the true owner's case is complete as soon as conversion is proved *prima facie* against the banker.

The general test of negligence is whether the person on whom it is sought to impose liability has acted as a reasonable business man would act in like circumstances if dealing with his own affairs In the case *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Ltd.*, 1920, Lord Dunedin was careful to point out that " it is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question as to whether there was negligence in collecting the cheque—the test of negligence is whether the transaction of paying in a given cheque coupled with the circumstances antecedent and present, were so out of the ordinary course that it ought to have aroused doubts in that banker's mind and caused him to make enquiry "

It follows that the question of negligence is one that can be determined only from the particular circumstances of each case, and that what may be negligence in one set of circumstances may not be negligence in another. Nevertheless, from an analysis of the law and of past legal decisions on the subject, it is possible to classify certain cases in which the action of a bank would be regarded as negligent

1. *Omission to verify the correctness of indorsements on cheques payable to order.* The collecting banker must ensure that the indorsements on all cheques presented by him are technically correct and in accordance with the recognised practice Thus in *Bavins, junr., and Sims* v. *London & South Western Bank*, 1900, the Court of Appeal held that the collecting banker was negligent in not detecting that an indorsement and a signature to a receipt did not correspond with the name of the payee.

2. *Omission to verify the existence of authority in the case of per procuration signatures if there are any circumstances connected with the transaction which should put the bank on inquiry* It was laid down in *Morison* v. *London, County, and Westminster Bank, Ltd.*, 1914, that Section 25 of the Bills of Exchange Act, which puts a person on inquiry regarding a procuration signature, has

no bearing on Section 82, and that it does not in any case give the true owner any right to recover the money once the instrument has been discharged In spite of this, the collecting banker should act with care in accepting cheques bearing per procuration indorsements, for, although the mere omission to verify the existence and extent of the authority for such an indorsement is not sufficient to constitute negligence, a wide variety of attendant circumstances have been held sufficient to put the banker on inquiry Hence, a banker should not accept procuration signatures on behalf of limited companies, partnerships, local authorities and official payees, unless he knows that the signatories have the requisite power both to indorse *and to deal with the instruments as they propose*

3 *Collecting for the private account of an official a cheque made payable to his company or firm and indorsed by him on its behalf* This has been so explicitly maintained as negligence in various cases that a banker should exercise extreme care before accepting for the credit of a person's private account cheques payable to a company which he represents, and indorsed by him as agent on its behalf *Hannan's Lake View Central, Ltd*, v *Armstrong* 1900, 4 *L Underwood* v *Bank of Liverpool and Martins* 1924, *Stewart* v *Westminster Bank*, 1926

But, as was pointed out by Mr Justice Mackinnon in *London & Montrose Shipbuilding Company Ltd*, v *Barclays Bank Ltd*, 1926, the mere fact that a cheque made payable to a limited company and properly indorsed on its behalf by an agent is paid into a *third person's* private account does not *of itself* put the bank upon inquiry as to whether the transaction is in order, for, if this were the case, no cheque negotiated by a company to whom it was made payable could be safely collected by a banker without elaborate preliminary inquiries In delivering judgment, Mackinnon J said "*Underwood's* case was a totally different case It was no doubt the cheque of a company indorsed by an official of the company and paid into a third party's account, but that third party was the very official of the company who had been indorsing and it had been going on for a long time"

4 *Accepting for a customer's private account cheques drawn "per pro" by him, or by him and another on behalf of his firm and made payable either to himself or to another* In *Morison* v *London, County & Westminster Bank Ltd*, 1914 (decided, however, on other grounds), the Court of Appeal held that the bank was *prima facie* guilty of negligence in accepting for an employee's private account cheques drawn by him "per pro" on his firm's account, either at the same bank or at another bank, the cheques being made payable either to the firm or to the employee himself, and being indorsed by him in his own name or "per pro" the

firm, as the cases required. Similarly, in *Lloyds Bank* v *Chartered Bank of India, Australia, & China*, 1928, the bank was held to be guilty of negligence in collecting for an employee's private account cheques drawn by *him and another* on the plaintiff account in favour of the collecting bank.

5. *Collecting for a partner's private account cheques payable to the partnership.* A banker has no right to assume without inquiry that a partner is entitled to place to his own account cheques payable to the firm.

6. *Placing to a customer's private account cheques payable to him in an official or fiduciary capacity*, as, for example, cheques payable to "Thomas Robinson, Collector of Taxes", "The Collector of Taxes", "The Collector of Inland Revenue", "Borough Rates", "Water Rates", etc. In no circumstances should cheques so payable be accepted for a private account, but the mere fact that a person is a public official, or that he acts in a fiduciary capacity which involves his having other people's money in his hands, does not of itself put the banker on inquiry in regard to other cheques paid in to a private account.

7. *Omission to obtain a reference from a new customer*, or to follow up a reference given by a customer on opening an account. Thus, in *Ladbroke* v *Todd*, 1914, the bank was regarded as negligent for not having obtained a reference, while in *Turner* v *London & Provincial Bank*, 1903, it was accepted as evidence of negligence on the part of a bank that it did not *take up* a reference which was given by a new customer.

8. *Collecting a cheque crossed "Account Payee" for other than the payee named.* The words "Account Payee" or "Account payee only" or "Account James Brown etc." have no statutory recognition, and do not impair the negotiability of a cheque, but they are now sufficiently recognised in practice and by the Courts that a banker who disregards them and, without making reasonable inquiries, collects a cheque bearing the words for someone other than the named payee is likely to lose the protection of Section 82 on the ground of negligence. In *Akrokerri (Ashanti Mines, Ltd.)* v *Economic Bank*, 1904, the judge considered that such an addition to a crossing on the face of a cheque constitutes a direction to the receiving banker as to how the proceeds of the instrument were to be dealt with *after receipt*. This clearly implies that the cheque can be taken and collected only for the named payee, and would apply as much in the case of a cheque payable to a named payee *or bearer*, as it would in the case of an instrument payable to order.

This view was confirmed by the Court of Appeal in *Underwood* v *Bank of Liverpool & Martins*, 1924, where Lord Justice Scrutton

stated "While this addition (*i.e.*, "Account Payee only") does not affect the negotiability of an order or bearer cheque, I agree with the view that, when such a cheque is paid into the account of a person who is not the payee, the bank is put on inquiry."

But the bank is not expected to make inquiries *unless it is in a position to do so*. So that where a London bank acting as clearing agent for a foreign correspondent collected a cheque crossed "A/c payee only" and bearing several indorsements the London bank was not expected to inquire into the validity of the foreign negotiations (*Importers Co., Ltd., v. Westminster Bank, Ltd.*, 1927).

9. *Where the operations on an account are of an unusual nature.* Sudden increases in the amounts of payments in, or other unusual operations on an account may be an important factor to be taken into consideration when determining the question of negligence. Thus, in the case of *Lloyds Bank v. Chartered Bank of India, Australia and China*, 1928, where cheques for large amounts drawn by an official on the plaintiffs' account were paid into an account of a small nature in that official's name and the funds so paid in were immediately withdrawn by payments to stock brokers, the bank was held to be put on enquiry as to the source of the payments.

Estoppel as against the True Owner.

In certain circumstances a banker may escape liability for negligence on the ground that his acts or omissions have been induced or encouraged by the action or inaction of the true owner who is thereby estopped from succeeding against the bank on the grounds of conversion. This was the case in *Morison v. London, County & Westminster Bank*, 1914, where an employee, Abbott, had for years fraudulently paid into his private account cheques drawn by him "per pro" on behalf of his firm, Bruce Morison & Co. The employer Morison had actual knowledge of some of the misappropriations, but took no steps to warn the bank, or to complain of the transactions, in spite of the fact that he had from time to time received his pass book. The Court held that, by his conduct, the plaintiff (*i.e.*, the true owner) must be held to have adopted the transactions and was therefore, not entitled to succeed against the bank in spite of the fact that it was technically guilty of conversion and of negligence.

"Receives Payment for a Customer".

In order to obtain the protection of Section 82, the banker must act throughout simply and solely *as an agent for his customer* in collecting the cheque and receiving payment of the proceeds,

but by virtue of the Bills of Exchange (Crossed Cheques) Ac 1906, already mentioned, the banker is not deprived of the pr tection merely because he has credited the amount of a cheq in process of collection to the customer's account before tl proceeds have actually been cleared

The protection *may* not apply, however, if there are circun stances indicating that the banker is not acting *on behalf of customer*, as, for example, where he is collecting a cheque of whic he is himself the holder for value by reason of having cashed th cheque for a customer or a stranger, or of having explicitly accepte a cheque in reduction of an overdraft, or of having expressly impliedly agreed to allow the customer to draw against credi as soon as they are paid in, without reserving the right to refu payment of cheques so drawn (See *ante*, page 233) But a bank does not become a holder for value merely because he credi cheques to an account before he receives the proceeds, for, in th absence of agreement, such entries do not empower the custom to draw at once, nor do they affect the banker's right to retu cheques drawn against uncleared items (*Underwood* v *Barcla Bank*, 1924)

If a banker receives cheques payable in words to himself bu accompanied by a request to credit them to a customer, he c properly be regarded as receiving the proceeds on behalf of customer within the meaning of the Act (*Lloyds Bank, Ltd Chartered Bank of India, Australia and China*, 1928)

Unfortunately there is no strict definition in the Bills Exchange Act or elsewhere as to what constitutes a custome for the purposes of this section, and therefore the matter must b decided in accordance with recognised practice and custo Undoubtedly, a person is a customer who has some sort of account with the banker, whether it is a current, deposit or bil discounted account, and a bank collects *for a customer* when collects for another bank for which it acts as clearing agen (*Importers Co* v *Westminster Bank, Ltd*, 1927)

But in *Ladbroke* v *Todd* 1914, it was decided that *one* tra saction was sufficient to constitute a person a customer, so th a banker would be rightly regarded as acting for a customer collecting cheques representing the first credit by which an accou was opened A person does not, however, become a custom merely by calling at a bank from time to time to cash chequ drawn in his favour (*G W Rly* v *London and County Ban* 1901)

Sir John Paget has expressed strong disagreement with th decision in *Ladbroke* v *Todd* He considers that one transactio does not make a 'customer' within the meaning of Section 8

and contends that there must exist some " use or habit " before the relationship is established. But it would doubtless be safer to rely on the decision quoted, particularly as it can be argued that, as soon as the banker assumes the liabilities essential to the relationship of banker and customer, he is entitled to the protection afforded to a banker in respect of his dealings with his customers.

Furthermore, " it is conceived that a person who has an account at a branch is a customer, not only of the branch, but of the bank as a whole within the meaning of the Section ".[1] If this view is accepted, a branch which collects crossed cheques on behalf of a customer of another branch or of the head office is protected by Section 82 But this protection does not extend to cheques included in credits for customers *of other banks* in respect of which the collecting banker is liable to the true owner, although he would no doubt be indemnified against loss by the banker for whom the credit was accepted

In the present connection some difficulty arises in regard to the subject of *banker's lien* A banker has a lien on all cheques, bills and notes of his customer which come into his hands in the ordinary course of business in respect of any loan or overdraft owing to him by the customer, and by virtue of Section 27 (3) of the Act, any holder who has a lien on a bill or cheque is deemed to be a holder for value to the extent of the sum for which he has a lien What therefore is the position of a banker who collects cheques in respect of which he is deemed to be a holder for value by reason of his having a lien over them ? The question remains to be decided by the Courts, but in the opinion of Sir John Paget, the fact that a banker has a lien over a cheque does not warrant his being deprived of the protection of Section 82 on the grounds that he is a holder for value and not an agent for his customer.

The Document must be a Crossed " Cheque ".

As Section 82 specifically mentions the word " *cheque* ", the banker is not protected thereby unless the instrument collected conforms in all respects with the essential requisites of a cheque which we have previously discussed.

Nevertheless, the banker is protected in respect of certain documents *issued by customers* which are not strictly cheques by virtue of the provisions of Section 17 of the Revenue Act, 1883 (discussed in Chapter 22), wherein consideration is also given to the application of the crossed cheque sections of the Act to dividend and interest warrants.

[1] Hart, *Law of Banking*, page 513.

The Cheque must be Crossed generally, or specially to the Collecting Banker.

The protection of Section 82 cannot be obtained unless the cheques collected are crossed generally or specially *when they come into the hands of the bank* seeking the protection, and it is not sufficient for this purpose if the collecting banker crosses the cheques himself

To safeguard himself, therefore, the collecting banker should ensure (*e g* , by inserting a request on his paying-in slips and pass books) that all cheques for collection are crossed before they are paid in by his customers, who, it will be remembered, have authority as holders to cross cheques either generally or specially, or to add the words " not negotiable " to an existing crossing

Collecting Cheques crossed " Not Negotiable ".

The point has not actually been before the Courts, but certain judges have expressed views which seem to indicate that they would regard as negligence the collection of " Not negotiable " cheques for a person other than the payee There would appear to be little justification for this attitude, however, since a banker in such circumstances can scarcely be accused of neglecting his duty towards the true owner, in view of the fact that the words " Not negotiable " do not in themselves limit the transferability of the cheque.

Not Transferable Cheques.

A collecting banker would clearly obtain no protection if he collected for anyone other than the payee a cheque which by its terms was made " not transferable " in accordance with Section 8 (1) of the Act, as, for example, where it was drawn " Pay John Smith *only* ". In collecting the proceeds of such a cheque the collecting banker must see that they are received by the named payee, and as evidence of this he is required in practice to confirm the indorsement of the payee with his own stamp and signature. The position is the same with regard to cheques bearing restrictive indorsements. (See Chapter 14)

" Not Liable to the True Owner ".

The liability referred to in Section 82 covers any liability which the collecting banker might incur in an action by the true owner for conversion, or for money had and received, or for any other reason. And as the true owner of a cheque is the person who is entitled to the property in and possession of the cheque, freedom from liability to the true owner implies that the banker is secure from all claims which may be made by or on behalf of any other parties.

The Collection of Bills of Exchange.

As the crossed cheque sections of the Bills of Exchange Act, 1882, apply only to cheques proper, a banker obtains no protection if he undertakes the collection of bills of exchange as distinct from cheques on behalf of his customer, or, of course, if he collects such instruments on his own behalf. In undertaking to collect bills, the banker accepts the functions of an agent for his customer. As such, he must strictly carry out the rules laid down by the Act regarding the presentment of bills, and, in the event of his failure to act without negligence and in good faith, he will be liable to his customer for any loss which may ensue

A banker is not entitled to refrain from presentment merely because he knows or has been informed that the bill will not be paid by the acceptor, or because he knows that the bill was merely accepted to accommodate the drawer or one of the indorsers If presentment is to be made through another banker or agent of the collecting banker, the bill must be sent off in time to give such banker or agent reasonable time in which to make the necessary arrangements for the presentment, particularly if the place where the bill is payable or the place of residence of the drawee is distant or difficult of access Furthermore, the collecting agent must, if necessary, be given time in which to determine whether any special expenses will be incurred by the presentment.

The banker will be liable for delay in making the presentment unless such delay is excused by the Act, or for omitting to present the bill at the proper place, or for neglecting to have it duly noted or protested in the event of non-payment Apart from this, the banker will be liable also to the true owner for conversion or for money had and received if the bill bears a forged indorsement or if the customer has no title or a defective title. In such circumstances the banker will usually be able to fall back on his customer, but his liability to the true owner exists quite independently of any such recourse that he may have.

If the acceptor wishes to pay, payment should not be accepted in the absence of special instructions unless it is made in legal tender, or by draft of a reputable banker or by a marked cheque. If an unmarked cheque is offered, the bill should not be surrendered to the acceptor, but should be attached to the cheque and a promise made to deliver it when the proceeds of the cheque are received from the drawee banker Otherwise the banker as agent of the holder of the bill will be deemed to have waived his rights on the bill in favour of his rights on the cheque, and all parties prior to the holder will be discharged from further liability, the holder being left with his right of recourse only on the cheque itself.

If the banker is offered part payment of the bill, or a payment on account, he should accept the amount tendered and indorse the bill with a receipt acknowledging the amount received and clearly specifying that it is accepted as a part payment only without prejudice to the rights of all parties liable on the instrument. Such a receipt given by the banker in the ordinary course of his business does not require a receipt stamp. On no account should the bill be surrendered in such circumstances. It should be noted for the unpaid balance, and notice of the dishonour of the bill in respect of the amount unpaid should be given to all parties liable thereon A foreign bill will also require protesting for the balance unpaid.

If a bill is not paid by the acceptor on presentment it should be at once noted by the bank, and if it is a foreign bill, it should be protested also. If a bill payable at the acceptor's place of business is not paid on presentment, a note should be left with the acceptor giving full particulars of the bill and informing him that the bill lies at the bank awaiting payment. Then, if payment is not received by the close of business on the same day, the instrument should be noted or protested in the usual way.

If the bill has documents attached which are to be given up on payment, the collecting banker should hand over the documents only if he is paid in cash or by a banker's draft or marked cheque, unless, of course, he has any special instructions in this connection from the person on whose behalf the proceeds are being collected. In any case it is no business of his, in the absence of special agreement, to see that the documents are in order, although he must see that all documents received by him are duly transferred to the person entitled to have them.

The Treatment of Unpaid Cheques and Bills.

Upon receipt of a cheque or bill which has been returned unpaid, the collecting banker should at once notify his customer, and will be liable for negligence if such notice of dishonour is not given within the time required by the Act. As a rule, cheques and bills returned unpaid are forwarded to the customer from whom they were received, together with a covering letter giving the reason for the return. The banker is entitled as a matter of recognised practice to debit his customer's account with the amount of a returned cheque, even though the instrument may not have been indorsed by the customer or even though it may have been cashed for him, or expressly paid in to reduce a loan or overdraft granted by the banker.

Frequently, however, in the case of instruments returned with such an answer as " Refer to Drawer, please re-present ", or

" Effects not cleared ", the collecting banker takes it upon himself to re-present the instrument without returning it to the customer from whom it was received The same applies where the return is due to an obvious irregularity, as, for example, mutilation or error in indorsement which may be put right by the confirmation of the collecting banker

But in all cases where this is done the customer should be duly advised of the fact, otherwise, if the cheque is again returned, he may refuse to be debited on the ground that he was entitled to assume that the cheque was paid as he had not been duly advised of its first dishonour And, apart from the necessity of giving notice of dishonour, it is to the customer's interests to be advised at once of the financial weakness of any persons with whom he is dealing Similarly, the customer should always be advised when a cheque or bill returned unpaid is recalled by letter, telegram or telephone for re-presentment

In the case of a cheque which has been cashed for a person who is not a customer, the instrument itself should *not* be returned to such person by the collecting banker, but notice of the dishonour should be sent together with a request for immediate payment of the amount If the cheque itself be returned the banker will be deprived of the only evidence of his right of action against any of the parties to the instrument, including the person for whom it was cashed if that person's indorsement was obtained

Similar steps should be taken in the case of dishonour of a bill which has been discounted for a customer or other person, but the banker cannot hold liable any person whose indorsement has not been obtained to the instrument, except in the case of a bill which is in such a condition as to be payable to bearer In that case, the transferor will be liable under Section 58 (3) of the Act if the bill bears a forged or unauthorized signature, or if he had no right to transfer it, or if he knew that it would not be met.

Record of Cheques and Bills returned Unpaid.

Full particulars of all cheques or bills returned unpaid for any reason are entered by the collecting banker in a special book kept for the purpose. This record is necessary in case queries arise concerning such cheques, and is also useful as enabling the collecting banker to keep before him the names of weak drawers of cheques paid in by his customers Obviously, a banker would not usually permit a customer to draw against the proceeds of a cheque if cheques of the same drawer had previously been returned marked " Refer to Drawer ". It will

be noted that particulars are recorded of cheques returned *for any reason.* This is useful, because bankers are known to return cheques of weak drawers on the slightest pretext of irregularity, with the object of giving such drawers time to obtain the necessary funds to meet the payments.

CHAPTER 17

THE MACHINERY OF COLLECTION

The extraordinary development of joint-stock banking and the wide use of cheques in this country made essential some organisation for the settlement of the great number of claims and counter-claims arising between the banks This organisation took the form of a system of *clearing*, whereby the claims of each bank on the others are quickly and conveniently settled by a process of cancellation or set-off. The claims arising between banks in the same town are easily adjusted by the conduct of purely *local clearing*, but the cancellation of claims between widely separated banks and groups of banks is effected through the more elaborate organisation of the Clearing System, having its headquarters at the London Clearing House in Post Office Court, Lombard Street, E.C.

English Local Clearings.

Local clearings in England and Wales are conducted between the banks in all places where more than one bank is represented, with the object of conveniently exchanging cheques drawn by their respective customers and other mutual claims. Most of these clearings are conducted without any formality at one or two fixed times during the day, when clerks from the various banks meet at one of the bank offices to exchange their claims (called " Bundles of Charges ") on each of the other banks for claims on their own banks. The totals of the claims are agreed, and, at the end of the day, the net balance owing to or by each bank is settled, usually by a transfer between the respective head offices.

In certain large provincial centres,—Birmingham, Bradford, Bristol, Hull, Leeds, Leicester, Liverpool, Manchester, Newcastle-on-Tyne, Nottingham and Sheffield,—specially organised *clearing houses* exist for the convenient carrying out of these exchanges. In these towns the principal local branch of each bank acts as a local clearing agent for all branches of that bank in the clearing area, receiving from those branches cheques drawn on all other banks for clearance, and distributing among the branches cheques

drawn thereon and received from the other banks. Each branch is debited or credited through the head office with the amount due to or payable by it, and the net balance owing to or by each bank in respect of the local clearing is usually settled by transfer through the Clearing House Account at the local branch of the Bank of England.

The London Clearing House.

The great majority of cheques drawn on English banks are now presented and collected through the London Clearing House. This clearing was originally established in 1775 between the London private bankers, and it was not until 1854 that the joint-stock banks, who are now the only members,[1] were admitted

The general principle of the clearing is that cheques and certain other items payable at the various offices and branches of the English clearing banks are brought into one central depôt where they can be conveniently exchanged and set-off by the respective head offices. Settlement of the "differences" owing to or by each bank on balance is effected by transfers between the clearing bankers' accounts at the Bank of England

The number of instruments which pass through the Clearing House, and the totals of the transactions therein, reach stupendous figures during the course of a year Nevertheless, the clearing system works with almost unerring precision, thanks to its efficient organisation and the use of specialised machinery, and it not only effects great economy in the work of the banks, but also permits commercial transactions to be settled with a minimum of expense and delay.

The London Clearing House originally dealt only with cheques payable in the City area, but it is now divided geographically into three sections (*a*) *The Town Clearing* which embraces all banks in the central London or City area around the Bank of England, and therefore includes the head offices of most of the banks, (*b*) *The Metropolitan Clearing*, embracing all banks and branches outside the town clearing, but within a radius of about four miles, and (*c*) *The Country Clearing*, which was established in 1858 and covers those branches and correspondents of the English clearing bankers which are outside the range of the other two collections.

The Country clearing deals only with *cheques*, but cheques, bills, and other claims are collected through the Town and Metro-

[1] The members are now Bank of England; Barclays Bank, Ltd; Coutts & Co.; Glyn, Mills & Co; Lloyds Bank, Ltd; Martins Bank, Ltd.; Midland Bank, Ltd.; National Bank, Ltd; National Provincial Bank, Ltd.; Westminster Bank, Ltd., and Williams Deacon's Bank, Ltd.

politan clearings. For convenience in sorting, and in order to avoid confusion, cheques belonging to the three groups are distinguished by the letters "T", "M", or "C" printed in the left-hand bottom corner.

The Town Clearing.

Two Town clearings are held daily, one from 10 30 to 11 5 a.m , and the other from 2 30 to 3 50 p m. (Saturdays, 9 to 10 30 a.m , and 12 to 12.35 p.m) The morning clearing deals primarily with cheques and bills drawn upon the town offices of the respective clearing banks, which have been received by the morning post from home and foreign branches and correspondents, or which were received at the City offices on the previous day too late for presentation through that day's Town clearing. The larger afternoon clearing covers cheques and bills received at the various City offices of the clearing banks during the day, and also items received from Metropolitan and suburban branches for special presentment.

The cheques and bills on other London banks which each head office receives from its branches are listed by the latter on separate sheets for each clearing bank These lists are agreed by the head office Clearing Departments on receipt, and their totals are machined or entered in a special "Out-Clearing Book" under the names of the respective banks, a grand total of the charges to be presented to each of the other clearing banks being thus obtained.

These bundles of cheques and bills—referred to as the presenting bank's "Out-clearing"—are taken to the Clearing House by the "Out-clearing" clerks, by whom the items are handed to the "In-clearing" clerks of the banks concerned. The items which each bank thus receives from all the other banks are collectively described as that bank's "In-clearing", and, upon receipt, the amounts are machined and the totals relating to each bank verified with the total supplied by that bank's "Out-clearer". These totals are then carried to the settlement sheet in the manner described below.

The cheques received by each "In-clearer" are taken to his head office for sorting and despatch to the various City offices upon which they are drawn. Any returns must reach the Clearing House before 5 p.m. on ordinary days or 1.30 p.m. on Saturdays, and must be received by the clearers and their amount credited to the returning bank on the same day by an adjustment on the Town clearing sheet. If returns are received by the head office too late for inclusion in the clearing, they must be despatched at once to the banks named in the crossings.

The Metropolitan Clearing.

This deals with cheques, bills, etc., drawn on the Metropolitan branches of the clearing banks, and takes place daily between the hours of 9 and 10 30 a.m on ordinary days, and between 8.45 and 9 50 a.m. on Saturdays.

The cheques exchanged between the representatives of the various banks are thereafter despatched to the relative branches upon which they are drawn for payment or return. Metropolitan cheques for any reason returned unpaid must be returned by post on the day of presentation *direct* to the bank or branch whose name appears in the crossing The totals owing to or by each bank in respect of the Metropolitan clearing are included in the Town clearing totals of the following business day.

The Country Clearing.

The Country clearing (10 30 to 12 30 on ordinary days, and 10 to 11 5 on Saturdays) deals with the exchange of cheques drawn on the country branches of the various clearing banks The branches list all country cheques drawn on each of the other clearing banks on separate sheets, and forward them to their head offices, where the totals are machined on special lists to arrive at a grand total of the " Out " charge to be presented to each of the other clearing banks The " In " country clearing received by each bank from all the other banks is sorted and machined at the relative head office, and the cheques on each branch are thereafter forwarded by post for payment or return The totals of the country clearing are agreed between the " In " and " Out " clearers of each bank, and the grand balance struck between each bank and all the other banks is included in the Town clearing settlement of the next business day but one.

Country clearing cheques which are for any reason returned unpaid must be sent *direct* by the drawee branch to the branch of the presenting bank indicated in the crossing on the face of the cheque, a voucher giving the necessary particulars being forwarded on the same day to the head office of the drawee banker so that the amount may be allowed for in the settlement The branch to which the unpaid cheque is returned credits the amount to its head office or its clearing agent on the day of receipt, so that the head office or clearing agent may in due course credit the drawee banker in respect of the return.

Since bills of exchange on country branches cannot be included in the Country clearing, they must be presented direct, if possible, through a branch or agent in the town where they are payable.

The Clearing Settlement.

The grand totals of the morning Town clearing are agreed between each bank before the clearing clerks leave the Clearing House. The afternoon clearing proceeds until the door of the Clearing House is closed at the appointed time as an indication that no further cheques can be presented The total of the cheques presented in the second clearing is then ascertained and verified, and the balances which are owing to or by each bank are carried to a " Clearing Summary Sheet ".

On this sheet is entered also the balance of the Country clearing for the previous day but one, together with the balance of the Metropolitan clearing for the previous day, allowance for returns having been made in both cases. When the two columns of this sheet are totalled, the difference between the two totals gives the amount owing to or by each bank from or to the Clearing House as a whole, and this difference is settled by a transfer at the Bank of England between the account of that bank and the Clearing House Account. For purposes of this transfer a green or white ticket is used, a *green* ticket when a bank on balance has *to receive from* the Clearing House Account, and a *white* ticket when the bank has on balance *to pay* the Clearing House.

Cheques, etc., on Banks outside the Clearings.

Cheques and bills on the many banks, discount houses, etc , which have offices in the City, but which are not members of the Clearing House, are described in practice as " *Walks* ", by reason of the fact that they are collected individually by " Walks " clerks whose business it is to make a round of the City from the respective head offices. The items to be collected in this way are listed by the various branches and correspondents of the banks on special " Walks " Clearing forms before despatch to the head office or clearing agent, and settlement of the totals involved is made between the banks either by transfers in their accounts or by bankers' payments which are passed through the Town clearing for payment

Cheques, dividend warrants, interest warrants and bank post bills on the Bank of England are dealt with by other banks in much the same way as " Walks ". The totals of such items received by the clearing banks from their branches and correspondents are recorded by the respective head offices in the *Bank of England Book* or *Goldsmiths' Book*, together with any other articles which it is proposed to pay in to the Bank, as, for example, surplus or defaced Bank notes, gold and silver coin, etc. The articles are thereafter presented direct to the Bank, and their total, after verification, is credited to the account of the presenting

bank. The Bank of England itself presents cheques on other banks through the Clearing House in the ordinary way · in other words, the Bank clears " outwards " but not " inwards ".

Items Drawn on Scotch and Irish Banks.

Cheques and bills drawn upon the London offices of Scotch and Irish banks are collected by individual presentation at the offices of the drawee banks much in the same way as other " Walks " cheques, and settlement is effected either by banker's payment or by current account transfers.

Cheques and bills drawn upon the offices of Scotch and Irish banks in Scotland and Ireland are listed by the collecting branches of the English banks on special forms, and forwarded to the respective head offices as part of the day's clearing. The articles are listed by the head office of each English bank and are sent for collection to the London office of the Scotch or Irish bank which acts as a clearing agent in its own country on behalf of the English bank.

The Dublin and Belfast Clearings.

In both cities there are four clearings each day (*a*) the morning clearing of notes and cheques, (*b*) the morning clearing of cheques on city branches other than the principal offices, (*c*) the midday clearing of cheques on the chief city offices and the country branches, and (*d*) the final afternoon clearing of cheques on the chief city offices only. The settlement of the balance of each day's exchanges is effected by transfers between the accounts of the clearing banks at the local office of the Bank of Ireland, but the grand settlement is effected twice weekly on Tuesdays and Fridays, when the net amount owing by or to the Bank of Ireland in respect of each clearing bank is settled by transfer between the Bank of Ireland and each clearing bank.

Time Allowed for Collecting Cheques.

A banker collecting cheques for his customer must do so with due diligence. Cheques collected through one of the clearings must be presented in accordance with the rules of the particular clearing concerned, and failure by a banker to observe those rules in collecting crossed cheques will amount to negligence sufficient to deprive him of the protection afforded by Section 82 of the Bills of Exchange Act. But it rests upon the party seeking to hold the banker liable to prove that the recognised practice has not been followed.

In practice, City banks endeavour to present all Town clearing cheques on the day of receipt, for it is the custom to assume that

all cheques paid in by customers at the City offices of the clearing banks are paid unless they are returned unpaid on the same day. Accordingly, if one of the Town clearing banks receives a cheque too late for presentment through the clearing, it is usual to present the cheque for marking at the bank upon which it is drawn. Cheques so marked are invariably paid on subsequent presentation. (See page 227)

Cheques received by country banks are forwarded for collection on the day of receipt, and are assumed paid if they are not returned after the lapse of *three* clear days in the case of Country cheques, and after *two* days in the case of Town and Metropolitan cheques. Scotch and Irish cheques usually take four or five days for presentment and payment, and it is therefore not safe to assume that they are paid until the lapse of at least a week.

Any Metropolitan or Country cheques which the drawee banker does not intend to pay should be returned direct to the crossing banker on the day of receipt, while any cheques which are received unpaid from other bankers should immediately be sent to the customer, or advice of the non-payment given to him

A collecting banker must present *local* cheques for payment not later than the business day following that upon which the cheques are received. As a general rule, such cheques are presented wherever it is possible on the day of receipt, but cheques which are received too late for presentation on that day must not be held over longer than the following day.

When cheques are presented *direct* by a banker in one place to a banker in another (*i e.*, other than through the clearing), the clearing rules do not apply and the presentment is governed by the rules laid down in the Bills of Exchange Act. In such a case the cheque must be forwarded for collection not later than by the last post on the day following that on which the cheque is received, or by the first post thereafter if there is no post on that day.

CHAPTER 18

THE DUTIES OF THE HOLDER

The Bills of Exchange Act confers upon the holder of a bill certain important *duties*, the neglect or omission of which may have serious consequences for both the holder himself and other parties to the bill The main duties are (*a*) to present the bill for acceptance and payment in accordance with the rules laid down in the Act , (*b*) to note or protest the bill on dishonour, where necessary ; and (*c*) to give due notice of dishonour to all prior parties.

The importance of the proper discharge of such duties lies in the fact that if, through negligence, the holder omits or unduly delays a statutory duty, the effect may be to discharge certain parties, not only in respect of their liability on the instrument itself, but also in respect of the debt or other consideration for which the instrument was given. Suppose, for example, that a bill due in three months drawn by Jones on Robinson, who is indebted to Jones, is given to Brown in payment for goods. Brown indorses the bill to a holder who carelessly omits to present it for acceptance and for payment on the due date If the holder is unable to obtain payment from Robinson, both Brown and the drawer Jones will be discharged from liability, while Brown will also be freed as regards the consideration between himself and the negligent holder. And this will be so even if Brown is not actually prejudiced by the holder's omission to present the bill to the drawee ; as, for example, where the drawee Robinson is insolvent.

Where a bill is in the hands of an *agent* of the holder, that agent must exercise as much care in discharging the duties of the holder as is required in the case of the holder himself, and, if by reason of the agent's negligence any loss ensues, he will be liable to his principal for damages. This point is of special importance to bankers, who frequently undertake the duties of presenting bills for acceptance and payment on behalf of customers.

PRESENTMENT FOR ACCEPTANCE.

While presentment of a bill for acceptance may be effected by the drawer before the issue of the instrument, the duty usually

falls upon the payee or a subsequent holder. But, subject to certain statutory exceptions shortly to be mentioned, it is not [illegible] to present a bill for acceptance. The holder may, if he so desires, await maturity of the bill and then present it for payment As a rule, however, the holder presents a bill for acceptance in order to secure the liability of the drawee by his signature on the instrument, for until the drawee signs he is not liable for due payment of the bill

Moreover, the existence of the signature of the acceptor on a bill not only increases the security for its due payment, but also makes the bill more readily negotiable On the other hand, if the bill is not accepted by the drawee on presentment, the holder obtains an immediate right of recourse against the other parties to the bill

Requisites of a Valid Acceptance.

By Section 17 the form and requisites of a valid acceptance are thus defined —

> **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

No one but the drawee can accept a bill, though his signature may be written either by himself or by his duly authorised agent Acceptance by anyone other than the drawee in the drawee's name will be either an unauthorised act or a forgery, while acceptance by such a person in his own name is of no effect as an acceptance (unless it is an acceptance for honour—see Chapter 19), although the signer may render himself liable as an indorser to a holder in due course. (See Section 56)

The signature to an acceptance need not, however, strictly conform to the name of the drawee. The two must be considered together, and, provided that the acceptance is in fact that of the drawee, the acceptance will be valid Thus the omission of the word " Limited " in a company's acceptance on a bill drawn on the company will not invalidate the signature as an acceptance by the company Similarly, if a bill is drawn on a firm as " B and Co " although its proper style is " A B & Co ", and the bill is accepted in the latter name, the acceptance will be valid

If a bill is accepted only by one or some of two or more drawees, those who sign the acceptance will be bound although

the others will not. Similarly, acceptance by a partner in his own name of a bill addressed to a firm will bind the partner signing but not the firm. But if a bill is addressed to Robinson, a partner in a firm, and Robinson accepts in the firm's name, "Brown & Robinson", he is personally liable as acceptor and the firm is not bound.

By virtue of Section 17 (2*b*), an acceptance will be invalid if the acceptor undertakes to pay in any way other than in money, *i e.*, legal tender, as, for example, in exchequer bills, or in goods, or in silver bullion

Time when a Bill may be accepted.

Section 18 provides that —

> **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.

Although Section 18 (1) allows an incomplete or inchoate bill to be accepted, an instrument which is lacking in a legal essential (*e g* , the drawer's signature), will not be valid as a bill until the omission is rectified. The effect of the acceptance of a bill which is overdue is as if the acceptor had accepted a bill payable on demand he is immediately liable to pay the instrument.

There is no presumption as to the *exact* date on which an undated acceptance was given, but, in the absence of evidence to the contrary on the face of a bill, an acceptance is deemed to have been made before maturity and within a reasonable time after the issue of the instrument.

Section 18 (3) is intended to secure that the holder of a bill which is dishonoured but subsequently accepted shall, as far as is possible, be placed in the same position as if there had been no dishonour. Hence, if a bill payable three months after sight is dishonoured by non-acceptance on the 1st June, but is subsequently accepted by the drawee on the 4th July, the holder may calculate the due date of the bill as from the 1st June, and so present it for payment on the 4th September. In the absence of this provision, the bill could not be presented for payment until the 7th October, in which case the holder would be prejudiced

by being out of his money for an additional thirty-three days, while the acceptor would have the use of the funds for the same period

"General" and "Qualified Acceptances."

Whereas the order from the drawer to the drawee must be unconditional and unqualified in its terms, Section 19 permits the acceptance of the drawee to be *qualified* in certain definite respects .—

> **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.

These provisions make it clear that, although the drawer in making out his order must conform to a very rigid standard, the acceptor is not only given a fair degree of latitude in deciding how, where, and when he will pay the instrument, but is permitted by the terms of his acceptance to vary *the effect of the bill as drawn*, even to the extent of making the payment conditional, without affecting the validity of the instrument as a bill

Wherever possible, however, an acceptance is to be construed as general and not qualified, and the insertion by the acceptor of a mere memorandum, *e g* , a wrong due date, will not make an acceptance qualified. To constitute a qualification, words added to an acceptance must be clearly opposed to the tenor of the bill, and, if an acceptor wishes to qualify his acceptance, he must do so in terms so clear and unequivocal that a holder could not fail to understand his wishes.

The following are examples of qualified acceptances which correspond to the five classes mentioned in the Section :—

(*a*) *Conditional :* "Accepted payable on surrender of bills of lading", or "Accepted payable when in funds".

(*b*) *Partial:* A bill drawn for £100 is accepted thus "Accepted payable for £50 only, James Brown", or thus, "Accepted payable £50 in cash and £50 in goods" The latter is valid as an acceptance for £50 only

(*c*) *Local* · An acceptance in the form "Accepted payable at the Northern Bank, Northtown", is general, whereas any of the following would be qualified as to place, *i e*, local "Accepted payable at the Northern Bank, Northtown, and not elsewhere", or "Accepted payable only at the Northern Bank, Northtown", or "Accepted payable at the Northern Bank, Northtown, and there only"

(*d*) *Qualified as to Time* · A bill is drawn payable three months after date, but is accepted as follows "Accepted payable six months after date, James Brown"

(*e*) *Acceptance by some of several Drawees* · A bill drawn on A, B, and C is accepted by A only, B and C refusing to accept. This is a qualified acceptance by A But, if A has authority to accept for all the drawees and does so accept, then the acceptance is not qualified

A holder is not bound to take a qualified acceptance but may regard it as a dishonour of the bill.

When a Bill must be Presented for Acceptance.

Section 39 prescribes certain specific cases in which the holder *must* present a bill for acceptance ·—

> **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 no 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.

Sub-section (4) protects the holder of a domiciled bill which reaches him so late as not to give him time before maturity to present it for acceptance. Suppose a bill payable one month after date, drawn in New York on a Bristol firm, but made payable in London, reaches London on the date of maturity. As the holder must present the bill at Bristol for acceptance before

presenting it for payment, the Sub-section excuses the delay which must arise by reason of the presentment for acceptance, and ensures that the delay will not prejudice the holder's rights against prior parties.

Time for Presenting Bills after Sight.

As the period of a bill payable after sight does not commence to run until it is presented for acceptance, unreasonable delay in making presentment might prejudice the position of the drawer or of an indorser, as, for example, where the holder delays for so long that, when the instrument is presented, the drawee has become financially incapable of meeting the claim. Hence, Section 40 enacts that —

> **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
>
> [*See Section* 41 (2) *for the provisions*]
>
> (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

In deciding what is a reasonable time for the purposes of this Section, consideration must be given to the interests of the different parties to the bill The question is one partly of law and partly of fact. Thus, if a person in London draws a bill at one month's sight on another person, say, in Birmingham, the holder will not be guilty of unreasonable delay if he holds it for four days before presenting it for acceptance, even though the bill is afterwards dishonoured On the other hand, if a person in New York draws a dollar bill at sixty days' sight on a person in London, and the holder retains the instrument for a period of six months before negotiation or presentment for acceptance, there will be unreasonable delay sufficient to discharge the drawer and indorsers if the drawee refuses to accept

Rules Governing Presentment for Acceptance.

Section 41 lays down, as follows, the rules respecting presentment for acceptance :—

> **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

There is no provision in this Section (as there is in the case of presentment *for payment*) as to *the place where* a bill is to be presented for acceptance Usually, the address of the drawee is given on the bill, but, if the address is not so given, presentment will be excused if the holder after exercising reasonable diligence cannot find the drawee

Where the drawee is a trader it is usual to present bills at his place of business, and in such circumstances placing a bill in a bill box or giving the bill to a clerk in the office will constitute a sufficient presentation to the drawee But any such agent to whom a bill is presented must be some person who may reasonably be assumed to have power to take and deal with a bill Hence, it is not sufficient to hand in a bill to a servant or maid at a private house

Presentment for acceptance must be made on a business day at a reasonable hour, *i e*, during advertised banking hours in case of a bank, or during usual and recognised business hours in case of a trader. The term "business day" is explained by Section 92 as follows —

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this Act mean—

(*a*) Sunday, Good Friday, Christmas Day

(*b*) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it

(*c*) A day appointed by Royal proclamation as a public fast or thanksgiving day

Any other day is a business day.

In connection with Section 41 (1*b*) reference should be made to Section 19 (2*e*), from which it will be seen that, if one of two or more drawees refuses to accept, the acceptance will be qualified and must be treated as such.

It should be carefully observed that Sub-sections 41 (1*c*) and 41 (1*d*) provide that presentment for acceptance to the persons specified is *optional*. It is, in fact, excused under Section 41 (2*a*)

below, and the holder can in any event treat the bill as dishonoured by non-acceptance. Section 41 (1*e*) recognises a common practice amongst merchants and banks of presenting bills by post for acceptance.

When Presentment for Acceptance is Excused.

Presentment for acceptance is excused in the circumstances thus given in Sub-sections 41 (2) and 41 (3) .—

> **41.**—(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

Where the Act provides that presentment *must* be made and presentment is not excused, there is an *absolute* duty on the holder to present, and his duty to do so is not excused merely by the fact that he has good reason to believe that presentment may be useless or futile

Manner of Presenting for Acceptance.

In the case of presentment for payment the Act provides that the mere exhibition of the bill to the acceptor is sufficient, but no such rule applies in the case of acceptance, though by custom a bill is always delivered over to the drawee for his acceptance, and he is allowed, in the case of ordinary trade bills, a period of twenty-four hours (exclusive of "non-business" days) in which he may accept or dishonour the instrument After the expiration of this period, the drawee must re-deliver the bill to the presenter, otherwise he will render himself liable for the conversion or wrongful retention of the property of another.

But this does not mean that the drawee must *send* the bill to the presenter, for in the absence of express arrangement between the parties, or of an agreement to the contrary implied from the course of dealings between them, it is the duty of the holder to call for the bill after the expiration of the prescribed period.

Holder's Rights in regard to Qualified Acceptances.

The rights of the holder in regard to taking a qualified acceptance are thus stated by Section 44 :—

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

Should the holder decide to take a qualified acceptance, he must give the other parties to the bill notice of the qualification and not notice of dishonour, and any such party who does not object to the qualification within a reasonable time will be deemed to have assented thereto [Section 44 (3)] In the case of a *partial* acceptance, however, the drawer and indorsers will not be discharged even if they object to the qualification, provided the holder gives them proper notice thereof.

PRESENTMENT FOR PAYMENT

The rules regarding presentment for payment are of particular importance to bankers, since they are frequently called upon to present bills of exchange for payment on behalf of their customers, and because any person acting in this way as a collecting agent for his principal will be liable in damages to that principal if he fails to use diligence in making the presentment Moreover, a banker who undertakes such duties will be liable, in the absence of arrangements to the contrary, for the default or negligence of any agent or correspondent whom he employs for the purpose of making the presentment

As compared with presentment for acceptance, presentment for payment is governed by somewhat different considerations. Speaking generally, presentment for acceptance is personal, while presentment for payment is local. A bill must be presented for payment where the money is, and anyone can then hand over the money. A bill must be presented for acceptance to the drawee himself, for he has to write the acceptance , but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill Again (except in the case of demand drafts), the day for payment is a fixed day ; but there is no such fixity as to the day when it may suit the holder to present the bill for acceptance These considerations are material as bearing on the question whether the holder has or has not used reasonable diligence to effect presentment.

Usually, a Bill must be Presented for Payment.

In this regard, Section 45 provides that .—

> **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

The provisions referred to are those contained in Section 46, below, which dispense with, or excuse delay in, presentment for payment

When a bill of exchange is given to the holder in payment of a debt or liability, the discharge of the drawer and indorsers by failure to present for payment will also free them from the debt or other liability

On the other hand, failure to present a bill for payment does not usually discharge the acceptor, for by Section 52 —

> **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.

Section 52 (1) is based on the principle of English law that a debtor must seek out his creditor in order to make payment of a debt, and its effect is to prevent the acceptor from taking advantage of any irregularity in the presentment. But if a holder commenced action on a bill without having first presented it for payment, he would presumably have to bear the costs of the action

The effect of Section 52 (2) is that an acceptor cannot claim to be discharged from liability because the bill was not presented to him *on its due date* unless he expressly stipulates in his acceptance that the bill shall be so presented

Time of Presentment for Payment.

By Section 45 ·—

> **45.** 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.

The due date of a bill not payable on demand is calculated in accordance with the provisions of Section 14 (see Chapter 10). Section 45 (2) is modified as regards the position of the drawer *of a cheque* by Section 74, which has already been discussed.

Who may Present for Payment.

By Section 45 (3) —

> **45.**—(3) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place, as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found

Presentment for payment is invalid unless it is made by the *holder* or by some person authorised to receive payment on his behalf, and as the acceptor's obligation is to pay the person who can give a *valid* discharge for the payment, he may be called upon to pay again to the true owner if he pays a person who holds through a forgery But the drawee of a *cheque*, *i e* , the paying banker, is specially protected by Section 60 even in the case of a forgery, provided that he pays in good faith and in the ordinary course of his business

A holder whose title is *defective*, such as a finder or a thief who does *not* claim through a forgery, can, of course, give a valid discharge to a drawee who pays in good faith

Manner of Presenting for Payment.

Where personal presentment is being made by the holder or his authorised agent, Section 52 (4) provides that —

> **52.**—(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

The bill need not be delivered into the hands of the acceptor until payment has been made In this respect the provisions of the Act differ from those governing presentment for acceptance, for, as already stated, such presentment involves the handing over of the bill to the drawee, who is allowed a reasonable time in which to make up his mind whether he will accept or refuse acceptance

The rule that the drawee of a bill is entitled to possession of the instrument on payment operates also in the case of a cheque drawn on a bank. The paid instrument serves as a voucher and discharge between the person paying and the drawer.

Although the general rule is that presentment of a bill for payment must be made *personally* by the holder or by some

person authorised to receive payment on his behalf, Section 45 (8) thus sanctions the custom of merchants and bankers of presenting bills for payment by post

> **45.**—(8) Where authorised by agreement or usage a presentment through the post office is sufficient.

But presentment of a bill by post would not, of course, be made unless the standing of the acceptor was beyond question, otherwise some difficulty might arise in obtaining the return of the instrument if it was dishonoured Hence, the usual practice, where the place of payment or the drawee's address is distant from the residence of the holder, is to forward the instrument for presentment by an agent or correspondent in the town of payment.

The holder of a bill who presents it by post is not liable for any delay which is not imputable to his fault, misconduct or negligence. [See below, Section 46 (1)]

The Proper Place of Presentment.

The " proper place " for presentment of a bill for payment —referred to in Section 45 (3)—is thus defined in Sub-sections 45 (4) and (5) —

> **45.**—(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

The place of payment may be specified by the drawer or by the acceptor, but if neither indicates the place of payment the above rules must be strictly applied, and Sub-section 45 (4*d*) applies only when all other places as specified in the previous Sub-sections are exhausted. Suppose, for example, that the bill does not specify a place of payment or the address of the drawee, then Section 45 (4*d*) will apply only if the holder does not know the residence or place of business of the acceptor. But, if he

does know either of these, then presentment must be made accordingly, and presentment to the acceptor at any other place, as, for example, during a chance meeting in the street or elsewhere, will not constitute a valid presentment

The acceptor must be ready to pay the instrument when it is presented at the proper place Accordingly, if the holder presents the bill at the proper place and the acceptor or his duly authorised agent is not there, then Section 45 (5) excuses any further presentment

The operation of the foregoing provisions may be further illustrated A bill is accepted payable at the acceptor's bankers Presentment for payment in such circumstances is valid only at the bank named, and presentment personally to the acceptor is invalid and insufficient.

Again, a bill is addressed to " Mr Brown, 4 Marlborough Road, Bristol ", and is accepted generally by the drawee Brown The holder presents the bill at the address given and finds either (*a*) that the house is unoccupied, or (*b*) that Brown is not now living there In both cases the presentment of payment at the specified address is sufficient, and no further presentment need be made before the holder applies to the other parties for payment

A bill which is accepted payable at a bank will be duly presented for payment if presented to a clerk or official of the bank at or through the clearing house in the customary manner Moreover, if alternative places of payment are specified, as for example, the residence of the drawee and also the address of his bankers, presentment for payment at either of such places is sufficient and valid

To Whom Presentment must be Made.

By Section 45 (3), presentment for payment must be made either to the person designated as the payer or to some person authorised to pay or refuse payment on his behalf In this connection, Sub-sections 45 (6) and (7) further provide that —

> **45.**—(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 the 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

If a bill is accepted by two or more persons who are partners, it is sufficient if presentment is made to one of them, for there is a legal presumption that one partner has authority to pay or refuse payment on behalf of himself and his co-partners.

It may, however, be doubtful from the face of the instrument whether two acceptors to a bill are partners or not, and two persons separately designated are not presumed to be partners unless there is an indication to that effect on the instrument. Hence, in the absence of such an indication, presentment must be made to them both. But in any case, where there is more than one acceptor, it will suffice if payment is made, or if a refusal of payment is made, by one on behalf of the other or others, *provided he has authority so to act*

It should be observed that Section 45 (7) requires presentment to be made to the personal representatives *only if no place of payment is specified in the bill.* If such a place of payment is given, then presentment for payment must be made at that place as provided by Section 45 (4*a*)

The fact that the drawee or acceptor has become bankrupt does not excuse presentment for payment as it does presentment for acceptance

When Delay in Presentment for Payment is Excused.

It sometimes happens that the holder of a bill, without any fault or negligence on his part, is unable to present the instrument for payment on the prescribed day, and, in such circumstances, Section 46 (1) provides .—

> **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.

This Sub-section does not *entirely* excuse presentment for payment, and presentment must be made with due diligence as soon as the disability is removed Thus the fact that a town is being besieged, or that it is surrounded by floods, may excuse presentment for a time, but presentment would have to be made as soon as the siege was raised or the floods abated

A common circumstance in which delay in making presentment is excused arises where delay is caused by fault or mistake on the part of the Post Office, provided the bill is dispatched by the holder in time, under ordinary circumstances, to be presented to the drawee on the date of maturity. (See above, under " Manner of Presenting for Payment ").

When Presentment for Payment is Dispensed with.

Section 46 (2) sets forth the following rules governing the circumstances in which presentment for payment is entirely dispensed with :—

46.—(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

It should be observed that different rules are laid down in respect of the different parties concerned Thus, clause (*c*) applies as regards the *drawer* and clause (*d*) as regards any *indorser*, whereas clauses (*a*), (*b*) and (*e*) apply as regards *all* prior parties to the bill

The case of *Hardy* v. *Woodroofe*, 1818, afforded an example of circumstances in which presentment was entirely excused because it could not be made after the exercise of reasonable diligence In this case, a bill was drawn payable at Guildford where the drawee did not reside, and, after being presented without avail at two banks in the town, was thereafter treated as dishonoured It was held that the presentment was sufficient

Circumstances in which the holder has reason to believe that a bill will be dishonoured on presentment but which do not excuse such presentment arise, for example, where the acceptor has become bankrupt, or has informed the holder that he will not or cannot pay the instrument when it falls due.

Presentment for payment is excused on the grounds that the drawee is a fictitious person if the bill is drawn on some person whose name has been inserted by the drawer by way of pretence merely. In such a case the bill may be treated as a bill or promissory note at the option of the holder, and in neither case is there any need to prove presentment for payment or dishonour before application for payment is made to the drawer or a prior indorser

Section 46 (2*c*) applies to cases in which the *drawer*, and not the holder, has reason to believe that the bill will not be paid if presented Hence, if a bill is accepted to accommodate the drawer, and the drawer indorses the bill to a holder, then, unless the drawer has supplied the acceptor with funds to meet the bill, he cannot escape liability on the ground that the bill has not

been duly presented. But the holder should not refrain from presenting a bill for payment merely because he knows that it was accepted for the drawer's accommodation, and, if the bill bears more than one indorsement, presentment *must* be made by the holder if he wishes to retain his rights against any prior indorsers

By virtue of this Sub-section, presentment of a cheque for payment need not be made, *so far as the drawer is concerned*, if he has no funds at the bank to meet it

In like manner, Clause (*d*) provides for the case where an indorser has no reason to expect that a bill accepted for his accommodation will be paid if presented, and, in such circumstances, the holder has no need to prove presentment for payment or dishonour before proceeding to claim payment from the indorser

But, again, the holder would be well advised to present the bill, even if he knows that it was made to accommodate an indorser, since the latter may have provided the acceptor with funds It should be observed that the words of the clause are " accommodation of that indorser *and* he has no reason . "

In regard to Clause (*e*), *implied* waiver will arise if the acceptor or indorser, with notice that the holder has omitted to present the bill for payment on the due date, nevertheless promises to pay the instrument, or, if after presentment has not been properly made, the acceptor hands the holder a sum of money in part payment of the bill

Express waiver will arise, for instance, where an indorser, in accordance with Section 16 (2), adds after his signature " Presentment for payment waived " But this waiver would be effective only as against the indorser who adds the words and subsequent parties to the bill

Loss of Bill does not Excuse Presentment for Payment.

The fact that a bill has been lost does not excuse presentment for payment. In such circumstances, the holder should present a copy of the instrument and tender the acceptor an indemnity against the claims of any persons who may come into possession of the lost instrument

CHAPTER 19

DISHONOUR OF A BILL AND ITS CONSEQUENCES

If the holder of a bill correctly carries out his duties in presenting a bill for acceptance or payment as required by the Act, and acceptance or payment is refused, the bill is said to be *dishonoured*, either by non-acceptance or by non-payment, as the case may be

Dishonour by Non-Acceptance.

It is usual, for reasons already discussed, for the holder to present a bill for acceptance as soon as possible, so as to ensure the liability of the drawee on the instrument, and if the drawee does not accept the bill on due presentation by the holder, it must be treated as dishonoured, in accordance with Section 42 —

> **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.

" Customary time " implies that if a bill left for acceptance during business hours on one day is not accepted before the close of business on the next day, it is to be treated as dishonoured by non-acceptance, *i e.*, the drawee is given about twenty-four hours during which to make up his mind whether to accept the bill or not In reckoning the twenty-four hours, " non-business " days must be excluded.

It is not the duty of the acceptor to return the bill to the holder after acceptance or refusal to accept , the holder must call for the instrument and inquire whether it has been accepted or not

By Section 43 of the Act :—

> **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.

Moreover, although " such an acceptance as is prescribed by the Act " [Section 43 (1*a*)] may be either general or qualified, by virtue of Section 44 (1) :—

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

Dishonour by non-acceptance may thus arise in *four* cases : (*a*) refusal of the drawee to accept , (*b*) omission of the drawee to accept within the customary time after presentment , (*c*) the giving of an acceptance which is not in accordance with the Act ; or (*d*) non-acceptance when presentment to the drawee is excused [Section 41 (2)] It follows from (*d*) that the holder's immediate right of recourse against prior parties [Section 43 (2)] may arise whether the bill has actually been presented or not

The holder's right of recourse is not the same as an immediate *right of action*. The right of recourse becomes a right of action only when any conditions precedent to the right of action as laid down in the Act have been complied with, *e g* , the giving of notice of dishonour, or protesting when necessary When, however, the holder has complied with these conditions, he has an immediate right of action against the drawer and indorsers, and there is no need for him to present the bill for payment at the due date before commencing such an action

By Sub-sections 18 (2) and (3) a bill may be accepted after it has been previously dishonoured, but it is within the holder's option to permit the drawee to accept or not in such circumstances

Dishonour by Non-Payment.

Section 47 thus defines the circumstances in which a bill may be treated as dishonoured by non-payment :—

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

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

The " provisions of this Act " here referred to are those relative to payment for honour contained in Section 68 and discussed hereafter.

Sub-section 47 (2) makes the consequences of dishonour by non-payment almost the same as in the case of dishonour by non-acceptance. The holder has an immediate right of action against the drawer and indorsers, subject to his complying with any conditions precedent, such as giving notice of dishonour and protesting where necessary

There is, however, one point of difference Whereas on dishonour by non-acceptance there is no right of *recourse* against the *drawee*, since he is not a party on the bill, in the case of dishonour by non-payment there is an immediate right of *action* against the *acceptor*, *i e* , the drawee who has given his acceptance And this right to proceed against the acceptor is not subject to any conditions precedent, as in the case of a right of action against the drawer or indorsers, for by Section 52 (3) —

> **52.**—(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him

When a bill is dishonoured by non-payment, action thereon cannot be taken until after the expiration of the last day of grace, and the right of action is limited, as in the case of any other simple contract, to six years from the time when the right of action first arises, *i.e* , six years from the date of dishonour Moreover, right of action against the drawer or indorsers does not arise until notice of dishonour has been or ought to have been *received by them*

Notice of Dishonour.

One of the conditions precedent to the conversion of the holder's right of recourse against prior parties to a bill into a right of action is the giving of due notice of dishonour to such parties In this connection, Section 48 provides that —

> **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

Sections 39 and 46 (2) provide for certain circumstances in which presentment for acceptance or payment is unnecessary in order to charge the drawer and indorsers, but if in such cases the holder chooses to make presentment and the bill is dishonoured, he must give the requisite notice of dishonour, unless such notice is dispensed with in accordance with the provisions dealt with below.

Where a bill has been dishonoured by non-acceptance and is subsequently negotiated, the transferee may or may not have notice of the dishonour. But unless such a transferee is a holder in due course and, therefore, protected by Section 48 (1) above, he will be prejudiced by the omission to give due notice of dishonour and unable to sue any parties who have been discharged by the omission to give such notice

By virtue of Section 48 (2) —

> **48.**—(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.

The effect of this Sub-section is illustrated in the case where a three months' bill in the hands of a holder X is dishonoured by non-acceptance, and X, instead of immediately exercising his rights of recourse against the drawer and prior indorsers, gives them notice of dishonour and retains the bill until maturity, when he presents it to the drawee for payment If the bill is again dishonoured, X need not give the drawer and indorsers notice of the dishonour by non-payment, for his previous right of recourse holds good in accordance with the sub-section But if the bill has in the meantime been accepted by the drawee, it will be necessary for X to give the drawer and indorsers notice of the subsequent dishonour by non-payment, if he is to retain his rights against them

Rules as to the Giving of Notice of Dishonour.

The provisions concerning a valid and effective notice of dishonour are contained in Section 49, and may be considered under five headings · (*a*) Who may give notice of dishonour , (*b*) Who benefits by the notice ; (*c*) The form of notice , (*d*) To whom notice must be given , (*e*) When notice must be given

Who May Give Notice of Dishonour.

Section 49 of the Act provides —

> **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.

Since notice must be given by or on behalf of the holder or an indorser, notice by a stranger to the bill, unless he purports to act as agent for the holder or an indorser, does not constitute

effective notice to the person sought to be charged. But if notice is given by a person who *purports to act* as agent, the giving of notice may be ratified by the principal and so made effective

Even when notice is given by or on behalf of an indorser, the indorser must be one who is liable on the bill at the time of the giving of notice, so that an indorser *sans recours*, or an indorser who has himself been freed from liability by delay in giving notice by the holder, cannot himself give effective notice Suppose A, B and C are successive indorsers of a dishonoured bill, and C gives notice too late to B only. B cannot make up for the delay by at once giving notice to A, for B, having been discharged by C's delay in giving him notice, is in the position of a mere stranger and cannot give an effectual notice to A.

In regard to Section 49 (2), if A, B and C are successive indorsers of a dishonoured bill, and C's agent gives notice to A, either in his own name or in the name of C or of B, the notice will be valid and effectual.

Who Benefits by Notice of Dishonour.

By Sub-sections 49 (3) and (4) :—

> **49.**—(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 hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

Suppose A, B, C and D are successive indorsers of a bill, and that, on dishonour, D gives notice to A, and then indorses the bill to E B, C and E each receive the benefit of the notice, for E is a " subsequent holder ", while B and C are prior indorsers with a right of recourse against A

Form of Notice of Dishonour.

Section 49 prescribes the manner in which notice of dishonour must be given in the following terms .—

> **49.**—(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.

Notices of dishonour are construed very liberally, and scarcely any written notice of dishonour would now be held to be bad on the ground of insufficiency in form Notice is adequate whether it is given orally or in writing, or partly orally and partly in writing, provided that the bill is sufficiently identified for the party receiving the notice to have no difficulty in understanding its purport.

The following is a common form of notice .—

FORM OF NOTICE OF DISHONOUR

I hereby give you notice that a bill for *£170 10s*, dated the *1st June, 19* , drawn by *James Brown* upon *Andrew Sims*, payable *three months after date* and indorsed by you has this day been dishonoured by *non-acceptance* I request immediate payment of the said bill of *£170 10s 0d*, plus expenses, *3s 6d.*

Thomas Robinson,

4th September, 19

Section 49 (5) sanctions the common practice, particularly on the part of collecting bankers, of returning a dishonoured bill or cheque instead of sending formal notice of dishonour

To Whom Notice must be Given.

By Sub-sections 49 (8), (9), (10) and (11) —

49.—(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

Although the Act does not specify *the place* at which notice must be given, it would appear that, where the party to be notified is a trader, notice is effectual if left at or forwarded to his place of business, while if such party is not a trader, notice should be sent to or left at his private residence

When Notice is to be Given.

By Section 49 (12) :—

49.—(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.

If, for example, a bill is dishonoured on Monday and the holder, A, desires to give notice of dishonour to a previous indorser, B, who resides in the same town, A must deliver or post the notice so that it reaches B not later than Tuesday If, however, A and B do not live in the same town, then A must post the letter of notice not later than Tuesday, unless there is no post on that day, when he must send off the letter by the first post thereafter In this connection Section 92 provides that no account need be taken of "non-business days" in estimating the correct time for giving notice of dishonour, so that if, in the former example, the bill had been dishonoured on the Saturday, A need only send off or give his notice so that it reaches B not later than the following Monday.

The provisions of Section 49 (12) apply only *in the absence of special circumstances*, and evidence is admissible to show that notice was in fact delayed by mistake or for other adequate reasons.

Notice Given by a Party.

Section 49 (14) applies a similar rule in the case of each party to the bill .—

> **49.**—(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.

In other words, each party who receives due notice is, for the purpose of giving notice to prior parties, placed in a position similar to that of the holder Suppose A, B and C are successive indorsers of a bill, and C, the holder in whose hands it is dishonoured, gives due notice to B B has thereafter the same time within which to give notice to A as if he (B) were the holder of the bill. But if B does not give due notice to A, A will be discharged, so that if the holder wishes to be absolutely sure of his rights against A as well as against B, he should give notice to both.

This provision illustrates the important principle that, if a holder wishes to secure his rights against *all* prior parties to a

bill, he should give notice to remote parties as well as to the party immediately preceding him in order of liability.

But if a holder decides to give notice to all prior parties, he must give such notice *to all* within precisely the same time as he is allowed to give notice to his immediate party. Similarly, an intermediate party can safeguard his rights against all prior parties only by himself giving notice to them all, unless, of course, he knows that due notice has been given to all such parties by the holder, or unless he is satisfied that notice will be duly passed on by the parties who precede him in order of liability.

Bill in the Hands of an Agent.

By Section 49 (13) —

> **49.**—(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

These provisions are of special importance to bankers, who so frequently have to make use of the services of agents in presenting bills for collection and payment One effect is that the Head Office of a bank and each branch have the same time within which to give notice of dishonour as any party liable on the instrument

Suppose a bill payable in London is sent by a country branch to its London office for presentment for payment, and is dishonoured, notice of dishonour being sent off on the same day by the London Office to the country branch. The latter can send off notice to the holder within the time allowed by Section 49 (12), *i e* , if the branch receives the notice on Tuesday, and the customer resides in the same place, the customer must receive notice not later than Wednesday , but if the customer resides in a different place, the notice must be sent off on Wednesday if there is a convenient post on that day, but if not, by the first convenient post thereafter.

Delay in Giving Notice.

It is essential that notice of dishonour be given within a reasonable time as defined in Section 49 (12), since delay may have the effect of discharging prior parties to the bill

It sometimes happens, however, that the holder is unable, through no fault of his own, to give notice within a reasonable time, and in such cases the delay in giving notice is excused by Section 50 (1) .—

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.

If, for example, the holder does not know the address of the party to whom notice is to be given, he must exercise reasonable diligence to determine the address, but any delay caused by making the necessary enquiries will be excused. Delay will also be excused in any case where the drawer or an indorser has given a wrong address.

Where the delay in giving notice of dishonour is caused by the negligence of the party *to whom notice is sent*, then, although the delay will operate in favour of the sender and consequently make the recipient liable, the recipient will be unable to give an effectual notice to prior parties, *i e*, he must suffer any loss which may arise by reason of his own negligence.

The loss or delay of notice of dishonour sent by post will not prejudice the sender, for by Section 49 (15) .—

49.—(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.

When Notice is Dispensed with.

Although the giving of due notice of dishonour is usually essential, notice is excused in certain circumstances detailed by Section 50 (2) —

50.—(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.

The mere fact that a party entitled to notice has reason to expect that when presented the bill will be dishonoured, does not release the holder from the duty of giving him notice Hence, even if the party entitled to notice knows that the acceptor is dead or bankrupt, the holder must still give that party due notice

The giving of notice of dishonour would be excused under Clause (*a*) if the holder had gone to a party's place of business in order to give the requisite notice, but had found the place shut up or no one there to answer enquiries On the other hand, the absence of an indorser's address does not relieve the holder of the duty of communicating with him, if it is possible So that if the holder makes some enquiry, but does not take such steps as he reasonably might have done, the indorser concerned will be discharged Moreover, circumstances which would excuse delay in giving notice of dishonour will not entirely dispense with notice

Waiver by an indorser of notice of dishonour, *e g* , by writing after his signature " Notice of dishonour waived ", will operate in favour of all holders *subsequent* to that indorser

Whether there is an *implied* waiver must be determined from the circumstances, but it must, in any case, have been made by the person sought to be charged Thus, if the drawer of a bill informs the holder that it will not be paid on presentment, this would operate as waiver of notice as far as concerns the drawer, but would not be effective against indorsers who had no notice of the waiver Waiver of notice will also be implied if a party who has not received due notice makes a promise to pay if the holder will give him time But there will be no waiver if such a promise is made, or if part payment of the bill is made, *under a mistake of fact* Thus, in *MacTavish* v *Michaels*, 1912, an indorser was not given notice of dishonour, but in the mistaken belief that she was a joint acceptor of the bill, the indorser made a part payment It was held that there was no waiver of notice, so that the indorser was discharged and the money paid had to be refunded

In regard to Clause (*c*), it may be noted that, although in the case of the dishonour of a cheque by reason of insufficient funds notice to the drawer is excused by virtue of Clause (*c*4), this clause does not excuse notice of dishonour to any indorsers of the cheque

Clause (*d*) applies only to the indorser The effect of (2) was illustrated in *Caunt* v *Thompson*, 1849, where the indorser of a bill became the executor of the acceptor The bill was presented at maturity to the indorser for payment in his capacity

of executor and was dishonoured by him It was held that the indorser was not entitled to notice of dishonour by the holder.

Notice to Acceptor, Maker, Guarantor or Transferor by Delivery.

Section 52 (3) (see below) provides that notice of dishonour need not be given either to the acceptor of a bill or to the maker of a promissory note. Nor need notice be given to a person who is not a party but who has given a separate undertaking to secure due payment of the instrument by the party primarily liable thereon, although it is, of course, very desirable that notice should be given in such cases. Moreover, it is generally necessary to give notice of dishonour to any person, who, although not a party to the bill, is nevertheless liable on the consideration in respect of which the bill was given, *e g* , a transferor by delivery.

NOTING AND PROTEST

When a bill has been dishonoured by non-acceptance or non-payment, it is sometimes necessary to obtain authentic proof that it has been properly presented and dishonoured This proof provides the holder with incontestable evidence of the dishonour and will be accepted as such evidence by the Courts of most foreign countries

The Meaning of "Noting."

The first step in securing this official proof is obtained by "*noting*" the bill, a process whereby a notary public (generally a solicitor), attests to the dishonour of the bill by the drawee or acceptor, as the case may be After the bill has been dishonoured, the holder obtains the services of a notary, whose clerk again presents the bill to the drawee or acceptor, and, if it is again dishonoured, makes a note or "minute" of the following items · (*a*) the initials of the notary ; (*b*) the date ; (*c*) the charges for noting , and (*d*) a reference or mark to the register of the notary, where a copy of the bill and the particulars of the noting are kept The notary also attaches to the bill a slip on which is written the answer, if any, given by the drawee or acceptor.

Protest of a Bill.

Noting is usually, though not necessarily, merely a preliminary step to the "*protest*" of a bill, which is a written declaration under seal made by a notary public that the bill has been refused acceptance or payment, and that the holder intends to recover all the expenses incurred by him in consequence thereof. Noting is, in fact, unknown in law apart from the protest , the notary, having noted the bill at the time of dishonour, draws up his protest (if it is required) at his leisure.

The requisites as to form of a protest are thus set forth in Section 51 (7).—

> **51.**—(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

The following is a form of protest, which may be in duplicate or triplicate, and bears a copy of the bill on the back —

PROTEST OF A BILL FOR NON-ACCEPTANCE

On this the *7th* day of *September*, One thousand nine hundred and ... , at the request of *James Brown*, of the City of *Birmingham*, *Grocer*, and holder of the original bill of exchange, a true copy of which is on the other side written, I, *Thomas Robinson*, of the said City, Notary Public, by lawful authority duly admitted and sworn, did produce and exhibit the said original bill of exchange to *Henry Abbott*, on whom it was drawn, at *17 East Street*, *Northtown*, for his acceptance, and demanded acceptance thereof, to which he replied that "*Reference should be made to the Drawer, William Burns*".

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 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 *Birmingham*,

in the presence of—

STAMP

Andrew Bennett,
21 Park Drive,
Birmingham,
Clerk.
Fred Barnes,
11 The Causeway,
Birmingham,
Clerk.
} Witnesses

Dated this *7th* Day of *September*, One thousand nine hundred and .

Which I attest,

Thomas Robinson,
Notary Public,
L. 179.

SEAL

The protest of a bill for non-payment is almost identical in form, with the necessary modifications to cover non-payment instead of non-acceptance.

The protest, which must bear a stamp (see Chapter 23), is accepted as evidence of dishonour in any country, and it is clearly highly desirable that a bill which bears foreign indorsements should be protested in order that any foreign parties thereon (and any foreign Courts in which action is to be taken) may have reliable evidence of dishonour. It is for this reason that, although

not usually necessary in the case of inland bills, protest is made *compulsory* in the case of foreign bills

When Inland Bills are Noted and Protested.

Although dishonoured inland bills are frequently noted, it is not necessary for the holder to do so in order to complete his right of action on the bill, for Section 51 (1) provides that —

> **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.

A holder who chooses to *note* an inland bill on dishonour may recover any expenses so incurred from any parties liable on the bill (Section 57, page 287) But, although there is nothing to prevent the holder of *any* bill from protesting it on dishonour if he so desires, the expenses of protest can be recovered only where protest is *compulsory* under the Act

Protest of an *inland* bill is necessary only in four cases. (*a*) as a preliminary to acceptance of the bill for honour, (*b*) as a preliminary to payment of the bill for honour; (*c*) for purposes of summary diligence in Scotland, (*d*) after dishonour by non-payment by an acceptor for honour These matters are dealt with hereafter.

Noting and Protest of Foreign Bills.

Any *foreign* bill which has been dishonoured must be protested before any action can be taken against any of the parties liable thereon, for by Section 51 (2).—

> **51.**—(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.

A foreign bill which has been partially accepted must be protested in respect of the unaccepted balance [Section 44 (2)].

Section 51 (2) makes it [illegible] to protest a foreign bill *once* only, either on dishonour by non-acceptance or on dishonour by non-payment, but, by Section 51 (3), the holder has the option of obtaining a second protest on the dishonour of a bill by non-payment:—

> **51.**—(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

A protest such as is provided for by this Sub-section may be necessary in order to charge a foreign drawer or indorser in his own country, for the law in most foreign countries does not regard protest for non-acceptance as excusing protest on subsequent non-payment.

Although the drawer and indorsers will be discharged by failure to protest a foreign bill, the liability of the acceptor is unaffected, for by Section 52 (3) —

> **52.**—(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him

Time Allowed for a Protest.

Section 51 (4) of the Act of 1882, as amended by Section 1 of the Bills of Exchange (Time of Noting) Act, 1917, provides that —

> **51.**—(4) Subject to the provisions of this Act, 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 business day* When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Although noting must be effected not later than the business day following the day of dishonour, Section 93 permits the formal protest (where it is required) to be extended at any subsequent time and antedated to the date of noting —

> **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
> (*Refer to sections* 65 *to* 68)

Where Protest must be Made.

The general rule is that a bill must be protested at the place where it is dishonoured, but Section 51 (6) specifies two exceptions —

> **51.**—(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.

In regard to Clause (*a*), suppose the holder of a bill who resides in Liverpool posts the instrument to the drawee in Burnley for acceptance, and that, acceptance having been refused, the bill reaches the holder by post on the day following dishonour. The bill may be protested in Liverpool on that day, although it was actually dishonoured in Burnley on the previous day And if the bill is not received back in Liverpool during business hours on a business day, the protest may be made not later than the succeeding business day.

In regard to Clause (*b*), suppose a bill drawn on X in Burnley, but payable in Liverpool, is dishonoured on due presentment for acceptance at Burnley. On the day of maturity it must be protested for non-payment in Liverpool without any further presentment to, or demand upon, the drawee X

Householder's Protest.

To cover circumstances where the services of a notary cannot be obtained, Section 94 provides that —

> **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

A householder's protest as required by this Section is in form somewhat as follows :—

SPECIMEN HOUSEHOLDER'S PROTEST.

Know all men that I, *James Brown* (householder), of *17 East Street, Northtown*, in the county of *Northshire*, in the United Kingdom, at the request of *Thomas Robinson*, there being no notary public available, did on the *17th* day of *June*, 19. , at *11 The Close, Northtown*, demand payment (or acceptance) of the bill of exchange hereunder written, from *Henry Arnold*, to which demand he made answer "*Refer to the Drawer*," wherefore I now, in the presence of *Andrew Burns* and *Fred Jones*, do protest the said bill of exchange.

(Signed) *James Brown.*

WITNESSES :

Andrew Burns,
11 East Street, Northtown,
Grocer.

Fred Jones,
143 North Road, Northtown,
Clerk.

STAMP

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

When Protest is Excused : Delay in Protesting.

Section 51 (9) provides that :—

> **51.**—(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

There is thus no need to protest a bill in those circumstances, prescribed by Section 50 (3), where notice of dishonour is dispensed with But the mere fact that delay in protesting a bill is excused does not altogether dispense with protest, and this must be made as soon as the cause of delay ceases to operate

Protest of a Lost Bill.

The loss or destruction of a bill does not excuse the holder from his duty to protest, for by Section 51 (8) —

> **51.**—(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

Protest for Better Security.

A holder of a bill which has *not* been dishonoured may, if certain events occur which are likely to prejudice his position, protest the bill for better security In this connection Section 51 (5) provides —

> **51.**—(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

As a rule, a holder whose position is likely to suffer will arrange for a notary to present the bill to the acceptor and to demand better security for the due payment of the bill in view of his insolvency, etc , and, if such security is refused, the bill may be protested and notice of the protest sent to any antecedent party.

A protest of this kind does not give the holder any right to sue the drawer or indorsers until the bill falls due and is dishonoured Its only effect is that it provides the necessary preliminary to the acceptance of the bill for honour. (See below)

How Damages on Dishonour are Assessed.

Section 57 defines in the following terms the damages which may be recovered by a holder from any party to a 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 requires 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

[*Interest proper is defined in Section* 9 (3)]

The measure of damages is the same against any party Interest, usually in the United Kingdom at 5 per cent , unless the bill provides for a specified rate, can be claimed only from the *date of maturity* and not from the date of dishonour, and this is so even in the case of dishonour by non-acceptance The expenses of *protest* are recoverable only where protest is compulsory and where the expenses have actually been incurred, but any expenses of *noting* that have been incurred can always be claimed even if noting was unnecessary

Section 57 (2) applies only to bills which are dishonoured abroad. "Re-exchange" is the loss resulting from the dishonour of a bill in a country different from that in which it was drawn or indorsed. It is made up of the sum for which a sight bill (drawn at the time and place of dishonour, at the *then rate of exchange*, on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realise at the place of dishonour (*a*) the amount of the dishonoured bill *plus* (*b*) the expenses consequent on its dishonour. The latter include the expenses of protest, postage, customary commission and brokerage, and when a re-draft is drawn, the price of the stamp

A bill drawn for the re-exchange is called a "re-draft" and any

indorser who pays a re-draft may in like manner draw upon an antecedent party

Suppose that Brown of New York sends a bill for £1000 payable in London to his creditor, Robinson of Liverpool On presentment for payment, the bill is dishonoured, and the expenses of noting, together with interest, amount to £4 Robinson can claim from Brown £1004, and may obtain payment thereof by drawing a sight bill (*i e* , a " re-draft ") on Brown for that amount in dollars which will yield £1004 at the rate of exchange ruling on the date of dishonour Thus, if the rate of exchange at which Robinson's banker would buy sight bills on New York, on the date of dishonour was $4 86 per £1, the re-draft will be drawn for

$$\$1004 \times 4\ 86 = \$4880 \text{ (approx)}$$

ACCEPTANCE AND PAYMENT FOR HONOUR

Referee in Case of Need.

Section 15 provides that —

> **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

The referee, sometimes described as a " drawee in case of need " or simply as a " case of need ", is not a party to the bill, although he may become a party thereto by accepting for honour in the manner prescribed in Section 65, and it should be observed that presentment of a bill to a referee in case of need after dishonour by non-acceptance or non-payment is *optional* and not compulsory

Acceptance for Honour.

By Section 65 —

> **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

An acceptance of this kind is known as an acceptance for honour *supra protest*, since it can be admitted only after the bill has been protested, either for non-acceptance or, *where acceptance has been obtained*, for better security.

Such an " intervention for honour ", as it is called, has the effect of staying the holder's action against the other parties to the bill, and may be made, *with the holder's consent*, by *any* person who is *not already liable on the instrument*. This implies that the drawee can accept for honour although he has previously refused to accept the bill in his capacity as a drawee, as long as the consent of *the holder* is obtained But unless his consent is obtained, the holder may exercise his usual remedies against any party to the bill.

The Act does not provide for the consent of the party *whose credit is protected*, in spite of the fact that such person and all parties prior to that person become liable to the acceptor for honour if the latter pays the bill

A bill which is to be accepted for honour must not be overdue, and protest is first necessary whether the bill is an inland or a foreign instrument

Although no special form is required for an acceptance for honour, it is usual for the acceptor to state for whose honour he accepts. If this is not done, the acceptance will be deemed to be given for the honour of the drawer

The person for whose account the bill is drawn, referred to in Section 65 (1), is sometimes described as the " third account "

Although it is not legally necessary, an acceptance for honour is *usually* attested by a notarial act of honour recording the transaction, and this is *always* done where it may be necessary to charge a foreign drawer or indorser in his own country

Section 65 (5) operates in favour of the holder, for by making the sighting date of a bill payable after sight the date of noting for non-acceptance, and not the date of acceptance for honour, it ensures that the holder does not suffer any delay in obtaining payment of the bill by reason of its dishonour.

Liability of the Acceptor for Honour.

Section 66 of the Act thus defines the liability and warranties of the 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.

The bill must, first of all, be presented to the drawee for payment before it is presented to the acceptor for honour because, although, at the time of dishonour by non-acceptance, the drawee may not have had sufficient funds in his hands to pay the bill, he may have received such funds by the time the bill is due for payment.

The liability of an acceptor for honour may be illustrated in the case where a bill, negotiated by indorsement to A, B, C and D respectively, is accepted by X for the honour of B X is liable to C and D, but not to B or A or to any party prior to A If an acceptor for honour pays, his rights are the same as those of an ordinary payer for honour, explained below.

Protest for Non-Payment is First Necessary.

Section 67 reads as follows .—

67.—(1) Where a dishonoured bill has been accepted for honour supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2) 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 circumstances which would excuse delay in presentment for payment or non-presentment for payment (*See Section* 46)

Although, by this Section and by Section 66, a bill must be *protested* for non-payment before it is presented to the acceptor for honour, it is sufficient, by Section 93, if it is merely noted, provided the protest is subsequently extended as of the date of noting.

Since Section 15 (*ante*, page 289) provides that presentment to a referee in case of need is *optional*, the holder may, if he so desires, demand payment from the other parties without first applying to the case of need.

The effect of Sections 66 and 67 together is that the right to sue the acceptor for honour is complete only if the following con-

ditions have been fulfilled : (*a*) There has been due presentment of the bill to the drawee for payment, unless such presentment is unnecessary, because the bill, being payable elsewhere than at the residence or place of business of the drawee, has already been dishonoured by non-acceptance, in which case it can be protested for non-payment at the place where it is expressed to be payable without further demand on the drawee [Section 51 (6*b*] , (*b*) the bill has been protested (or noted as a preliminary to protest) for non-payment , (*c*) the acceptor for honour has received notice of these facts , (*d*) the bill has been presented to the acceptor for honour for payment, and payment has been refused

The position of an acceptor for honour thus differs from that of an ordinary acceptor Presentment for payment is *not* necessary to make the latter liable unless his acceptance expresssly provides that such presentment shall be made, nor is notice of dishonour or protest of a bill necessary as a condition precedent to the right to sue an ordinary acceptor

Dishonour by Acceptor for Honour.

Section 67 (4) provides —

> **67.**—(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him

This is one of the four circumstances where protest of an inland bill (as well as of a foreign bill) is *compulsory* In the event of dishonour by an ordinary acceptor, protest is *optional* in the case of an inland bill, and is necessary only in the case of a *foreign* bill before action can be taken against the other parties liable

Payment for Honour.

The second form of intervention for honour is known as " payment for honour *supra* protest ", thus provided for in Section 68 —

> **68.**—(1) Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn
>
> (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 supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it
>
> (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

Unlike acceptance for honour, payment for honour may be made by *any person*, i e , including a party already liable on the bill, and, whereas acceptance for honour must take place before the bill is overdue, payment for honour necessarily takes place at or after the maturity of the instrument, *after* the bill has been dishonoured by non-payment by an ordinary acceptor or by an acceptor for honour Moreover, while a notarial act of honour, though usual in practice, is not legally *essential* in the case of acceptance for honour, such an act is *compulsory* in the case of payment for honour, the object in the latter case being to distinguish clearly the action of the payer for honour from a mere voluntary payment, and effectively to preserve his rights against the party for whose honour he pays

Finally, the consent of the holder to payment for honour is *not* necessary, whereas he has the *option* of refusing an acceptance for honour And the holder cannot refuse payment for honour without prejudicing his rights on the instrument, for by Section 68 (7) —

> **68.**—(7) Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment

Suppose A draws a bill on B payable to C, which is successively indorsed by C, D, and E to F, the holder X offers to pay F for the honour of C If F refuses to accept this payment, he loses his rights against C, D and E, but he will still retain his right of recourse against A and B, for they would not have been discharged by the payment of the bill by or on behalf of C

Discharge of Parties by Payment supra Protest.

By Sub-sections 68 (5) and (6) —

> **68.**—(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

Although neither acceptance nor payment for honour need be made with the consent of the person *for whose honour intervention is made*, the acceptor or payer for honour nevertheless has a right of action against the person whose honour is protected as well as against any parties who are liable to that person

In illustration of this, suppose a bill drawn by A on B payable to C, is successively indorsed by C, D, and E, to F the holder, and that, on dishonour, X pays *supra protest* for the honour of C This payment discharges D and E, while the payer for honour, X, stands in the same position as C, the person for whose honour he paid, *i e.*, he has a right of recourse against A and B, but he must assume any duties of C in order to complete his right of action against A and B. In addition X has a right of recovery against C

If a person intervenes and pays a bill for honour of the acceptor, he has no rights against any parties except the acceptor. But if a bill is accepted for the honour of the drawer and the acceptor for honour refuses to pay, a payer for honour of the drawer can recover from the drawer, but he has no right of action against the acceptor for honour, for the latter is not a party who is liable to the drawer.

When the acceptor for honour pays a bill, his payment discharges all parties subsequent to the party for whose honour he *accepts*.

CHAPTER 20

DISCHARGE OF A BILL: CONFLICT OF LAWS

A bill is said to be discharged when the rights and liabilities of all the parties thereto come to an end, but there is an important difference between the discharge of a bill and the discharge of any of the parties thereto. It will be remembered that a party or parties to a bill may be discharged from liability on various grounds, but the fact that one or more parties to a bill have been discharged does not necessarily involve the discharge of all the parties to the instrument The drawer or an indorser may be discharged by the omission to give him due notice of dishonour, but any other indorser to whom such notice is properly given will not be freed from liability. The acceptor of a bill is discharged on obtaining his discharge in bankruptcy, but the drawer and indorsers are discharged, so far as the holder is concerned, only to the extent of any dividends which that holder may have received from the estate of the bankrupt acceptor

The Bills of Exchange Act enumerates and explains five ways in which a bill may be discharged (1) By payment in due course, (2) When the acceptor becomes the holder in his own right, (3) By renunciation by the holder, (4) By cancellation by the holder or his agent, (5) By material alteration

Discharge by Payment in Due Course.

By Section 59 of the Act.—

> **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 hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but
>
> (*a*) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill
>
> (*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

Unless the holder is willing to receive payment in any other form offered by the acceptor, as, for example, an agreement to set-off a debt, payment must be made in legal tender in accordance with the terms and amount specified in the bill

Since "Payment in due course" means payment made *at or after maturity*, payment by the acceptor *before* that date will not discharge the instrument, though it may operate to discharge the rights of parties thereto as between themselves Hence, if a bill so paid is subsequently reissued by the acceptor in pursuance of his rights under Section 37 of the Act, any person who takes the bill will have a right of action against any parties whose names appear on the instrument

Payment of a bill is not made "in due course" unless it is made to the *holder* of the bill or to a person duly authorised to receive payment on his behalf Hence, payment of a bill (other than a cheque) made in good faith to a thief who claims under a forged indorsement will not discharge the acceptor from liability to the true owner for a person who holds a bill under a forged indorsement is not a holder , he is merely a wrongful possessor But if the bill when stolen was payable to bearer, the thief would be a holder and payment to him would be a valid discharge Moreover, a person whose title is merely defective can give the payer a valid discharge by virtue of Section 38 (3*b*)—page 157

This general rule that payment in due course cannot be made to a person who holds under a forged indorsement does not apply to the payment of cheques by a banker, a matter which is treated in Chapter 15

Payment in due course must be made by or on behalf of the drawee or acceptor, and payment by another party does not discharge the bill If a bill payable to a third party is paid by the drawer, he can still proceed against the acceptor, but he cannot reissue the bill unless it is payable to his own order On the other hand, an indorser who pays can still claim against any prior indorsers, the drawer, and the acceptor, and he may reissue the instrument if he thinks fit.

Suppose a bill drawn by A and accepted by B is negotiated from the payee C to D, E, and F, who successively indorse. When the bill is presented by F to B for payment, it is dishonoured, and F applies to the drawer, A, by whom the bill is paid. A can claim against B, but he cannot reissue the bill.

But if the bill is paid by indorser D, he may, if he thinks fit, strike out his own indorsement and the indorsements of E and F, and again negotiate the instrument Moreover, if the bill was originally payable to the order of the drawer A, and was paid by him, A would stand in the same position as any other indorser who paid the instrument, *i e* , he could strike out his own indorsement and any subsequent indorsements and again negotiate the bill. Of course, if in any such cases the bill is overdue when it is reissued, no person taking it can become a holder in due course

The general principle that a bill to be discharged by payment in due course must be paid by the drawee or acceptor, is subject to the exception that an accommodation bill, by virtue of Section 59 (3), may be discharged by payment *by the party accommodated* Suppose a bill drawn by A and accepted by B for the accommodation of a payee C is indorsed to D. Payment by C, the party accommodated, to D, or to any other holder, will discharge the bill, and C will have no right of recourse against either A or B.

There *can* be part payment of a bill by the acceptor, and if such part payment is made it operates as a discharge *pro tanto*

Acceptor a Holder in his Own Right.

Section 61 provides that —

> **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

When a bill is negotiated and comes into the hands of the acceptor at or after maturity, as holder in his own right, he is in the position of being both the party primarily liable and the party having the rights in the instrument Hence, the rights and liabilities on the bill, being vested in the same person, cancel each other, and the bill is discharged. Suppose A draws a bill on B, who accepts The payee, C, negotiates the bill to D, by whom it is negotiated back to B, who holds it in his own right until maturity. Since B is then both holder and acceptor in the same right, the bill is automatically discharged. But if B, the acceptor, holds the bill at maturity merely as executor, trustee or agent of another person (*i.e* , not in *his own* right), the bill is not discharged Moreover, the acceptor in such a case would have every right to reissue the bill if it came into his hands (as executor, etc.) *before* its maturity. (See page 154)

Renunciation of Rights by the Holder.

By Section 62 of the Act —

> **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.

Following these provisions, a bill is discharged if the holder at maturity tells the acceptor that he renounces all claims against him, *and* gives up the bill to him, or if the holder *in writing* absolutely renounces his rights *against the acceptor*. But renunciation by the holder of his rights against *any other party* will not discharge the bill. Suppose that A is the payee and first indorser of a bill, and that B, C, and D are subsequent indorsers. If D renounces his rights against A, the renunciation will operate to discharge A and any indorsers subsequent to A, *i e*, B and C, but it will not discharge the drawer and acceptor, who will still remain liable to D and to any subsequent holder

Since the section requires a renunciation to be *absolute* and *unconditional*, a renunciation which is conditional on the happening of an event, *e g*, a person's death, does not become effective merely by the happening of that event

Effect of the Cancellation of a Bill.

Section 63 (1) provides that —

63. (1) Where a bill is intentionally cancelled by the holder or his agent and the cancellation is apparent thereon, the bill is discharged

The term " Cancellation " is not defined in the Act, but presumably it covers any method which indicates an unmistakable intention to discharge the bill. If the bill is not actually destroyed, cancellation should be made effective by deleting with a pen the signature of the drawer, and of the acceptor (if any) As an additional safeguard, the word " Cancelled " is usually written or stamped across the face of the bill.

To be effective, cancellation of a bill must be apparent on the face thereof, and, if it is not so apparent, the bill will be valid in the hands of a holder in due course.

This sub-section provides for the discharge of *the whole bill* by cancellation, but Section 63 (2) provides in addition for the discharge of *any party* to a bill by the intentional cancellation of his signature by the holder or his agent —

63.—(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.

Cancellation of the signature of a party will not operate as a discharge of the whole instrument. So, if A, B, C, and D are successive indorsers of a bill, and the holder E cancels B's indorsement, B, C, and D are discharged, but A and all prior parties remain liable.

To be operative, any such cancellation must be *intentional*, for by Section 63 (3).—

> **63.**—(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

This means that, although the apparent cancellation of a signature to a bill is *prima facie* deemed to be intentional, evidence may be admitted to prove that the cancellation was unintentional, or made by mistake, or without authority.

In accordance with the provisions of this sub-section, the mere fact that the paying banker cancels the drawer's signature on a cheque does not constitute an irrevocable discharge. The banker may, if he subsequently wishes to dishonour the cheque, mark it with the words "Cancelled in error" and return it, provided, of course, that he does so within the customary time in which he is allowed to decide whether he will pay or return the cheque

Discharge by Reason of Material Alteration.

Section 64 of the Act which deals with the discharge of a bill by material alteration thereof has already been discussed in Chapter 12.

Bills and the Statutes of Limitation.

Since a bill of exchange is a simple contract, it falls within the provisions of the Limitation Act, 1623, to the effect that any action thereon is barred after the lapse of six years from the time when the right of action first arose, unless (by virtue of the Statute of Frauds (Amendment) Act, 1828) such right is renewed by a written promise to pay, or by an acknowledgment of the existence of the debt (evidenced by the bill), signed by the party to be charged or by his authorised agent, or by any payment on account of principal or interest.

If the right of action on a bill is thus barred, the holder as a rule has no remedy against any parties to the instrument, who are therefore discharged from their liability thereon.

So far as the acceptor is concerned, the right of action on a bill payable after date or after sight arises when it becomes due and payable by him. But where, by the terms of the acceptance,

the bill *must* be presented to the acceptor for payment, then the time begins to run from the date when the bill is so presented and payment is refused.

In like manner, wherever the holder has to perform certain statutory duties before the right of action is complete, then the date of the accrual of the cause of action depends upon the performance of those duties As regards the drawer or an indorser, the giving of due notice of dishonour is essential to the completion of the holder's right of action against them, so, as against these parties, the time under the Statute of Limitation commences to run from the date on which notice of dishonour is given or despatched by the holder.

In the case of a bill *payable on demand*, the time begins to run from the date of issue The time in such a case must not be reckoned from the date of demand for payment or from the date of dishonour

Discharge of a Person in the Position of Surety.

Where a person signs a bill or note merely as a surety for another person or persons, and the holder gets to know of this relationship of principal and surety, he must exercise extreme care in his dealings with such parties Otherwise, if, without expressly reserving his rights against a surety, he agrees to give time to the principal debtor, or waives his rights against him, the surety will be freed from liability

Moreover, the holder must not disregard the fact that, in effect, the drawer and indorsers of a bill are sureties for the acceptor, and that the indorsers are sureties for the drawer, the second indorser surety for the first indorser, and so on in order of liability

For these reasons, the holder of a bill who wishes to retain the liability of all parties thereto, must not enter into any arrangement with a prior party which would conflict with the rights of any subsequent party as a surety for due payment of the instrument For example, the holder will release the drawer and any indorsers if, without the knowledge or consent of such parties, he makes a binding agreement with the acceptor to give him time within which to pay, or if he takes from the acceptor a new bill payable at a future time instead of a bill which has matured, or if, at the express request of the acceptor, he delays in presenting the bill for payment. In like manner, a holder who agrees to give time to the first indorser, discharges all subsequent indorsers (who are in the position of sureties for the first indorser), but does not discharge the drawer or acceptor.

Before an agreement to give time can operate as a discharge,

it must be a binding agreement and must be founded on consideration But so long as the party seeking to be discharged can prove the existence of an agreement between the holder and the principal debtor, it does not matter whether he was in fact prejudiced by the arrangement or not.

CONFLICT OF LAWS

Conflict of laws arises from the fact that the laws of various countries differ in their interpretation of the validity of certain instruments and of the usages and principles applicable thereto As a result, our Courts have sometimes to decide the validity of certain instruments and transactions which have been completed in another country, wherein the laws applicable in the particular circumstances differ from our own. In such cases, there is a conflict of laws, and what is valid in this country is not valid in the other country, or *vice versa*. The Courts have therefore to decide whether the rules of the country where the action is brought shall be applied, or whether the transaction shall be subject to the rules of law of the country in which it took place

In connection with bills of exchange, Section 72 of the Act sets out the following rules for the guidance of the Court in this connection —

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

Requisites as to Form.

By virtue of Section 72 (1), a bill which is valid in form according to its *place of issue* will also be treated as valid in the English Courts, but a bill which is not valid in form according to the law of the place of issue will, if negotiated or paid here, be treated as invalid by the Courts in this country also.

This principle is subject to two exceptions Section 72 (1*a*) provides that a bill issued out of the United Kingdom is not invalid by reason only that it does not bear the stamp required in the country of issue. But the Stamp Act, 1891, requires a bill issued abroad to be stamped according to English law before it can be dealt with in this country, although the title of a *bona fide* holder is not affected because the bill was not stamped before being dealt with in this country, provided that it was duly stamped when negotiated to him.

The second exception, provided for in Section 72 (1 *b*), is that a bill conforming to the requisites as to form required by the law of the United Kingdom, but contravening those of the country of issue, will be valid in the hands of a holder against all persons who became parties thereto *in the United Kingdom.* But no action can be taken on such a bill against those who were parties to it in the country of issue.

It remains to be noticed that, as regards the requisites as to the form of transactions on the bill *subsequent* to its issue, Section 72 (1) provides that the law of the place where the transaction took place will decide its validity. If an inland bill is negotiated abroad, any foreign indorsement which appears thereon must comply with the law of the country where it was affixed, otherwise no action can be brought against the indorser in the English Courts, even though the indorsement satisfies the law of the United Kingdom. But the person paying the bill need only satisfy himself that the indorsements conform to British Law.

Due Date.

Section 72 (5) is important in the case of bills payable in countries which have no days of grace. If action is brought on a bill drawn in the United Kingdom but payable in Paris, then the fact that no days of grace were allowed by the holder when presenting the bill for payment will not prevent action for dishonour, as no days of grace are allowed in France. But days of grace must be added in the case of a bill drawn in France and payable in this country.

Consideration.

No action can succeed on a bill in respect of which the consideration is void at English Law, even though the consideration is valid in the place where the bill was drawn or given Thus, in the case of *Moulis* v. *Owen*, 1907, it was held that no action could be taken on a cheque which had been given in Monte Carlo (where gaming is not illegal) in consideration of a loan made for the purpose of gambling. But the fact that an instrument is void in this country on account of the illegality of consideration does not make the debt itself irrecoverable (*Société des Grands Etablissements du Touquet Paris-Plage* v *Baumgart*, 1927)

Sum Payable.

In the case of bills payable *outside* the United Kingdom, but on which action is brought in the United Kingdom, Section 57 (2) provides that the holder can sue for the amount of *re-exchange* with interest up to the date of payment Re-exchange is explained in Chapter 19

CHAPTER 21

PROMISSORY NOTES

In this country, promissory notes originated in the documents issued by the early goldsmiths, promising to repay money which had been left with them for safe custody Actually, these early notes were really receipts, but as time went on they gradually assumed their present form, embodying a promise or undertaking on the part of the issuer to pay on demand a stated sum of money

For some years the character and precise significance of the early promissory notes were not clearly defined, but by an Act of 1704 it was declared that promissory notes were to be regarded as generally similar to bills of exchange Later, two distinct classes of promissory note came to be identified, *i e*, those issued by bankers, and those issued by private individuals or traders The latter were used like bills of exchange to settle debts and to make loans of money between members of the trading community, but the former, distinguished as *bank notes*, came to be used as a general means of payment, and functioned as an important part of the nation's currency

When the law relating to bills of exchange was codified in the Bills of Exchange Act, 1882, it was enacted that the provisions of the Act should apply, with necessary modifications, to promissory notes and bank notes, while a number of provisions specially applicable to these instruments were inserted as Sections 83 to 89 of the Act

Legal Definition of a Promissory Note.

Section 83 of the Act defines a promissory note as follows —

> **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.

The following specimens comply with the definition :—

PROMISSORY NOTE PAYABLE ON DEMAND



£50 LONDON, 17*th September*, 19

On demand I promise to pay to James Brown or order the sum of fifty pounds for value received

THOMAS ROBINSON

PROMISSORY NOTE PAYABLE AFTER DATE



£100 LONDON, 17*th September*, 19

Two months after date I promise to pay to James Brown or order the sum of one hundred pounds for value received

THOMAS ROBINSON

In these examples, Thomas Robinson is the *maker* (*i e*, the person primarily liable in respect of the promise), and James Brown is the *payee*, who becomes liable *on the instrument* only if he indorses it to a third person

PROMISSORY NOTE AFTER DATE PAYABLE WITH INTEREST AT A PARTICULAR PLACE



£100 LONDON, 17*th September*, 19

Three months after date I promise to pay the Northern Bank, Limited, or order, at their Northtown Branch, the sum of one hundred pounds with interest thereon at the rate of 5% per annum until payment

THOMAS ROBINSON

The definition of a promissory note given in Section 83 differs very little from the definition of a bill of exchange in Section 3 of the Act, so, in estimating the exact purport and requirements of the definition, reference can be made to the analysis of the definition of a bill of exchange in Chapter 10

First, the promise must be *unconditional*, so that a note running "Nine years after date I promise to pay C £100 pro-

vided X shall not return to England " would be invalid because the promise to pay is subject to a condition Secondly, the instrument must be payable at a *fixed or determinable future time*, so that a note payable on a contingency is invalid, and the happening of the event does not cure the defect Thus a promissory note payable " Three months after the death of X " would be quite in order as the time of payment is determinable although uncertain, but a note payable " Three months after the marriage of X " is invalid, for the marriage may never take place

Thirdly, the note must promise payment of *a sum certain in money*, which, by Section 9, includes a sum payable with interest or by stated instalments or according to an indicated or determinable rate of exchange A specimen of a note payable with interest is given on page 305. Sometimes the phrase " with lawful interest " is included instead of a precise indication of the rate to be charged, and in such circumstances the rate of interest will be such as is agreed between the parties, subject to the fact that if a harsh or unconscionable rate is charged, the Court will enforce payment of interest against the debtor only at a *reasonable* rate

Although the several requisites of the definition must be complied with, it is not imperative that a promissory note should be in any stereotyped form. So, a note running " I, Thomas Robinson, promise to pay " is quite in order if it is written out by Thomas Robinson, even though his signature does not appear at the foot of the instrument Similarly, a note running " I do acknowledge myself to be indebted to A in £100 to be paid on demand for value received " has been held to be valid as a promissory note, since the words " to be paid " were construed as embodying a promise to pay

An I O U running, for example, " I O U £20 for value received, Thomas Robinson " is not a promissory note, although it may, of course, constitute a valid promissory note if it also contains a promise to pay.

The provision in Section 83 (3), that a promissory note is perfectly valid even though it recites that the maker has deposited title deeds or negotiable securities as a collateral security, recognises the common practice of taking a promissory note in conjunction with other securities, such as mortgages, bills of sale, etc , as an additional safeguard The idea is that, although the mortgage, etc , may be perfectly valid and effectual in itself, the existence of a promissory note signed by the debtor affords a more speedy remedy against him in case of default, and would, of course, prove particularly useful if the mortgage or other security should prove to be invalid

In *Kirkwood* v. *Carroll*, 1903, a promissory note containing the following clause was held to be valid " No time given to, or security taken from, or compensation entered into with, either party, shall prejudice the rights of the holder to proceed against any other party ".

A note payable to the maker's order [Section 83 (2)] would be one running . " On demand I promise to pay myself or order ", but, as provided in the Section, such an instrument is not valid as a promissory note unless and until it is indorsed by the maker If the indorsement is in blank the note becomes payable to bearer, but if the instrument is specially indorsed it becomes payable to order

Similarly, a note made by the maker in favour of himself and another person, or a *joint* note made by two or more persons in favour of one of their number, is not a valid note until it is indorsed by the payee who is also a maker On the other hand, a *joint and several* note signed by two or more persons is valid if payable to one of their number. (See page 308)

Inland and Foreign Promissory Notes Distinguished.

The legal distinction between inland and foreign promissory notes is thus stated in Section 83 (4) —

> **83.**—(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.

For the purposes of this section, the British Islands include the Isle of Man and the Channel Islands, as provided in Section 4 of the Act Hence, examples of foreign notes would be (*a*) a note made in London and in the body of the instrument stated to be payable in Paris , (*b*) a note made in Berlin but payable in London , (*c*) a note made in any foreign place but with no place of payment indicated

By virtue of the express exception in Section 89 (4), a foreign note does not require protest upon dishonour, and in this respect differs from a foreign bill It may nevertheless be advisable to protest a foreign note on dishonour in order to secure the liability of a foreign party thereto in his own country.

Bank Notes.

A bank note may be defined as a promissory note made by a banker, and payable to bearer on demand.

In general, the provisions of the Bills of Exchange Act, 1882, concerning promissory notes payable on demand apply to bank notes, but there are one or two minor points of difference.

As a result of the provisions of the Bank Charter Act, 1844, and the Currency and Bank Notes Act, 1928, the right to issue bank notes is now confined, in England and Wales, to the Bank of England In Scotland and Ireland, however, certain of the banks continue to issue notes of £1 and upwards

A promissory note other than a bank note cannot be reissued, but is absolutely discharged when once paid in due course by or on behalf of the maker On the other hand, bank notes may be reissued as often as is desired Bank of England notes are not ordinarily reissued by the Bank of England, but the notes of Scotch and Irish banks are frequently reissued

"Delivery" of a Promissory Note.

As in the case of a bill of exchange, a valid delivery of a promissory note in accordance with Section 21 of the Act is necessary to render the maker liable, for by Section 84 —

> **84.** A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer

Hence, if the maker of a promissory note can prove that actual or constructive delivery of the instrument was not made by him, he will not be liable in respect of his signature to any holder. (See Chapter 12)

Joint, and Joint and Several, Promissory Notes.

By Section 85 of the Act —

> **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

FORM OF A JOINT PROMISSORY NOTE

£200 LONDON, 17*th September*, 19

IMPRESSED STAMP 2/-

On demand we promise to pay James Brown or order the sum of two hundred pounds for value received

THOMAS ROBINSON.
JOHN CHAMBERS.

. . ..

SPECIMEN JOINT AND SEVERAL PROMISSORY NOTE

£100–10–0 LONDON, 17*th September*, 19

IMPRESSED STAMP 2/–

Three months after date we jointly and severally promise to pay James Brown or order the sum of one hundred pounds, ten shillings, with lawful interest thereon

THOMAS ROBINSON
JOHN CHAMBERS

A note signed by two or more persons is a joint and several note only if it is drawn either in the form provided for in Section 85 (2), *i e* , " I promise to pay " followed by two or more signatures, or in the form " We *jointly* and *severally* promise to pay ", followed by the signatures of the parties as in the specimen here given Sir M D Chalmers suggests that a note running " I, John Brown, promise to pay ", which is signed by John Brown and another person Smith, is to be regarded as the note of John Brown only, but although Smith would not be liable as a co-maker, he would presumably be liable as an indorser under Section 56 of the Act

Where two or more parties accept *joint* liability upon a note, each is liable for the full amount, but the holder cannot, of course, recover in all more than the amount due to him Moreover, the holder possesses *one right of action only* He may employ this right of action against all the parties jointly or against any of them individually, but, once judgment has been obtained against one, no further remedy is available Consequently, if action has to be taken on a *joint* note, all the makers should be sued together, so that judgment against them all may be obtained

If, however, two or more parties accept *joint and several* liability on a promissory note, the holder possesses as many rights of action as there are parties, and judgment obtained against one party will not prevent him from suing the other or others subsequently The makers of a *joint and several* note may be sued either singly or together for the whole amount, and although payment to the holder by one of the makers will discharge the note, the fact that judgment is obtained against one does not prevent action being taken against any remaining maker if the judgment is not satisfied, *i e* , if payment of the full amount is not obtained.

Moreover, one maker of a joint promissory note or of a joint and several note who is compelled to pay may maintain an action against his co-maker or co-makers for a proportionate

contribution, and, if one maker of a joint or joint and several note is sued, he may insist upon his co-maker or co-makers being introduced as a co-defendant or co-defendants in the action

Although a partner has no authority to bind his co-partners *severally* yet, if he signs a joint and several promissory note *in the name* of *his firm*, he will bind the firm *jointly* and himself *severally* *i.e.*, the holder may obtain full payment from the partner himself *or* from the firm, but not, of course, from both

A joint and several promissory note differs from a bill of exchange accepted by two or more drawees, in the fact that the parties primarily liable on the note (*i e*, the joint makers) are jointly *and severally* liable, whereas the joint acceptors of a bill of exchange (*i e*, the parties primarily liable) are only liable jointly and cannot in any circumstances be liable severally On the other hand, a promissory note cannot have two makers who are liable in the alternative nor can it be made so that two or more makers are liable severally, and not jointly and severally Thus a note, signed by two makers, and running " On demand one of us promises to pay ", would be invalid

When a Note Payable on Demand is Overdue.

Section 86 of the Act provides as follows —

> **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.

By Section 10, a promissory note, like a bill of exchange, is payable on demand when it is expressed to be payable on demand, or at sight, or on presentation, or when no time for payment is expressed therein But a " reasonable time " for presentment for payment in the case of a promissory note is a different matter from a reasonable time in the case of a cheque or other bill on demand Moreover, the Act does not provide that the maker of a note is discharged to the extent that he suffers damage through delay in presentment, as it does in the case of the drawer of a cheque.

There are two main reasons for this · first, the fact that promissory notes issued by the banks (*i e.*, bank notes) may be

in circulation for a considerable time before being presented for payment to the issuers, secondly, the fact that promissory notes are frequently taken as cover for an advance, and, in estimating reasonable time, the character of the instrument as a continuing security must be taken into account So, while twelve days has been held to be an unreasonable time before negotiation in the case of a cheque, it was laid down in one case that ten months was not an unreasonable time before presentment for payment in the case of a promissory note on demand which was held as a continuing security

Presentment for Payment.

A promissory note does not, of course, require acceptance, for the signature of the party primarily liable (*i e*, the maker) appears thereon before issue The rules regarding the presentment of promissory notes for payment are thus set forth in Section 87 —

> **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
>
> (*Refer to Section* 52)
>
> (2) Presentment for payment is necessary in order to render the indorser of a note liable
>
> (*Compare Sections* 45 *and* 46)
>
> (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

If a note which in the body of it is made payable at a particular place (see specimen on page 305) is not presented for payment at the place indicated, the maker is discharged But the place of payment must be clearly indicated in the body of the note if it is to affect the liabilities of the parties, so that a note bearing the words " Payable at the Northern Bank, Northtown ", *under* the maker's signature, need not be presented *at the place indicated* in order to render the maker and indorsers liable, though, to retain the liability of the indorsers, the note must be presented to the maker somewhere

In other respects the rules governing presentment for payment contained in Section 45, and also the circumstances in which presentment for payment is excused as set forth in Section 46, apply to promissory notes

Liability of the Maker.

The maker of a promissory note is the principal debtor or the party primarily liable on the instrument, and in this respect he differs from the drawer of a bill of exchange In general, his liabilities and obligations correspond with those of the *acceptor* of a bill of exchange

Section 88 thus defines the liability of the maker of a note —

> **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
>
> (*Compare Sections 54 and 55*)

Maker's Liability compared with that of Acceptor.

The main distinction between the maker of a note and the acceptor of a bill is that whereas the maker originates the note and is the party primarily liable thereon, the drawee of a bill is not liable as acceptor until he signs, and, if he does not sign, the drawer is the party ultimately liable

In addition, there are the differences that (*a*) a note cannot be made conditionally, whereas a bill may be accepted conditionally, (*b*) the maker and payee of a note are immediate parties in direct relationship with each other, whereas the acceptor and payee of a bill have no direct relationship unless the bill is payable to the drawer's order, (*c*) the maker of a note will be discharged unless the note is presented for payment at the place mentioned in the body of the instrument, whereas the acceptor of a bill is not discharged by the omission to present at the place of payment, unless it is expressly stipulated that if the bill is not presented for payment at the place indicated he will be so discharged [Cf Section 52 (2)]

In the event of non-payment of a note, the measure of damages recoverable from the maker will be determined as provided by Section 57 (See Chapter 19)

Persons who sign as Sureties.

A bank sometimes advances money to a customer against a joint and several promissory note signed by him and one or more other persons who are regarded as sureties for the due payment of the instrument by the customer accommodated. In such cases, each of the persons signing is *prima facie* liable to pay the full amount of the instrument at maturity, or, if the note is payable on demand, when the banker demands repayment At law each person so signing is *prima facie* regarded as a *principal* liable for the due payment of the instrument, and, until comparatively

recent years, it was generally considered that, even if that person signed the note merely as *surety*, evidence was nevertheless inadmissible to show that his intention was to act merely as surety and not as principal Now, however, it is considered that a person who signs a promissory note as a surety is entitled to prove that the creditor was cognisant of the fact that he was a surety and not a principal.

The importance of this lies in the fact that the creditor, in such circumstances, must treat the parties as principal debtor and surety or sureties respectively, and not as joint and several debtors liable equally for the due payment of the instrument The ordinary rules relative to suretyship and guarantees will therefore apply, and any special arrangement made without the surety's knowledge with the principal debtor in regard to payment, or any time given to the debtor by the holder of the note, will discharge the surety

In one case, a joint and several promissory note was signed by A and B, B being merely a surety for A The holder X, who knew of the relationship between the parties, arranged, without B's knowledge, to give A, the principal debtor, extra time in which to pay the note It was held that B was discharged in respect of his liability on the instrument

Promissory Notes and the Law Relating to Bills.

Section 89 enacts that —

> **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 supra protest,
> (*d*) Bills in a set.
>
> (4) Where a foreign note is dishonoured, protest thereof is unnecessary.

It follows from this section that the provisions of the Act respecting the calculation of due date (including the provisions respecting days of grace) apply to promissory notes as they do to bills of exchange As a promissory note is not accepted, the

period of a note payable after sight is deemed to begin to run from the date on which the instrument is first exhibited to the maker

When a Bill can be Treated as a Promissory Note.

In this regard, Section 5 (2) provides that —

> **5.**—(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

An instrument which, under this section, can be treated as a promissory note need not be presented for acceptance, and the holder is freed from his liability so far as the drawer is concerned to prove presentment of the note for payment and to give the drawer notice of dishonour

This most frequently happens when the drawer and drawee of a bill are the same person, *e.g* , when the Manchester branch of a firm draws a bill on the London branch or London Head Office. In such a case, the holder may treat the instrument as a note payable in London of which the Manchester branch is maker He is therefore relieved of the necessity of presenting the instrument for acceptance, and need not give notice of dishonour to the Manchester branch if the instrument is not paid at maturity Similarly, if the directors of a joint-stock company draw a bill in the name of the company and address the order " To the Cashier ", the holder may treat the instrument as a note made by the company.

Material Alteration of a Note.

In general, the rules regarding the material alteration of a bill of exchange apply also in the case of a promissory note, but, with special reference to promissory notes, the following have been held to be material alterations sufficient to avoid the instrument as against a party who has not assented to the alteration · the alteration of a joint note to a joint and several note , the addition of a new maker to a joint and several note ; the erasure or cutting-off of the name of a maker from a joint and several note , the alteration of the place of payment or the insertion of a place of payment where no such place was previously included ; the alteration of the stamp or date, and the alteration of the number on a bank note On the other hand, the alteration of the words " Or bearer " to " Or order ", or the addition of the words " On demand " on a note in which no time for payment was expressed, have been held to be immaterial

alterations insufficient to avoid the instrument as against any parties thereto.

In the case of *Leeds and County Bank, Ltd*, v *Walker*, 1883, it was held that Section 64 of the Bills of Exchange Act, 1882, (which empowers the holder of a note which has been materially altered, and on which the alteration is non-apparent, to enforce payment of the note according to its original tenor) did not apply to Bank of England notes It was also held in this case, as in the earlier case of *Suffell* v *Bank of England*, 1882, that the alteration of the number of a bank note was a material alteration sufficient to avoid the instrument

Lost Promissory Notes.

By virtue of Section 69, the maker of a lost promissory note may be compelled to give the holder a duplicate of the same tenor, provided the holder gives a satisfactory indemnity against the claims of all persons who may come into possession of the lost instrument Moreover, Section 70 provides that if such an indemnity is given, the loss of a note cannot be set up as a defence to an action by the holder to recover the amount of the instrument from the maker or other parties thereto

This matter is of special importance in reference to bank notes If the loser of such a note can give the issuing banker sufficient particulars of the instrument to identify it, he may claim a fresh note for the same amount on giving a satisfactory indemnity, as provided by Section 69

It must be remembered, however, that as bank notes are payable to bearer, the finder of a bank note has a good title to the instrument against all the world except the loser, and if the finder pays such a note away for value to a person who takes it as a holder in due course, *i e*, without notice that it has been lost, that holder has an absolute title to the note and even the original owner cannot reclaim it from him Moreover, although the finder himself cannot obtain payment of a lost note from the issuing banker if a stop has been registered against it, a *bonâ fide* holder to whom the note has been transferred for value can insist upon payment, and the banker will be compelled to pay if the answers of such a holder to his inquiries are satisfactory

Payment of a note may be stopped by giving full particulars thereof to the issuing banker, who will thereafter make careful inquiries as to the title of the holder if the note is presented for payment But if the answers of the holder are satisfactory, the bank will be compelled to pay, and its only duty is to give the person registering the stop particulars of the circumstances in which the note was paid.

Destroyed or Damaged Notes.

The value of notes which have been partially or wholly destroyed may be claimed from the issuing bank if satisfactory proof of the destruction and full particulars of the notes are given in the case of total destruction, or if the partially destroyed notes are returned to the issuers The issuers will, however, require a satisfactory indemnity from the claimant so that they may be adequately protected in the event of any claims being subsequently made

Attempts have been made by banks to refuse payment of notes whereof the numbers have been obliterated or accidentally destroyed In so doing, they have relied on the two decisions above quoted to the effect that alteration (including obliteration) of the number on a bank note is a material alteration sufficient to avoid the instrument and relieve the issuers of their obligation to pay But in the case of *Hong Kong and Shanghai Banking Corporation* v *Lo Lee Shi*, 1928, when a portion of a note, including the number, had been destroyed, the Privy Council decided that, *in the special circumstances of the case*, it was possible by means of the fragments of the document, assisted by verbal evidence, to establish a claim against the bank for the amount of the note

CHAPTER 22

OTHER BANKING INSTRUMENTS

It is now proposed to consider certain important instruments (other than cheques and bills) with which a banker has to deal in the course of his business.

Conditional Orders to Pay.

Customers such as railway companies, government departments, friendly societies and local authorities frequently issue documents similar to cheques but embodying orders to pay which, by reason of the fact that the order to the banker calls for fulfilment of a condition before payment can be made, do not conform to the legal requirement that a cheque must be an *unconditional* order. Such instruments are often worded somewhat as follows —

TO THE NORTHERN BANK LTD.

7th June, 19

PAY *Thomas Robinson* OR ORDER,
the sum of *Twenty-five pounds, ten shillings*
Provided the receipt below is duly signed,
stamped, and dated

2d STAMP

£25 10 0 For The Northern Railway Co., Ltd.,
James Brown,
General Manager

. . ..

Received of THE NORTHERN RAILWAY CO., LTD., the sum of..... .

. . . .

£ : . 2d STAMP Date . . . .

.. ..

An order worded in this form obviously imposes a duty upon the paying banker to see that the direction is obeyed before payment is made, and accordingly the insertion of such a condition precedent to payment prevents the document from being a cheque within the meaning of the Bills of Exchange Act. Moreover, it is doubtful whether such an instrument can strictly be regarded as being payable upon demand, for payment cannot be *demanded* until the condition precedent to payment has been fulfilled. A conditional order does not, in fact, possess the essential characteristics of a negotiable instrument, for, even if it is made payable to order or to bearer, it cannot strictly be regarded as being negotiable or even transferable, since it would obviously be incongruous for a banker to pay anyone other than the payee who had given his receipt for the money.

But an order to pay is to be regarded as conditional *only if the condition is imposed on the drawee banker* and not merely on the payee. Hence, documents which are precisely similar in form to an ordinary cheque, but which bear on their face a note to the effect that an attached receipt must be signed before the instrument is *presented* for payment, or merely such words as "The receipt at back hereof must be signed, stamped, and dated", are not conditional *orders* to pay.

Since the direction in these cases is merely *addressed to the payee*, and not to the drawee-banker, the documents can properly be regarded as cheques and as fully negotiable instruments.

Nevertheless, the position of the paying banker in such cases is a difficult one, for although the direction is clearly addressed to the payee, it can be disregarded by the paying banker only at the risk that the customer might contend that his instructions had not been fully obeyed Even if a receipt form is merely attached to or stamped on the back of a cheque, and no direction is given that the receipt is to be signed before presentment, the paying banker would run considerable risk in ignoring the existence of the receipt, for he must see that his customer's wishes are fulfilled so far as is reasonably possible.

Paying bankers ordinarily insist upon a complete discharge to a conditional order before they will honour such an instrument, but they sometimes experience difficulty in obtaining a receipt stamp from the payee, particularly where the latter has already sent a receipt to the drawer. But the banker's duty is to his customer and not to the payee, consequently he incurs no liability by insisting upon the completion of such a document in accordance with the customer's instructions. If the instrument is made payable *to order*, the indorsement of the payee will usually be required *in addition to* his signature to the receipt, whether

that receipt appears on the back or on the face of the instrument.

Dividend warrants sometimes bear a statement to the effect that they will not be paid after the lapse of three months (or other period) from the date of issue, unless they are specially indorsed or initialled by the secretary of the issuing body. In *Thairlwall* v. *Great Northern Railway* 1910, it was held that such a statement was addressed to the payee or holder and that it did not impose a condition on the drawee banker sufficient to make the document a conditional order.

Protection of Bankers in respect of Conditional Orders.

If the direction inserted in documents of the type here discussed is such as to make the order to pay conditional, the general effect will be to place both the collecting and paying bankers outside any protection afforded to them by the Bills of Exchange Act, 1882.

In the case of an *open* or *uncrossed* conditional order, neither the collecting nor the paying banker obtains any protection as against the true owner, if the payee's signature or an indorsement is forged or if the holder has no title or a defective title to the instrument Section 60 of the Bills of Exchange Act will not protect the paying banker against a forged indorsement because it applies to cheques only, while Section 19 of the Stamp Act, 1853, probably affords no protection because it refers only to drafts or orders drawn on a banker and *payable to order on demand*, whereas a conditional order is not payable to order unless it is specifically expressed to be so payable, and it cannot properly be regarded as payable on *demand*.

But, if a document of this kind is *crossed*, the collecting and paying bankers are brought within the scope of the protection afforded by Section 17 of the Revenue Act, 1883, which reads as follows .—

> **17.** Sections 76 to 82, both inclusive, of the Bills of Exchange Act, 1882, 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 document were a cheque : Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument

By virtue of this section, a paying banker incurs no liability to the true owner of a crossed conditional order if he pays the amount thereof to another banker *for account of the payee*, in good faith and without negligence, and strictly in accordance with the crossing. In like manner, the collecting banker is protected if,

in good faith and without negligence, he collects such an order *for the payee*, if the payee is his customer. But the collecting banker receives no protection if he credits such an order *as cash* before receipt of advice of payment, since the Bills of Exchange (Crossed Cheques) Act, 1906, applies only to cheques proper.

In view of the last clause of Section 17 that " nothing in this Act shall be deemed to render any such document a negotiable instrument ", it is not quite clear whether paying and collecting bankers are protected in respect of a crossed conditional order which bears evidence, in the form of more than one indorsement, of having been transferred. Some authorities, including Sir John Paget, consider that the word " negotiable " in the clause referred to must be read as having the meaning " *transferable* "—a well-recognised use of the term—and, if this is the case, neither the paying nor the collecting banker is protected in respect of a conditional order which bears evidence of having been negotiated.

The general position of bankers in regard to these documents is thus highly unsatisfactory, in spite of the fact that they are frequently met with in practice, and bankers must therefore exercise great care in dealing with them. Paying bankers, especially, should require any customers who wish to issue conditional orders to give the bank a satisfactory indemnity against the claims of the true owner of any such instrument paid by the bank to a person with a defective title or no title thereto.

Orders issued by Local Authorities.

Conditional orders issued on account of local authorities introduce another complication because they are almost invariably drawn, not upon a banker, but upon *a treasurer*, who may or may not be the manager of the branch at which the account of the local authority is kept.

The banker obtains no protection of any kind against the claims of the true owner if he pays or collects such a document to or for a holder having no title or a defective title thereto The protection of the Bills of Exchange Act is excluded because such a document is not a cheque, while Section 19 of the Stamp Act, 1853, applies only to instruments payable to order on demand, and Section 17 of the Revenue Act, 1883 probably does not apply as the document is not drawn *on a banker* The only loophole would seem to be that the paying treasurer may bring himself within the protection afforded by Section 17 of the Revenue Act in respect of *crossed* conditional orders if he can show that, as between himself and the local authority, he is to be regarded as the banker and not merely as the treasurer.

Even this does not relieve the treasurer of his personal lia-

bility to the true owner of the instrument for conversion, although he is usually given an indemnity by the authority covering any claims which may be made against him by reason of the payment of such orders to persons who have no title or a defective title

In no circumstances should per procuration signatures be accepted on the receipts or in indorsements to instruments of the kind here referred to, unless such discharges are guaranteed by the collecting bankers.

Documents in the Form of Receipts.

Documents are sometimes issued by Government Departments which have no similarity to a cheque, but are merely drawn up in the form of a receipt for a certain amount which it is intended shall be paid by the banker upon presentation of the receipt duly dated, signed, and, if necessary, stamped. These instruments frequently bear an intimation that presentment must be made within a prescribed period after issue.

Neither the paying nor the collecting banker obtains any protection in respect of such documents as against the claims of the true owner if the recipient's signature on the instrument is forged, or if the title of the person receiving payment is defective Moreover, the paying banker cannot debit his customer with an amount paid against a forged signature to a receipt.

As a rule, the paying banker is furnished with a list of the persons who are to receive payment of such instruments, and it is desirable also that he should obtain from the drawer or drawers a satisfactory indemnity against the claims of any person or persons who may seek to hold him liable in respect of a wrong payment

In addition to the 2d receipt stamp that is required if the amount of the receipt is £2 or over, such documents, whatever their amount, must bear a 2d impressed or adhesive stamp, as they fall within the definition of a " bill of exchange payable on demand " given in the Stamp Act, 1891 (see Chapter 23)

Dividend and Interest Warrants.

A *Dividend* Warrant is an order or authority issued by a company in payment of the dividend due to the registered holder of its stocks or shares, authorising its bankers to pay the amount specified therein to the holder or to his named agent

An *Interest* Warrant is similar in form to a dividend warrant, but differs from the latter in that it authorises payment of a sum representing a fixed percentage of interest, for the period specified, on registered stock in a company, local authority, or government—more usually one of the last two.

Both dividend and interest warrants are usually made payable to a named payee *or order*, and the discharge of that payee is required in the special space provided for the purpose on the face of the instrument.

Occasionally, these warrants are made payable to a named payee *or bearer*, but even then they should in no circumstances be paid without the signature of the payee, for apparently the fact that a space is reserved on the face of such a warrant for the signature of the proprietor overrides the usual effect of making a negotiable instrument payable to a named payee or bearer.

As a rule, a *per pro.* signature on behalf of an individual payee will not be accepted either by the paying banker or by the issuers of the warrant except in special circumstances, and even then a form of authority must be exhibited to and approved by the latter. Dividend warrants made payable to a limited company or corporation should be discharged by its authorised officials in the manner prescribed by their regulations, while, if the warrant is made payable to a partnership, any one of the partners may sign the firm's name or sign for the firm in the usual way.

Section 97 (3) of the act provides that —

> **97.**—(3) Nothing in this Act or in any repeal effected thereby shall affect .—
>
> (*d*) the validity of any usage relating to dividend warrants, or the indorsement thereof

This provision legalises the well-established custom which permits *dividend* warrants payable to *joint payees* to be discharged by any one of the payees named, who may either sign his own name alone or sign for himself and the other or others Such a signature is apparently valid and may be accepted by the paying banker or issuers of the warrant even though the joint payees are actually trustees of the money received.

The section does not, apparently, apply to *interest* warrants, in respect of which it is not usual to accept the signature of one joint payee, the discharge of all payees being usually required

Dividend warrants are frequently made out to the order of, say, " A. Jones ", followed by some such direction as " A/c A. Jones, S. Smith and D. Craig ". Bankers must *not* place such a warrant to the credit of the personal account of the named payee, *e.g.*, " A. Jones ", unless they are quite satisfied that the matter is in order. The addition of the other names definitely indicates that the stock is held jointly by the three persons named, and, in the event of any fraudulent application of the warrant, the banker could not contend that the direction " A/c A. Jones,

etc.", was merely a note for the guidance of the payee. Even when dividend warrants so payable are in the form of crossed cheques and are negotiable, a banker runs grave risk in collecting them for the named payee's private account.

Dividend or interest warrants must bear the ordinary cheque stamp, except that interest warrants issued by the Government are exempt.

Protection of Bankers re Dividend and Interest Warrants.

The protection afforded to the paying and collecting bankers in regard to dividend and interest warrants depends on whether the instruments are or are not in strict cheque form. If they conform to the legal requirements of a cheque, then they are, of course, covered by the relative sections of the Bills of Exchange Act, but if they do not conform to these requirements, the position is not quite so clear

Section 95 of the Act provides that —

> **95.** The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend

Presumably, this section applies to a *dividend* warrant whose form does not comply with the requirements of a valid cheque This means that the paying banker will be protected by Section 80 of the Act if he pays a crossed dividend warrant in good faith, without negligence and in accordance with the crossing, and that the collecting banker will be protected by Section 82 if, in good faith and without negligence, he collects crossed dividend warrants for his customers only.

Although Section 95 does not specifically include *interest* warrants as distinct from dividend warrants, the former are in any case covered by Section 17 of the Revenue Act, 1883, provided that they are issued by a customer and drawn on a banker Moreover, in the case of *Slingsby* v. *Westminster Bank*, 1930, it was held that a warrant for the payment of interest on Government stock was a dividend warrant within the meaning of Section 95 But although the judge's remarks in that case might appear to support the view that Section 95 covers *all* interest warrants, the case is, strictly, an authority only for the proposition that the particular warrant concerned was so covered

But it would appear that the collecting banker obtains *no* protection in respect of either dividend or interest warrants which are not strictly cheques if he credits their amount as cash to the accounts of his customers *before actually receiving payment*, for the Bills of Exchange (Crossed Cheques) Act, 1906, applies

only to cheques proper, and makes no mention of dividend warrants or any other documents which are not cheques

In the case of *open* or *uncrossed* dividend warrants, the paying banker will obtain the protection of Section 60 only if the document is in strict cheque form, although he may be protected by Section 19 of the Stamp Act, 1853, if there is nothing in the instrument which makes it not payable on demand. The collecting banker, on the other hand, obtains no protection if he collects an open or uncrossed dividend warrant in respect of which the holder has no title or a defective title (*e.g.*, one on which an indorsement is forged)

Difficult questions sometimes arise in connection with the negotiability of dividend warrants which are not strictly cheques. While Section 95 extends to such documents the provisions of the crossed cheques sections of the Bills of Exchange Act, it does not recognise them as negotiable instruments. Nevertheless, there is little doubt that dividend warrants can properly be regarded as negotiable by mercantile custom so long as there is nothing on the face thereof to affect their negotiability, as, for example, the words "Not Negotiable" forming part of a crossing, or the fact that the instrument is made payable to a named payee *only* But, if such a document is by its terms of payment made not transferable, then a collecting or paying banker would undoubtedly lose any protection to which he might otherwise be entitled if the instrument was paid to, or collected for, a person other than the named payee.

Registered and Bearer Bonds.

A BOND is a written obligation under seal whereby one person undertakes to pay a specified sum of money to another person on a specified day, or on the happening of a specified event The term is frequently applied to an undertaking or promise, given under seal, whereby a company, corporation or government promises to pay the bearer or the registered holder a specified sum of money

Bonds to bearer pass by delivery, and are now generally regarded as negotiable instruments whether they are issued by a home, foreign or colonial undertaking *Registered bonds* (*e g*, Registered Exchequer Bonds) are similar to other registered securities which are transferable by deed of transfer ; the property therein is vested in the registered holder for the time being, and to that holder the interest or dividends are payable as they fall due.

Coupons.

As a rule, interest and dividends on the capital represented by bearer bonds (as also in the case of share warrants and scrip

certificates) are paid by the issue with the bonds of sheets of *coupons*, which are small pieces of paper bearing the number of the relative bond and being numbered (and sometimes dated) consecutively. The coupons embody a warrant for the interest or dividend from time to time payable on the bond, and are cut off at half-yearly or other intervals as they fall due to be presented for payment at the place indicated thereon Usually, coupons bear on their face an indication of the place at which they are payable, but if this is omitted the place is intimated to holders by advertisement in the financial papers. A specimen coupon is reproduced on page 60.

When the coupons attached to a bond are exhausted, a fresh supply may be obtained by the holder on presenting to the issuing company a slip, known as a *talon*, which is usually attached to the bond If a talon is not attached the bond itself will have to be presented in order that the new coupon sheets may be obtained

Coupons generally are exempt from stamp duty, but an exception occurs in the case of coupons attached to scrip certificates, which must bear a twopenny impressed stamp

Coupons falling due on a Sunday or Bank Holiday are payable on the [illegible] business day, for, like cheques, they cannot be debited to the paying customer's account until the date on which payment is due

Postal Orders and Money Orders.

Postal orders and money orders are instructions issued by the Post Office for the payment of money deposited at one post office and payable at another

POSTAL ORDERS bear spaces for the name of the payee and for his signature upon receipt of the money If the name of the office of payment is inserted in a postal order by the sender, payment will be made only at that office

MONEY ORDERS are always made payable to specified persons at the office of payment, such persons being entitled to receive the money only upon presentment of the order Payment of a money order may be stopped by the sender, although the Postmaster-General will not hold himself responsible if payment is made by mistake or negligence after receipt by the Post Office of notice of the stop Payment may also be deferred for any period not exceeding ten days

Since both postal orders and money orders are expressly marked " Not Negotiable ", a *bona fide* transferee for value of such an order which has been lost or stolen can obtain no title to the instrument as against the rightful owner. These orders may

also be crossed generally or specially, in which case they will be paid only to a bank or through the bank named in the crossing. If a postal order is thus crossed, the Post Office does not insist on the insertion of the name and signature of the payee in the spaces provided

Bankers who receive postal and money orders as part of credits paid in by their customers obtain payment thereof through the nearest Post Office If, in presenting *postal orders* for payment, the banker acts simply and solely as an agent for collection, he is protected as against the claims of the true owner by Section 25 of the Post Office Act, 1908. This provides that a banker who collects *for a principal* a postal order or document purporting to be a postal order, shall not incur liability to *anyone except that principal* by reason of having received payment of any such order or document As a general rule, however, a banker cannot avail himself of this protection because he credits the instrument as cash *before actually receiving payment thereof*, in which circumstances he becomes liable to the true owner for conversion if the customer has no title or a defective title

The collecting banker has no such statutory protection in regard to *money orders*, and, in the case of his customer's having a defective title, is liable to the true owner for conversion Moreover, encashment of *money orders* is provisional only, since the Post Office is permitted by its regulations to return *at any subsequent time* any order which is found to be irregular, and the presenting bank must thereupon refund the money (*London and Provincial Bank* v *Golding*, 1918)

Bank Drafts upon Demand.

A bank draft upon demand is an order addressed usually by a branch of a bank to its Head Office, instructing the latter to pay a specified sum to a named payee or to his order These drafts may, however, be drawn by the Head Office on one of its branches, or by one branch upon another.

The drawer and drawee of such a draft constitute only one legal person, and therefore the instrument is not a cheque or a bill of exchange within the definitions given by the Bills of Exchange Act. On the other hand, by virtue of Section 5 (2) of the Act, the holder of such a draft has the option of *treating it* either as a bill of exchange or as a promissory note.

As a banker's draft is not a cheque it cannot be effectively crossed and is not within the protection afforded to either the paying or the collecting banker by the Bills of Exchange Act. But though the banker paying such an instrument bearing a forged indorsement is not covered by the Bills of Exchange Act,

he is protected by Section 19 of the Stamp Act, 1853, since this relates to " *any draft or order drawn upon a banker for a sum of money payable to order on demand* ".

As the crossing on a draft of this kind is of no legal effect, the paying banker incurs no liability by paying such an instrument in disregard of the crossing, as, for example, by cashing a crossed draft over the counter or by paying its amount to a banker other than the one named in a special crossing. At the same time, a banker would usually endeavour to abide by the obvious intention of the drawer or holder if such an instrument presented for payment bore a general or special crossing, and it has to be remembered that he cannot obtain the protection of Section 19 of the Stamp Act, 1853, unless he acts *reasonably and in good faith*, and unless he sees that the draft *purports* to be correctly indorsed.

The term " banker's draft " does not include drafts on demand or after sight or after date drawn *by one banker upon another*, for such instruments are valid cheques or bills of exchange, and as such are subject to all the usual statutory provisions relative to those instruments. Neither does the term include drafts or orders drawn by one banker on another banker for the settlement of clearing differences or other accounts between the bankers concerned. Documents of the latter kind are described as " bankers' payments ", and are exempt from stamp duty.

A banker's draft must not be made payable *to bearer* on demand, otherwise the issuing banker will render himself liable to a penalty under the Bank Charter Act, 1844.

Traders' Payments.

Commercial concerns and others who have to make numerous payments at regular periods can save themselves considerable trouble and not a little stamp-duty by adopting the system of " traders' payments " instead of using cheques The procedure under this system is for the customer to draw a single cheque for the total amount of payments he desires to make, and to hand this to his bankers together with a list of the creditors, giving particulars of their bankers and the amount payable to each

On receipt of this list the bank makes out separate credit tickets for the several creditors and, having listed them, sends them with the list to Head Office At Head Office the lists received from all branches are combined and payments are made to the Head Offices of the banks concerned to whom are delivered also the credit tickets for their customers The latter are credited through the branches in accordance with the tickets which are passed through

Customers who adopt this system save the stamp-duty which would otherwise be payable on their cheques, besides considerably reducing their postage bill The creditors, too, save receipt stamp-duty and postage A small charge is made by the banks for this service, which varies according to the number and volume of the transactions, and the standing of the customer

Bank Post Bills.

English Bank Post Bills are bills at seven or sixty days' sight payable to the order of a named payee, issued by the Bank of England and any of its branches for any sum of money between £10 and £1000. The bills are issued free of charge against a deposit of the relative sum, the interest on the amount for the period of the bill being regarded by the Bank as sufficient remuneration for the issue of the instrument They are paid without days of grace, and are sometimes issued with an acceptance written on the face by an official of the Bank, although bills which are to be sent into the country are not usually so accepted.

Nowadays these bills are rarely used except for the transfer of funds on account of Government Departments

Irish Bank Post Bills are issued by various banks in Ireland, and differ from those issued in England in the fact that they may be drawn for varying periods after date or after sight, and that they always take the usual three days of grace.

Deposit Receipts.

A Deposit Receipt is a document issued by a banker, discount house or other person acknowledging the receipt of money on deposit, and specifying that interest at a stated rate will be paid on the amount, which is declared to be withdrawable either at call, on demand, or after a specified period of notice Some receipts specify that the money deposited is left for a *fixed period*, although it may be repaid before the expiration of that period subject to a reduction or forfeit of interest.

If a banker is asked to issue a deposit receipt in the names of more than one person, to be repaid to any one of the parties, he should require *all* the parties to sign a form of authority to that effect.

A joint deposit receipt is payable to the survivor or survivors upon the death of one or some. Except in the case of death and in the absence of instructions providing for repayment to any one party, a joint receipt must not be paid to one of the parties unless definite written instructions are produced.

The deposit receipts issued by bankers and discount houses vary considerably in form, but the form below is a typical specimen

Deposit Receipt

THE LOMBARD BANK LIMITED,

EASTELM BRANCH,

Not transferable

No *1397* 11*th October*, 19

£*200 . 0 0*

Received from *Mr Wm Atkins, The Cedars, Eastelm,* the sum of *two hundred pounds* sterling to be accounted for with interest at the rate of 2½ *per cent* per annum from the date hereof subject to *seven* days' notice of withdrawal

Entered *S R*

For the Lombard Bank Limited,
Henry Jones,
Manager

This receipt must be produced by the depositor when the deposit or any part thereof is withdrawn, and must be given up on repayment of the amount, which can be paid to no one but the person in whose favour the receipt is granted or his personal representatives.

On the back is printed :

Received the sum of . . . in payment of the within-mentioned sum with interest to date at 2½ per cent per annum.

Signature of Depositor . .

Date . . .

Payment of Deposit Receipts.

Deposit receipts are not negotiable or even transferable-although they may be made the subject of a bequest or assign, ment, so that a banker will be liable, even if he acts in good faith, if he pays the amount of a receipt to a person who is not entitled to receive the money, even though that person produces the receipt duly indorsed by the depositor. Probably the only line of defence open to the banker who pays anyone other than the depositor, where the title is defective, is that afforded by the doctrine of *estoppel*, which might preclude the depositor from denying that the person who presented the receipt was entitled to it.

Since a banker is never really safe in paying a deposit receipt to someone other than the depositor himself, his best course, if he is called upon to do so, is to require the properly discharged receipt to be handed to him with an authority, signed by the depositor, sanctioning the payment to the third party, and he should also require proof as to the identity of the person presenting the receipt In practice, bankers enface their receipts with a

notice to the effect that payment will be made only on presentation of the instrument by the depositor in person

Collecting Deposit Receipts.

As a deposit receipt is not transferable, a banker who *collects* such an instrument on behalf of any person other than the true owner will be liable to the latter for conversion. A collecting banker has no statutory protection whatsoever in regard to deposit receipts, and he should therefore refuse to present such instruments for payment unless he has every reason to be satisfied with the title of the presenter This point is of importance because persons sometimes open accounts by paying in for collection a deposit receipt issued by another bank.

Deposit Receipts may be Assigned in Writing.

Although a deposit receipt is not a negotiable instrument and is not transferable, it is nevertheless a chose in action, which can be *legally* assigned like any other debt or chose in action. To be valid, the assignment must be in writing, signed by the depositor and written notice thereof must be given to the banker who issued the receipt. The assignment must also be *absolute* and not merely by way of charge.

Hence, a banker who receives notice that the amount of a deposit receipt has been properly assigned, must pay the amount of the deposit to the assignee and to no other, and he may regard the signature of such assignee as a good discharge for the payment

In the case of *In re Mead*, 1880, it was held that if a cheque form on the back of such a receipt was filled in for *part* only of the amount of the deposit, it would be valid as an order on the banker, requiring payment of the sum mentioned to be made to the person indicated. The banker is not, however, bound to honour cheques drawn against deposit receipts unless he has specially undertaken to do so.

Garnishee Orders and Deposit Receipts.

Funds on a deposit receipt repayable *on demand* will be attached by the service of a garnishee order, but if repayment is subject to the *giving of notice* or to the *return of the receipt*, the funds will not be attached unless the stipulated notice has been given or the receipt has been returned by the customer before the order is served.

On the other hand, money on deposit receipt for a *fixed period* would be attached by a garnishee order as being a debt which is *accruing due*. But here again the order would not operate to attach the funds if the return of the receipt was a condition precedent to withdrawal.

Loss of Deposit Receipt.

Where a deposit receipt is lost or mislaid, and the depositor requires the money, it is the practice of bankers to obtain an indemnity against the recovery and presentment for payment of the lost document. Strictly, the banker is not entitled to demand this, inasmuch as the receipt is not a negotiable instrument, and he may therefore be compelled to pay the depositor without being given an indemnity

LETTERS OF CREDIT

Letters of credit issued by the banks in this and in other countries partake of such a great variety of forms and fulfil such a variety of functions, that it is almost impossible to give a definition which will cover all of them. In general, however, a Letter of Credit is a document which enables the credit of the grantee (*i e.*, the person in whose favour it is issued) to be reinforced or substituted by the superior credit of the issuer, usually a banker, with the object of enabling the grantee to obtain funds in a strange place on the strength of that reinforced or substituted credit.

Credits fall into two broad classes (*a*) those which are *bank* credits, and (*b*) those which are not. The former group comprises all credits which embody an *undertaking* by the issuing bank to honour drafts drawn under the credit by the grantee or beneficiary, provided certain conditions are duly fulfilled. Unfortunately, there is no agreement on this usage, and the term "bank" credit is frequently applied to documents which do not embody such an undertaking on the part of the issuer.

Letters of credit may be further classified as (*a*) *Commercial* or *Trade Credits*, which are intended to facilitate the movement of *goods*, and (*b*) *Non-commercial credits*, which are intended to facilitate the movement of *persons*, *i e*, to enable travellers abroad to obtain such funds as they require for business or pleasure on the strength of an instrument or authority issued under the signature of the bank granting the credit.

Non-Commercial Credits

Travellers' Letters of Credit.

A Travellers' Letter of Credit is an irrevocable bank credit, issued in favour of a person who is about to make a journey abroad, containing a request addressed by the issuing bank to its correspondents and agents to cash on demand any drafts or cheques drawn by the holder of the credit on the issuing bank up to a stated amount.

These credits are issued only to persons who are well known to the bank, or who are satisfactorily introduced, and only against payment of the full amount involved, or against the deposit of a guarantee or other security.

The general object of a travellers' letter of credit is to save the grantee the trouble of carrying unnecessarily large sums of money with him from place to place There are three principal kinds

(*a*) *Circular* or *World-wide Letters of Credit* These are available with *any* of the issuing bank's agents or branches abroad or at home, whose names are given on a list handed to the customer in the form of a " Letter of Indication " This bears the signature of the holder, signed in the presence of the issuing banker, as a means of identification, and, for safety's sake, should always be carried by the holder separately from the letter of credit. The object of the letter of indication is to introduce the holder to the issuing bank's agents, and so to relieve the banker of the almost impossible task of advising the issue of the credit to all his agents and correspondents

(*b*) *Limited Letters of Credit* These are addressed to, and are only available with, certain agents and correspondents specified in the letter of credit, which itself contains the speciment signature of the holder No letter of indication is issued in this case, because each one of the specified agents with whom the credit is available is advised of its issue, and is furnished with a specimen signature of the holder for comparison with that given in the letter of credit The ordinary form of *Encashment Credit*, so frequently issued in this country (*e g* , to persons going on holiday), is of this type

(*c*) *Travellers' Commercial Letters of Credit* These are really a type of limited letter of credit issued to enable the holder to purchase produce at various points, and funds are available thereunder only on presentation of drafts with specified shipping documents attached.

Circular Notes.

A Circular Note is a modified Travellers' Letter of Credit. Essentially, it takes the form of a letter of introduction to foreign agents and correspondents of the issuing bank combined with a blank form of sight draft on the issuing bank for a fixed denomination in the currency of that bank's country. The notes are handed to the customer against payment of their full face value, and when the sight draft is completed by the holder, it can usually be encashed abroad at the cashing bank's buying rate

for sight drafts on the issuing centre on the date of encashment.

CIRCULAR NOTE

. . .

THE LOMBARD BANK LIMITED

No *1793* London, E C
17th June, 19

CIRCULAR NOTE FOR TEN POUNDS STERLING

GENTLEMEN,

This Circular Note should be presented to you by *Mr James Brown*, whose signature appears on our Letter of Indication No *108*, with which *he* has been furnished Please pay *him* or *his* order the value of Ten pounds sterling at the current rate of exchange

£10 0 0 We are, Gentlemen,
Your obedient Servants,
To the Branches and Correspondents of the Bank The Lombard Bank Limited,
Henry Robinson,
General Manager

[On the Back is printed]

TO THE LOMBARD BANK LIMITED

£10 0 0 London, E C

At sight pay to the order of ten pounds sterling for value received at the rate of

(Holder's Signature)

(Date) .

Travellers' Cheques.

Travellers' Cheques are documents, very much like the ordinary cheque, requiring payment by the issuing bank of certain round sums, in this country usually £5 or £10, and are issued by the banks to known customers, in exchange for cash. The customer is required to sign each cheque (as a drawer signs any ordinary cheque), when it is handed to him, in the presence of an official of the issuing bank, and he can thereafter cash the cheque at any agent of the issuing bank or elsewhere.

Frequently, the current value of these cheques in various important foreign currencies is clearly indicated on the face, and they are sometimes, though not always, accompanied by a Letter of Indication, giving a list of agents and correspondents of the issuing bank. On encashment, the holder is required to sign the instrument in the presence of the payer, who compares the signa-

ture with that already on the cheque. As a further safeguard, the holder may be asked to produce his passport.

TRAVELLERS' CHEQUE
PAYABLE IN ALL COUNTRIES OF THE WORLD

No. *7196*

Payable within Twelve months from (Date) 20th June 19

Drawer's Endorsement
(To be signed in the presence of the Paying Agent)

To THE LOMBARD BANK, LIMITED
LONDON, E.C.2

Pay Self or Order

Ten pounds

Signature of Drawer } *John Davis,*

Witness to Signature of Drawer } *Hy Brown,* Manager

Westfield Branch

£10 OR THE EQUIVALENT ABROAD AT CURRENT RATES OF EXCHANGE

Circular Cheques.

Circular cheques (to be clearly distinguished from Circular Notes) are issued by banks in certain countries to their agents or correspondents abroad so that the latter may fill them in (*i.e., draw* them) and sell them to customers who are about to visit the country of the issuing bank The cheques are similar in form to ordinary blank cheques and are bound in books of 10, 20, etc., in the same way. They bear the name of the issuing bank and are printed in different colours according to the maximum amount for which they may be drawn. For example, cheques printed in red must not be used for amounts in excess of 1,000 francs, and so on

Commercial Credits

Commercial letters of credit are those which are designed for the purpose of assisting traders rather than travellers. They enable a buyer of goods to reinforce his own credit by that of a well-known bank, and so to obtain better terms from the seller. In some cases, also, commercial credits are utilised by exporters to enable them to finance their shipments of goods by bank bills instead of by trade bills.

Commercial letters of credit issued in this country and abroad are variously described according to their terms and the facilities

which they place at the disposal of a customer The more important types are described in the following paragraphs.

Bank Acceptance Credits.

These are frequently issued by London bankers and accepting houses, and authorise the grantees to draw bills upon the issuers within prescribed limits, the issuers undertaking to accept and pay the bills provided they are in proper form and conform with the conditions laid down in the letter of credit.

Such credits may be issued by London bankers in favour of foreign exporters at the request of importers, either here or abroad, the arrangement enabling the foreign exporter easily to negotiate bills drawn on a London house of established reputation, and giving the importer the benefit of that reputation in making his purchases.

Many acceptance credits are arranged with London banks by exporters *in this country* to finance outward shipments of goods. The exporters, instead of drawing their bills on importers abroad, draw by arrangement on well-known London banks or accepting houses as soon as the relative goods are shipped. The bank usually confirms to the exporter that it will accept bills representing about 75% of the invoice value of goods exported, provided the bills are accompanied by certain specified documents, valid and in order. After examination and verification of the documents, which are retained by the bank, the bill is accepted and returned to the exporter, who is thereby enabled to have it discounted immediately and the proceeds placed to his credit.

This method is of considerable use in those cases where the foreign buyer is unable or unwilling to open a suitable credit, or when goods are being sent abroad on consignment.

Confirmed Bank Credits.

The term " Confirmed " Credit has no well-defined application. In this country, it means a credit which embodies an undertaking by the issuing banker to honour all drafts drawn under the credit so long as they are in conformity with its terms The inclusion of such an undertaking or promise means that the credit is *irrevocable* so far as the issuing banker is concerned, and that the beneficiary can safely rely upon due honour of his bills and can negotiate them without difficulty.

Some people consider that a confirmed credit is one which involves, not only the undertaking of the issuing banker, but also that of the negotiating banker, *i.e.*, the banker who advises the credit to the beneficiary and who usually negotiates the bills drawn thereunder, in other words, they regard a confirmed

credit as one in which the negotiating banker adds his own undertaking to that of the issuing banker, and so, in fact, gives the beneficiary a double guarantee that his bills will be duly met.

Unconfirmed Credits.

An Unconfirmed Credit differs from the type of credit last described in that it involves no *undertaking* on the part of the banker opening the credit that he will accept bills drawn thereunder. Such a credit is in fact nothing more than an intimation to the addressee that, at the time of writing, the issuing banker is prepared to honour bills drawn under the credit provided that all conditions as to form, amount and term are complied with. It is, however, possible for the customer opening the credit to cancel it at any time, and, if this is done, the issuing banker is under no obligation to advise the addressee abroad Such credits are thus unsatisfactory, for the issuing banker is not bound to honour drafts drawn thereunder before receipt by the addressee of notice of cancellation, unless he has specifically agreed to do this

In the United States, the terms *Revocable Credit* and *Irrevocable Credit* are used in much the same sense as the terms Confirmed Credit and Unconfirmed Credit adopted in this country. A revocable credit may be withdrawn by the issuing banker at any time after its issue, whereas an irrevocable credit cannot be withdrawn once its terms are communicated to the beneficiary.

Omnibus, Fixed and Revolving Credits.

An OMNIBUS CREDIT is one granted to shippers of undoubted standing to enable them to draw *round amounts* on a bank against security of a *general lien* over their goods, the object being to enable the shippers to obtain capital for further operations and prompt payment for their produce as soon as it is placed on board ship

FIXED CREDITS are ordinary credits which are available for a fixed total amount, either in one draft or several As a rule, their availability is limited to a stated period

REVOLVING CREDITS are those which are automatically renewed from time to time as certain conditions are fulfilled. They are of four principal types : (*a*) For a fixed amount *in one draft at any one time,* the credit being immediately re-available (*b*) For a fixed amount in one draft at any one time, the credit being re-available for the next draft *only when advice has been received of payment of the previous one drawn.* (*c*) For *an unlimited amount in all, but with a limit to drafts current* at one time, so that the credit is re-available only when advice has been received that previous drafts have been paid, bringing the total amount of drafts current at any one time below the agreed limit.

(*d*) For a *limited amount in all during a specified period, e g*, up to a limit of £10,000 during any one month The credit is re-available during each period for the limited amount

Documentary Credits.

The term " Documentary " Credit is applied to any of the foregoing forms of credit (confirmed, unconfirmed, fixed, revolving, etc) which provide that bills drawn thereunder will not be negotiated and honoured unless they are accompanied by the documents relative to the shipment of goods in respect of which the bills are drawn.

The documents thus required are usually the bills of lading, marine insurance policy, invoice, and such other documents as may be prescribed in the credit. The documents convey the title to the goods to the banker and provide him with security in case the customer at whose request the credit is opened does not put him in funds to meet the bills drawn under the credit when they are presented for payment at maturity. Frequently, the pledge of documents of title to goods as cover for the due payment of documentary bills is evidenced in a Letter of Hypothecation (see page 86).

Clean Credits.

Clean credits are those available in drafts unaccompanied by shipping or other documents of value and are, in effect, much the same as Travellers' Letters of Credit, funds thereunder being obtained by the beneficiary merely by presenting his bills with the credit to the agents or correspondents of the issuing bank.

Clean Credits are frequently opened, not to finance the movement of goods, but purely for finance purposes connected with the transfer and loaning of funds by bankers in one centre to those in another When clean credits are opened to finance shipments of goods, the bills of lading are usually sent direct to the consignee, instead of being handed to the bank with the relative drafts for negotiation.

A banker naturally has to exercise great care in opening clean credits for anyone other than a bank or financial house of known repute, for there is no collateral security in the form of shipping documents, and there is always the possibility that the credits are being utilised by persons for other than legitimate trade purposes. Unless, therefore, the parties are of the very highest standing, the issuing banker will usually insist on the deposit of security in the form either of a guarantee or of a cash deposit of the whole amount involved.

CHAPTER 23

STAMP DUTIES ON BANK INSTRUMENTS

The Bills of Exchange Act, 1882, makes no reference to the fact that all bills of exchange and promissory notes which are not specifically exempt from stamp duty must be properly and adequately stamped in accordance with the requirements of the Stamp Act, 1891, and subsequent amending Acts

Unless an instrument executed in the United Kingdom or relating to property situate in the United Kingdom is properly stamped, action cannot be taken thereon and it cannot be received in a British Court of law as evidence except in criminal proceedings But if the document is one which may be legally stamped *after execution*, it may be received in evidence on payment of (*a*) the unpaid duty , (*b*) the prescribed penalty for omission to stamp , and (*c*) a fee of £1.

By the Stamp Act, 1891, it is provided that, except where express provision is made to the contrary, the stamp duty on all documents shall be denoted by *impressed* stamps only The stamp must be affixed and the instrument written in such a way that the stamp cannot be used for any other purpose, while if more than one instrument appears on the same piece of material each instrument must be stamped as if it were a separate document

Appropriated Stamps.

Appropriated stamps are those which by words on the face are intended to be used only for a particular description of instrument, *e.g.*, the foreign bill stamp, which bears on its face the words " Foreign bill or note ", and the *impressed* " Bill or note " stamp, which is specifically appropriated to the payment of *ad valorem* duty on inland bills and promissory notes payable at more than three days after date or sight Other stamps of the same class are National Health Insurance stamps and Unemployment Insurance stamps.

Appropriated stamps cannot be used on any other instruments than those for which they are specifically intended, whilst the

instruments for which they are intended are not deemed to be duly stamped unless the proper appropriated stamps are used thereon.

. Though postage stamps are appropriated, it is provided by the Stamp Act that such stamps can be used for any stamp duties not exceeding two shillings and sixpence for which adhesive stamps may be used and for which there are no appropriated stamps.

Duty to Cancel Adhesive Stamps.

In this regard Section 8 of the Act provides that —

> **8.**—(1) 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 purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time
>
> (2) 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
>
> (3) 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*

Adhesive stamps may be cancelled by any method which renders them incapable of being applied for any other purpose, *e g* , a rubber date-stamp may be impressed on the face, or the stamps may be cancelled in ink or in copying pencil Cancellation with an ordinary lead pencil or by a mere ink cross is not sufficient.

STAMPING BILLS OF EXCHANGE AND PROMISSORY NOTES.

For purposes of stamp duty, the following definitions of a bill of exchange and of a promissory note, as given in Sections 32 and 33 of the Stamp Act, 1891, are much wider than those given in the Bills of Exchange Act, 1882, and bring within their scope many instruments which would not be valid under the latter Act .—

> **32.** For the purposes of this Act the expression " bill of exchange ' includes draft, order, cheque, and letter of credit, 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—

(*a*) 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

(*b*) 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

33.—(1) For the purposes of this Act the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money

(2) 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

Scale of Duties on Bills and Promissory Notes.

The scale of duties payable in respect of bills of exchange and promissory notes as defined by the foregoing sections is set forth in the First Schedule of the Stamp Act, 1891, since amended by the Finance Act, 1899, and the Finance Act, 1918 By the combined operation of the three Acts, the duties are now as follows :—

	£	s	d
BILL OF EXCHANGE payable on demand or at sight or on presentation, or not exceeding three days after date or sight, for any amount . . .	0	0	2

This duty is "*fixed*", *i e*, it does not vary whatever the amount of the instrument, and may be denoted, whether the bill is drawn in this country or abroad, by an impressed stamp or by a postage stamp or postage stamps to the value of 2d

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 in the United Kingdom —

	£	s	d
Where the amount or value of the money for which the bill or note is drawn or made does not exceed £10	0	0	2
Exceeds £10 and does not exceed £25 . .	0	0	3
„ £25 „ £50 .	0	0	6
„ £50 „ £75	0	0	9
„ £75 „ £100	0	1	0
„ £100, then for every £100, and also for any fractional part of such amount or value .	0	1	0

All the duties in this table, *including the* ' .·. · / *duty* on bills under £10, must be denoted by the specially appropriated *ad valorem* stamps

. In. the case of bills and notes drawn or made within the United Kingdom, the proper " bill or note " stamps must be *impressed* before issue, while in the case of bills drawn abroad, the appropriated *adhesive* " foreign bill or note " stamp must be affixed in accordance with the provisions detailed below There is a distinct difference between the 2d stamp on a cheque or bill for £10 on demand and the " bill or note " stamp on a bill for £10 payable 30 days after date In the former case the duty is " fixed " and the stamp *may* be either impressed or adhesive In the latter case the duty is *ad valorem* and the stamp, which is appropriated, *must* be impressed in the case of inland bills, and *must* be adhesive on foreign drawn bills

It will be observed that a promissory note *of any kind whatsoever, i e* , whether payable on demand or not, requires an *ad valorem* stamp

Bills drawn and payable out of the United Kingdom.

Bills of exchange which are *both drawn and expressed to be payable out of the United Kingdom* and which are paid or in any manner negotiated in the United Kingdom are subject to reduced duties

Where the amount of such a bill does not exceed £25 the duty is as in the foregoing schedule, but thereafter —

(*a*) Where the amount exceeds £25 and does not exceed £100, the duty is 6d ,

(*b*) Where the amount exceeds £100, the duty is 6d for every £100, and also for any fractional part of £100

Hence, a bill for £75 drawn in Paris payable in Berlin but negotiated in this country would require a 6d *adhesive foreign bill stamp* by reason of its being *both drawn and payable* out of the United Kingdom But a bill for £75 drawn in London and payable in Paris would require a 9d *impressed* stamp, while a bill drawn in Paris payable in London would require a 9d. *adhesive foreign bill stamp*

Bills and Notes drawn in the United Kingdom.

An inland cheque is properly stamped if it is drawn on one of the usual impressed stamp forms or if it is drawn on an ordinary piece of paper to which postage stamps to the value of 2d are affixed. An inland bill of exchange for £1000 payable on demand or at not more than three days after date or sight may be stamped

with an impressed or adhesive 2d. stamp ; but an inland bill of exchange for £10 payable 30 days after date must be drawn on paper bearing a 2d impressed *bill or note stamp*

With one exception, provided for as follows in Section 37 of the Stamp Act, no bill of exchange or promissory note subject to an impressed stamp can be stamped after execution :—

> **37.**—(1) 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
>
> (2) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

Orders for Payment other than Cheques and Bills.

An order sent by a customer to a banker instructing the latter to make a payment at a certain fixed future date does not require stamping as a bill of exchange after date , a 2d impressed or adhesive stamp is sufficient, for by virtue of Section 32 of the Stamp Act, already quoted, the expression " bill on demand " includes an order for the payment of a sum of money at any time after the date thereof, provided the order is sent 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.

By virtue of the same section, a bill of exchange payable on demand includes an order instructing a person to make payment of a sum of money weekly, monthly or at any other stated periods, and thus applies to a " standing order ", by which a customer instructs a banker to pay subscriptions, insurance premiums or other periodical payments on his behalf Such an order, therefore, requires a 2d stamp

Where payments are made by a banker under the " Traders' Payments " system described on page 327, neither the list of payments given by the customer to his banker nor the " credit tickets " which are passed through require to be stamped The only duty payable is the *2d* stamp on the customer's cheque If the customer gives no cheque, but merely requests his banker to make the payments and to debit him, then the list itself needs a *2d* stamp

Stamping Bills and Notes Drawn Abroad.

For stamp duty purposes, the respective definitions of inland and foreign bills as given in the Bills of Exchange Act, 1882, do not apply, but a bill or note is to be regarded as " foreign " for the purposes of determining the type of stamp which it should

bear, if it purports to be drawn or made outside the *United Kingdom* (Stamp Act, 1891, Section 36).

The *United Kingdom* includes England, Wales, Scotland and Northern Ireland, but not the Irish Free State, nor the Isle of Man, nor the Channel Islands (Jersey, Guernsey, Alderney and Sark), though the Channel Islands and the Isle of Man are within the term *British Islands* used in the Bills of Exchange Act definition of an inland bill It follows, therefore, that bills drawn in the Channel Islands and in the Isle of Man are foreign bills for stamp duty purposes, but inland bills for the purposes of the Bills of Exchange Act

The position in regard to the Irish Free State is not altogether clear, since no alteration has been made in the stamp laws to cover its assumption of independent status Apparently, however, the Irish Free State is not to be regarded as a foreign country for purposes of British stamp duty, though it is to be so regarded for purposes of the Bills of Exchange Act

A circular issued by the Commissioners of Inland Revenue in May, 1923, stated that

> "An instrument chargeable with stamp duties in both countries and stamped in either country will, to the extent of the duty it bears, be deemed to be stamped in the other country So long, therefore, as the same rates of stamp duties obtain in Great Britain and the Irish Free State, such an instrument, duly stamped in the one country, will not require to be stamped in the other"

The bill must, in any case, be stamped in the country of origin. Thus, a bill drawn in London on a person resident in Dublin, and payable in Dublin, is not properly stamped with an Irish impressed stamp an impressed British stamp is required

All foreign bills and notes which are liable to the *ad valorem* duty must be stamped with *adhesive* foreign bill stamps, but those which are liable to the *fixed* 2d duty (*i e*, foreign *bills of exchange*, but *not* promissory notes, payable on demand, at sight, or at not exceeding three days after date or sight), may be stamped with impressed stamps *or* adhesive postage stamps, *or* adhesive foreign bill stamps.

Thus, a foreign drawn bill for £1000 payable on demand may be stamped with an impressed stamp or a 2d postage stamp or a 2d foreign bill stamp, but a foreign drawn bill for £10 payable 30 days after date or sight must be stamped with an adhesive foreign bill stamp The duty in the latter case, being *ad valorem* and not fixed, must be denoted by the stamp specially appropriated to the class of document, *i.e*, the adhesive foreign bill stamp.

Promissory notes drawn abroad must in all cases bear

adhesive foreign bill or note stamps, whether they are payable on demand or not.

The fact that a bill or note is adequately stamped according to the law of the country of issue does not affect its liability to stamp duty under British Law, while our Courts are not concerned with the fact that a foreign bill is not properly stamped in accordance with the law of the country of issue Nevertheless, a holder who wishes to maintain a right of action on the bill against parties resident in another country, should, for his own protection, ensure that the proper stamp duty is affixed according to the relative foreign stamp laws

Holder's Duty to Stamp a Foreign Drawn Bill.

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 in the United Kingdom before it is stamped is required, before he presents the bill or note for payment, or before he indorses, transfers, or in any manner negotiates, or pays it, to affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and to cancel every stamp so affixed

But if, when any such bill or note comes into the hands of any bonâ fide holder, (*a*) 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 , or (*b*) there is affixed thereto an adhesive stamp not duly cancelled, the holder may 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 to be duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed

Neither of these provisos will, however, relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp

Since this section applies only when a bill is presented for payment, indorsed, transferred, negotiated or paid, a foreign drawn bill may be *presented for acceptance* in this country without becoming liable to British stamp duty But such a bill will require stamping with the relative foreign bill stamp if the drawee pays it at once instead of accepting Moreover, if a foreign bill is both drawn *and payable* abroad, and, without being negotiated in this country, is indorsed by the payee or a holder and is sent here to be held during its currency as security for a loan, then it must be stamped in accordance with British law (at the reduced rate).

Penalty for Issuing Unstamped Bills and Notes.

By Section 38 of the Stamp Act, 1891 —

> **38.**—(1) 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 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.
>
> (2) Provided that if any bill of exchange payable on demand or at sight or on presentation [*or at a period not exceeding three days after date or sight—Revenue Act*, 1909], 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
>
> (3) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill

From Section 38 (2), it will be seen that if an *inland* cheque or bill of exchange on demand, or at sight, or at not exceeding three days after date or sight, is issued unstamped, the person to whom it is presented for payment (*e g* , a banker) is the *only* person who is authorised to affix and cancel an adhesive stamp, if such a stamp has not been previously affixed But even if such an instrument is so stamped by the drawee, such stamping does not relieve any defaulting party from the penalty of £10 to which he is subject by reason of having omitted to stamp the instrument

In the case of unstamped *foreign drawn* bills on demand, etc., the stamp may be affixed not only by the drawee, in accordance with this section, but also by any holder in this country as provided by Section 35 In this respect the rights of a *bonâ fide* holder of a foreign bill differ from those of a *bonâ fide* holder of an inland bill, for, as has been pointed out, an inland bill cannot be stamped after execution unless it falls within the exceptions specified in Sections 37 and 38

Documents Exempt from Duty as Bills or Promissory Notes.

The following are among those documents which are exempted by the Stamp Act from the duties discussed in the foregoing paragraphs —

(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

The latter exemption refers to the documents known as " Bankers' Payments ", issued for the purpose of settling clearing differences, or making special payments between bankers who do not conduct agency accounts with each other. *Both* drawer *and* drawee must be bankers.

(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

This covers letters (including Mail Transfers) addressed by one bank to another directing a payment or transfer of money to, or to the account of, a third person, or a direction sent by one banker to another directing the latter to transfer money to the account of the former at a third bank In this case it is essential that the letter or instruction shall pass between the two bankers first mentioned

(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 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

By Exemption 5, all cheques issued by Government departments are exempt, but cheques issued by local authorities require to be stamped

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

This applies only to the remittance of money which is already public money.

By the Post Office Act, 1890, cheques of postmasters are exempt from stamp duty if executed for the purpose of making payments for the purpose of the Post Office from one department to another.

(7) Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for payment of a security

This exemption does not apply to a coupon attached to a scrip certificate, but the Finance Act, 1894, exempts from stamp duty a coupon for interest on a marketable security, being one of a set of coupons whether issued with the security or subsequently issued in a sheet

By the Friendly Societies Act, 1896, cheques issued by a friendly society or a building society or an Approved Society under the National Insurance Acts, provided in each case that the Society is *registered* under the Friendly Societies Acts, are exempt

from stamp duty, but the cheques of unincorporated building societies and other societies require to be stamped Cheques issued by a trustee in bankruptcy are also exempt

Bills Payable with Interest.

The stamp duty on a bill or promissory note payable with interest is chargeable only on the principal sum for which the bill is drawn *unless* the actual amount of interest is clearly indicated on the face of the instrument, in which case the stamp must cover the interest as well as the principal sum. Hence, a bill for £1200 with interest at 5 per cent per annum requires a stamp for 12s only, whereas if the instrument is drawn for payment of " £1200 with the addition of £60 as interest ", a stamp for 13s. will be required

Bills Drawn in Foreign Currency.

Section 6 of the Stamp Act, 1891, provides that the *ad valorem* stamp duty on bills of exchange and promissory notes drawn in a foreign currency shall be calculated on the value of the money in British currency according to the current rate of exchange on *the date of the instrument*

If an exchange is a fluctuating one, it is sometimes difficult to determine, on the day when stamping becomes necessary, what was the current rate on the date of the bill Nevertheless, the Inland Revenue will not countenance the practice which is sometimes adopted of taking for stamping purposes the rate of exchange on the date of maturity. On the other hand, the rate of exchange at the date of maturity must be taken for purposes of *payment*

Bills Drawn in a Set.

By virtue of Section 39 of the Stamp Act, 1891 —

> **39.** When 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.

The law will recognise an unstamped part of a bill in a set as evidence *only if it has not been issued or in any manner negotiated* apart from the other parts ; and, if such a part has been so issued, negotiated or transferred as a separate instrument, it must be properly stamped, otherwise any parties to the issue, negotiation or transfer will render themselves liable to the usual penalties.

Moreover, a *part of a set* to which the section relates must be distinguished from a *copy* of a bill A copy of a bill is recognised in this country for two purposes only (1) as evidence of indorsement and of the liability of an indorser on a bill issued and negotiated in a foreign country where copies are legal, and (2) for purposes of protest when the original bill is lost. In this connection, the practice of seeking to validate an originally unstamped inland bill of exchange by attaching thereto a copy drawn subsequently on properly stamped paper is undoubtedly illegal It amounts to stamping a bill with an impressed stamp after execution, and anyone issuing negotiating or paying such an instrument is liable to a penalty, while no transferee or holder can sue upon it

Difficulties sometimes arise when an unstamped blank acceptance is sent from abroad for the signature of the drawer If it is possible (*i e*, if the form of the bill permits), the blank acceptance should be attached to a duly stamped second part and the two parts negotiated together as a bill in a set If this cannot be done, apparently the only alternative is to make application to Somerset House to have the instrument stamped with an impressed stamp, for adhesive stamps cannot be used for a bill which on the face of it is an inland instrument

Stamping Bills and Notes after Execution.

There are only *three* cases in which a *bill of exchange or cheque* can be legally stamped after execution and two cases in which a promissory note can be so stamped —

1 *Bills of exchange* of any kind subject to the *fixed* 2d stamp duty, *i e*, those payable on demand, or payable at not more than three days after date or sight, may be stamped after execution by the person to whom they are presented for payment, but by no other Moreover, this power cannot be exercised by the drawee unless he is prepared to pay the instrument

2 *Bills of exchange or promissory notes*, drawn or made out of the United Kingdom and therefore requiring to be stamped with adhesive stamps, may be stamped by any holder into whose hands they come in this country

3. *Bills of exchange or promissory notes*, sufficiently stamped as to amount, but written on paper meant for a different sort of instrument, such as an insurance policy form or a protest form, which bears a stamp of improper denomination, may be stamped with the requisite stamp in accordance with the provisions of Section 37 of the Stamp Act (*ante*).

Although a post-dated cheque is in effect a bill payable at a future date, it is not invalid as a cheque either under the Bills of Exchange Act or the Stamp Act, and is therefore correctly stamped with a 2d impressed or adhesive stamp

STAMPS ON RECEIPTS

Section 101 of the Stamp Act gives an extremely wide definition of a receipt —

> **101.**—(1) For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person
>
> (2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands

The requisite duty of twopence may be denoted either by impressed or adhesive stamps The adhesive stamps used are postage stamps, which must be properly cancelled by the person giving the receipt before he delivers it out of his hands A receipt may not be stamped after it has once been given, except under the conditions set forth in Section 102 of the Act, as follows —

> **102.** A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,
>
> (1) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds,
>
> (2) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds,
>
> and shall not in any other case be stamped with an impressed stamp.

A Duplicate Receipt requires stamping in the same way as the original if the amount is for £2 or over.

Receipts which are Exempt from Stamp Duty.

The First Schedule of the Stamp Act, 1891, as amended or extended by the Acts referred to below, provides that the following documents *inter alia* shall be exempt from stamp duty ·—

> (1) 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.

By this provision, a deposit receipt issued by a banker to a customer is exempt from stamp duty, but the receipt indorsed on the back of the instrument must be stamped by the customer on withdrawal if the amount is £2 or over. But no receipt stamp is required if the amount of the deposit is being transferred to a current account or to another deposit account or deposit receipt.

The exemption also extends to a letter sent by a banker to his customer acknowledging the receipt of money (including cheques, bills, etc) for the credit of that customer's account But an acknowledgment or receipt sent by a banker *to a third party*, in respect of money paid in by that party to a customer's account, is not exempt from duty, as it is not sent to the person to whom the banker is accountable for the money. On like grounds, a receipt in respect of money transferred from one account to another will not require stamping if it is given to the person *to whose account the money is transferred* ; but a stamp will be required if the receipt is given to the person *transferring the funds*

Again, a receipt given by one bank for money received by it for transfer to another bank will not be exempt, for the bank receiving the money has not to account for it to the person for whose account it is received. The difficulty in such a case may, however, be overcome if the banker receiving the money acknowledges it as agent for the other bank, as, for example, by stating on the receipt " Received by the Northern Bank, Limited (by its agent the Southern Bank, Ltd), the sum of . . .", etc

(2) 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

This exemption covers the receipt by a banker of any cheques, bills of exchange, promissory notes, dividend warrants and conditional orders for payment which fall within the definitions of these documents for stamp duty purposes

By Section 9 of the Finance Act, 1895, it is provided that *a receipt* written upon a bill of exchange or promissory note must be duly stamped, whether it appears on the face or back of the instrument But 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 a payee (*without words of receipt*) written upon a draft or order, does not constitute a receipt chargeable with stamp duty.

This exemption covers the case where a banker indorses a cheque or bill of exchange with the words " Received for the

credit of payee's account with us " or " Placed to the credit of payee's account with us ", and also the stamping of a banker's name on the back of a bill of exchange forwarded for collection, although such a crossing is obviously evidence that a banker receives, or wishes to receive, the proceeds

Section 33 of the Friendly Societies Act, 1896, exempts from stamp duty a receipt given by a registered friendly society in respect of any money received by it according to its rules, or for its purposes.

Section 36 of the Finance Act, 1924, exempts from stamp duty receipts given for or on account of any salary, pay or wages, or for or on account of any other like payment made to or for the account or benefit of any person, being the holder of an office or an employee, in respect of his office or employment, or for or on account of money paid in respect of any pension, superannuation allowance, compassionate allowance or other like allowances

A receipt executed abroad and afterwards sent to a person residing in this country is subject to British stamp duty if it relates to any property situated, or to any transaction effected, in any part of the United Kingdom, otherwise it is exempt Receipts on cheques drawn in favour of payees residing abroad may be exempt from stamp duty, but, as it is usually impossible for the paying banker to determine whether or not stamp duty is payable, his best plan is to insist on a stamp in all such cases.

OTHER STAMP DUTIES OF IMPORTANCE TO THE BANKER

An Agreement under Hand requires a 6d. adhesive stamp There are certain exceptions.

Articles of Association of a joint-stock company require a 10s deed stamp, which must be impressed, and on registration must be accompanied by a 5s. fee stamp.

Articles of Partnership require a 6d adhesive or impressed stamp if under hand, or a 10s deed stamp if under seal

Bank Notes for money payable on demand (other than Bank of England Notes) require stamping as follows .—

		£	s.	d.
If the amount does not exceed	£1	0	0	5
,, ,,	£2	0	0	10
,, ,,	£5	0	1	3
,, ,,	£10	0	1	9
,, ,,	£20	0	2	0
,, ,,	£30	0	3	0
,, ,,	£50	0	5	0
,, ,,	£100	0	8	6

The penalty for issuing unstamped bank notes is £50, and for receiving or transferring such notes, £20 As a rule, the stamp duty on bank notes is compounded, *i e*, the issuing bank arranges to pay a fixed annual sum to the Inland Revenue instead of stamping its notes Bank notes may be reissued without being liable to any further stamp duty, but the notes of the Bank of England are not usually re-issued when once they are returned to that institution

A BILL OF LADING or order for any goods to be exported or carried coastwise requires a 6d impressed stamp which must be affixed before execution Any person who executes a bill of lading not duly stamped will incur a fine of fifty pounds

A DEED of any kind not otherwise specifically charged with stamp duty requires a 10s impressed stamp, which may be fixed at any time within 30 days of its first execution if made in the United Kingdom, or within 30 days of its first receipt in this country if executed abroad

A DELIVERY ORDER does not require stamping.

A DOCK WARRANT or other warrant for goods requires a 3d adhesive stamp which must be affixed by the person making or issuing the warrant, otherwise such person will incur a fine of £20 A document given by an inland carrier acknowledging the receipt of goods, and a weight note issued in conjunction with a duly stamped warrant, are exempt

A GUARANTEE under hand requires a 6d adhesive or impressed stamp If adhesive, it must be affixed and cancelled at the time of execution by the party signing the instrument An impressed stamp may be affixed at any time within 14 days of the execution of the guarantee but not afterwards If the guarantee is under seal, it requires a 2s 6d per cent *ad valorem* impressed deed stamp, which may be affixed at any time within 30 days of its first execution if made within the United Kingdom, or within 30 days of its receipt in this country if executed abroad

A HOUSEHOLDER'S PROTEST requires stamping at the same rate as an ordinary protest (see below)

AN I.O.U. does not require a stamp

LETTERS OF CREDIT which do not fall within the exact scope of Exemption 4 on page 346 must be stamped with an *ad valorem* bill stamp on the amount which the grantee is authorised to draw. Thus an impressed *ad valorem* stamp must be borne by a letter of credit issued in the United Kingdom, authorising drafts to be drawn *within* the United Kingdom, whether payable here or abroad.

THE MEMORANDUM OF ASSOCIATION of a joint-stock company

requires a 10s impressed deed stamp together with a fee-stamp, whose value varies according to the amount of the capital.

A. NOTARIAL ACT of any kind, except a Protest (see below), requires a 1s adhesive stamp, which must be cancelled by the notary.

PROTEST OF A BILL OF EXCHANGE OR PROMISSORY NOTE. The stamp duty on a protest may be denoted by an adhesive or impressed stamp If an adhesive stamp is used, it must be properly cancelled by the notary issuing the protest. The stamp duty on a protest is the same as that on the bill or note if the duty on the latter does not exceed 1s , in any other case, the duty is 1s

WAREHOUSE RECEIPTS are exempt from stamp duty

WAREHOUSE WARRANTS See Dock Warrant

APPENDIX A

BILLS OF EXCHANGE ACT, 1882.

[45 & 46 VICT CH. 61.]

[NOTE —*The page references in the margin are to the pages of the text wherein the relative Sections of the Act are discussed. The most important references are in heavy type*]

Chapter 61.

D 1882

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

hort title

1. This Act may be cited as the Bills of Exchange Act, 1882

nterpreta-ion of terms **13, 97,** 104, 17, 119, 120, 26, 145, 162, 80]

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

"Acceptance" means an acceptance completed by delivery or notification (*See section* 17)

"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 (*See section* 21)

"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 (*See section* 32)

"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. (*See section* 27.)

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

PART II

BILLS OF EXCHANGE

Form and Interpretation

Bill of exchange defined [102, 103, 128, 105, 106, 112, 164, 305]

3. (1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer

(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 [110, 111, 307]

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 [105, 109, 314, 118, 326]

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 [104, 119]

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 [109, 134, 126, 164, 202]

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 [108, 170, 182, 244]

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 [106, 107, 112, 163, 306]

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

See section 57

Bill payable on demand [163, 107, 310]

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

Refer to sections 14, 36 (3), 45 (2), 60 *and* 73

Bill payable at a future time [107.]

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

Sections 14 (2) (3), 18 (3), *and* 65 (5) *indicate how the due date is determined*

Omission of date in bill payable after date [112, 148]

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

Ante-dating and post-dating [112, 219]

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.

Computation of time of payment [113, 114, 115, 156, 266]

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 pay-

ment 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 hereinafter provided for, due and payable on the preceding business day;

(*b*) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day 34 & 35 Vict c 17

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

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

See sections 65 (5) *and* 18 (3)

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

Case of need [289, 291]

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 [186, 138, 271]

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.

See also section 31 (5) *as to persons indorsing in a representative capacity*

Definition and requisites of acceptance [257]

17. (1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

See sections 2 *and* 21 *as to the necessity for notification or delivery*

(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 [258, 105, 273]

18. A bill may be accepted—

(1) before it has been signed by the drawer, or while otherwise incomplete: (*See section* 20)

(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 [259, 103, 262]

19. (1) An acceptance is either (*a*) general or (*b*) qualified.

See section 44 *as to the holder's right to refuse a qualified acceptance, also section* 52 (2)

(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 (*See section* 44 (2))

(*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 [**148, 151,** 165, 172]

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

(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

Refer to section 12 *as to the omission of the date*

Delivery [**118, 146,** 119, 308]

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 [**120.**]

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 indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Signature essential to liability [117, 163]

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 [124, 108, 125, 179]

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

See sections 54 (2), 55, 60, 72 (2), 80 *and* 82 *for the provisions referred to*

Procuration signature [22, 238]

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

The provisions of this section do not, apparently, apply to signatures on behalf of companies

Person signing as agent or in representative capacity [123]

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 [128, 131, 132, 243]

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 [133.

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.

See section 59 (3)

Holder in due course [129, 131, 155, 156, 234

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

Refer to section 27 (2)

Presumption of value and good faith [128, 136, 132]

30. (1) Every party whose signature appears on a bill is primâ facie deemed to have become a party thereto for value

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

Negotiation of Bills

Negotiation of bill [123, 152, 153, 154, 130]

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

See sections 16 *and* 26

Requisites of a valid indorsement [180, 189]

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely —

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

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.

See section 97 (*d*) *as to dividend warrants*

(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.

Conditional indorsement [183, 103]

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

Indorsement in blank and special indorsement [182]

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

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

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

See sections 7 *and* 8

(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

Restrictive indorsement [184, 155]

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"

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

(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 [155, 156, 157, 165]

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

Refer to sections 59–64 *as to discharge and to section* 35 (2) *as to restrictive indorsements*

(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

Bill on demand is defined in section 10 *By virtue of section* 73, *this sub-section applies to cheques, but not to promissory notes* [*section* 86(3)]

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

(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 [154, 296]

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 [157, 158, 296]

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 [260, 274]

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 no 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 [261.]

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

See section 41 (2) *for the provisions*

(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 [261, 263, 262, 273]

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 [272]

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 [272]

'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 [263, 273, 138, 284]

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

See section 19 (2)

Rules as to presentment for payment [166, 265, 266, 267, 268, 218, 224, 311]

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

The provisions referred to are contained in section 46

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

The due date is calculated in accordance with section 14

(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 where-

ever 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 [269, 267, 274, 311]

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

Dishonour by non-payment [273]

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

The provisions referred to are contained in sections 65–68.

Notice of dishonour and effect of non-notice [274, 275]

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

See section 50 *for the provisions referred to.*

Rules as to notice of dishonour [275, 276, 277, 278, 279, 280]

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 hereinbefore 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 [279, 280, 287]

50. (1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence When the cause of delay ceases to operate the notice must be given with reasonable diligence *See section* 49 (15) *as to delay in the post.*

(2.) Notice of dishonour is dispensed with—

(*a*) When, after the exercise of reasonable diligence, notice as required

by this Act cannot be given to or does not reach the drawer or indorser sought to be charged

(*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 [**283, 284, 285, 287, 159, 292**]

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

This section has been amended by the Bills of Exchange (Time of Noting) Act, 1917 *See Appendix* C

(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.

See sections 69 *and* 70 *as to lost bills*

(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 [265, 266, 274, 285, 218, 282, 312]

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

Qualified acceptances are dealt with in sections 19 *and* 44

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him

(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 hands of drawee [139, 216]

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 [139, 126]

54. The acceptor of a bill, by . . it—

(1) Engages that he will pay it a . . 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 [138, 140 126, 141]

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 [120, 257, 309]

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 [287, 284, 303, 312]

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

Interest proper is defined in section 9 (3)

Transferor by delivery and transferee [143, 126, 183, 247]

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 [221, 295, 133, 134, 231, 232]

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 hereinafter 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 [222, 225, 226, 235, 266]

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 [297.]

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 [297.]

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 [298, 299, 175, 180]

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 [150, 152, 173, 174, 175, 299, 315]

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 [289, 115]

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 suprâ protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn

See section 93

(2) A bill may be accepted for honour for part only of the sum for which it is drawn

(3) An acceptance for honour suprà 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 [291]

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 [291, 292]

67. (1) Where a dishonoured bill has been accepted for honour suprâ 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 suprâ protest [292, 293, 273]

68. (1) Where a bill has been protested for non-payment, any person may intervene and pay it suprâ 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 suprâ 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 suprâ 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 [158, 315]

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 [159, 315]

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 [181]

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 [301, 115]

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 [160.]

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

For the provisions referred to see sections 10, 36 (3), 45 (2), *and* 60

74. Subject to the provisions of this Act—

(*i e*, *those of section* 46, *relating to excuses for non-presentment*)

Presentment of cheque for payment [166, 266]

(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 [212.]

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 [167.]

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

Section 17 *of the Revenue Act*, 1883, *extends the provisions of sections* 76–82 *of this Act to any document issued by a customer of a banker, and intended to enable any person to obtain payment from the banker of the sum indicated therein*

Crossing by drawer or after issue [171.]

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 [171, 173]

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.

Section 64 *explains the effect of a material alteration.*

Duties of banker as to crossed cheques [222, 224]

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 [222, 225, 226, 235]

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 [168]

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 [236, 51, 235, 254]

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

See section 76 *for definitions of general and special crossings This section has been extended by the Bills of Exchange (Crossed Cheques) Act,* 1906 *See Appendix B*

PART IV.

Promissory Notes

Promissory note defined [304, 307.]

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

Refer to section 4, *and also to sub-section* 89 (4).

Delivery necessary [308.]

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer

See sections 2 *and* 21 *for the meaning of delivery.*

Joint and several notes [308.]

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 tenour.

(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 [310.]

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 [311]

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

Refer to section 52

(2.) Presentment for payment is necessary in order to render the indorser of a note liable

Compare sections 45 *and* 46

(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 [312]

88. The maker of a promissory note by making it—

(1.) Engages that he will pay it according to its tenour,

(2.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse

Compare sections 52 *and* 57

Application of Part II to notes [313, 307]

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 supra protest,

(*d*.) Bills in a set

(4.) Where a foreign note is dishonoured, protest thereof is unnecessary

PART V.

SUPPLEMENTARY.

Good faith [223, 237]

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 [121, 188, 192]

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.

*** Refer to sections 23 to 26.*

Computation of time [262, 278]

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded

"Non-business days" for the purposes of this Act mean—

(*a*) Sunday, Good Friday, Christmas Day:

(*b*) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it: 34 & 35 Vict c 17

(*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 [285, 291]

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

Refer to sections 65 to 68

Protest when notary not accessible [286.]

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

For Schedule 1 see next page

Dividend warrants may be crossed [323]

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend

Repeal

96. The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest

Savings [322, 181]

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

(*b*) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies 25 & 26 Vict c 89

(*c*) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively

(*d*) The validity of any usage relating to dividend warrants, or the indorsements thereof

Saving of summary diligence in Scotland

98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

Construction with other Acts, &c

99. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act

Parole evidence allowed in certain judicial proceedings in Scotland

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenour of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription

FIRST SCHEDULE

Section 94

Form of protest which may be used when the services of a notary cannot be obtained

Know all men that I, *A B* [householder], of in the county of , in the United Kingdon, at the request of *C D*, there being no notary public available, did on the day of 188 at demand payment [*or* acceptance] of the bill of exchange hereunder written, from *E F*, to which demand he made answer [state answer, if any] wherefore I now, in the presence of *G H.* and *J. K*, do protest the said bill of exchange

(Signed) *A B*
G H } Witnesses
J K }

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

APPENDIX B

BILLS OF EXCHANGE (CROSSED CHEQUES) ACT, 1906.

[6 EDW 7 CH 17.]

Chapter 17.

An Act to amend section eighty-two of the Bills of Exchange Act, 1882 [4th August 1906] A D 1906

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 —

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

Amendment of 45 & 46 Vict c 61 s 82 [236, 242, 320, 323]

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

Short title

APPENDIX C

BILLS OF EXCHANGE (TIME OF NOTING) ACT, 1917.

[7 & 8 GEO 5 CH 48.]

Chapter 48.

An Act to amend the Bills of Exchange Act, 1882, with respect to the time for noting Bills. [8th November 1917] A D 1917

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 —

1. In subsection (4) of section fifty-one 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"

Time of noting 45 & 46 Vict c 61 [285]

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

Short title and construction 6 Edw 7 c 17

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